REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, JOHANNESBURG

CASE NO: SS 54/2024

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: NO

10 March 2025

In the matter between:

THE STATE

And

N[…] K[…] Accused

JUDGMENT

Mdalana-Mayisela J

INTRODUCTION

[1] The accused is charged with murder of her newborn baby boy K[…] (“the deceased”), read with section 51(1) of the Criminal Law Amendment Act 105 of 1997, as amended (“the CLAA”). The state alleged that upon or about 3 March 2024 and at or near Fordsburg in the district of Johannesburg Central, the accused did unlawfully and intentionally kill the deceased.

[2] The provisions of section 51(1) read with Part I (a) (planned or premeditated murder) and (b)(iii) (victim was a person under the age of eighteen years) of Schedule 2 of the CLAA were explained to the accused before pleading to the charge of murder. She pleaded not guilty to murder and gave no plea explanation.

EVIDENCE

Exhibits

[3] The following exhibits were admitted as evidence during the trial:

A - Admissions in terms of section 220 of Act 51 of 1977 (“the CPA”);
B1 - Affidavit in terms of section 212(4&8) of the CPA made by Dr Leonardo Mantanga;
B2 - Medico-legal autopsy report prepared by Dr LL Mantanga;
C - Affidavit made by Johan N[...];
D - Affidavit in terms of section 212(4) of the CPA made by Dr Tayla Sarah Ferguson;
E – 3 Photographs of the deceased taken by Dr TS Ferguson;
F - Clinical notes made by Dr TS Ferguson;
G - Photo album and key prepared by Sergeant Owen Moeketsi;
H - Clinical notes made by Dr Dayna Ferguson;
I - Qualifications and experience document prepared by Dr Efrat Barnes;
J - Referral report prepared by the social worker, Ms S P Papila;
K - Clinical notes made by Dr Ronwyn Stevens; and
L - Helen Joseph final Laboratory report for N[…] K[…] (accused).

The witnesses

[4] To prove its case against the accused the state called her boyfriend J[...] N[...], Dr Tayla Sarah Ferguson, Dr Dayna Jane Ferguson, Dr Efrat Barnes, Ms SP Papila and Dr Ronwyn Stevens. Some of the state witnesses’ evidence was handed up by agreement between the state and accused, and those witnesses were not called to testify. The accused testified in her

defence. I have considered the evidence in totality. However, I do not intend to summarize the evidence of the witnesses individually in this judgment because most of the material facts are common cause.

The common cause facts

[5] The following facts are common cause, and/or not in dispute between the state witnesses and accused:

[5.1] The identity of the deceased and that he is the accused's late baby boy.

[5.2] The accused gave birth to the deceased on 3 March 2024 at home in Crown Mines.

[5.3] The deceased was healthy and normal at the time of his birth. He did not have any congenital abnormalities. He had a height of 46 centimeters and a weight of 2305 grams which was an indication that he was a full-term baby. He was carried to at least 36 weeks gestation.

[5.4] The deceased was crying and breathing well at birth. The umbilical cord was not wrapped around his neck.

[5.5] The placenta was not removed, and the umbilical cord was not clamped or cut at home after the deceased was born.

[5.6] The accused's boyfriend, J[...] N[...] whom she began dating from December 2023, did not know that the accused was pregnant until the deceased was born.

[5.7] The accused was alone at home when the deceased was born, as well as when J[...] went to look for an ambulance or car to take her and the deceased to hospital.

[5.8] J[...] organized a car and accompanied the accused and deceased to Rahima Moosa Mother and Child hospital on 3 March 2024.

[5.9] The deceased was wrapped in a towel that had blood and covered with a blanket.

[5.10] The deceased was not crying and struggled to breathe inside the car on the way to Rahima Moosa hospital.

[5.11] The accused was holding the deceased from birth at home until she handed him over to Dr Dayna Ferguson in Rahima Moosa hospital, and nobody tried to harm him during that time.

[5.12] The deceased arrived at Rahima Moosa hospital emergency department at about 19H50 and he was immediately taken to neonatal resuscitation area, placed under a warmer and stimulated. A face mask was placed to give him oxygen. The placenta was

removed. The umbilical cord was clamped, lifted away from the deceased, placed on a thick maternity pad and then cut with a scalpel by the nurses in the presence of Dr Dayna.

[5.13] Dr Dayna conducted the initial assessment of the deceased in the presence of her senior, Dr Umer Thair. The deceased was observed to be cyanotic. He was making respiratory effort but not saturating well. He was also hypothermic. He had signs of respiratory distress. A laceration above the left clavicle was observed initially. When the deceased was placed in position for supportive breaths and his neck extended, three deep lacerations to the right anterior-lateral neck were noticed. The wounds were not actively bleeding. Dr Thair took over airway breathing control and resus situation was declared.

[5.14] When doctors Dayna and Thair's shift ended at 20H00 in the emergency department, Dr Sarah Ferguson took over the resuscitation of the deceased and proceeded to stabilize him. The deceased's lips were noted to be blue, he was gasping and struggling to breathe. Dr Sarah examined the body of the deceased and when she extended his neck, she noticed that he had multiple penetrating wounds to his neck. The deceased's trachea (breathing pipe), vocal cords, oesophagus (swallowing pipe) and neck muscles were completely cut through and severed. As a result, the deceased could not cry or swallow food and struggled to breathe. Dr Sarah managed to stabilize the deceased by putting a breathing pipe in the neck through the actual wound of the windpipe. He was placed on a ventilator to help him breathe. The medication for pain was administered and he was kept in the ICU.

[5.15] Dr Sarah completed a J88 and attached diagrams. She also took black and white, and colour photographs of the deceased's multiple injuries. She also took two videos showing the deceased not crying, having multiple penetrating wounds in the neck, blood stains and abnormal breathing with her phone. By agreement between the parties the videos were played during her testimony in court.

[5.16] She described the injuries as extensive and not superficial cuts. The first wound was a 4-centimeter by 4-centimeter laceration with the trachea exposed and the sternocleidomastoid muscle severed in the right anterior neck triangle. This injury also had surgical emphysema with an audible air leak or sucking chest wound. That means there was air escaping from the chest into the tissue underneath the neck. The second wound was a 2-centimeter by 0,5- centimeter laceration to the anterior neck triangle. The third wound was a 2-centimeter by 3-centimeter laceration on the right neck

triangle. The fourth wound was a 3 centimeter by 2-centimeter laceration to the left anterior neck triangle that was about 3-centimeters above the clavicle. All the wounds were deep lacerations or incisions. They had sharp edges caused by a sharp object, for example a knife or scalpel blade. She concluded that there were multiple deep lacerations to the neck of the deceased in keeping with nonaccidental injuries.

[5.17] The deceased was transferred to Charlotte Maxeke Academic hospital which has pediatric surgical expertise for further management. He was kept in the pediatric ICU. Dr Efrat Barnes oversaw the treatment administered to the deceased by a team of medical doctors. The head of the pediatric surgical team, Dr Mapunda performed a surgery and repaired the oesophagus of the deceased. The ear, nose and throat specialist repaired his trachea. The deceased's condition remained critical until his demise on 26 April 2024. He could not maintain blood pressure and pulse. He could not breathe on his own. The signs of life were not present unless he was supported by machines. He was given inotropes drugs to support his heart and blood pressure. An MRI scan was done, and it was found that he sustained a brain injury. Dr Barnes opined that the deceased sustained an initial brain injury because of not having received oxygen to the brain for a long period due to the loss of significant amount of blood and severed trachea. A tracheostomy (windpipe) was inserted into the penetrating wound of the neck perforating the trachea and oesophagus to help maintain his breathing and oxygenating.

[5.19] Dr Leonardo Mantanga conducted a postmortem examination on the body of the deceased on 3 May 2024 and found the cause of death to be *"unnatural causes: penetrating wound of the neck"*.

[5.20] Dr Ronwyn Stevens examined the accused on 4 March 2024. She noted that the uterus was well contracted. She had normal blood after delivery. Her heart sound was normal. She was calm and cooperative. She was clinically stable.

Issues in dispute

[6] The following issues are in dispute:

[6.1] The identity of the person who inflicted multiple penetrating wounds in the neck of the deceased.

[6.2] Whether there was a new intervening act that broke the chain of causation.

EVALUATION OF EVIDENCE

[7] It is trite law that the state bears the onus to prove the guilt of the accused beyond reasonable doubt.[1] The accused is entitled to her acquittal should her version be reasonably possibly true.

[8] First, I deal with the issue of the identity of the perpetrator. It is common cause that the state did not present direct evidence to prove the identity of the perpetrator. It relies on circumstantial evidence. The court in *Mashia v S*[2] in dealing with circumstantial evidence stated as follows:

> *"(47) Circumstantial evidence is sometimes described as that network of facts and circumstances that swirls around the accused. The court is called upon under such circumstances to determine whether or not those facts and circumstances justifies the court to infer what could have actually happened even though there is no direct evidence available. Simply put pieces of evidence, facts, documentary evidence, surrounding circumstances, exhibits, the conduct of an accused person, his reaction to questioning - be it by the prosecution or the police; all these and other relevant and material aspects can conflate and confluence into a body of ascertainable facts and evidence that can go a long way towards proving the guilt of an accused person, despite the absence of direct evidence by witnesses to that effect.*
>
> *(48) Such an exercise may sometimes come up with nothing implicating an accused person. On the other hand, the circumstances may turn out to be such that a convincing story indeed ultimately shines through. The law does not demand that one should act upon certainties alone. In our lives, in our courts, in our thoughts, we do not always deal with certainties: we also act upon just and reasonable convictions founded upon just and reasonable or set grounds. The law asks for no more and the law demands no less. see: Ranzani Ndumalo v The State (Case No 450/2008 [2009] ZASCA 113."*

[9] In *S v Reddy and Others*[3] it was held as follows:

> "*In assessing the circumstantial evidence one needs to be careful not to approach such evidence on a piece-meal basis and to subject each individual piece of evidence to a*

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[1] R v Difford 1937 AD 377; R v Ndhlovu 1945 AD 369.
[2] *(41/1449/2005) [2013] ZAGPJHC 43 (7 March 2013).*
[3] 1996 (2) SACR 1 (A) at 8 paragraph C-D.

consideration whether it excludes the reasonable possibility that the explanation given by the 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 that is sought to be drawn'."

[10] The state proved the following facts relevant to the issue of identity:

[10.1] The deceased was the accused's newborn baby.

[10.2] The accused was alone in the shack when the deceased was born.

[10.3] The accused held the deceased from birth until he was handed over to Dr Dayna at Rahima Moosa hospital, and nobody else held him during that time.

[10.4] The accused never lost sight of the deceased from birth until he was handed over to Dr Dayna.

[10.5] The deceased's multiple penetrating wounds were nonaccidental and were inflicted intentionally.

[10.6] When the deceased was born his vocal cords, oesophagus and trachea were normal. He was crying and breathing normally. The umbilical cord was still attached but it was not wrapped around his neck.

[10.7] J[...] left the deceased crying in the shack when he went to organize a car to take the deceased and accused to hospital.

[10.8] When J[...] returned the deceased was not crying and he was wrapped in a towel that had blood. He gave the accused a blanket to cover the deceased.

[10.9] When the deceased was transported to Rahima Moosa hospital he was not crying and was struggling to breathe.

[10.10] When he arrived at Rahima Moosa hospital he was taken to neonatal resuscitation area where the doctors noticed multiple deep lacerations or penetrating wounds within few minutes after his admission.

[10.11] Drs Sarah, Dayna and Barnes opined that the deceased was unable to cry because his vocal cords were severed, and he was struggling to breathe because his trachea was also severed.

[10.12] The accused informed doctors Sarah, Dayna and the social worker Papila that she did not want this pregnancy.

[10.13] The accused did not show any emotions in hospital when the doctors were trying to save the deceased's life. She did not enquire about the deceased's health.
[10.14] I observed the accused in court. She did not show any emotions during the state case and even when the two videos showing the deceased's injuries were played.

[11] The accused applied for her discharge in terms of section 174 of the Criminal Procedure Act 51 of 1977 at the end of the state case. I dismissed the application because I believed that the common cause facts together with the above proven facts are sufficient to convict and require an explanation from the accused. The accused testified in her defence. Her defence is a bare denial.

[12] It was argued on behalf of the accused that the breathing problem could have been caused by the placenta and umbilical cord that were still attached. However, this was not put to doctors Sarah, Dayna and Barnes for their comment. It was also not the accused's testimony. The proven fact is that the umbilical cord was not wrapped around the deceased's neck when he was born. The breathing problem persisted even after the placenta was removed and the umbilical cord was cut. This argument is without substance because the deceased was crying and breathing well when he was born. The accused and J[...] observed the breathing problem when the deceased was inside the car on the way to Rahima Moosa hospital. The only reasonable inference consistent with these facts is that the breathing problem was caused by the injury to the trachea.

[13] Furthermore, it was argued that the injuries could have been inflicted by nurses when they were cutting a cord with a scalpel, or the doctors when they were putting a windpipe. This was not put to doctors Sarah and Dayna for their comment. It was also not the accused's testimony. The accused in her testimony denied inflicting the multiple wounds and stated that she did not know how they were inflicted and by whom. This argument is also without substance because the pediatrician initially inserted a breathing pipe orally and it was unsuccessful. Dr Sarah put a windpipe through a defect, that is in one of the multiple penetrating wounds. She did not cut the deceased's neck. Dr Dayna was present when the nurses cut the umbilical cord. She explained that it was clamped, lifted away from the deceased and placed on a thick maternity pad and then it was cut.

[14] he accused lied to Dr Dayna about the deceased being removed from the shack after birth by his father and grandmother and returned with a breathing problem. Although she denied this in court, I have no reason to reject the testimony of Dr Dayna. This information was noted in her clinical notes that she made during the interview with the accused. She was a good witness. She did not exaggerate her evidence.

[15] The accused also informed Dr Stevens during the interview that the deceased could have been injured on the rough floor inside the shack. That is not probable because Drs Sarah and Dayna described the injuries as deep lacerations or penetrating wounds with sharp edges inflicted using a sharp object. They were not superficial wounds. The trachea, oesophagus and vocal cords were cut into half.

[16] I observed all the witnesses and the accused during their testimonies. I found all the state witnesses to be credible witnesses. They corroborated each other in material respects. The few contradictions in their testimonies are not material. J[...] was also corroborated by the accused in material respects.

[17] The accused manufactured her evidence during the trial. The version inconsistent with her evidence was put to the state witnesses that as a caring mother she took the deceased to hospital because she observed at home that he had a breathing problem. She testified that she observed for the first time inside the car on the way to Rahima Moosa hospital that the deceased had a breathing problem. J[...] testified that he left the shack and went to organize a car to take the deceased and accused to hospital because he was shocked after becoming aware that the accused gave birth at home, and he had never seen something like that before. This version was not disputed by the accused when J[...] testified. There was no discussion between J[...] and the accused about organizing a car. But during her testimony the accused claimed that she was the one that advised J[...] to organize an ambulance or a car to take them to hospital.

[18] The accused testified that she did not know that she was pregnant. She stated that the liquid substance would come out of her breasts only when she was pregnant. J[...] stated in his statement which was admitted as evidence in court that he started dating the accused from December 2023. In January 2024 while they were in bed, he touched the accused’s breast, and a liquid substance came out. He asked the accused what it was, and she answered that

she always had a liquid substance coming out of her breasts and it was normal. It was at night, and he could not see if it was water or milk. Dr Stevens testified that considering that the deceased was born at 36 weeks and weighed 2305 grams, it is highly unlikely that the accused did not know that she was pregnant. For these reasons, I reject the accused's version that she did not know that she was pregnant.

[19] In my view the only reasonable inference consistent with the above proven facts is that when J[...] left the shack to organize a car to take the deceased and accused to Rahima Moosa hospital, the accused inflicted the four penetrating wounds in the neck of the deceased intentionally.

[20] It was argued that the postmortem report mentioned only 3 wounds and not four wounds. Drs Sarah and Dayna observed the fresh four penetrating wounds during the examination of the deceased's body on 3 March 2024. They described the nature of all four wounds, the positions where they were inflicted and their sizes. They were treating doctors. Their evidence was not disputed. I accept their evidence in this regard. Furthermore, there is no discrepancy between the postmortem and their evidence on the existence of the fatal penetrating wound to the neck that caused death.

[20] I now deal with the issue of the new intervening act. It was not the accused's testimony that there was a new intervening act that broke a cause of causation of death. However, it was argued on her behalf that an obstruction in the tracheostomy medical device inserted into the open wound to maintain airway ventilation which culminated in terminal hypoxic brain injury due to oxygen deprivation was an intervening act which broke a causation.

[21] In MEC for Health Eastern Cape v Mkhitha[4], it was held as follows:

> *"It is trite that causation involves two distinct enquiries: factual and legal causation. Generally, the enquiry as to factual causation is whether, but for the defendant's wrongful act, the plaintiff would not have sustained the loss in question; whether a postulated cause can be identified is a causa sine qua non of the loss. The second enquiry, legal causation, is whether the wrongful act is linked sufficiently closely or directly to the loss for legal liability to ensue; or whether the loss is too remote."*

[4] 1221/2015 [2016] ZASCA 176 (26 November 2016).

[22] The penetrating wounds were repaired surgically and some healed. However, Dr Barnes who oversaw the treatment of the deceased until he died, testified that the deceased's condition was critical and he was kept alive by the machines until his death. He could not breathe on his own. He died as a result of being stabbed repeatedly in his neck. She agreed with Dr Mantanga that the cause of death was the penetrating wound of the neck. The accused admitted the cause of death in the section 220 admissions.

[23] I find that the hypoxic brain injury did not break a chain of causation. The penetrating wound of the neck inflicted by the accused is linked sufficiently closely to the death of the deceased. It is not too remote. The penetrating wound of the neck was a direct cause of death. I reject the argument by defence that the hypoxic brain injury broke the chain of causation.

ORDER

[..] Accordingly, the following order is made:

1. The accused is found guilty of murder read with section 51(1) and Part I of Schedule 2 of the Criminal Law Amendment Act 105 of 1997, as amended.

MMP Mdalana-Mayisela
Judge of the High Court
Gauteng Division,
Johannesburg

Date of delivery: 10 March 2024
Appearances:

On behalf of the State: Adv C Ryan

Instructed by: National Prosecuting Authority

On behalf of the Accused: Ms L Qoqo
Instructed by: Legal Aid SA