



**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

Appeal No: A 75 / 2026

In the matter between:

CHELRY SMITH

APPELLANT

and

THE STATE

RESPONDENT

Coram: Fortuin, J *et* Christians, AJ

Heard: 7 August 2026

Further submissions: 17 and 27 August 2026

Delivered: 4 September 2026

JUDGMENT

CHRISTIANS, AJ (FORTUIN, J concurring)

INTRODUCTION

[1] The appellant was convicted on 5 September 2024, in the Knysna Regional court, on the following charges:

[1.1] Count 1: Murder, read with section 51(1) of the Criminal Law Amendment Act 105 of 1997 (“the Minimum Sentencing Act”);
and

- [1.2] Count 2: Robbery with aggravating circumstances, read with section 51(2) of the Minimum Sentencing Act.
- [2] Pursuant to the above convictions, the appellant was sentenced to life imprisonment on Count 1, and 15 years' imprisonment on Count 2 (both mandatory minimum sentences in terms of the Minimum Sentencing Act). The sentences were ordered to run concurrently.
- [3] The appellant appeals against both convictions and the sentences imposed in respect of each.
- [4] The appellant pleaded 'not guilty' in the trial court and entered a plea explanation in terms of section 115 of the Criminal Procedure Act ("the CPA"). Because his plea explanation is relevant to the manner in which the State went about proving its case, we start with the plea explanation.

APPELLANT'S PLEA EXPLANATION

- [5] As stated, the appellant pleaded 'not guilty' to both charges.
- [6] In his plea explanation, he made the following formal admissions:
- [6.1] That the deceased was fatally injured on 23 December 2012 near the N2, New Horizons, Plettenberg Bay.
- [6.2] That the deceased sustained no further injuries during transport to the forensic pathology laboratory.

- [6.3] That the post-mortem conducted on 24 December 2012 be admitted as an exhibit.
- [6.4] That the cause of death was a stab wound to the chest penetrating the left lung and heart.
- [6.5] That photographs taken of the scene be admitted as exhibits.
- [7] The Appellant further tendered the following version in defence of the charges:
- [7.1] He had known the deceased for approximately five months, having met her at the Tavern where he worked as a bouncer. He and the deceased had a casual, non-sexual relationship and they kissed occasionally. At the time, he was in a permanent relationship with Ms Margaret Liesing. The Appellant also indicated that he had one prior disagreement with the deceased on 27 November 2012, that resulted in him striking her with a bottle and that he had been charged pursuant to this incident. We mention this admission only for the sake of completeness, but note that no evidence was lead at the trial in respect of the 27 November 2012 incident.
- [7.2] On the evening of 22/23 December 2012 the Appellant attended the Tavern at approximately 23h00 where he found the deceased drinking with friends. After the Tavern closed, at approximately 00h00, they left together and sat under a tree alongside the new footpath along the N2. They did not keep track of the time but kissed and talked for a long while.

- [7.3] While they were seated there, he suddenly felt a harsh blow to his left jaw, which he believed was broken as a result. He jumped up, grabbed both his and the deceased's cell phones, placed them in his right trouser pocket, and ran to escape the attacker. As he ran, he heard the deceased yell "*do not kill him*". He looked over his shoulder and recognised the attacker as somebody known to him as Ricardo. This person stopped chasing him after the deceased shouted, "*do not kill him*".
- [7.4] He had seen that the deceased was standing with one other person, concluded that she (the deceased) would be okay and then continued to run home, where he slept.
- [7.5] Later that morning, he returned to where he had last seen the deceased. He first noticed one flip-flop lying a short distance from the tree and, as he went closer, he noticed her body lying against the municipal fence. She was still wearing her clothes, and he did not see any wounds or blood on her. He saw the handle of a knife lying in front of the deceased with no blade. She was lying on her back, and he could see that she was deceased. He panicked because people had seen her in his presence, and they knew his history.
- [7.6] He then went to the deceased's house to inform her family that he had found her body. When he arrived, he saw Ricardo exiting the yard and one Monique was sitting on a rock outside the yard. Being suspicious, he asked if the deceased was at home. Ricardo

said she was not home yet and walked over to Monique, saying “*hy loop soek na haar*” (meaning “*he is looking for her*”).

[7.7] He then told his cousin, Ms Marlene Plank, that he had found the deceased’s body and that people had seen him walking with her. He believed people would think it he had killed her.

[7.8] He did not see Ricardo or Monique commit the offence, but believe that they were responsible.

[7.9] He acknowledged that he made a statement to the police and that he was not honest. He explained that he believed the investigation officer, Mr Nomdoe, would not have believed him.

[7.10] He denied that he killed, robbed or assaulted the deceased.

THE STATE’S CASE

[8] The State led the evidence of the following witnesses:

[8.1] Mr Nomdoe, the investigating officer;

[8.2] Ms Liesing, the appellant’s girlfriend at the time;

[8.3] Mr Sidwell Tyatya, Ms Plank’s husband;

[8.4] Ms Plank;

[8.5] Ms Monique Augustus, the deceased’s niece and the person referred to in the appellant’s plea explanation; and

[8.6] Ms Johanna Davids, one of the community members who searched for and found the deceased's body.

[9] We summarise the relevant parts of each witness' evidence, in turn.

Mr Nomdoe

[10] Mr Nomdoe was called to the scene during the afternoon of 23 December 2012, where he found the deceased's body – she was wearing a top but her pants was pulled down, with one leg completely uncovered. The grass leading to the body was flattened, leading him to believe that she been dragged. He found a knife handle and, according to him, there was no blood on the handle.

[11] He made enquiries to find out with whom the deceased was last seen and was informed that she had been seen with the appellant at the Tavern. He got hold of the Appellant the next day and interviewed him. At that stage, the Appellant was not a suspect, but a witness. During the interview he noticed that the appellant's *right* cheek was swollen and, what look to him like an old wound, that was already healing. Mr Nomdoe was not probed on the details regarding this wound.

[12] Mr Nomdoe testified that he would have asked the Appellant about how he sustained the injuries but could not recall the Appellant's explanation.

[13] Mr Nomdoe also read the Appellant's statement into the record, the contents of which may be summarised as follows:

[13.1] The explanation up until he received the blow to his face is consistent with the plea explanation.

- [13.2] He claimed that he was attacked by three black men. One of the men yelled '*baleka!*' (run!) at him, and he ran home. He heard the deceased yell but ran away. He returned a short while later but did not see the three men or the deceased. He then went home. His head and mouth were both bleeding and his T-shirt was covered in blood.
- [13.3] Later that morning, he went back to where he had last seen the deceased and found her body lying there, with a broken knife next to her.
- [13.4] He then went to Ms Plank's house, where he told her and her husband about what had happened. Later that day, he went for a walk and, after thinking about what had happened, decided to go to the police.
- [14] Although the appellant was not, at that stage, a suspect in connection with the deceased's murder, Mr Nomdoo arrested the appellant upon learning that there was an extant warrant for his arrest in connection with an unrelated offence – no details were provided.
- [15] Weeks later, Mr Nomdoo obtained a search warrant and found the deceased's phone under a mattress at the appellant's home. He also confiscated the T-shirt and black pants the deceased was wearing on the night in question. No conclusive DNA evidence, or blood from the deceased, was found on these clothing items.
- [16] Although Mr Nomdoo did not arrest the Appellant in connection with the deceased's murder, he was aware that the docket had been referred

for an inquest. He subsequently retired but was contacted by the prosecutor in 2022 and informed that the matter had been enrolled.

[17] Under cross-examination, Mr Nomdoe confirmed that the appellant had told him Ricardo was responsible for the deceased's murder. Mr Nomdoe's evidence was that he "*interviewed [Ricardo] and checked his alibi and everything and find that he was not in that area of New Horizon, or he wasn't at Jobs Tavern that night*". No details were given about Ricardo's alibi.

[18] Mr Nomdoe further indicated that there was no blood on the knife handle that was found at the scene. There were also no conclusive DNA results from the samples taken from the deceased's fingernails.

Margaret Liesing

[19] Ms Liesing confirmed that the Appellant came home early in the morning of 23 December 2012 and that he complained about his jaw being broken. The Appellant had told her that he was assaulted by four men. She also confirmed that the collar of his T-shirt was covered in blood.

[20] She found out later that day that the deceased had been killed and that the police were looking for the appellant. When she found him at Ms Plank's house, she informed him so.

[21] Much was made of her initial indication that the Appellant entered the house through a broken window, but she later stated that she could not remember and that she might have opened the door for him. She

explained that it was a long time ago and she really just remembers that she saw him in the house.

[22] Ms Liesing testified that, whilst the Appellant was in custody (for the unrelated offence mentioned by Mr Nomdoe), he told her to get a phone from under the mattress at Ms Plank's house, which she did. She later handed it over to Mr Nomdoe. We note that this aspect of Ms Liesing's evidence was carefully navigated so as not to induce Ms Liesing to give self-incriminating evidence. In the circumstances, her version that she handed the phone to Mr Nomdoe was not actively disputed.

[23] All the appellant told her about the night in question (as far as the deceased was concerned) was that he was walking with her late that night.

Mr Tyatya

[24] Mr Tyatya's evidence was that the Appellant arrived at his house early in the morning on 23 December 2012, told him that his girlfriend was 'missing' and asked to lie down for five minutes. While the Appellant was lying down, Mr Tyatya went to a police friend of his. When he returned home, he woke his wife and they tried to figure out who the 'girlfriend' was. Later that day, they learned that the deceased had been killed. By then, the Appellant had left their house and Mr Tyatya did not see him again after that.

[25] Mr Tyatya indicated that he had drank heavily the previous night and that he had a hangover the next morning. He did not recall if the Appellant had any visible injuries when he arrived at the house.

- [26] Mr Tyatya was referred to the statement he made on 23 December 2012 in which he stated that the Appellant had, earlier that morning, told him about the deceased's death and that he was afraid everyone would think he (the Appellant) had killed her. Mr Tyata attempted to distance himself from the statement on the basis that he was intoxicated when he gave it.

Marlene Plank

- [27] She recalled that, on the morning of 23 December 2012, her husband woke her to inform her that the appellant wanted to lie down for five minutes and that the Appellant also wanted to tell them something.
- [28] She went to see the Appellant, who told her that the girl he had been walking with the previous night was dead. He also mentioned that he had been attacked by five men. The appellant then went to sleep.
- [29] Ms Plank confirmed that the Appellant's jaw was swollen when she saw him that morning.

Johanna Davids

- [30] Ms Davids testified that, after hearing that people were looking for the deceased, she looked along the path while en route to the shops. She did not see the deceased during this initial walk.

- [31] On her way back, she noticed blood on a pole and along the ground. She followed the blood marks on the ground and found the deceased's body.

Monique Augustus

- [32] Monique gave evidence that she saw the deceased at her grandmother's 60th birthday party on 22 December 2012, as well as at the Tavern and her house later that same night.
- [33] She recalled seeing the appellant at the Tavern that night as well.
- [34] She found out about the deceased's death the next morning.
- [35] Under cross-examination, when asked whether she knows Ricardo, she asked which one because she knows many Ricardos.
- [36] It was put to her that the appellant arrived at her house that morning and saw Ricardo exiting the yard, whilst she was sitting on a rock. She testified that there are no large rocks inside or outside her yard. She denied being in the company of any Ricardo on 22 or 23 December 2012. She accordingly denied the version of the accused that was put to her.
- [37] She further stated that she was in a relationship at the time but not with any Ricardo.
- [38] Upon questioning from the Magistrate, she indicated that there was a Ricardo who lived next door to one of her earlier boyfriends – i.e. before

2012. She stated that she is still with the boyfriend she had in 2012, namely one Marshall.

[39] Upon further questioning from the Magistrate, she indicated that she heard of the appellant's accusation against her for the first time in court that day. The Magistrate observed that she was very calm for somebody hearing such an accusation for the first time.

[40] In further cross-examination, Monique was asked whether Mr Nomdoe had ever asked her about her and Ricardo's whereabouts. Monique responded that she could not recall. She was then asked if the deceased had been in a relationship with Ricardo Petersen, to which she said she did not know anything about that. At this point, she indicated that she knows Ricardo Petersen and that he used to live next door to her current boyfriend, Marshall. She denied seeing Ricardo Petersen on 22 December 2012.

EVIDENCE FOR THE ACCUSED

[41] The Appellant's evidence in chief was largely consistent with his plea explanation.

[42] His evidence was that the reason he grabbed and put both phones in his pocket was because, while they were sitting at the tree, the deceased had given her phone to him to hold. In other words, on his version, he was already holding both phones when he was hit.

- [43] He said that the reason he went back the next morning was because he knew Ricardo's reputation and knew that something might have happened to her.
- [44] The Appellant's evidence in relation to his interactions with Ms Liesing and Ms Plank during the morning of 23 December 2012 is also largely consistent with their respective accounts.
- [45] The Appellant testified that he went to the police the following day, being 24 December 2012. His explanation for giving a false statement about his alleged attackers was that Mr Nomdoe did not know him and he thought that Mr Nomdoe would not believe him if he mentioned Ricardo.
- [46] He further testified that, when he was later taken to have his DNA samples taken, he mentioned the names of Ricardo and Monique to Mr Nomdoe. His evidence in this regard was "*as hy my bloed laat trek word, dan moet hy die twee persone se bloed ook laat trek*" ("if he is going to have my blood drawn, these two people's blood must also be drawn").
- [47] He confirmed that he left the deceased's phone under a mattress at Ms Plank's house.
- [48] As to why he did not tell Ms Liesing or Ms Plank the truth, the Appellant's evidence was that:
- [48.1] He did not want to tell Ms Liesing that he was with the deceased the night before; and

- [48.2] He told Ms Plank the story about the unknown attackers because he knew her to be a gossip and would tell everybody.
- [49] The Appellant's injuries – both to his jaw and the cut on his head – were corroborated by the J88. In his evidence, the Appellant could not categorically explain the injury to his head but suggested that he might have hit it against the tree when he was hit because he did not have the injury before that night. His evidence throughout was that he and the deceased were sitting by a tree when he was hit.
- [50] After enduring vigorous cross-examination, the Appellant exclaimed with apparent exasperation that '*the murderers are walking outside*' and that, if the DNA samples were properly tested, he would not have been before the court.¹
- [51] That was the Appellant's case.

BIOLOGICAL EVIDENCE

- [52] It seems that the Appellant's insistence during his evidence prompted the state to draw and test DNA samples from Monique, Ricardo and the Appellant.
- [53] Notably, the record includes an email from a Warrant Officer Basardien dated 15 March 2024, stating the following:

"1. There is a second blood stand on the knife that hasn't been analysed yet.

2. In order to conclusively report that the DNA on the knife belonged to so to the deceased, the DNA profile of the second blood stand will need to be obtained and comparison to the suspect and deceased needs to be done.

3. We also require an alternative reference sample of the deceased...

4. The FSL will require approximately three weeks from the date of the above mentioned sample is received, to complete the analysis of the case.”

- [54] Exhibit I, a biology report dated 21 May 2024 (i.e. more than two months after the evidence was lead), recorded the following in respect of Monique and the Appellant:

“4.8 The donor... ‘Augustus Monique’... was excluded as the donor of the DNA obtained from the possible blood & possible high friction [on the knife handle]”.

4.9. The donor... ‘Smith C’... was excluded as the donor of the DNA obtained from the semen swab... and panty [taken from the deceased]’.

- [55] It further appears that a DNA sample was taken from Ricardo Pieterse on 26 May 2024, the result of which were the following:

“The donor ‘Pieterse R... was excluded as the donor of the DNA obtained from the semen on the swab... and panty [taken from the deceased]”.

- [56] It remains unclear whether the second blood stain on the knife was tested against the appellant's or Ricardo's DNA.
- [57] The Appellant's semen sample did not match the sample taken from the deceased. It appears that, although the deceased's blood was found on the knife handle, the Appellant's blood sample was not tested against the second blood sample obtained from the knife handle. There is no explanation as to why this was not done. Instead, Monique's blood sample was tested and returned a negative or inconclusive result.
- [58] Ricardo's semen sample was also negative or inconclusive, but it is not clear whether his DNA was tested against the blood found on the knife.
- [59] As was testified by Mr Nomdoe, the samples taken from the deceased's fingernails yielded no conclusive results either.
- [60] Before we consider the Magistrate's judgment on the convictions against the evidence, we briefly discuss the relevant legal principles applicable in this matter.

THE LAW

- [61] The Supreme Court of Appeal recently reaffirmed the general approach to appeals in criminal proceedings thus:

“[9] It is trite law that a court of appeal's power to interfere with a trial court's findings of fact and credibility is limited. Such findings are presumed to be correct unless there is a demonstrable and material

misdirection by the trial court, or if the record reveals that the findings are clearly wrong.”²

- [62] Of necessity, the trial court’s findings must be evaluated against the *onus* on the State to prove an accused’s guilt beyond reasonable doubt. The proper approach to evaluating whether the State has made its case was articulated by Nugent JA in *S v Mbuli*³:

“[57] It is trite that the State bears the onus of establishing the guilt of the appellant beyond reasonable doubt, and the converse is that he is entitled to be acquitted if there is a reasonable possibility that he might be innocent (R v Difford 1937 AD 370 at 373, 383). In S v Van der Meyden 1999 (2) SA 79 (W), which was adopted and affirmed by this Court in S v Van Aswegen 2001 (2) SACR 97 (SCA), I had occasion to reiterate that in whichever form the test is applied it must be satisfied upon a consideration of all the evidence. Just as a court does not look at the evidence implicating the accused in isolation to determine whether there is proof beyond reasonable doubt, so too does it not look at the exculpatory evidence in isolation to determine whether it is reasonably possible that it might be true.”

- [63] Nugent JA then went on to quote, with approval, the following *dicta* in *S v Hadebe*:⁴

“...Doubts about one aspect of the evidence led in a trial may arise when that aspect is viewed in isolation. Those doubts may be set at rest when it is evaluated again together with all the other available evidence. That is not to say that a broad and indulgent approach is appropriate

when evaluating evidence. Far from it. There is no substitute for a detailed and critical examination of each and every component in a body of evidence. But, once that has been done, it is necessary to step back a pace and consider the mosaic as a whole. If that is not done, one may fail to see the wood for the trees.”

[64] When the State relies on circumstantial evidence only, as in this case, the test is even more stringent.

[65] The Supreme Court of Appeal in *S v Reddy and Others*⁵ confirmed the general approach to be adopted when evaluating circumstantial evidence as follows:

‘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.”’ [Emphasis added]

[66] Where the circumstantial evidence is buttressed only by doubt in relation to the accused’s own version, the following dicta by Nugent JA in *S v Vilakazi*⁶ is instructive:

“Where an accused person advances a false defence, as the appellant did in this case, a court might ordinarily infer that the reason for doing so is that he or she has no other defence. But on the ordinary logic of inferential reasoning that inference could not properly be drawn if another reason presents itself. The most that could then be said is that he or she might have advanced a false defence for either of those reasons. Needless to say an accused person in that position takes a considerable risk. For if there is unchallenged evidence of all the elements of the offence a court would be perfectly justified in accepting the evidence. It is if there is no evidence on the issue that the onus that rests on the state will accrue to the benefit of the accused for the gap in the evidence could not be filled by an inference drawn against the accused. That is not a matter of law but only a consequence of ordinary inferential reasoning.” [Emphasis added]

IS THE MURDER CONVICTION JUSTIFIED BY THE EVIDENCE?

- [67] It will be apparent from our summaries of the evidence that the State’s case relied exclusively on circumstantial evidence.
- [68] After receiving the biological reports into evidence, by agreement between the parties, the Magistrate delivered her judgment on 4 September 2024, in which she found the Appellant guilty of murder, read with section 51(1) of the Minimum Sentence Act and of robbery with aggravating circumstances.
- [69] Importantly, the Magistrate noted in her judgment that:

“On the conclusion of the State’s case including the reopening after the defence case there was no direct evidence linking the accused to the offence. None of the state witnesses saw the deceased in the company of the accused on the night and/or morning of the incident...

It was the accused’s plea explanation which places the accused in the company of the deceased on the early morning of the 23rd December 2012...”

[70] The Magistrate rejected the appellant’s version that Ricardo and Monique were the last people he saw with the deceased.

[71] The Magistrate then considered and rejected the following aspects of the Appellant’s evidence:

[71.1] That he received a laceration to his head, ostensibly on the basis that (a) it defies logic that he could have hit the back of his head against the tree if he was hit from behind, and (b) that Mr Nomdoe noted that the injury appeared to be old and healing. In doing so, the Magistrate appears to have disregarded the corroboration of the Appellant’s injuries by Ms Liesing and the J88. The Magistrate also did not account for the fact that: Mr Nomdoe saw the appellant on 24 December 2012, which was more than 24 hours after the stated attack; Mr Nomdoe gave evidence 12 years after the fact and appeared not to have made a contemporaneous note of the injuries; Mr Nomdoe recalled the appellant’s *right* jaw was swollen (it being common cause that it was his left); Mr Nomdoe could not recall the Appellant’s

explanation as to how he had sustained the injuries. In the circumstances, the Magistrate misdirected herself in accepting Mr Nomdoe's *ipse dixit* as conclusive proof that the Appellant's head wound was an old one.

[71.2] Having done so, the Magistrate failed to have proper regard to the Appellant's injuries when she evaluated his version that he was attacked whilst sitting with the deceased and, thereafter, ran away. Notwithstanding that his version as to the number and identity of the attacker(s) has changed, the common thread to his version, throughout, was that he was attacked and ran away. His injuries support that version, and it was, therefore, necessary to assess whether his version is reasonably possibly true in light thereof.

[71.3] The Magistrate relied on Monique's DNA having been excluded as a basis to reject the Appellant's version. She, however, did not account for the fact that neither the Appellant's nor Ricardo's DNA was tested against the second blood sample found on the knife handle. That Monique's blood was not found on the knife does not prove that the Appellant killed the deceased, nor does it justify, without more, the conclusion that his version is not reasonably possibly true.

[71.4] The Magistrate also drew a number of inferences that were not supported by the evidence, including that the absence of any of his DNA on the deceased, in light of his own version that they were kissing and holding each other, is implausible. It is unclear

what inference the Magistrate sought to draw on this score – perhaps that the Appellant took active steps to avoid his DNA being transferred. The difficulty with this reasoning lies in the fact that the DNA evidence led by the State was scant and largely inconclusive. The Appellant’s clothing was tested for the deceased’s blood, and those tests were negative or inconclusive. Save for this, only his semen sample was tested against the sample taken from the deceased. The Magistrate’s line of reasoning was neither put to the Appellant, nor was it argued by the State. The Magistrate accordingly misdirected herself by drawing such a drastic conclusion in the absence of any evidence to justify it.

[72] A further difficulty with the Magistrate’s judgment on conviction is that she appeared to have disregarded significant parts of the evidence in drawing an inference as to his guilt. As highlighted in the authorities discussed above, where the state relies on circumstantial evidence only, an inference of guilt must account for all of the evidence and must be the only evidence that can sensibly be drawn in the circumstances.

[73] The following aspects of the Appellant’s evidence stood out quite starkly but were apparently disregarded by the Magistrate:

[73.1] His apparent recollection that Ricardo told Monique ‘*hy loop soek haar nou*’ seems a curious thing to make up. Although Monique denied the Appellant’s version on this score, but the Magistrate did not critically evaluate the reliability of her evidence – particularly in light of her evasiveness when

questioned about Ricardo. Moreover, Mr Nomdoe's failure to provide any details of Ricardo's alibi means that the reliability of the alibi was not tested. The result of the State's failure on this score was that the accused's version could also not be properly tested. As indicated above, the gaps in the State's evidence cannot be filled by drawing an inference against the accused.

[73.2] The Appellant was also quite emphatic in his evidence when he stated that 'the murderers are walking outside' and that, if the DNA samples were properly tested, he would not have been before the court.

[73.3] As we indicated above, the DNA tests were conducted, seemingly as an afterthought, after both parties had closed their cases. The DNA results, in any event, did not establish the Appellant's guilt.

[73.4] Given that the State's evidence was purely circumstantial, more should have been done to close these gaps. Again, the failure by the State to do exactly what the Appellant requested cannot justify an inference being drawn against him as to his guilt.

[74] As touched on earlier in our judgment, the Magistrate's reasoning also did not account for the Appellant's proven injuries on the morning the crime was committed. The Magistrate placed much reliance on the unlikelihood, in her view, that the Appellant could have sustained an injury to the back of his head if he received a blow to his jaw from behind. It is so that the Appellant tried to offer an explanation, but

ultimately testified that he did not know for certain how the cut to his head was sustained. His inability to offer a conclusive explanation, however, could not be a basis to disregard the fact of his injury.

[75] In the absence of any evidence of a struggle between the Appellant and the deceased, the Appellant's version that he was attacked must be accepted as reasonably possibly true.

[76] It is apparent from the Magistrate's judgment that the primary factor which she found to point to the Appellant's guilt was his prior inconsistent statements regarding the number and identity of his attackers.

[77] But his guilt is not the only inference to be drawn from the change in his version. The Appellant explained that his initial account that he was attacked by strangers was because he did not believe Mr Nomdoe would believe him if he had identified Ricardo as his attacker. His assumption was informed by his belief that, because he was relatively new to the area and Ricardo was well known, Mr Nomdoe would believe Ricardo over him. However, when Mr Nomdoe indicated that DNA samples would be taken from the Appellant, the Appellant told Mr Nomdoe to take Ricardo's DNA as well. Mr Nomdoe could not recall whether the Appellant mentioned taking Ricardo's DNA but confirmed that the Appellant had mentioned Ricardo during the course of the investigation. It appears that Mr Nomdoe did not take any contemporaneous notes in respect of this aspect of the investigation. The point, however, is that Mr Nomdoe's own recollection substantially corroborates the Appellant's explanation.

- [78] And in light of the State's failure to test the second blood sample on the knife handle, it cannot fairly be concluded that the Appellant's version is not reasonably possibly true.
- [79] There is, in any event, an inherent logic in his explanation that he did not mention Ricardo when, by all accounts, it would have been his word against Ricardo's (and Monique's). But, with the possibility of objective DNA evidence being introduced, he might have felt more confident to name the person who had attacked him and who he believed was responsible for the deceased's killing. That the number of the alleged unknown attackers in the original version changed between what the Appellant told Ms Liesing, then Ms Plank and then in his statement also suggests that the version of the unknown attackers was more likely the fabricated one.
- [80] There is also the Appellant's evidence that, when he found the deceased's body, he noticed the broken knife handle. He repeated this version in his plea explanation and in his evidence. That the knife handle was found, as described by the Appellant, was confirmed by Mr Nomdoe. The obvious question is, if the Appellant had killed the deceased, why would he leave such a crucial piece of evidence at the scene of the crime? It is not an improbable inference to draw from these facts that the Appellant found the deceased's body in the manner that he described and that he simply left it untouched. There was certainly no evidence or suggestion that the Appellant had planted the knife handle at the scene as a subterfuge to throw the police off his scent, as it were.

[81] Perhaps the most glaring question about the Appellant's conduct is: why did he return to the place where he last saw the deceased when he awoke later in the morning of 23 December 2012?

[81.1] It could, as the State argued, be because he knew that that was where he had killed the deceased and left her body. This may, in isolation, even be the most *probable* inference to be drawn.

[81.2] But it is not the *only* inference to be drawn. At least one alternative is that he returned because, upon reflection, he was concerned that he had left her there, in danger, and went back to find out. That was his explanation and, viewed in the context of all the evidence, his explanation cannot be excluded as being reasonably possibly true.

[82] For all these reasons, we find that the State did not prove, beyond a reasonable doubt, that the Appellant killed the deceased.

[83] What, then, about his conviction of robbery?

ROBBERY OR THEFT?

[84] The conclusion that the Appellant robbed the deceased of her phone, with aggravating circumstances, rested entirely on the conclusion that he had killed her. In the absence of any proof of violence or assault, the conviction of robbery must fall away and, so too, the minimum sentence of 15 years' direct imprisonment.

- [85] But there remains the fact that the Appellant did not hand over the phone to the deceased's family, nor did he disclose its whereabouts to the police after he was arrested. We accordingly invited the parties to make submissions on (a) whether the Appellant's conduct would justify a conviction on the lesser sentence of theft, and (b) if so, what the appropriate sentence would be if we so convicted him. We express our gratitude to both legal representatives for the helpful submissions they provided on this issue.
- [86] Section 260 of the CPA provides that where the evidence on a charge of robbery does not prove robbery, but proves the offence of theft, the accused may be convicted of theft, notwithstanding that he was not charged with that offence in the alternative. It is trite that this provision applies without the need for a separate charge, and irrespective of whether the accused was expressly warned of the competent verdict, provided no prejudice results.
- [87] Counsel for the Appellant fairly accepted that, even if we accept the Appellant's evidence as reasonably possibly true, which we have, then his conduct in concealing the phone for an extended period, without report to the police or the family, is conduct capable of constituting theft by conversion.
- [88] The concealment, coupled with the Appellant's own evidence that he was aware the police were looking for him and that the phone was a potentially important piece of evidence, is capable of supporting an inference that, whatever the innocence of the original taking, the Appellant subsequently formed and acted upon an intention to

appropriate the phone and permanently deprive the deceased's estate and family of it.

[89] Whether his motive was to conceal the phone as evidence or for his own use, we find that, on a conspectus of all the evidence, the Appellant is guilty of theft in relation to the deceased's phone.

[90] We turn, then, to discuss the appropriate sentence for the conviction on the lesser charge of theft.

SENTENCE

[91] It is well-established that, in determining an appropriate sentence, a court must consider the crime, the offender and the interests of justice.⁷ In doing so, the principal objective is to ensure that the "*punishment should befit the criminal as well as the crime, be fair to society and be blended with a measure of mercy according to the circumstances.*"⁸

[92] It is relevant in this matter that the Appellant did not initially set out to steal the deceased's phone but formed the intention to do so only after he found that she had been killed.

[93] It is also relevant that the item stolen was of modest value and there is no evidence that the Appellant intended to profit from it. The police also retrieved the phone within one month of the Appellant have taken it.

[94] The accused has been in custody since his conviction on 4 September 2024 – almost 2 years to the day.

[95] Taking into account all the circumstances, including his age (he was 33 years old when the offence was committed and is now 47 years old), that he has one minor child, and that he has prior convictions for theft and robbery, we find that a sentence of 2 years' direct imprisonment, backdated to 4 September 2024, is appropriate.⁹

CONCLUSION

[96] In the premises, we conclude that:

[96.1] the State failed to prove, beyond a reasonable doubt, that the Appellant killed the deceased;

[96.2] the Appellant is guilty of theft in relation to the deceased's phone; and

[96.3] a sentence of two years' direct imprisonment is an appropriate punishment for the theft of the deceased's phone.

ORDER

[97] Accordingly, the following order is made:

1. The conviction of the Appellant on the charge of murder, read with section 51(1) of the Criminal Law Amendment Act 105 of 1997

(“the Minimum Sentencing Act”), and the sentence imposes in respect of that conviction is set aside.

2. The conviction of the Appellant on the charge of robbery with aggravating circumstances, read with section 51(2) of the Minimum Sentencing Act, and the sentence imposes in respect of that conviction is set aside and replaced with the following:

“The Appellant is convicted on the competent charge of theft, for which the Appellant is sentenced to 2 years’ direct imprisonment, backdated to 4 September 2024.”

CHRISTIANS, AJ

I agree and it is so ordered.

FORTUIN, J

FORTUIN, J (concurring judgment)

- [98] In addition to the findings above, I find it necessary to focus on the South African Police Service’s duty to investigate crimes. This duty is a constitutional one. Section 205(3) of the Constitution charges the police with the objective “*to prevent, combat and investigate crime, to maintain public order, to protect and secure the inhabitants of the*

Republic and their property, and to uphold and enforce the law,”. This mandate is given further content in the South African Police Service Act 68 of 1995.

[99] This duty does not end with identifying the subject. It requires the police to conduct a thorough and impartial investigation aimed at uncovering all available evidence bearing on whether an offence was in fact committed and by whom, so that a properly constituted docket can be placed before the prosecuting authorities. Our courts have recognised this as a positive duty owed not only to the public interest in law enforcement but, in appropriate circumstances, to individual complainants and victims. A breach of this positive duty may found delictual liability, as was found in *Carmichele v Minister of Safety and Security*¹⁰.

[100] It is trite that the ultimate onus is on the state to prove guilt beyond reasonable doubt. The investigation however must go beyond gathering evidence that merely raises suspicion or is consistent with guilt. It must pursue all reasonable lines of enquiry, both inculpatory and exculpatory, so that the evidence eventually led is capable of excluding reasonable alternative explanations for the accused’s conduct.

[101] A docket built on a single strand of evidence, an incomplete chain of custody, or an investigation that stops once the suspect is identified, without testing that evidence against other reasonable possibilities, would fail to produce proof beyond reasonable doubt. This should be the case irrespective of how strong the initial suspicion was. Where the investigation falls short of this standard, as we have found was the case

here, the consequences should be borne by the state. This means that an acquittal should follow because the evidence does not meet the required threshold. What should not be done, as was the case here, is to shift the *onus* onto the accused.

- [102] The deficiencies in the police investigation in this matter are glaring, and it cannot be fixed by expecting the accused to disprove his guilt.
- [103] The obligation of the state is not to raise mere suspicion. Its constitutional responsibility is to investigate properly and to prove the guilt of the accused.
- [104] The investigating officer in this matter did not do what is expected of him. The investigation leaves much to be desired.
- [105] Both the deceased and the accused are not sophisticated people. In addition to the constitutional rights of the accused, this was also a failure to uphold the dignity of the deceased and her family. They deserved a thorough investigation leading to a proper prosecution and the conviction of the correct person who committed this heinous crime.
- [106] I trust that the social standing of the appellant and the deceased did not play a role in the manner in which this matter was investigated. As the accused said during his evidence in chief that he mentioned the names of two other people to Mr Nomdoe:

“as my bloed laat trek word, dan moet hy die twee persone se bloed ook trek”

[107] The failure to do this, in my view, points to a total disregard of the dignity of both the appellant and the deceased. This is a disregard of the constitutional right entrenched in section 10 of our Constitution.

FORTUIN J

Appearances

For the Appellant : **Ms S Kuun**
Instructed by **Legal-Aid South Africa**

For the Respondent : **Adv A Hess**
Instructed by **DPP, Western Cape**

¹ The original Afrikaans evidence was not included in the transcript for this part of his evidence.

² Van Jaarsveld v S; Ras v S (1105/2023; 885/2024) [2025] ZASCA 92 (20 June 2025), with reference to S v Monyane and Others [2006] ZASCA 113; [2006] SCA 141 (RSA); 2008 (1) SACR 543 (SCA) para 15.

³ S v Mbuli 2003 (1) SACR 97 (SCA)

⁴ S v Hadebe and Others 1998 (1) SACR 422 (SCA) at 426f-h.

⁵ S v Reddy and Others 1996 (2) SACR 1 (A) at 8C-E (most recently endorsed in Ngwadla v S (936/2020) [2026] ZASCA 77 (25 May 2026)).

⁶ S v Vilakazi (576/07) [2008] ZASCA 87; [2008] 4 All SA 396 (SCA) ; 2009 (1) SACR 552 (SCA); 2012 (6) SA 353 (SCA) (3 September 2008) para 48

⁷ The so-called Zinn triad.

⁸ S v Rabie 1975 (4) 855 (AD) at 862G.

⁹ See, in this regard, the sentences imposed in:

S v Rankali and Others (Sentencing) (KS 3/2019) [2025] ZANCHC 26 (11 March 2025) in which accused one was sentenced to three years' imprisonment for theft (having received and concealed goods stolen by his co-accused); the sentence was suspended because accused one had already spent 2 years and 3 months in prison before he was granted bail.

S v Trickard 2014 (2) SACR 245 – the appellant was convicted of stealing a piece of cheese to the value of R66.99. The appeal court set aside a declaration that the appellant is a habitual criminal and replaced it with a sentence of 2 years, 10 months and 7 days for the time he had already spent incarcerated.

¹⁰ *Carmichele v Minister of Safety and Security* 2001 (4) SA 938 (CC)