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

KS11/20244

Reportable: YES / NO

Circulate to Judges: YES / NO

Circulate to Regional Magistrates: YES / NO

Circulate to Magistrates: YES / NO

In the matter between:

THE STATE

And

LESOLE ABRAM CIYA

Accused

Coram: Lever J

JUDGMENT

Lever J

1. The accused in this matter faced two charges: Charge 1, murder read with section 51(1) of the Criminal Law Amendment Act 105 of 1997 (CLAA) as amended; and Charge 2, attempt to defeat or obstruct the ends of justice.
2. In respect of the murder charge, reference to section 51(1) of the said CLAA means that if the offence is covered by Part 1 of Schedule 2 of the said Act, then there is a mandatory minimum sentence of life imprisonment. The said part 1 of schedule 2 of that Act, amongst others, deals with murder where the victim was in a domestic relationship with the alleged murderer. The relevant portion of Part 1 of Schedule 2 reads as follows:

“Murder, when-

. . .

- (g) the death of the victim resulted from physical abuse or sexual abuse, as contemplated in paragraphs (a) and (b) of the definition of ‘domestic violence’ in section 1 of the Domestic Violence Act, 1998 (Act 116 of 1998), by the accused who is or was in a domestic relationship, as defined in section 1 of that Act, with the victim.”

3. It was common cause between the State and the defence that the accused was in a domestic relationship with P[...] M[...], the deceased in relation to the murder charge. The upshot of this is that a minimum prescribed life sentence would apply should the accused be convicted on the first charge, and if there are no substantial and compelling grounds to depart from the said prescribed minimum sentence.
4. In defining the issues to be decided by this court, it is necessary to give a brief summation of the version put forward by the accused and that put forward by the prosecution.
5. In short, the version of the accused is that he was on duty as a heavy-duty truck driver on 1 August 2023. His girlfriend, the deceased, was travelling with him at the time in question. He had delivered a load to the GWK silo at Modderivier. After the off-loading process and paperwork had been completed,

he moved the truck concerned from the off-loading area to an area where the truck drivers rested, washed and prepared meals. He remained in the said rest area for some time.

6. The truck was fitted with a 'Tracker device' and the Tracker report was furnished, which shows the accused departed Modderivier to make his way to the point where he was to collect his next load for delivery. The accused then maintains that he stopped the truck to urinate in the proximity of Kimberley just after the traffic circle where he turned onto the Douglas Road. The Tracker report shows that the accused stopped at this geographic location at 22:18:44 on 1 August 2023.
7. The accused alighted from the vehicle to urinate. Whilst urinating on the side of the road, he noticed two people approaching him. He stopped urinating and hurried around the front of the truck to the driver's side, where he observed another two persons approaching him from that side. He was hit on the head and claims to have passed out. When he came to, he heard the persons who attacked him leaving. He went to check on his girlfriend, the deceased in this matter. He found her unresponsive on a bed in the back of the cab of the truck.
8. The accused phoned his boss to call the police and an ambulance. The evidence shows that he and his boss, Mr Sarel van der Walt, spoke on the phone at 22:33. The accused denies killing his girlfriend and blames it on the aforementioned attackers.
9. The State contends that by the time the paramedics examined the deceased, the process of *rigor mortis* had already set in. On the State's version, the murder of the deceased could not have taken place between the times of 22:18:44 and 22:33, as contended by the accused, since *rigor mortis* had set in on the body of the deceased, and the process takes 8 hours to develop.
10. Mr Sekeleni was the paramedic whom the State relied upon for the primary observations of the body of the deceased at approximately 23:30 on 1 August 2023. Then the State led the evidence of the pathologist Dr Lemaine Fouchè,

who sat in on the evidence of Mr Sekeleni. Based on the primary observations of Mr Sekeleni, Dr Fouchè expressed the opinion that the deceased, the girlfriend of the accused, had been dead for some 8 hours when Mr Sekeleni examined the body.

11. Insofar as these primary observations of the deceased are concerned, Mr Sekeleni, the paramedic, is a single witness. His evidence needs to be assessed on that basis to determine if the primary observations he made are reliable as the basis upon which Dr Fouchè formed her opinion.
12. It is clear from the State's case, as summarised above, that there is no direct evidence implicating the accused, and the case presented by the State is based on circumstantial evidence.
13. The above is a brief summation of the respective cases put by both the accused and the prosecution in the matter. The relevant detail and the veracity or otherwise of the relevant evidence will be examined more closely later in this judgment.
14. For the sake of completeness, the defence brought an application on behalf of the accused under the provisions of section 174 of the Criminal Procedure Act¹ (CPA) for the discharge of the accused at the close of the State case. I dismissed this application and indicated that I would provide my reasons for doing so in this judgment. My reason for dismissing the section 174 application was that I had concluded that there was at that stage evidence adduced by the State on the strength of which a reasonable court might convict the accused.
15. The evidence that the State had adduced at the stage of the section 174 application related to the setting in of *rigor mortis* and the timelines involved. However, even at that stage, I had concerns about the evidence of the paramedic, Mr Sekeleni, as well as the manner in which the State introduced

¹ 51 of 1977.

the evidence in relation to the alleged *rigor mortis* in which the deceased's body was found when Mr Sekeleni examined the body of the victim.

16. In the light of my concerns, I found that it would be in the interests of justice that both Mr Sekeleni and the pathologist Dr Fouchè be recalled. I further directed that Dr Fouchè sit in on the proceedings when Mr Sekeleni gave his evidence after being recalled.
17. In these circumstances, the law upon which the evidence must be assessed will be briefly considered alongside the law required to establish the case against the accused.
18. The law in relation to assessing the case in such circumstances has been succinctly set out by Zulman JA in the case of *S v V²*, as follows:

“It is trite that there is no obligation upon an accused person, where the State bears the *onus*, ‘to convince the court’. If his version is reasonably possibly true he is entitled to his acquittal even though his explanation is improbable. A court is not entitled to convict unless it is satisfied not only that the explanation is improbable but that beyond any reasonable doubt it is false. It is permissible to look at the probabilities of the case to determine whether the accused's version is reasonably possibly true but whether one subjectively believes him is not the test. As pointed out in many judgments of this Court and other courts the test is whether there is a reasonable possibility that the accused's evidence may be true.”³

19. The next question is how one approaches the evidence that has been placed before the court to apply the above test. Guidance on this aspect can be found in the judgment of Nugent J (as he then was) in the case of *S v Van Der Meyden*⁴, the relevant passage reads as follows:

² 2000 (1) SACR 453 (SCA).

³ at 455A-C.

⁴ 1999 (1) SACR 447 (W).

“The *onus* of proof in a criminal case is discharged by the State if the evidence establishes the guilt of the accused beyond reasonable doubt. The corollary is that he is entitled to be acquitted if it is reasonably possible that he might be innocent. These are not separate and independent tests, but the expression of the same test when viewed from opposite perspectives. In order to convict, the evidence must establish the guilt of the accused beyond reasonable doubt, which will be so only if there is at the same time no reasonable possibility that an innocent explanation which has been put forward might be true. The two are inseparable, each being the logical corollary of the other.

In whichever form the test is expressed, it must be satisfied upon a consideration of all the evidence. A court does not look at the evidence implicating the accused in isolation in order to determine whether there is proof beyond reasonable doubt, and so too does it not look at the exculpatory evidence in isolation in order to determine whether it is reasonably possible that it might be true.”⁵ (references omitted)

20. At this point, it is also apposite to quote the *dicta* of Cameron JA in the matter of *S v Mavinini*.⁶ The relevant passage reads as follows:

“It is sometimes said that proof beyond reasonable doubt requires the decision-maker to have ‘moral certainty’ of the guilt of the accused. Though the notion of ‘moral certainty’ has been criticised as importing potential confusion in jury trials, it may be helpful in providing a contrast with mathematical or logical or ‘complete’ certainty. It comes down to this: even if there is some measure of doubt, the decision-maker must be prepared not only to take moral responsibility on the evidence and inferences for convicting the accused, but to vouch that the integrity of the system that has produced the conviction – in our case, the rules of evidence interpreted within the precepts of the Bill of Rights – remains intact. Differently put, subjective moral satisfaction of guilt is not enough: it must be subjective satisfaction attained through proper application of the rules of the system.”⁷

⁵ at 448F-I.

⁶ 2009 (1) SACR 523 (SCA).

⁷ para 26.

21. As already set out above, there is no direct evidence linking the accused to the murder of his girlfriend. The State's case is based on circumstantial evidence.
22. The very nature of circumstantial evidence means that inferences need to be drawn from the facts placed before the court. In the case of *Rex v Blom*⁸, Watermeyer JA set out what has become the *locus classicus* on the question of assessing what inferences can be drawn from circumstantial evidence and when such inferences can be used in a criminal trial to link the accused to the act in question. The relevant passage reads as follows:

"In reasoning by inference there are two cardinal rules of logic which cannot be ignored:

- (1) The inference sought to be drawn must be consistent with all the proved facts. If it is not, the inference cannot be drawn.
- (2) The proved facts should be such that they exclude every reasonable inference from them save the one sought to be drawn. If they do not exclude other reasonable inferences, then there must be a doubt whether the inference sought to be drawn is correct."⁹

23. The critical evidence which the State asks this court to accept and draw inferences from is that of a single witness, the paramedic, Mr Sekeleni.
24. The provisions of section 208 of the CPA are to the effect that a conviction may follow from the evidence of a single witness. However, the cautionary rule that has built up around the acceptance of the evidence of a single witness remains well-entrenched. It appears that this cautionary rule originated from the case of *R v Mokoena*¹⁰ where it was held "[the statutory provision then applicable] should only be relied on where the evidence of a single witness is clear and satisfactory in every material respect. . . ." ¹¹

⁸ 1939 AD 188.

⁹ at 202-203.

¹⁰ 1932 OPD 79.

¹¹ at 80.

25. There was controversy around the application of this cautionary rule, and it was argued that it should not be applied thoughtlessly as if it were a checklist. The cautionary rule has survived the historical debate on its application, and the manner in which it is to be applied was set out by Dlodlo JA writing for the unanimous bench of the SCA in the unreported case of *Rugnanan v The State*¹², where the approach to be followed was set out as follows:

“It is trite that an accused can be convicted of any offence on the evidence of a single competent witness. The well-established practice though, is that the evidence of a single witness should be approached with caution and that his or her merits as a witness are properly weighed against factors which militate against his or her credibility. The cautionary rule does not require that the evidence of a single witness must be free of all conceivable criticism. The requirement is merely that it should be substantially satisfactory in relation to material aspects or be corroborated. . . .”¹³ (references omitted)

26. The Namibian Supreme Court dealt with the matter in the case of *Minister of Basic Education, Sport and Culture v Vivier N.O and Another*.¹⁴ where Maritz, J.A. set out the position as follows:

“These judicial concerns and, I should add, also those which arise when the Prosecution is seeking a conviction on the evidence of a single, uncorroborated witness, require of Courts to make a guarded assessment of the veracity and reliability of the testimonies given by such witnesses in criminal proceedings. As a rule, this cautionary approach has consistently been applied in this jurisdiction. Not, it should be noted, as a formalistic procedural requirement to which mere lip service must be paid, but as an intrinsic part of a broader logical and reasoned inquiry into the substance of the evidence against the accused: after due appreciation and assessment of the peculiar and inherent dangers of convicting the accused on the evidence of the single/child witness who testified at the trial, is the evidence of that witness, when considered in the context of

¹² (Case No 259/18) [2020] ZASCA 166 ; *S v Rugnanan* 2020 JDR 2721 (SCA).

¹³ para 23.

¹⁴ 2012 (2) NR 613 (SC); (SA 30 of 2007) [2012] NASC 9 (29 June 2012).

and together with all the other evidence adduced at the trial, sufficiently credible and reliable to prove the guilt of the accused beyond reasonable doubt? This cautionary approach, as Holmes JA pointed out in *S v Artman and Another*, 'does not require the existence of implicatory corroboration: indeed, in that event she would not be a single witness. What was required was that her testimony should be clear and satisfactory in all material respects; ... I would add that, while there is always need for caution in such cases, the ultimate requirement is proof beyond reasonable doubt; and courts must guard against their reasoning tending to become stifled by formalism. In other words, the exercise of caution must not be allowed to displace the exercise of common sense'.¹⁵ (references omitted).

27. In an earlier judgment of the then Appellate Division in the case of *S v Webber*¹⁶, which, although it was based on an earlier and slightly different wording of the relevant provision relating to single witnesses, is still a useful guide, Rumpff JA, set out the position as follows:

"...Dis natuurlik onmoontlik om 'n formule te skep waarvolgens elke enkele getuie se geloofwaardigheid vasgestel kan word, maar dit is noodsaaklik om met versigtigheid die getuienis van 'n enkel getuie te benader en om die gooeie eienskappe van so 'n getuie te oorweeg tesame met al die faktore wat aan die geloofwaardigheid van die getuie kan afdoen."¹⁷

28. The second charge, being an attempt to defeat or obstruct the ends of justice, in the present circumstances, depends upon a conviction of the accused on the first count and a rejection of the version put forward by the accused. Accordingly, I do not intend to spend any time on this aspect at this point and will return to it if necessary.
29. As already mentioned, the case against the accused rests on circumstantial evidence. Evidence was placed before the court in the form of formal

¹⁵ para 17.

¹⁶ 1971 (3) SA 754 (A).

¹⁷ at 758G-H.

admissions under the provisions of section 220 of the CPA. Also, the photographs, the J88 form pertaining to the medical examination of the accused shortly after the incident, and the DNA results of swabbing of the fingernails of the deceased and the material found under the nails of the deceased, were all admitted by consent. Also, statements made by various witnesses and the accused were handed in as exhibits by agreement.

30. There was also a report that tracked the movements of the truck concerned on the day in question. The report used what is described as “Tracker” technology to log the movements of the said truck. This report was accepted by agreement and was admitted to the record as Exhibit “G”. The said report provided the position and movement of the relevant truck from 14:31:33 on 1 August 2023 until 22:22:13 on the same date. The said report comprised some 12 pages divided into 9 columns. Each column provided different information relating to the relevant truck for that particular time. The first column reflected the date and time of the information update for the truck concerned. The second column reflects the date and time the information was transmitted to the Tracker’s ‘back office’ to be stored on the Tracker database. The third and fourth columns respectively recorded the latitude and longitude of the said truck at that particular date and time as recorded by the GPS satellite technology incorporated into the ‘Tracker’ system. The fifth column provided a physical location in terms of a street the said vehicle was on, the suburb the vehicle was in or adjacent to, and the city the vehicle was in or in the vicinity of at that point in time. Column six gives the actual speed of the vehicle at the specified time, and column seven gives the speed limit on that stretch of road. Column eight gave the odometer reading, and so comparing it to the previous entry, it is possible to see the distance moved by the said truck between entries on the report. The ninth column would give the status of the vehicle, i.e. whether it was moving or stationary and/or whether the ignition was on or off at the relevant time.
31. The tracker report would allow one to compare events as they unfolded to the timeline provided by the Tracker report, Exhibit “G”.

32. The State also called the following witnesses: Sergeant L Arendse; Sergeant A Riet; Ms M[...] M[...] (the mother of the deceased); Warrant Officer Segoje (the investigating officer); Dr L Fouchè (the pathologist); Mr L Sekeleni (the paramedic); and Mr Sarel van der Walt, who employed the accused at the material time and who owned the truck around which much of the case revolved.
33. The accused gave evidence in his own defence.
34. The formal admissions made by the accused under the provisions of section 220 of the CPA were set out as follows: the deceased is the person mentioned in the indictment, to wit, P[...] M[...]; that the deceased died on 1 August 2023; That the deceased was declared dead on arrival, with no sign of life at the scene on 1 August 2023 by Luvuyo Sekeleni, Emergency Medical Officer from Kimberley Emergency Medical Services; that the body of the deceased sustained no further injuries from the time the deceased died until the post-mortem examination was conducted thereon; that Dr Lemaïne Fouchè conducted a post-mortem examination of the body of the deceased on the 3 August 2023; that the cause of death was recorded as “strangulation”; that Exhibit “B” is the post-mortem report, marked KDR 298/2023, by Dr Lemaïne Fouchè; the correctness of the facts and findings of the post-mortem report is admitted to be both true and correct; that photographs 42 – 55 as per Kimberley LCRC 02/08/2023 and part of Exhibit “C” were taken during the post-mortem examination by Sergeant Tshepo Mogoiwa, from the NC Provincial CR & CSM, Kimberley; that Sergeant Tshepo Mogoiwa, of the NC Provincial CR & CSM, Kimberley, took photos of the crime scene on 2 August 2023 and on 18 April 2024; he further took photos of the deceased’s body on 3 August 2023 and compiled a photo album and drafted an affidavit in terms of section 212 of the CPA; Exhibit “C” is the photo-album compiled by Sergeant Tshepo Mogoiwa; the content of Exhibit “C” is admitted to be both true and correct. These formal admissions were admitted to the record as Exhibit “A”.

35. The J88, being Exhibit “F” in these proceedings, showed that the accused, when he was examined by a Doctor at the provincial hospital on 2 August 2023, had multiple scratch marks on his chest and upper left thigh.
36. The postmortem report, being Exhibit “B” in these proceedings, showed that DNA samples were taken under the nails of the left and right hands of the deceased.
37. A DNA analysis was done on the relevant samples referred to above. The results were set out in a report that was handed in by agreement as Exhibit “M”. The DNA material found under the deceased’s nails was her own. In the light of the multiple scratches to the accused’s chest and the upper left thigh, if there had been a struggle between the accused and the deceased before she was killed, Mr Babuseng who represented the accused, suggested that one would have expected the DNA material under the nails of the deceased to include that of the accused.
38. Ms Stellenberg, who appeared for the state, submitted that the DNA results being that of the deceased were explained by the circumstances and cause of her death, being strangled by a seat belt near where she was found in the back of the cab of the truck. In Ms Stellenberg’s submission, the deceased scratched herself while trying to remove the said seat belt from around her neck.
39. In my view, the fact that the accused’s DNA material was not found under the deceased’s nails does not in and of itself exonerate the accused, but it also does not implicate him in the said circumstances. However, the question of how the accused sustained the said scratches is left unresolved and unanswered by both the State and the defence.
40. In essence, the State case rests on the observations of Mr Sekeleni and the conclusions that Dr Fouché drew from such evidence. As already pointed out, in these circumstances, Mr Sekeleni is a single witness and the cautionary rule described above applies to his evidence. This court must be satisfied in relation to both the reliability and credibility of Mr Sekeleni’s evidence.

41. Mr Sekeleni and his partner are paramedics, and they were the first persons to arrive on the scene after the accused's boss, Mr Sarel van der Walt, had arranged for help after the phone call between the said Sarel van der Walt and the accused at 22:33 on 1 August 2023. Shortly after the paramedics arrived, the first policemen to arrive were Sgt Arendse and Sgt Riet. The body of the deceased was found shortly after Sgt Arendse climbed into the cab of the truck. Mr Sekeleni was called into the cab of the truck to examine the deceased.
42. Mr Sekeleni examined the deceased. This was recorded in an ER24 'Declaration of Death' form. The findings of Mr Sekeleni were recorded on this form. This form also recorded that the body of the deceased was handed to Sgt Arendse at 23:30 on 1 August 2023. This form was admitted into the record by agreement as Exhibit "H".
43. Exhibit "H" had various parts to such form. Part D was the part that dealt with 'Confirmation of Death'. Part D was divided into 2 columns. The first column had the heading 'Obviously Dead'. Under this heading, there were 4 rows. The first row reads, 'Decapitation or mortal disfigurement'. In the appropriate space provided for an answer, Mr Sekeleni wrote 'yes'. The second row reads, 'Generalised charring due to extensive burns'. In the appropriate space provided for an answer in this row, Mr Sekeleni wrote 'No'. The third row of this first column reads. 'Putrefaction'. In the appropriate place provided for an answer in this row, Mr Sekeleni wrote 'Ye' for 'Yes'. The fourth row of this first column reads, 'Post Mortem lividity'. In the space provided for an answer in this row, Mr Sekeleni wrote 'Y' for 'Yes'.
44. The second column in section D of this declaration of death form, Exhibit "H", is headed 'Clinical Investigation'. There are six rows under this column. The first row under this second column reads, 'No cardiac electrical activity on ECG on all three leads'. In the appropriate space for an answer provided on this row of the form, Mr Sekeleni wrote 'No'. The second row under this column reads, 'No palpable pulses'. In the appropriate place for an answer on this row, Mr Sekeleni wrote 'No'. The third row under this column reads, 'No audible heart

sounds'. In the appropriate place for an answer on this row, Mr Sekeleni wrote 'No'. The fourth row reads, 'Bilateral fixed and dilated pupils'. In the appropriate place for an answer on this row, Mr Sekeleni wrote 'Yes'. The fifth row under this second column reads, 'No spontaneous breathing for the last five minutes'. In the appropriate place for an answer on this row, Mr Sekeleni wrote 'No'. The sixth row under this column reads, 'No dolls eye movement present'. In the appropriate place for an answer on this row, Mr Sekeleni wrote 'No'.

45. For present purposes, the important part of Mr Sekeleni's evidence and the controversy is contained in the first column. In relation to the first column and the first row under that column, it is clear from the postmortem report, Exhibit "B", that when Dr Fouchè examined the body of the deceased in this matter, there was no decapitation or mortal disfigurement of the deceased's body. In relation to the third row under the first column, it is clear from the relevant postmortem report that when Dr Fouchè examined the body of the deceased, there was no question of putrefaction of the said body.
46. When asked about these two glaring mistakes, Mr Sekeleni said he had made a mistake. That in consultation with the advocate representing the State in this matter, he asked to correct the form, but the said advocate refused to allow such correction. Ms Stellenberg was quite correct to refuse to allow such correction.
47. When Mr Sekeleni was cross-examined on this issue by Mr Babuseng, he said he made the obvious mistake in relation to 'decapitation' "...because maybe I was tired." Further on in the said cross-examination, Mr Sekeleni, when pressed by Mr Babuseng, said "Yes, I am saying with certainty that I was tired."
48. The same process was repeated when Mr Babuseng cross-examined Mr Sekeleni on the second glaring mistake, being the putrefaction of the deceased's body as referred to on Exhibit "H". Mr Sekeleni again contended he made this mistake because he was tired.

49. Mr Babuseng asked Mr Sekeleni why this court should accept his evidence if he was tired when he made and recorded his observations. Mr Sekeleni maintained he made an obvious mistake and said the court can trust his observations despite such mistake. Then Mr Sekeleni made a request that his partner be called as a witness¹⁸, the direct implication being that his partner would support his observations. Mr Babuseng pressed Mr Sekeleni on the alleged stiffness of the deceased's body not being mentioned on Exhibit "H". Again, Mr Sekeleni requested that his partner be called to give evidence.¹⁹
50. Mr Sekeleni, in his testimony, took to referring to 'ticking the form' in relation to the above mistakes because he was tired. Both Ms Stellenberg and Mr Babuseng took to using this terminology uncritically. It is evident from section D of Exhibit "H", as has been quoted above, that Mr Sekeleni did more than simply tick a box on a form. He in fact wrote 'yes', 'ye' or 'y' to symbolise yes. This is different from simply ticking a box, it shows that one applied one's mind to what was being responded to on the relevant form in a more direct way than simply ticking a box.
51. There are other concerns with Mr Sekeleni's evidence. On Exhibit "H" under section D, he wrote 'y', indicating yes for 'Post Mortem lividity'. It is clear that Mr Sekeleni did not know what post mortem lividity was. In the transcript of his evidence, he refers to stiffness in this context. However, in his evidence, he also acknowledges that there is a difference between 'post mortem lividity' and '*rigor mortis*'. It is not clear from this what Mr Sekeleni actually understood.
52. Mr Babuseng put to Mr Sekeleni that his evidence regarding the alleged stiffness of the deceased's body was an afterthought, because it is not mentioned in the 'declaration of death form', being Exhibit "H". To which Mr Sekeleni responded: "No, that is why I am requesting the court to call my partner, the one that was in my company to also come and testify."²⁰

¹⁸ Transcript: 24 February 2025, (Page 20 - line 23 to Page 21 line 2).

¹⁹ Transcript: 24 February 2025, (Page 26 - line 4 to 6).

²⁰ Transcript: 24 February 2025; (Page 26-27).

53. Then Mr Babuseng referred Mr Sekeleni to Exhibit “O”, one of two statements Mr Sekeleni made on 3 August 2023. The relevant passage of Exhibit “O” reads:

“On 1 August 2023 in the performance of my official duties I attended the scene of a murder at R357 Douglas Road, Kimberley where I examined the body of an unknown female and noticed the following injuries: On the right side of the neck, there were scratch marks, the eyes were blue, there were no signs of life, there was no breathing, eyes were dilated, she was cold.”

54. Mr Babuseng then put to Mr Sekeleni that after Exhibit “H”, this was the second statement (Exhibit “O”) where Mr Sekeleni did not mention the alleged stiffness of the deceased at the time he examined her. Mr Sekeleni did not answer this question directly: he responded that he did mention the stiffness in court. Eventually, after Mr Babuseng pushed the issue, Mr Sekeleni answered that he forgot to include it or write it in.
55. There was a further statement made by Mr Sekeleni also on 3 August 2023. This statement deals with Mr Sekeleni’s observations in respect of the accused on the scene. This statement also does not mention the alleged stiffness of the deceased.
56. In re-examination, Ms Stellenberg asked Mr Sekeleni if he had tried to bend the arms and legs of the deceased. Mr Sekeleni then answered that he palpated the deceased and made a gesture to indicate what he meant by use of that term. It is usually my practice to describe gestures made by witnesses for the benefit of the transcript. Unfortunately, I did not do so in this instance. I checked this passage in the transcript against my bench-book. In my bench-book, I described the gesture as a kneading motion. This would fit in with my understanding of the word ‘palpate’. Again, Mr Sekeleni did not answer this question directly. Eventually, he stated that he did not try and bend the arm because the body was stiff and hard.

57. It is important to be reminded of the fact that I recalled Mr Sekeleni to give evidence for the reasons already set out above. The first time Mr Sekeleni gave evidence, he described the body of the deceased as 'a little bit stiff'. This was also the position in his evidence-in-chief in the second round of evidence given by him. Yet in re-examination, in closing off the second round of evidence, this has progressed to him not trying to bend an arm because the body was stiff and hard.
58. This was not the only difference between the evidence of Mr Sekeleni during his first round of evidence and the second round of evidence. In the first round of evidence, he described the deceased's body as being cold. Yet in his second round of evidence, Mr Sekeleni described the body as being abnormally cold. Painting a completely different picture to that presented in his first round of evidence.
59. A further problem with Mr Sekeleni's evidence is that he testified that when he examined the deceased, her lips were a blueish colour. Mr Babuseng referred Mr Sekeleni to Exhibit "C", the photo album, and specifically referred to a photograph of the deceased's body where the face was clearly visible and asked Mr Sekeleni if the deceased's lips appeared blue in the photo. Initially, Mr Sekeleni appeared to concede that the deceased's lips did not appear blue in the relevant photograph, but finally he asserted that to him, they appeared blue. Mr Babuseng referred Dr Fouchè to the same photograph and asked the same question. In her response, Dr Fouchè stated that she was not an expert in interpreting photographs, but to her, the deceased's lips did not appear to be blue.
60. I have to mention that in my overall assessment of Mr Sekeleni as a witness, he did not impress. He was willing to expand on his evidence as set out in the two examples discussed above. He often did not answer questions directly, even when they came from the State advocate, Ms Stellenberg. In dealing with the obvious errors on Exhibit "H", he provided weak and uncreditworthy excuses. These mistakes are both glaring and material; they cannot simply be ignored.

There is no proper explanation for such mistakes. At best for Mr Sekeleni, he was careless to an unacceptable degree given what is at stake.

61. Mr Sekeleni's evidence is of such a nature that it cannot be considered reliable. In these circumstances, it could only be accepted if such evidence could be substantively corroborated.
62. It is clear from Mr Sekeleni's requests to call his partner paramedic that Mr Sekeleni himself considered that such a partner would corroborate his evidence. The State did not, however, call the paramedic who was Mr Sekeleni's partner on the night in question.
63. It was only halfway through the State's closing argument that I heard that Ms Stellenberg had contacted and spoken to the said partner. Ms Stellenberg informed the court that the said partner maintained he could not recall anything of this specific incident, as he attended thousands of incidents in his career and that he did not fill in the 'declaration of death form'. I have to assume that this is the reason why the State did not call such 'partner' as a witness or apply to re-open the State's case in order to do so.
64. In debating the issue of the evidence of such partner with Ms Stellenberg, she conceded that she did not make this witness available to the defence. Ms Stellenberg suggested that if this court feels it is in the interests of justice to call this witness, the court should do so. I am only going to respond to this suggestion to the extent that circumstances require. I have accepted Ms Stellenberg's assertion that this witness felt that he could not add anything in the circumstances. For me to delay this case further would constitute a needless and unjustified delay in those circumstances. This reveals what was probably a weakness in the way this case was investigated and prepared for prosecution. The Investigating Officer ought to have taken a statement from Mr Sekeleni's partner paramedic at the same time as he secured the evidence of Mr Sekeleni. There was no explanation as to why this was not done.

65. In the circumstances, the observations and testimony of Mr Sekeleni needed to be corroborated before this court could place any reliance on such evidence. With the failure to secure the evidence of the paramedic partner of Mr Sekeleni, the material aspects of his evidence that required corroboration could not be corroborated. There was no other evidence placed before this court that corroborated the observations of Mr Sekeleni in relation to the onset of *rigor mortis*.
66. This leaves me to deal with the status of Dr Fouchè's evidence. Obviously, Dr Fouchè's evidence on the cause of death and her findings as set out in the postmortem report, being Exhibit "B", stand. The said report was not challenged in any way and was, in fact, conceded as correct in the formal admissions made by the accused. At issue is the opinion ventured by Dr Fouchè relating to the death of the deceased occurring eight hours before Mr Sekeleni examined the body of the deceased. This opinion was based on the primary observations of Mr Sekeleni. Such observations have been found to be unreliable by this court.
67. Firstly, Dr Fouchè does not decide upon the reliability of Mr Sekeleni's evidence. To be clear, she did not try to do so, as will emerge presently. It is the function of this court to decide on the reliability and credibility of Mr Sekeleni's evidence. Dr Fouchè's opinion is based on the assumption that Mr Sekeleni's observations in relation to the state of the deceased's body are accurate, correct and reliable. Dr Fouchè herself conceded that her opinion would change if Mr Sekeleni's observations were incorrect. Further, Dr Fouchè also testified that academic writing held that *rigor mortis* set in at 8 hours and lasted for 36 hours, but Dr Fouchè testified that this was not an exact science and that there were a number of external factors that could affect these timelines. Examples of these external factors given by Dr Fouchè included the relatively small or light body mass of the deceased, the deceased being lightly dressed and the ambient temperature on 1 August 2023. We do not have evidence of the ambient temperature at the scene on the Douglas Road after 22:18 on the night in question.

68. However, the main issue is whether the evidence of Mr Sekeleni can be relied upon for the purpose of Dr Fouchè's opinion on the time of death. The short answer to this question is "*no*", for the reasons already set out above. Dr Fouchè's opinion as expressed in court relating to the time of death can only be accepted if the evidence upon which such opinion is based can safely be accepted as reliable. In the case of Mr Sekeleni, for the reasons already set out, I cannot accept his evidence as reliable.
69. The accused's version has already been summarised above, and without repeating that entire summary, I need to repeat that the accused testified that he was struck on the forehead with an object, he claimed to pass out and came to when he heard the voices of his assailants departing. He testified to waking up confused and struggling to stand. It dawned on him that he needed to check on his girlfriend. He testified that he got into the cab of the truck and found his girlfriend in an unresponsive state that he did not understand. He tried to revive her but did not succeed in doing so.
70. The State argued that there were material contradictions between the evidence of the accused in court and the statement of the Doctor who examined him and recorded the findings on the J88, being Exhibit "F". Also, the State pointed to the differences between the evidence of Mr Sarel van der Walt and that of the accused. Mr van der Walt testified that in the phone call that took place at 22:33 on the night in question, the accused claimed that he had been hijacked and stabbed. That he did not mention his girlfriend being his travelling companion.
71. Dealing with what is recorded on the J88 being Exhibit "F". The relevant passage is contained in paragraph 5 of Exhibit "F", which reads as follows:

"According to the patient, while he stopped the truck to urinate, he was attacked by two unknown males, hit with something on right side of face and he lost conscious (sic), when he wakes up he heard his girlfriend screaming and heavily breathing, he attempt (sic) to resuscitate her. Tried to call for help; called his boss. Do (sic) not recall how he got scratches."

72. This version is at odds with the accused's testimony in a number of respects. Firstly, the number of attackers and the ability to recognise their gender. Secondly, that when he came to, he heard his girlfriend screaming and breathing heavily. The accused, when confronted by these different versions, explained that there was a language barrier between him and the Doctor who filled in the J88. It is evident from the Doctor's stamp as it appears on the J88, being Exhibit "F", that the relevant Doctor qualified in the United Kingdom. In these circumstances, the accused's explanation is at least plausible. In the circumstances, the accused must be given the benefit of the doubt.
73. In at least one respect, the J88 does corroborate or at least support the accused's version. It records a bump on the accused's right forehead. This is consistent with the accused's version that he was hit on his head with an object, and he lost consciousness.
74. Turning now to the evidence of Mr van der Walt that when he spoke to the accused telephonically at 22:33 on the night in question, the accused had informed him that he (the accused) had been stabbed. The accused also testified that he asked his boss, Mr van der Walt, to call an ambulance for his girlfriend. Mr van der Walt denies this assertion. The accused explained that he was in an emotional state, that he had been crying. He was in a state that he did not understand himself. That in these circumstances, he and Mr van der Walt had difficulty in communicating. Mr van der Walt's evidence confirmed that the accused was crying and was difficult to understand in that telephone conversation. In these circumstances, a misunderstanding is plausible.
75. Ms Stellenberg submitted that taking into account that the accused had given conflicting versions, the period between the accused stopping to urinate at 22:18 and the telephone call with the accused's boss, Mr Sarel van der Walt at 22:33, was too short a time for the assault on the accused and the killing of the deceased. Ms Stellenberg submitted further that there was still loose change in the truck after the attack, furthermore, the fact that the truck was not stolen, and the accused's cell phone, which had been in the possession of the deceased, was also not taken, shows the accused's version to be false.

76. In responding to the elements that make up Ms Stellenberg's submission, while he was under cross-examination, the accused maintained that he was attacked, and he was unconscious for a period. That there was more than a hundred Rand in the same place where some change was found that appeared to be missing. That there were also some blankets and other items that were not returned to him from the said truck.
77. Having regard to the fact that the place where the accused stopped at 22:18 on the night in question was not a planned stop. There was also no evidence that such a location was a hijacking hotspot. In these circumstances, the probabilities are that the attack was an opportunistic one. It was not planned. We do not know what the attackers hoped to find or get away with. In my view, 15 minutes is certainly enough time to attack the accused and kill the deceased. It is possible that the attackers took the bulk of the money and left some change behind. We do not know when the deceased dropped the accused's cell phone between the bed and the front passenger seat or even if the attackers were aware of this.
78. The first responders agreed that when they encountered the accused, they perceived him to be in a state of shock. This can be interpreted in a number of ways, but on the probabilities, it may well support the accused's version.
79. Further, the bump on the accused's forehead, as recorded in the J88, Exhibit "F", is consistent with the accused's version. The fact that the accused could not explain his injuries is, on the probabilities, consistent with his version that he had been rendered unconscious by a blow to the head.
80. It must be remembered that there is no onus on the accused. In the present circumstances, there are certainly questions and concerns that I have regarding his evidence, but it cannot be said that beyond a reasonable doubt, his version is false. Conversely, his version could reasonably possibly be true.

81. In these circumstances, I must find the accused not guilty on both count 1 and count 2.

L. G. Lever
Judge
Northern Cape Division, Kimberley

Representation:

For the State: ADV A STELLENBERG And ADV T ENGELBRECHT
Instructed by: DIRECTOR OF PUBLIC PROSECUTIONS

For the Accused: ADV B BABUSENG
Instructed by: LEGAL AID SA (JUDICARE)

Date of Judgment: 21 JULY 2025