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**REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG.**

Case No: SS19/2026

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

SIGNATURE

DATE: 7 September 2026

In the matter between:

THE STATE

And

MMAKO THABANG ELISTAS

Accused

Coram: Noko J

Heard on: 28 August and 3 September 2026.

Delivered on: 7 September 2026.

JUDGMENT

NOKO J

[1] The accused is charged with three counts, namely, count 1 – murder read with the provisions of section 51(1) of the Criminal Law Amendment Act¹ (CLAA) in that he intentionally and unlawfully killed R[...] G[...] P[...] (deceased), a 5-year-old female child; count 2 - rape read with the provisions of section 51(1) of the CLAA,² count 3 - contravention of the Criminal Law (Sexual Offences and Related Matters) Amendment Act,³ read with sections 256 and 270 of the Criminal Procedure Act⁴ (CPA) and read with the provisions of section 51(1) of the CLAA, in that the accused had sexual intercourse with the deceased by penetrating her anus with an object unknown to the State.⁵

[2] The accused was made aware of the prescribed minimum sentence regime as set out in section 51(1) of the CLAA in terms of which, if he is found guilty of any or all of the counts, a sentence of life imprisonment may be imposed. Further, the Court may deviate from imposing the said minimum sentence if he can present substantial and compelling circumstances to justify the deviation. He further confirmed that he does understand.

[3] The accused pleaded guilty to the charge of murder and to count 2 (rape), except that he penetrated the deceased's vagina with a finger rather than with an unknown object. The accused pleaded not guilty to count 3. He submitted a plea statement in terms of section 112(2) of the CPA and confirmed that the signature and initials on the statement were his, and that it was made freely and voluntarily, without undue influence, in his sound and sober senses. The statement was marked exhibit A for the record.

[4] The State accepted the plea of guilty in respect of count 1, and the accused was accordingly found guilty of murder as charged. The State rejected the plea of guilty in respect of the count of rape and the Court then changed the plea of guilty to the plea of not guilty.

¹ Act 105 of 1997.

² The alternative count to count 2 is the charge of unlawfully and intentionally committing a sexual act with a human corpse by penetrating the vagina of the deceased Palane with an unknown object unknown to the State.

³ 32 of 2007.

⁴ 51 of 1977.

⁵ An alternative to count 3 is committing a sexual act with a human corpse by penetrating the deceased's anus with an object unknown to the State.

[5] The following exhibits were handed up and marked as follows: the post-mortem report and the affidavit under section 212 of the CPA were marked as Exhibit B; the crime scene photographs, together with the section 212 statement, were marked as Exhibit C; and the post-mortem photographs, together with the section 212 statement, were marked as Exhibit D.

[6] The State opened its case and led the evidence of Dr Bozena Krysztfiak, who, under oath, stated that she obtained the following qualifications: a Diploma in Medicine from a Medical Academy in Poland (equivalent to M.B, Ch.B.), obtained in 1989; a Diploma in Forensic Medicine from the College of Medicine, obtained in 2001; a Fellowship in Forensic Pathology from the College of Medicine, obtained in 2007; and a Master's degree in Medical Science from Wits University, obtained in 2017.

[7] She is employed by the Gauteng Provincial Government as Head: Clinical Unit (Medical) Forensic Pathology Service, Germiston. Her overall experience in Forensic Pathology spans from 2001.

[8] She stated that she examined the deceased body and recorded her findings as set out in Exhibit D as follows: Cutaneous and mucosal abrasions involving the right and left labia majora; cutaneous abrasion at the anterior commissure of the labia; abrasions of the minora bilaterally; bruising of the vaginal vestibule bilaterally; Extensive laceration of the vaginal introitus involving the entire posterior part of the vaginal orifice, extending into the posterior vaginal wall, fossa navicularis, perineum and subcutaneous adipose tissue of both medial buttocks, with only a thin fragment of perineal tissue remaining between the vaginal vestibule and the anus; abrasions of the anal margin anteriorly; abrasions over the left buttock and left posterior groin regions; focal abrasion on the right medial buttock and abrasion of both buttocks medially, within the gluteal cleft.

[9] In her summation, as invited by the State advocate, she testified that, having regard to the nature and extent of the injuries, the deceased's vagina was penetrated with a large object. Further, those injuries are not consistent with the accused's version that he

penetrated the deceased's vagina with a finger. It was a blunt object, and it could have been an adult penis in an erect state.

[10] She stated under cross-examination that she identified an abrasion at the margin of the anal ring, which was indicative of penetration of the anus. In view of the muscular nature of the anal canal, no injuries could be detected, as the muscles can accommodate the passage of an object, normally faeces, without tearing. She stated that allegations that a finger may have been used would be sustainable in respect of the anus, not the vagina.

[11] The defence closed its case without calling any witnesses or the accused to give evidence.

[12] In its closing argument, the State advocate submitted that, in respect of count 2, the evidence made it clear that the accused's averment that he used his finger to penetrate the deceased's vagina was unsustainable. To this end, she urged the Court to return a conviction of rape with an unknown object. The defence, in turn, contended that the accused's version, as set out in the statement submitted, was maintained, namely that he used his finger to penetrate the deceased.

[13] Concerning count 3, the State advocate submitted that, having regard to the circumstances of the case, the Court is implored to return a finding of guilt. Further, the Court should have regard to the accused's statement submitted in terms of section 112 of the CPA read together with the admissions in terms of section 220 of the CPA, including the postmortem report which states that the deceased was penetrated from behind.

[14] The defence, on the other hand, submitted that the State's case appears to be based on circumstantial evidence and failed to satisfy the two cardinal rules of logic set out in *R v Blom*,⁶ namely that "... (1) the inference sought to be drawn must be consistent with all the proven facts. If it is not, the inference sought 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...".⁷ He submitted that no facts were proved linking the

⁶ 1939 AD 188 ("*Blom*").

⁷ Id at 202-203.

accused to the alleged penetration of the deceased's anus. The evidence relating to the injuries, as presented by the State's expert witness, is not disputed, but it does not, on its own, support the possibility that the injuries were caused by the accused or were sustained at the same time as the accused raped and murdered the deceased.

[15] In addition, the counsel argued further that it would be senseless for the accused to have raped the deceased by penetrating her with a blunt object and then used a finger when penetrating the deceased's anus. Furthermore, his plea of guilty to the serious charges of murder and rape would make it difficult for him to deny the lesser charge as stated in count 3. To this end he contended that the accused should not be found guilty in respect of count 3.

[16] It is settled in our jurisprudence that the State bears the onus of proving the accused's guilt beyond reasonable doubt, and the corollary is that the accused is entitled to be acquitted if it is reasonably possible that he might be innocent.⁸ The Supreme Court of Appeal in *Komane v S*⁹ referred with approval to the sentiments expressed in *S v Ntsele*,¹⁰ where it was held that "... the onus rests upon the State in criminal proceedings to prove the guilt of the accused beyond a reasonable doubt, not beyond all shadow of a doubt".¹¹ The accused also bears the onus of demonstrating that the explanation proffered is true. The court may, however, not convict even if the explanation is improbable; instead, the explanation should be false beyond a reasonable doubt. The court should consider the evidence in its entirety rather than piecemeal.

[17] With regard to the test for evaluating circumstantial evidence, the accused's counsel has correctly stated that it is set out in *Blom*, where the cardinal rules of logic applicable are two-fold: first, the inference sought to be drawn must be consistent with the proved facts. If not, then inference cannot be drawn. Secondly, 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, there must be doubt that the inference sought to be drawn is correct.

⁸ See *Tshiki v S* [2020] ZASCA 92 at para 44.

⁹ [2022] ZASCA 55 ("*Komane*").

¹⁰ [1998] ZASCA 49; 1998 (2) SACR 178 (SCA).

¹¹ *Komane* id at para 37.

[18] The Court has found the accused guilty of murder in accordance with his plea, tendered by the accused and accepted by the State. The evidence presented, and not challenged by the defence, with regard to count 2 is that the deceased's vagina was certainly penetrated not by a finger but with a larger blunt object, which may even be an erect penis of an average adult male. The evidence is persuasive, and the accused could, on the face of this evidence, have challenged the expert opinion. But it is settled in our jurisprudence that the accused has the right to remain silent and should not suffer any prejudice for exercising that right. In any event, the accused admitted the elements of the crime of rape and, as his counsel has submitted, whether it is a blunt object or a finger, it is immaterial for the purposes of conviction on a charge of rape.

[19] With regard to the offence in count 3, the State relied solely on the expert's evidence and tendered no factual evidence upon which the Court could conclude that the accused should be found guilty. The test formulated in *Blom* has withstood the test of time, and, without any proven facts proffered by the State, this Court cannot draw an inference that the accused committed the crime he is charged with. In the premises, count 3 is unsustainable.

[20] In the premises, I find that the State has proven its case beyond a reasonable doubt relative to counts 1 and 2 and therefore conclude that Mr Thabang Elistas Mmako is found:

1. Guilty of Count 1 - murder of R[...] G[...] P[...], read with section 51(1) of the Criminal Law Amendment Act 105 of 1997
2. Guilty of Count 2 - rape of R[...] G[...] P[...], read with section 51(1) of the Criminal Law Amendment Act 105 of 1997.
3. Not guilty of Count 3 of rape.

M V NOKO
Judge of the High Court

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Appearances:

For the State:

MJ Morule, DPP Johannesburg.

For the Accused:

A Mavatha, Legal Aid South Africa.