

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

Case No: K/S 17A/2023

Heard on: 13 – 17/11/2023;

27/11 – 01/12/2023;

27 – 31/05/2024

Delivered on: 21/06/2024

Reportable: YES / NO

Circulate to Judges: YES / NO

Circulate to Magistrates: YES / NO

Circulate to Regional Magistrates: YES / NO

In the matter between:

THE STATE

and

JACOB RATEL

Accused

JUDGMENT

MAMOSEBO J

- [1] The accused, Mr Jacob Ratel, faced four counts: Murder read with s 51(1) of Act 105 of 1997 and three counts of assault with intent to do Grievous Bodily Harm (assault GBH). Before pleading to the charges, he confirmed

that his legal representative, Adv. K Biyela, had explained to him the provisions of the Criminal Law Amendment Act (the CLAA).

[2] The accused pleaded not guilty to all four counts in terms of s 115 of the Criminal Procedure Act, 51 of 1977 (CPA). His plea explanation, which his legal representative confirmed was in accordance with his instructions, was the following: In Count 1, he denies causing the death of the deceased; the allegations relating to counts 2 to 4 are denied and the State was put to the proof thereof.

[3] The accused made written formal admissions in terms of s 220 of the CPA, signed by both himself and his legal representative, admitting:

3.1 the identification of the body as that of R[...] L[...] L[...] by S[...] B[...] v[...] R[...];

3.2 the report on a medico-legal post-mortem examination compiled by Dr Lemaine Fouché;

3.3 that the body of the deceased sustained no further injuries from the time that it was removed from Sewende Laan until a post mortem examination was performed thereon by Dr Fouché on 19 May 2021 at Kimberley; and

3.4 the sworn statement, key to sketch plan and photographs by W/O Gaonathebe McNulty Diphephenyane attached to the Kimberley Local Criminal Record Centre.

Count 1: Murder

[4] This is how the events in Count 1 unfolded. Dr Lemainé Fouché is an experienced Principal Forensic Pathologist whose credentials are not disputed. On 19 May 2021 she conducted the post mortem examination on the body KDR 138/2021 and compiled a report in terms of s 212(4)(a) of the CPA marked Exh D. Attached to the report are diagrams with injuries

observed by the doctor for easy reference. The body had not only reached *rigor mortis*, that means it had stiffened, but also hypostasis (discolouration) on the posterior surface of the trunk and limbs. The injuries and the discolouration make the photos too ghastly to view. The doctor extensively explained each injury not only in the report but orally in court.

- [5] The chief post mortem findings made by the doctor are the following: The body of a coloured adult female with multiple bruises, abrasions and lacerations to the head, torso, arms and legs. There were extensive under-scalp haemorrhages over the skull. The brain is macroscopically swollen with flattening of the gyri. There is a subdural smear of blood over the brain. There is a subarachnoidal haemorrhage over the left cerebral lobe. There is haemorrhage into the interstitial tissue of the neck on the right. There is blood in the abdominal cavity. There is haemorrhage into the mesenterium. There is haemorrhage into perinephric tissue of the left kidney. **Dr Fouché concluded that the cause of death was blunt trauma.**

- [6] S[...] V[...] R[...] is the deceased's sister. The deceased, R[...] L [...], cohabited with the accused since 2018 in her sister's shack. S[...] visited her sister on Saturday morning 15 May 2021. They chatted and cleaned the shack. The accused arrived later. He insulted, shouted and yelled at the deceased demanding R50.00 from her that he claimed he had given her on 14 May 2021. The deceased told him that the two of them bought alcohol with that money. He went to the bedroom, took her clothes and set them alight under a tree using diesel that S[...] had kept in a 2-litre bottle used to mix with putty to install window frames. He also threatened to set the shack alight. He said he was burning the clothes for his R50.00. The deceased returned the insults and told him to leave because he was involved in a love relationship with Tollies Magdeline Gerts. S[...] phoned the police but there was no answer. S[...] advised the deceased, in the presence of the accused, to end their relationship, because he was hurting her.

- [7] The deceased left reportedly going to the accused's mother's place. The accused also left but S[...] remained behind cleaning the shack. The

deceased had consumed liquor but she was not drunk. The deceased returned around 19:00 and suggested her sister go home since the accused's mother had summoned the police and the accused had been arrested. The deceased told her that she was going to sleep. When S[...] left at around 21:00 promising to return the following day, 16 May 2021, the deceased was crying but unharmed.

- [8] The following morning S[...] arrived at the deceased's place between 09:00 and 10:00 and found the padlock hanging on the door. To her it was an indication that the deceased was not home. She searched for the deceased but nobody knew her whereabouts and she returned to her mother's place. On Monday morning she went to work but was summoned by her mother to return home only to be notified of her sister's passing.
- [9] Ms Mpho Motabogi is 35 years old and unemployed. She and the accused's sister, Daisy Plaatjies, are friends. She was aware of the love relationship between the accused and the deceased. She was telephonically contacted by Daisy on Monday morning requesting her to accompany her to look for the deceased at her shack. Daisy told her that her mother had phoned her to say that the accused was at home and had confessed that he killed the deceased and was threatening to commit suicide.
- [10] Mpho accompanied Daisy to the deceased's shack. Daisy was afraid to enter the shack. Mpho pushed the door open and found the deceased covered with a blanket on the bed. Mpho shouted the deceased's name three times but she was unresponsive. Mpho and Daisy went to aunt Matsotso, Daisy's aunt, and returned with her to the deceased's shack. Aunt Matsotso uncovered the blanket up to the deceased's waist and, without touching her, noticed that the body lay lifeless on the bed. They both stepped outside and told Daisy that the deceased was not breathing. Daisy appeared shocked. The deceased's face was swollen, black and dark purple. She had blue stains (bruises) on her body. They remained there until the police arrived. The police interviewed and obtained statements from

them. Mpho was not cross-examined by the defence and her evidence remains uncontroverted.

- [11] Ms Rolene Visagie is 38 years old with matric and busy with a learnership. She knows the accused from school and was aware of the relationship between the accused and the deceased. She was also aware of the love relationship between the accused and her neighbour, Magdeline Tollies Gerts. She only became aware of the incident on Monday, 17 May 2021. At around 06:00 in the morning, when she returned from the outside toilet, she saw the accused emerge from Tollies' residence. He had two bottles of beer in his hands. He did not spend the night at Tollies' home because she had heard him knocking around 02:00 that same morning. Their houses are in close proximity to one other.
- [12] Rolene asked the accused for some beer and he said he just needs to exchange them for cold ones and will return shortly. The accused returned about an hour later with two cold beers. They were joined by Tollies and her sister at her home. They imbibed liquor from around 07:00 in the morning until around 16:00 when Mmeme arrived and broke the news about R[...]s passing. The accused looked shocked and said *"now I have done s**t."* (*nou het ek k*k gemaak*). The accused demanded that Tollies accompany him. Rolene followed the accused up to the gate, curious to know what was going on. They were not drunk because they were five and had shared about four or five 750 ml beers. She asked him what happened and he said *"Bolle, I killed the lady"*. *"Bolle"* is Rolene's nickname. He told her he just wants to get to his mother and left with Tollies. Shortly after they left, the police arrived looking for the accused. Yvonne Gerts corroborates Rolene's evidence in all material respects. The only difference, which is not material, is that she heard the accused saying *"what s**t did I do?"*
- [13] Tollies is 39 years old and the accused is her ex-boyfriend. The relationship was terminated after his arrest. She was aware that she was in a love triangle with the accused and the deceased. She saw the deceased on Friday at Madiks Club not far from the deceased's place. When she arrived

at the club she saw the deceased removing money from the accused's pocket. The accused was inebriated. Tollies enquired from her what she was doing and another patron, unknown to Tollies, started yelling at her and the club owner kicked them out. Tollies went home. She does not know where the accused had spent the Friday night.

[14] Tollies saw the deceased again the following day (Saturday) at Madiks Club. The deceased demanded money from the accused. An argument ensued and insults were exchanged. The deceased pushed the accused and he slapped her once. Tollies intervened. The owner gave the three of them (the accused, the deceased and Tollies) marching orders. The accused told Tollies they should leave but the deceased followed them. They went to the accused's sister's place. The accused and the deceased started arguing again until Daisy emerged and wanted to know what was going on. Tollies explained, at which stage the deceased grabbed the accused by his T-shirt on the chest for which Daisy reprimanded her. The accused slapped the deceased causing her to fall on her back. He told her to leave but she remained seated on the ground. Tollies did not notice any injuries on the deceased.

[15] The accused and Tollies returned to Madiks Club and consumed Black Label beer. They had left the deceased and Daisy at Daisy's place. Tollies fetched her children from her ex-boyfriend's residence. As she walked past Daisy's place the accused accosted her and pinned her against the fence with her three-year old toddler on her back. He also throttled her and she stabbed him with a blunt knife causing him to release his grip. He accused her of having been intimate with her ex-boyfriend. She did not see the accused at all on Sunday but he arrived at around 02:00 in the morning on Monday when he asked her for cigarettes, which she gave him and he left.

[16] Tollies narrates further that the accused showed up again later that morning with two beers and a carton of milk. They consumed one beer and took the milk to his mother's home. They then went to Rolene's place next door where they drank beer together. Her evidence corroborates what was

testified to by Rolene and Yvonne pertaining to Mmeme's arrival, the conversation at the gate and the accused's departure in all material respects.

[17] When the accused joined Tollies he was carrying two more beers. After having one beer the accused asked Tollies to accompany him to his mother's place for him to break the news to her. When Tollies asked him where he was the previous day he said that he had slept at his mother's place for the entire day. They did not find his mother home. The police arrested him on the way. In the presence of the police and other people at the police station the accused threatened to kill Tollies should she be promiscuous while he was in detention. Without any solicitation Tollies says the accused told her that the deceased was seeing a white man and he saw his bakkie parked at her place.

[18] On 17 May 2021, Sgt Modirapula Albert Moreotsenye, with 15 years' experience as a member of the SAPS stationed in the charge office at the Delportshoop police station, was responsible for attending to complaints and patrolling duties. He received communication through a two-way radio that Ms Daisy Plaatjies had called the police station reporting that she was uncertain whether R[...] was still alive or had died and requested the police to visit her home for verification. He was accompanied by Cst Bartnes. They attended the scene at 2[...] S[...]. The community had already gathered at the shack. Daisy was among them. Despite her pointing the shack to them she declined the invitation to enter the shack with the police. Sgt Moreotsenye and Cst Bartnes entered and found the deceased lying on her back covered with a blanket. He observed that her face was swollen and discoloured. She did not look alive as there was no movement. He further observed bloodspots on the curtain and on the carpet next to the bed as well as a bloodstained wooden plank next to the bed. They cordoned off the shack and summoned other police officials and an ambulance. The deceased was certified dead. Members of the Local Criminal Record Centre (LCRC) arrived and W/O Diphephenyane took photographs of the scene. Sgt Moreotsenye observed injuries all over the deceased's body and a

bloodstained wooden plank next to her body. W/O Diphephenyane was confirmed to have died on 18 July 2023 and therefore Sgt Moreotsenye explained the scene as depicted on the photo album received as Exh B.

[19] Pursuant to the preliminary investigation by Sgt Olebogeng Raphael Khoboho, informed by statements obtained at the scene, the suspect became known as Jacob Ratel, the accused. He is known to the police. Sgt Moreotsenye and Sgt Khoboho searched for the suspect driving around the township. The accused was found at Nkele Street. Sgt Moreotsenye introduced himself and informed him of the murder that was committed and that he is a suspect. He informed him of his constitutional rights and arrested him. He was with Tollies who accompanied them to the police station. Sgt Moreotsenye completed form 14A which the accused refused to sign as witnessed by W/O Drier. The accused had threatened to kill Tollies should she be promiscuous while he was in prison. Tollies left. Cst Ike Bartnes is a member of the SAPS with 10 years' experience. He was the driver of the patrol vehicle accompanied by Sgt Moreotsenye. He essentially confirmed Sgt Moreotsenye's testimony and was not cross-examined by the defence.

[20] Marlyn Daisy Plaatjies is 32 years old and the accused's younger sister. Her highest level of education is Grade 10. She is in the Expanded Public Works Programme (EPWP). The deceased was introduced to her by the accused as his girlfriend. She has known her for several years. The deceased frequented her place. She last saw the deceased on Saturday in the company of the accused and Tollies at around 19:00 when they were yelling at each other. The deceased was bleeding from her mouth and told Daisy that she wanted her money from the accused. She then grabbed the accused by his T-shirt on his chest and Daisy broke the deceased's grip. The accused pushed the deceased and she fell on her back. Daisy left them and went to stand at the corner of the house. She heard Tollies telling the deceased that she (the deceased) had taken R100.00 from the accused whilst he was passed out at the shebeen. The accused told her that he kicked and trampled on the deceased's head but she did not witness that.

She told him to stop hitting the deceased. The accused and Tollies left with Tollies' two children who were left at Daisy's home earlier. Daisy did not see any other injuries on the deceased except for the blood from her mouth. Daisy went inside her house to dress warmly and left to play cards elsewhere.

[21] On Daisy's return she saw Tollies walking in front of the accused. The accused warned her not to go near Tollies because she had a knife. Daisy walked the accused halfway because she was afraid Tollies might injure him. He went to the deceased's house. She did not enter the shack but stood outside. She left for her place while the accused remained knocking at the deceased's shack.

[22] Daisy testified that she did not see the accused on Sunday. On Monday her mother called and requested her to look for R[...] to assist her with washing some blankets. Mpho Motabogi accompanied Daisy to the deceased's place. They saw a brick behind the burglar door and Mpho removed it. Mpho pushed the door open and entered. She shouted R[...]s name but there was no response. When asked why she did not enter she said "*I just did not want to enter*". Mpho came out and said R[...] was not breathing. She suggested that they find an elder to make an observation. They went to her aunt Matsotso who accompanied them to the deceased's place.

[23] Again Daisy did not enter the shack. They confirmed R[...] had died. Daisy suggested that they report the matter to the police. She also called her mother and told her that R[...] had passed on. Her mother came to the scene but did not stay long. Daisy made her statement on that same day. She confirmed her and her mother's telephone numbers as those appearing on the cellphone data analysis report. In Court she was shown the report and asked to comment on the times she and her mother had called one another and the reasons for those calls. She initially said she called her mother to speak about the children but later changed her version and said she does not remember the reason for the calls because she and her mother spoke often.

- [24] Gladys Ratel is the accused's mother. She is 58 years old. She never attended school and is unemployed. She confirmed calling her daughter, Daisy, on Monday morning at around 11:00, requesting her to communicate with the deceased to assist with the laundry. Daisy called her back and said she must come quickly and see what happened. She first went to Daisy's place and when she did not find her there, she proceeded to the deceased's place. She found the police and Daisy there. Daisy told her that the deceased was lying there inside the shack. She sought and obtained permission from the police to enter the shack. She saw the deceased lying on the bed and then she went to Daisy's place.
- [25] On Friday he arrived home after work but left shortly thereafter. She does not know where he went. He returned that same evening but left again. He returned home on Saturday morning stating that he was from Tollies. He was not long at home but spent the entire Saturday away and only returned home around 24:00 when he demanded food. According to her, the accused was not aware of the passing of the deceased. On Sunday morning she asked him to fix her stove because she wanted to cook before going to church. He fixed it and returned to bed.
- [26] The State pressed her for clarity on the three phone calls made at 23:49:08; 01:44:42 and 11:18:18 on Monday morning. Her explanation was that she had called Daisy to reprimand her for being at the tavern that late because she was a married woman. She called her at 01:44:42 to ascertain if she had gone home. She called her again on Sunday morning to make cooking arrangements. The call on Monday morning was for Daisy to ask the deceased to come and assist her with washing her blankets. When Daisy returned her mother's call on Monday at 11:41:45 they spoke for 82 seconds. According to her that is when Daisy called her to the deceased's shack. She further called Daisy at 11:41:45; 11:44:42 and 12:45 explaining that they usually call each other. She denied phoning Daisy at 02:00 am on Sunday morning telling her that the accused's shoes were bloodied. She

also denied any knowledge of the accused having confessed to her that he had killed the deceased and had threatened to commit suicide.

[27] The State called the cellphone data analyst and profiler, Lt Col Hanlie Conradie, a SAPS member with 35 years' experience of which 12 years were in Crime Intelligence. She received a request to establish whether there was communication between two cellphone numbers and whether they were in the same cell tower vicinity or otherwise. The request related to a murder investigation in Delportshoop CAS47/05/2021.

[28] Col Conradie established from the RICA information on 14 July 2020 that the phone number 0[...] belonged to Elizabeth Vos. The Towers activated for the period 15 to 17 May 2021 were Delportshoop CEN1 and Ulco CEN2. Data received regarding cellphone number 0[...] started on 15 May 2021 and ended on 17 May 2021. The RICA information on 26 September 2014 reflected as that of Daisy Ratel. Towers activated for the periods 15 to 17 May 2021 were Delportshoop DC and Dikgatlong ATC. Col Conradie provided a Microsoft excel spreadsheet showing the communication between the two cellphone numbers, date, time, record type, calling number and called number, call duration, originating base station as well as the originating suburb.

[29] From the analysis made, Col Conradie confirmed that the following calls were made, and for convenience, I will reflect the numbers on the first sentence but thereafter, use the name Daisy for cellphone 0[...] and mother for cellphone 0[...] for the period 15 May 2021 to 17 May 2021:

29.1 On Saturday, 15 May 2021 cellphone number 0[...] (Daisy) called 0[...] (mother) at 23:49:08 and the call duration was 120 seconds.

29.2 On Sunday, 16 May 2021 mother called Daisy at 01:44:42 and the call went to voicemail.

29.3 On Sunday, 16 May 2021 Daisy returned her mother's call at 01:45:09 which lasted 62 seconds.

29.4 On Sunday, 16 May 2021 mother called Daisy at 11:10:36 and the call lasted 24 seconds.

29.5 On Monday, 17 May 2021 Daisy called mother at 11:18:18 which lasted for 41 seconds.

29.6 On Monday, 17 May 2021 mother called Daisy at 11:41:45 and their call lasted for 82 seconds; and again at 11:44:42 for the duration of 41 seconds; and a further call at 12:45:23 which lasted for 92 seconds.

[30] Col Conradie assured the Court of the reliability of the records provided as obtained from the towers. According to her testimony, the information cannot be altered before it is received as it comes on a PDF format. Mr Biyela neither cross-examined the witness nor disputed her credentials.

[31] It became apparent to the State during the testimony of Daisy and her mother that their evidence was in stark contrast to the facts they had disclosed in their statements to the investigating officer, Sgt Khoboho. It is plain that their testimony was glaringly straying from the truth. The version furnished by Daisy to Sgt Khoboho appears to be consistent with the version of the other witnesses, more particularly, Rolene Visagie and Mpho Motabogi. Similarly, Ms Ratel's two statements are inconsistent with her *vivo voce* evidence and her daughter Daisy's, as well as that of Sgt Khoboho. The State submitted that the deviation was untruthful and *mala fide* and therefore detrimental to the State's case. The State sought leave to hand in Daisy's and Ms Ratel's prior statements under s 190 (2) of the CPA to have them declared hostile witnesses.

[32] Where a party calls a witness, who gives evidence which is unfavourable to him/her there are three courses open to such party:

- (a) He or she may lead evidence to contradict the unfavourable witness (*Moothoosamy v Murugan* (1919) 40 NLR 402; *Hampson and Co v Else* (1884) 2 HCG 439;
- (b) He or she may ask the court to declare the witness hostile, thus allowing the person who called the witness to cross-examine them;
- (c) He or she may prove a previous inconsistent statement made by the witness in terms of sub s (2) of s190 of the CPA.¹

[33] The test to declare a witness hostile was revisited by the SCA in its recent judgment in *S v Makhala and Another* 2022 (1) SACR 485 (SCA) at para 88:

“[88] *The mere fact that a witness gives evidence that is unfavourable to the party calling the witness does not render the witness hostile. However, the need to show an intention to prejudice, as reflected in Steyn, does not appear to be the position in English law on 13 May 1961, as required by s 190(1) of the CPA. The test was stated in Meyer's Trustee v Malan² to be as follows: the court must decide whether the witness is adverse, from his demeanour, his relationship to the party calling him, and the general circumstances of the case. This test is not predicated on proof of a subjective intent to prejudice.*”

[34] Regard being had to the test enunciated in *Meyer's Trustee* above and that it is a matter in the discretion of the court in every case, I found that the demeanour of Daisy and her mother was dishonest and untruthful. Their relationship with the investigating officer, as testified to by Sgt Khoboho, changed negatively from the moment he opposed the accused's application to be admitted to bail. They refused to testify on behalf of the State and were reluctant to attend consultations with the State. I therefore concluded

¹ Commentary on the Criminal Procedure Act, Du Toit et al, Volume 1, Juta [Service 69, 2022] 23 - 17

² *Meyer's Trustee v Malan* 1911 TPD 559 at 561

that Daisy and her mother were hostile towards the State and they were declared hostile witnesses. The State was allowed to cross-examine them on their inconsistencies.

[35] This is what Daisy deposed to in her statement furnished to Sgt Khoboho on the same day, 17 May 2021 at 14:50, Delportshoop, after the body of the deceased was discovered:

“Marlyn Daisy Plaatjies, state under oath in English.

1. *I am a mature woman 29 years old with ID No³, residing at house no 2[...] S[...], Delportshoop, contact no. 0[...].*
2. *On Saturday 2021-05-15 at about 19:00 in the evening I was at my place. My brother Jacob Ratel came with his girlfriend R[...] and another lady Tollies. R[...] was having blood on her mouth, they started arguing, R[...] and Jakob I intervened and told them to stop. Jacob and Tollies then left my place, and R[...] also left afterwards.*
3. *Again, later Saturday evening at about 22:00, Jacob came back and told me that he assaulted R[...], he kicked and trampled her on her head. I told him I am going to the toilet, he must wait for me I will take him half way. Till at his place or where they stay with R[...]. I stood at the corner as he was knocking at the door. I then left and went back to my place.*
4. *On Sunday morning at about 02:00 I received a call from my mother Gladys Ratel and told me that Jacob is full of blood on his tekkies and I said to my mother ‘no mom, is it not as I left him being just fine.’ I then sent my boy (Chaid) to look for R[...]. He came back and told me that he knocked but no one responded. I then in the afternoon went to R[...]’s place to check on her.*

³ Full ID No not included to protect her security

5. *On my arrival at R[...]’s place the door was not locked. I started to leave and getting [strange] feelings, and just turned away. On Monday 2021-05-17 at about 11:15 my mother Gladys Ratel called me and told me to check where R[...] is, when she asks Jacob where R[...] is he is just crying and told her that he killed R[...] and that he is going away and going to kill himself. So he left.*
6. *I then asked Mpho [Motabogi] the lady who is staying opposite me to accompany me to R[...]’s house. On our arrival at R[...]’s place I stood outside and Mpho opened the door and put her head in to look. She screamed ‘R[...], R[...],’ with no response. She told me that R[...] is lying on her bed and does not [seem] as if she is breathing. We then left to look for [an] elderly woman/mother to come and look for us to make sure. We then met aunt Matsotso. I asked her to come and assist us. She came with us and entered the house with Mpho as I was standing outside. Mpho came out and after aunt Matsotso, then Mpho told me that aunt Matsotso said that R[...] is no more. I then called the police.*
7. *That is all I can declare.*
8. *I know and understand the contents of the statement. I have no objection in taking the prescribed oath. I consider the prescribed oath as binding to my conscience.”*

[36] Daisy deliberately excluded material information in her oral evidence. The following are noteworthy:

- 36.1 She omitted the aspect that she left the accused knocking at the deceased’s shack on Saturday night.

- 36.2 She received a call from her mother at 02:00 in the morning alerting her that the accused's tekkies were full of blood and that she had asked her mother if it was not mud.
- 36.3 That she sent her late son at that time (02:00) after her mother's call to check whether the deceased was at her shack and that he went and reported that he had knocked on the door but that no one responded.
- 36.4 On Sunday afternoon she went to the deceased's place to check on her and found the door unlocked. She was afraid and had a bad feeling resultantly causing her to leave without entering the shack.
- 36.5 On Monday, 17 May 2021, her mother called her again at 11:15 asking her to check on the deceased because when she enquired about the whereabouts of the deceased from the accused he just cried continuously without giving any response.
- 36.6 In the statement it is written that she asked Mpho to accompany her whereas in her testimony she testified that Mpho volunteered to go with her which is not consistent with Mpho's testimony.
- 36.7 Although she admits that she furnished her statement to Sgt Khoboho, she denied being at the deceased's place on Sunday.
- 36.8 During cross-examination she said although she and her mother speak regularly on the phone she denied any knowledge pertaining to the accused's tekkies that were soaked in blood. She further denied that her mother had called her at 02:00 in the morning.
- 36.9 She denied that her late son went to check on the deceased contending that she said she wanted to send her son to the deceased's place on Monday and not that she sent him there.

36.10 It was put to Daisy that when the accused returned to her home at 22:00 he informed her that he had kicked and trampled on the deceased's head. She was adamant that the kicking and trampling happened around 19:00 at her home. The State put it to her that 22:00 was sensible considering that her mother called her at 23:47, but she denied this.

36.11 When confronted with the part of her statement where she said Mpho went to the deceased's bedroom she vehemently denied that Mpho had entered the bedroom.

36.12 She does not know why Khoboho wrote in her statement that her mother had phoned and told her that her brother came home with blood on his shoes.

36.13 Daisy said Tollies left her children at her (Daisy's) home whereas the evidence was that the children were fetched from their father's place. Even the accused was placed at the father's place, not only by Tollies but also by Sgt Khoboho who confirmed that there was a charge laid against the accused after the children were fetched.

[37] This is what Ms Gladys Ratel deposed to before Sgt Khoboho in her first statement signed on 18/05/2021 at 16:10

"Gladys Ratel verklaar onder eed in Afrikaans:

1. *Ek is 'n volwasse vrou met 56 jaar oud, woonagtig te 1[...] I[...], Delportshoop. Werkloos en geen kontak nommer.*
2. *Op Sondag 2021-05-16 om ongeveer 02:00 was ek by my huis en geslaap. Toe kom klop Jacob by die deur en ek het vir hom oop gaan maak. Hy het in gegaan en toe vra hy kos. Ek het hom gesê dat daar is nie kos nie, want ons het klaar in die middag geëet. Toe antwoord hy en sê is reg my ma, toe gaan slaap hy.*

3. *Sondag het hy heel dag geslaap en nooit opgestaan nie. Hy het eers Maandag 2021-05-17 opgestaan wat ek vir hom melk stuur. Die Maandag 2021-05-17 het ek vir Jacob weer gevra wat het hy gemaak. En toe antwoord hy en sê my ma sorry. Ek het so 11:00 vir Daisy my meisie kind gebel en gesê sy moet gaan kyk waar is R[...], want Jacob huil net as ek hom vra. Sy het my terug gebel en gesê my ma kom gou kom kyk wat hier aangaan. Ek het haar gesê ek voel nie reg nie, maar ek gaan opstaan.*
4. *Wat ek daar kom toe sien ek die polisie was daar en toe maak hulle die deur oop en toe sê hulle ons moet kyk. Ek het ingegaan en toe sien ek R[...] lê op haar bed en sy was vol bloed in die gesig. Toe gaan ek uit en gaan sit daar by Daisy tot alles oor is.*
5. *Van daar af toe kom ek terug huis toe.*
6. *Ek is vertrouwd met die inhoud van die verklaring en bevestig dit. Ek het geen beswaar met die aflê van die eed nie. Ek beskou die voorgeskrewe eed as bindend op my gewete. “*

[38] Ms Ratel's second statement, where she appended her signature G Bedwell was obtained on 16 February 2022 at 12:10 in Delporthoop, reads:

1. *“Gladys Ratel verklaar onder eed in Afrikaans.*
2. *Ek is 'n volwasse vrou van 56 jaar oud, woonagtig te I[...] 1[...], Delporthoop, en werkloos.*
3. *Ek het Jakob weer gevra omdat hy my nie geantwoord het nie, en ook omdat hy gehuil het toe ek hom vra waar is R[...].*
4. *Hy het my nie geantwoord nie, dis waarom toe bel ek my meisiekind Daisy om vir R[...] te gaan kyk by die shanty.*

5. *Dis al.*

6. *Ek is vertrouwd met die inhoud van die verklaring en bevestig dit. Ek het geen beswaar met die aflê van die eed nie. Ek beskou die voorgeskrewe eed as bindend op my gewete.”*

[39] Sgt Khoboho was later recalled and confirmed that he, and not the unnamed Captain, obtained Ms Ratel’s second statement. That was done following the DPP query seeking clarity regarding Ms Ratel’s questioning of the accused for the second time regarding what he had done to the deceased. Hence her response at para 3 of the statement *“Ek het Jacob weer gevra omdat hy my nie geantwoord nie, en ook omdat hy gehuil het toe ek hom vra waar is R[...].”*

[40] In Ms Ratel’s statement she indicated that the accused had arrived home on Sunday morning at 02:00 but testified that she did not remember the time. She then said it could be around 24:00 to 02:00. She went on to say he was asleep the entire day on Sunday and only woke up on Monday morning, 17 May 2021, when she sent him to buy milk. He then said to her: *“Mom, I am sorry”*. Ms Ratel then called Daisy and asked her to look for R[...] because Jacob is continuously crying when she enquired from him what he had done. Daisy then called her back and said *“Mom, quickly come and have a look what is happening here.”* Ms Ratel denied mentioning that to Sgt Khoboho and said she only told him about the milk. She also denied telling Sgt Khoboho that the accused had apologised when she asked him what he had done. She was shown the second statement taken on 16 February 2022 by Sgt Khoboho where she appended her signature, G Bedwell. She wanted to create the impression that the second statement was not taken by Sgt Khoboho but by an unnamed Captain. She confirmed giving the second statement at her home. She also confirmed her signature. It was put to her that her statement explains the accused’s behaviour on that Saturday evening and early Sunday morning when he came to her crying with bloodied shoes not long after he had told his sister that he had kicked and

trampled on the deceased's head. She refuted the averment imputed to her that the accused came home with blood-stained shoes. Ms Ratel cannot explain why Daisy would tell the police that her mother called her at 02:00 telling her about the accused's blood-stained shoes if she had not told her so. She further denied telling Daisy that Jacob had confessed to killing the deceased.

[41] During cross-examination by Mr Biyela, the accused's version was put to Ms Ratel that the accused never saw his mother at all on Sunday and yet she said she woke him up on Sunday morning to fix her stove. It was further put to her that the accused said she sent him to buy milk and to fix the stove on Monday morning. She was adamant that he fixed the stove on Sunday morning. She does not know where he was the entire day on Monday. It was also put to her that she is suffering from a mental condition. She agreed that she has been suffering from depression for the past fifteen years but that it was under control and well managed.

[42] Sgt Khoboho is attached to the detective unit at Delportshoop with 16 years' experience as a member of the SAPS of which 12 years were as an investigating officer (detective). He was assigned to investigate this case. He attended the scene and met with W/O Hawkins, Sgt Moreotsenye and Sgt Bartnes. His testimony regarding how they found the body and the injuries materially corroborates what was said by Sgt Moreotsenye and Bartnes. He further testified that he spoke to Daisy who confirmed to him that she was the one who had called the police. Daisy explained to him about the interaction at her place on Saturday when the accused, the deceased and Tollies were there. A fight ensued between the accused and the deceased resulting in the deceased bleeding from her mouth. She reprimanded them whereafter the accused left with Tollies. The deceased left later and went to her place.

[43] Sgt Khoboho testified that Daisy further informed him that her mother contacted her telephonically around 02:00 on Sunday morning requesting her to check where the deceased was because the accused had arrived

home with bloodstained tekkies. She said that she told her mother it was late and she was scared to leave her house at that time. Her mother called again around 11:00 in the morning and repeated her request. It is then that she called her neighbour, Mpho Motabogi, to accompany her to the deceased's place. Daisy told Sgt Khoboho that she let Mpho enter the shack alone and on her return, they went to call her aunt to confirm what Mpho had told her. She then telephoned the police and reported the matter.

[44] Sgt Khoboho was present when Sgt Diphephenyane removed the blanket from the deceased and took photographs of the scene and the body. He observed the injuries on the deceased's naked body. He also confirms the bloodstains on the bed as well as the carpet next to the bed. They found a cigarette butt which was also collected for forensic purposes. All the exhibits were collected and sent to the forensic laboratory for testing. Sgt Khoboho testified on the basis of a report compiled by Lieutenant Colonel Regina Cecilia Janse Van Rensburg, Chief Forensic Analyst and Reporting Officer. No DNA was obtained from either the plank (PA4003889447), the cloth (PA6003951802) or the underwear (PA6003951882). Not enough DNA (blood) was obtained from the pair of jeans (PA5002745165). The cigarette butt had the accused's DNA. A female DNA (blood) result was obtained from cloth (PA6003951803); Sheet [blood] (PA4004385315); and jacket (PA5002745166).

[45] Sgt Khoboho obtained Daisy's statement at the scene. Daisy told him that her mother told her that the accused had informed her that he had killed the deceased and was going to kill himself. At the police station, Sgt Moreotsenye, in Sgt Khoboho's presence, read the accused rights to him before detaining him. It was only then that he was arrested and not earlier as insinuated by Ms Ratel.

[46] Sgt Khoboho followed up on the information furnished by Daisy by making an application in terms of s 205 of the CPA to obtain data analyses from the cellphones. He received the cellphone records analysed by Captain Conradie. The records show that cellphone numbers: 0[...] and 0[...] were in

contact. Daisy's cell number is 0[...] and her mother's, Gladys Ratel, is 0[...]. He went further to establish that her mother's phone was not in her name but in that of Elizabeth Vos, who had passed on. Vos was her husband's sister. Gladys Ratel gave the cellphone number to the investigating officer as hers.

- [47] Sgt Khoboho also followed up on the information furnished by Daisy regarding the report made to her by her mother regarding the accused's bloodstained tekkies. He went to visit the mother at her home and she disclaimed any knowledge thereof. After he opposed the bail application by the accused the attitude of Daisy and her mother changed towards him and he received no cooperation from them. They refused to consult with the State Advocate and further refused to attend court.

Count 2 and 3: Assault GBH – 08 September 2017

- [48] The State led the evidence of the complainant, Ms J[...] A[...]. She is 32 years old, of miniature stature, and soft-spoken. She is unemployed and studied up to Grade 9. She and the accused were in a love relationship for seven years, from which two children were born. On 08 September 2017 she was in the company of N[...] A[...], K[...] S[...], G[...] S[...] and W[...] C[...] at a tavern. The accused arrived and used vulgar language against her. Her cousins reprimanded him and he left. He returned shortly thereafter and continued with the insults. He choked her by putting his arm tightly around her neck whilst standing behind her. She was seated and screamed. Her cousins intervened and he left.
- [49] As the complainant and her cousins were walking home, the accused grabbed the complainant from behind around her neck and stabbed her once with a screwdriver just below her temple. Her cousins intervened once more and he left. She sustained an open wound showing the court a 1cm healed scar on the right temporal area. She did not receive medical treatment. She did not report immediately because she was under the influence of liquor. She and her cousins had shared five 750ml of beer. She subsequently withdrew the charges under pressure from the accused. The accused and the deceased were cohabiting at the time.

[50] W[...] C[...] is 36 years old and went to school up to Standard 8. The complainant is his cousin. He knows the accused and is also aware of their relationship. When asked to describe the relationship between the accused and the complainant he said that they fought every now and then. He testified that the accused called the complainant to him but she refused and told him to stay away from her. He then went to where they were seated and throttled her in the manner of a vice-grip. W[...] demonstrated to the court. They intervened. The accused swore at the complainant and left. They remained consuming alcohol. As they were walking the accused approached them from behind and grabbed the complainant. She screamed that he had stabbed her. He swore at her again and left. They did not witness the stabbing because they were walking in front of her but noticed that he was right next to her. When they reprimanded the accused he insulted them. He then noticed that the complainant was bleeding on the side of her face and on her back.

[51] Sgt Moreotsenye was on duty on 11 September 2017 when the complainant laid a complaint at the police station. He completed an injury statement at 11:55 noting the visible fresh injuries on the complainant. This statement is completed as backup in case the complainant did not receive medical treatment, where a J88 is completed by a medical doctor. He noted a stab wound on the right side of the face. The complainant informed Sgt Moreotsenye of a wound on her back but their Standing Orders do not allow a male inspecting a female on concealed parts of her body. There was no female officer on duty.

Count 4: Assault GBH – 14 April 2018

[52] J[...] testified that on the night of 14 April 2018 she was walking to a specific place in Heidelaan Street, in Delporthoop. The accused then pounced on her and just started hitting her with clenched fists and kicked her with booted feet indiscriminately. It was just the two of them when the incident occurred. She reported the incident to the police following day. She sustained what is colloquially known as “blue eyes” and her face was swollen. Her body

ached. She could not remember whether she received medical treatment. After she opened a case against him he acknowledged the assault and undertook not to do it again. When the incident took place, she had returned to her parents' home but two weeks later resumed her cohabitation with the accused. She therefore withdrew the charges against him because he is the father of her children. Their relationship was mainly violent and the beatings led to her decision to end it. It boggles the mind why partners, mainly women, would stay in abusive relationships which more often than not lead to fatal consequences.

- [53] Dr Kumakamba Ndjondo holds an MBChB degree from Lubumbashi University in the Democratic Republic of Congo (DRC). He has been stationed at the ZK Matthews District Hospital in Barkley West since 01 September 2014. He completed a J88 form on 17 April 2018 at 10:42 after examining the complainant. She reported to the doctor that she was assaulted on 14 April 2018 around 22:00. According to the doctor, the medical examination happened on Sunday, 15 April 2018, but the J88 was only completed on 17 April 2018. The doctor's findings as recorded on the J88: Right red eye subconjunctival haemorrhage (i.e the white part of the eye was red); haematoma of the peri-orbital area (black eye) – swollen; swollen right cheek; multiple bruises and superficial cuts on the back. She was treated and discharged. The J88 was handed up and accepted provisionally as Exh "A" but after its author, Dr Njondo testified, it was formally admitted.

The State closed its case

- [54] The accused testified in his defence and did not call any witnesses. He denied choking the complainant, J[...] A[...], in Count 2, on 08 September 2017. He stated that he does not know anything about the incident. He also denies knowledge of the assault in Count 3 that he stabbed and throttled the complainant. In as far as Count 4 is concerned, he further denied hitting the complainant with clenched fists and kicking her with booted feet. He admits that he fathered two of her children. They were in a relationship for ten

years. He was never arrested for assaulting the complainant and did not unduly influence her to withdraw the criminal charges against him.

[55] In as far as Count 1 of murder is concerned, he testified that he was at work on Friday, 15 May 2021. After knocking off he went to Madiks Tavern with the deceased where they consumed alcohol, a Black Label 750ml beer. They spent the night together at the deceased's shack. On Saturday morning they returned to Madiks Tavern and consumed beer. As they were hungry the deceased went to her shack to prepare food while he remained at the tavern. He later followed her to establish the cause for the delay. He found the deceased in the company of her sister and a white tall man.

[56] He requested the man to buy beer but he said he did not have money. The man and the deceased went to his vehicle which was parked in front of the deceased's shack and the accused and the deceased started arguing. He took the suitcase containing his clothes, threw it under a tree, poured diesel over it and set it alight. He left for Tollies' place vowing never to return. He and Tollies went to Madiks Tavern and consumed alcohol. The deceased arrived at the tavern and an argument ensued over her following him around. The deceased got confrontational and he pushed her causing her to fall. The deceased, Tollies and the accused were evicted. He and Tollies went to his sister, Daisy's, place.

[57] The deceased still followed them there. He told Daisy to ask the deceased to stay away from him because he had found her with another man. The deceased became physical again and he pushed her causing her to fall. Daisy intervened. He and Tollies returned to Madiks leaving the deceased at Daisy's. They drank until late at night when the father of Tollies' children, whose details were not specified, arrived at Madiks. When the man left Tollies said she will quickly go with him because there was something that she needed from him. The accused waited for some time and went to ascertain the reason for Tollies' extended stay at the man's shack. The lights were on and he peeked through the window and saw Tollies getting dressed. He punched the glass and the window broke. A quarrel ensued

while Tollies was still inside the shack. She emerged from the shack carrying a knife. They all left the premises. Tollies went to fetch her children from Daisy's house and went to her house. Daisy walked the accused half-way to his mother's house because she was told that Tollies was armed with a knife. The accused put up overnight at his mother's house.

[58] On Sunday the accused went to Tidimalo Location in Delportshoop and later to Rooikoppie where he consumed alcohol. He returned home between 16:00 and 17:00 on Sunday afternoon and spent the night at home. On Monday morning his mother sent him to buy milk. He in the process took two beers to Tollies' place where he dropped them off, took the milk home and made tea for his mother. He returned to Tollies' place and consumed liquor with Tollies and *Bolla* (Rolene Visagie). Yvonne Gerts and her boyfriend joined them later. The five of them shared about seven beers.

[59] Mmeme told them about R[...]’s passing. He was heartbroken. He was with Tollies when he was confronted by Sgt Khoboho who arrested him and took him to the police station. He denies questioning or demanding R50.00 from the deceased. He further denies swearing after Mmeme reported R[...]’s passing to them. He denies that Tollies fetched the children from their father and was adamant that they were left at Daisy's place. He further denied that Tollies carried a child on her back and also denied having pushed both against a fence. He disputes the allegation by her mother that he fixed her stove on Sunday or that he had slept the whole day as she testified.

Analysis of the evidence

[60] The proper approach in the analysis of the evidence which I follow is pronounced by the Supreme Court of Appeal in *S v Chabalala* 2003 (1) SACR 134 (SCA) at para 15. See also *S v Trainor* 2003 (1) SACR 35 (SCA) 41b-c. It is further trite that where there are contradictions between two witnesses and contradictions between the versions of the same witness, a possibility is that the witness may have erred either because of a defective recollection or because of dishonesty. Not every contradiction or deviation

affects the credibility of a witness. See *S v Mafaladiso* 2003 (1) SACR 583 (SCA) at 593e – 594h and *S v Mkohle* 1990 (1) SACR 95 (A) at 98f-h.

Count 2: Assault GBH

[61] The accused confronted J[...] and demanded to speak to her but she refused. She had no business with him since they were no longer in a love relationship. The complainant is corroborated by her cousin W[...] that the accused insulted her before he choked her. This attack was clearly unprovoked. There is no question of mistaken identity. Their evidence is consistent and probable. I did not gain any impression that it was fabricated. They are credible witnesses. The accused's version only comprises bare denials. It is common cause that he was on the crime scene. I am persuaded that the State has made out its case against the accused in respect of Count 2.

Count 3: Assault GBH

[62] J[...] and her cousins were walking home when the accused reappeared. He was armed and stabbed J[...]. Her evidence in respect of this count is not only supported by her cousin, W[...], but also by Sgt Moreotsenye who had completed the injury statement. Just because the complainant had withdrawn the charges after being unduly influenced did not take away the criminal responsibility of the accused. The commission of the offence did not disappear. It is a crime against the State. There was no justification for the accused's conduct. There is therefore no reason why the accused cannot be found guilty on this count either. His bare denials did not assist him.

Count 4: Assault GBH

[63] J[...] was a single witness in count 4 when the incident occurred and the cautionary rule is applicable. Section 208 of the CPA stipulates that an accused person may be convicted of any offence on the single evidence of any competent witness. Her evidence is corroborated by the objective evidence of the doctor. The injuries are consistent with being punched and kicked. It was contended on behalf of the accused that because the complainant could not recall having gone to a doctor she was not truthful and

she further could not explain her memory loss. Dr Ndjondo explained that alcohol can cause temporary amnesia but the ARV medication, depending on the type of medication taken, if for example efavirenz, can affect a person's mental state. He did not take the details of the patient's medication. Taking cue from *Mafaladiso* and *Mkohle* this lapse, in my view, did not affect her credibility. The accused only makes bare denials. The complainant was not sober but she recalls who her assailant was and that she ultimately withdrew the charges not because he did not assault her, but because he is the father of her children.

[64] I am mindful that the state bears the *onus* to prove its case beyond reasonable doubt and that it is not for the accused to prove his innocence. It became apparent during his cross-examination that he loathed her consumption of alcohol and concluded that the consumption caused her to neglect her children. It is clear that when he met her late that night, intoxicated, his reaction was to assault her. She withdrew the charges after their talks because they were still in a relationship and he is the father of her children. I have no doubt in my mind that the accused assaulted J[...] on that day for no justifiable reason. It follows that the State has proved its case against the accused in respect of Count 4.

Count 1: murder

The alibi defence

[65] The accused denied being present at the deceased's shack and having perpetrated the murder. After his arrest by Sgt Moreotsenye and having been warned of his rights he was informed of the murder that was committed and that he is a suspect. He failed to proffer any explanation and even refused to sign form 14A completed Sgt Moreotsenye.

[66] Galgut AJA in *S v Shabalalala* 1986 (4) SA 734 (AD) at 736B-D held:

"The appellant's defence was an alibi. Hiemstra Suid-Afrikaanse `Strafproses 3rd ed at 218 (Notes). It is trite law that, where an alibi is raised, there is no burden on the accused to prove his alibi. The onus rests

on the State to prove his alibi is false. R v Biya 1952 (4) SA at 521D - E; R v Hlongwane 1959 (3) SA at 340 - 1; Hiemstra (op cit at 219); S v Nunu 1979 (1) PH H14. It was proved beyond any 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."

[67] In *S v Thebus and Another* 2003 (2) SACR 319 (CC) at 67 and 68 Moseneke J, then, reasoned:

"[67] First, the late disclosure of an alibi is one of the factors to be taken into account in evaluating the evidence of the alibi. Standing alone it does not justify an inference of guilt. Secondly, it is a factor which is only taken into consideration in determining the weight to be placed on the evidence of the alibi. The absence of a prior warning is, in my view, a matter which goes to the weight to be placed upon the late disclosure of an alibi. Where a prior warning that the late disclosure of an alibi may be taken into consideration is given, this may well justify greater weight being placed on the alibi than would be the case where there was no prior warning. In all the circumstances, and in particular, having regard to the limited use to which the late disclosure of the alibi is put, I am satisfied that the rule is justifiable under s 36(1).

[68] The failure to disclose an alibi timeously is therefore not a neutral factor. It may have consequences and can legitimately be taken into account in evaluating the evidence as a whole. In deciding what, if any, those consequences are, it is relevant to have regard to the evidence of the accused, taken together with any explanation offered by her or him for failing to disclose the alibi timeously within the factual context of the evidence as a whole."

[68] The accused failed to disclose his alibi outright when confronted about the murder of the deceased. His claim to have been elsewhere when the

deceased was murdered is unsubstantiated. The following is not only uncontroverted but is also persuasive:

- 68.1 Daisy's statement that she walked the accused half-way to the deceased's shack and stood at the corner of the premises while he knocked at the deceased's door on Saturday night;
- 68.2 The accused went to his mother's home in the early hours of Sunday with blood-stained shoes;
- 68.3 The accused confessed to Rolene Visagie that he caused the death of the deceased and said so freely and voluntarily, not influenced or coerced by anybody and not promised anything in return; and
- 68.4 The frequency of the telephone calls between the accused's mother and sister around the time of the murder and the persistence by the mother for Daisy to check on the deceased as she was perturbed by the accused's behaviour.

I find the accused's alibi vague, truncated and false. It was also disclosed late in the proceedings. Having rejected the alibi defence of the accused does not, however, bring the matter to an end. The State still bears the onus of proving its case beyond reasonable doubt.

- [69] There is no direct eye-witness account in the murder count. It is for that reason that a conspectus of all the evidence is required. In *S v Reddy and Others* 1996 (2) SACR (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 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.'"

The extra-curial statements

[70] The effect of having the oral evidence and extra-curial statement is that the court now has two conflicting versions given by one witness. I am prepared to accept that Daisy and her mother made the statements to Sgt Khoboho and were probably telling the truth when they did so. They are trying to distance themselves from the contents of their statements. I, however, find that Sgt Khoboho was an honest, credible and reliable witness when he testified. I have no reason to doubt his evidence. The central question is whether the extra-curial statements made by Daisy and her mother, to the investigating officer, Sgt Khoboho, the contents of which were disavowed when they testified, should be admitted as evidence.

[71] Whether to admit the statements by Daisy and her mother the correct starting point is s 3(1)(c) of the Law of Evidence Amendment Act 45 of 1988 which provides:

“(1) Subject to the provisions of any other law, hearsay evidence shall not be admitted as evidence at criminal or civil proceedings, unless-

...

(c) the court, having regard to-

(i) the nature of the proceedings;

(ii) the nature of the evidence;

(iii) the purpose for which the evidence is tendered;

(iv) the probative value of the evidence;

(v) the reason why the evidence is not given by the person upon whose credibility the probative value of such evidence depends;

(vi) any prejudice to a party which the admission of such evidence might entail; and

(vii) any other factor which should in the opinion of the court be taken into account, is of the opinion that such evidence should be admitted in the interests of justice.”

[72] The statements of Daisy and her mother are hearsay evidence. Cameron JA in *S v Ndhlovu and Others* 2002 (2) SACR 325 (SCA) considered the provision of s 3 and at para 31 held that:

...“The probative value of the hearsay evidence depends primarily on the credibility of the declarant at the time of the declaration, and the central question is whether the interests of justice require that the prior

statement be admitted notwithstanding its later disavowal or non-affirmation. And though the witness's disavowal of or inability to affirm the prior statement may bear on the question of the statement's reliability at the time it was made, it does not change the nature of the essential inquiry, which is whether the interests of justice require its admission.” (emphasis added)

[73] In *Makhala and Another v The State* 2022 (1) SACR 485 (SCA), Meyer AJA, writing for the majority, having visited the SCA’s previous cases in *S v Rathumbu* 2012 (2) SACR 219 (SCA), *S v Mamushe* [2007] 4 All SA 972 (SCA) and *S v Mathonsi* 2012 (1) SACR 335 (KZP), emphasised at paras 117 and 118:

“[117] However, the common-law principle, that a state witness's extracurial inconsistent statement may be used solely for the purposes of impeaching him or her and may not be tendered into court as proof of the facts contained therein, no longer finds application in our law. In this country we have our definition of hearsay evidence and legislative instrument prescribing the factors or safeguards that the court must consider in deciding whether the extracurial inconsistent hearsay statement of a state witness should be admitted as evidence in the interests of justice. Our courts, therefore, are not permitted to substitute our statutory prescripts with common-law principles or statutory provisions of foreign jurisdictions in deciding whether such hearsay should be admitted as evidence. Therefore, the decision in Mathonsi is wrong.

[118] I have mentioned that our Hearsay Act allows for a more flexible discretionary approach to the admissibility of hearsay evidence than the common law did. In deciding whether hearsay should be admitted in the interests of justice, the court is not limited to the factors listed in s 3(1)(c)(i) – (vi), but empowered in terms of s 3(1)(c)(vii) to have regard to 'any other factor which should in the opinion of the court be taken into account'. If, in deciding whether hearsay should be admitted in the interests of justice in terms of s

3(1)(c) of the Hearsay Act in a given case, the trial court is of the opinion that a factor taken into account in another jurisdiction when admitting hearsay into evidence should additionally be taken into account, it is by virtue of s 3(1)(c)(vii) empowered to do so.”

- [74] Following the approach as set out in *S v Ndlovu and Others* 2002 (2) SACR 325 (SCA) para 17 and considering all the circumstances under which the statements were made, I find that they were made voluntarily and in a language Daisy and her mother were both conversant in. Sgt Khoboho posed questions to Daisy and wrote her responses down. They conversed in Setswana and the statement was written in English and read back to her before she appended her signature. She neither experienced any problems in the communication nor felt any pressure from Sgt Khoboho or anyone else to give the statement. In respect of Ms Ratel, they conversed in Setswana and the statements were written in Afrikaans. Sgt Khoboho was writing as she was speaking to him. She says he did not read the statements back to her before she appended her signature but confirms signing both statements which were obtained at her home.
- [75] Daisy and her mother were extensively cross-examined on the contents of the statements which were admitted into evidence. They both recanted the aspects which implicated the accused in the count of murder. Evidently, they were under no pressure to furnish such statements and there was no language barrier between them and the investigating officer. It is plain, in my view, that the three statements are pivotal to the State's case. Taking cue from *Makhala* the contents of these statements is admitted against the accused in the interests of justice by virtue of the provisions of s 3(1)(c) of the Law of Evidence Amendment Act 45 of 1988.
- [76] The deceased spent some time with her sister, S[...] B[...] v[...] R [...], cleaning her shack on Saturday morning and when they parted around 21:00, she was still alive. What I perceive as farfetched is the contention by the accused that he found the deceased and his sister in the company of the white man and he burnt *his own clothes* contained in a suitcase as a result

thereof. According to S[...] he went in and out of the bedroom twice carrying the deceased's clothes and set them alight. He could not have carried one suitcase in and out of the shack twice. In any event, if he was angered by the deceased's betrayal with the white man, why would he burn his own clothes instead of just taking them away?

[77] Tollies told him that, while he had blacked-out as a result of over-indulgence in alcohol on Saturday, the deceased had searched him and took money from his pocket. This is a more probable reason to stir up an argument because they argued about money before the clothes were burnt as testified to by the deceased's sister. It becomes even more probable to agitate him towards burning her clothes since she was not returning his money.

[78] Despite having pushed each other at Madiks and further at Daisy's residence on Saturday evening, the only visible injury that Daisy testified to was the deceased bleeding from her mouth. It is common cause that the accused left with Tollies and the deceased went to her shack that evening. Interestingly, from that early evening testimony we now get to around 22:00 to 23:00 when the accused informed Daisy that he had kicked and trampled on the deceased's head. This piece of information, coupled with the fact that Daisy walked him half-way towards the direction of the deceased's shack, stopping at the corner of the deceased's premises when the accused stood knocking at the deceased's shack puts the accused at the deceased's shack from 23:00 and beyond. I reject the accused's concocted version that Daisy walked him half-way towards his mother's home as untenable, farfetched and false.

[79] The accused went home after being at the deceased's shack on Saturday night. This then links with the evidence from the written statement of Daisy that her mother had called in a panic informing her that the accused had arrived home in blood-stained tekkies and was just crying when she asked him about the whereabouts of R[...]. She required Daisy to check on the deceased. Absent this trigger, why would the mother persist with the request for Daisy to check on the deceased? It is reasonable to infer that

the telephonic communication between Daisy and her mother was imputed by the condition in which his mother had observed him when he arrived home. I am satisfied in the conclusion that Daisy and her mother had become acutely aware of the eventuality for which their mother needed confirmation. It is plain that they were adapting and changing their versions to exculpate the accused. The truth that Daisy and her mother told was to Sgt Khoboho when they furnished their statements.

[80] It boggles the mind why the accused's mother did not speak to the deceased herself if she wanted the deceased's help with the washing of her blankets. Daisy's blatant refusal to enter the deceased's shack is also not an innocent act. She refused to enter when she first went with Mpho and asked Mpho to enter alone, and again when they returned with her aunt, and further when the police invited her to enter with them. It shows that they had an interest or fear of what was to be discovered at the deceased's shack, something they failed to explain. The number of calls made by Daisy and her mother specifically between 23:00 and 02:00 are pieces of a jigsaw puzzle fitting so coherently that the accused cannot break it apart. There was no reason for those calls unless there was, to their knowledge, a dead body waiting to be discovered once the deceased's shack was visited. The irresistible inference is that they knew, or expected, that the deceased had been killed by the accused.

[81] During their oral evidence Daisy and her mother tried, especially the mother, to modify their testimony but it became even more apparent that it was a fabrication. A glaring example is one where she says the accused repaired her stove on Sunday and later spent the entire day sleeping, which was refuted by the accused himself. It is not disputed that the accused did not spend Saturday night at Tollies' because they had parted ways on a bitter note. The accused only went to his mother's home after 23:00 which was followed by her mother's call to Daisy at 23:47. He also did not spend Sunday night at Tollies' because Tollies testified that she did not see him for the entire day on Sunday and he also testified that he went to a different location. The accused only went to Tollies in the early hours of Monday

morning around 02:00am asking for some cigarettes from her and left. When he knocked at Tollies' door Rolene heard. The accused returned later that morning around 06:00 or 07:00 to Tollies' with beers which they consumed together until they received the news.

[82] The utterances made by the accused immediately after Mmeme informed them of the passing of the deceased was testified to by Rolene Visagie and Yvonne Gerts. They may not have repeated his exact words or said it in the same way but they essentially told the court what he said when he said in Afrikaans "*nou het ek k*k gemaak*" or "*watse k*k het ek nou aangevang*"? These differences are, in my view, not material. At the gate he said to Rolene Visagie "*Bolle, I killed the lady*". If indeed he had done nothing to the deceased it escapes me why he was displaying a reaction only displayed as a consequence of a guilty mind. This evidence pointing towards the accused as the perpetrator cannot be assailed. It is axiomatic from the above expression that Mmeme's message could have come as a shock to the accused because he was acutely aware that he was the culprit. The rest may have been.

[83] The deceased and her sister were cleaning the shack on Saturday morning. Despite the deceased leaving, her sister continued with and completed the cleaning of her shack. It must be borne in mind that the accused had already left after burning the deceased's clothes threatening not to set foot at her shack again. If he indeed kept his word, why was a cigarette butt found by the forensic official with his matching DNA if he did not return to the deceased's shack? This can only mean that he returned to the deceased's shack on Saturday night after her sister had left. What further boggles the mind is the lie that the accused's mother would have told the deceased that the accused was arrested when he had not been at that stage. There was no record of the arrest in the OB register and the SAP14 register as testified to by Sgt Khoboho.

[84] There is no doubt in my mind that the accused acted violently towards the deceased. In my view the only reasonable inference that is consistent with

the totality of all the proved facts and which excludes any other reasonable inference is that the accused killed R[...] L[...] and had full knowledge of her death and that his evidence that he had no knowledge of the death was false beyond a reasonable doubt. The accused's culpability for the murder of the deceased was established beyond any reasonable doubt.

[85] On a conspectus of the evidence in this case I am satisfied that the State has proved its case beyond reasonable doubt and return the following verdicts against the accused:

Count 1: Murder r/w s 51 (1) of the Criminal Law Amendment Act 105 of 1997: I find the accused guilty of Murder with *dolus directus* as the form of intent.

Count 2: Assault with intent to do grievous bodily harm: I find the accused guilty as charged.

Count 3: Assault with intent to do grievous bodily harm: I find the accused guilty as charged.

Count 4: Assault with intent to do grievous bodily harm: I find the accused guilty as charged.

**MC MAMOSEBO
JUDGE OF THE HIGH COURT
NORTHERN CAPE DIVISION**

Instructed by:

The Director Public Prosecutions

For the Accused:

Adv. K Biyela

Instructed by:

Justice Centre, Kimberley