**I N THE HIGH COURT OF SOUTH AFRICA**

**(GAUTENG DIVISION, PRETORIA)**

**CASE NO: CC135/2013**

**DATE: 13/11/2015**

**REPORTABLE**

**OF INTEREST TO OTHER JUDGES**

In the matter between:

**THE STATE**

**and**

**ZWELIBANZI KIDWELL ZUNGU**

**JUDGMENT**

**Baqwa J**

**Summary**

***Criminal law*** *- Murder - proof of corpus delicti - degree of proof when body of deceased not recovered - use of cellular communication data charts and maps. and CCTV footage together with DNA evidence to prove State case - Mutually destructive versions - what constitutes - conviction of rnurder sustainable where inference drawn that accused killed the deceased consistent with all proven facts.*

**An notations:**

Reported cases

R v Difford 1937 AD 370 at 373

S v Webber 1971 (3) SA 754 (A)

S v Singh 1975 (1) SA 227 (N)

S v Hadebe and Others 1997 SACR 641 at 645 h - i S v Phallo and Others 1999 (2) SACR 558 at 559 a-b

S v Malgas 2001 (1) SACR 469 (SCA) (2001 (2) SA 1222; [2001] 3 AllSA 220) at 470d

S v Govender and Others 2004 (2) SACR 381 (SCA) S v Waldeck 2006 (2) SACR 120 (NC)

S v Nkuna 2012 (1) SACR 167 (8)

Statutes

Criminal Procedure Act 51 of 1977 Criminal Law Amendment Act 105 of 1997

**Introduction**

[1] The accused in this case is Zwelibanzi Kidwell Zungu a 33 year old male residing at [.....] M. C., Mailula Park, Vosloorus.

[2] He had been initially arraigned on seven counts namely three counts of assault with intent to do grievous bodily harm, one count of assault, one count of murder read with the provisions of section 51 of schedule 2 of the Criminal Law Amendment Act 105 of 1997 ("Minimum Sentences Act"), one count of theft and one count of malicious injury to property.

[3] At the commencement of the proceedings counts 1 and 2 which related to assault with intent to do grievous bodily harm were withdrawn by the State leaving a balance of five counts which the accused presently faces.

[4] The accused has been legally represented and he pleaded not guilty to all the charges opting not to disclose the basis of his defence. He confirmed that he understood the meaning and the implications of the Minimum Sentences Act.

[5] Initially, there were no admissions made by the defence in terms of section 220 of the Act 51 of 1977.

**Background**

[6] According to the summary in terms of section 144 (3) (a) of the Criminal Procedure Act 51 of 1977, the accused and the deceased *("N.")*, were in a love relationship for some time prior to the incident in question. At the beginning of 2012 N. terminated the relationship with the accused.

[7] N. formed a new relationship with the complainant in count 1, Oliver Matlala *("Oliver")* and in the early hours of Sunday morning of 4 March 2012, the accused drove to N.'s house where he found her and Oliver in bed. The accused then assaulted both of them. In the events that followed the accused is alleged to have damaged a watch and a cellular phone belonging to Oliver.

[8] The accused then ordered Oliver to leave the house giving him N.'s vehicle keys, Oliver left the house leaving N. with the accused. N. has since that day never been seen again.

**Issues to be decided**

[9] 9.1 The Court has to determine firstly whether N. is indeed missing and if so whether there is sufficient evidence to prove that N. is deceased.

9.2 Whether the accused had killed her and committed the other crimes for which he is charged.

**Nature of the Evidence**

[10] The nature of the evidence led by the State can be grouped for ease of reference into a number of broad categories, namely, testimony that was led from friends and relatives of N.; South African Police Service (SAPS) members involved in the arrests immediately after N.'s disappearance; SAPS members who recovered exhibits from the crime scene and elsewhere; expert witnesses who downloaded and analysed cell phone data; expert witnesses who downloaded and analysed information from CCTV footage and lastly experts who analysed and presented evidence with regard to DNA recovered from various participants. It will not be necessary for the purposes of this judgment to summarise all the detail in these categories as a significant percentage of it is either similar or repetitive. Secondly, even though such evidence was not formally admitted at the commencement of these proceedings admissions were subsequently made later during the trial in terms of section 220 of the Criminal Procedure Act 51 of 1977.

**Applicable Law**

[11] In the case of **S v Nkuna** 2012 (1) SACR 167 (B) the law regarding cases of this nature was stated as follows:

> *" To require the production or discovery of the body **(corpus delicti)** in all cases of murder would be unreasonable and unrealistic and in certain cases would lead to absurdities. It would lead to* a *gross injustice particularly in cases where* a *discovery of the body is rendered impossible by the act of the offender himself. It is thus proper for* a *court to convict an accused on circumstantial evidence provided it has the necessary probative force to warrant* a *conviction: that death can be inferred from circumstances that leave no ground for* a *reasonable doubt. The absence of the body **(corpus delicti)** is not an insurmountable bar to finding*

*an accused guilty of murder. It is not correct - as has been stated in academic textbooks - that it must always be* a *prerequisite that* a *satisfactory explanation be provided as to why the body is missing; the circumstances may vary from case to case and each case must be decided on its own merits. A conviction of murder can therefore be sustained on the basis that there are facts so incriminating and so incapable of any reasonable or innocent explanation as to be incompatible with any hypothesis other than* a *finding that the accused has in fact killed the person who has disappeared."*

[12] The facts of this case are such that the court will have to reach a conclusion by inferential reasoning due to the largely circumstantial nature of the evidence.

[13] The approach to circumstantial evidence is enunciated in **Zeffertt, Paizes** & **Skeen** **The South African Law of Evidence** (formerly Hoffmann and Zeffertt) Second Edition (pp 99 - 100) as follows:

*"All circumstantial evidence ultimately depends upon facts which are proved by direct evidence. Its use, however, involves* a *source of potential error not found in direct evidence, where possibility of error lies in the fact that the witness may not be telling the truth. This potential additional error lies in the need for properly and accurately assessing the degree, if any, to which the evidence, on the assumption that it is true, renders the fact that it is tendered to establish more probable. In making such as assessment, the court may be mistaken in its reasoning. It may draw an inference which is* a *non sequitur, it may overlook the possibility of the other inferences which have equal or even greater force; or it may over-assess the degree to which the evidence increases the probability of the existence of the fact it is tendered to prove. Circumstantial evidence is popularly supposed by laymen to be*

*Jess cogent than direct evidence. This is of course, not true as a general proposition. As the courts have pointed out, circumstantial evidence may in some cases be the more convincing form of evidence.*

*Circumstantial identification by a fingerprint will, for instance, tend to be more reliable than the direct evidence of a witness who identifies the accused as the person he or she saw. But obviously there are cases in which inferences will be Jess compelling and direct evidence more trustworthy. It is therefore impossible to lay down a general rule in this regard."*

[14] In further dealing with the issue of inferential reasoning the learned authors make reference to the cardinal rule of logic as set out in **R v Blom** 1939 AD 188 at 202 - 203. They state as follows (at p 100):

"There were, said Watermeyer JA in R v Blom, "two cardinal rules of logic" which could not be ignored when it came to reasoning by inference:

*(1) The inference sought to be drawn must be consistent with all the proven facts. If it is not, then 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."*

[15] In S v Nkuna **(supra)** Hendricks J reasoned as follows:

*"[123] In S v Cooper 1976 (2) SA 875 (A), that court cautiously remarked that when one is faced with circumstantial evidence alone, one must make a distinction between inference and conjecture.*

*[124] There can be no inference unless there are objective facts from which to infer the other facts which it is sought to establish. Sometimes these other facts can be inferred with considerable certainty. If there are no positive proven facts from which the inference can be made, the method of inferential reasoning fails and what is left is mere speculation or conjecture.*

*[125] Of course, the strength of circumstantial evidence will tend to vary depending on the cogency and character of the circumstances. What needs to be pointed out however, is that when the evidence is abundant, such as in this case, it may be equal to or even superior to direct evidence."*

**The evidence tendered by the State**

[16] The first witnesses to be called by the State were the mother, Doris Mbizane and the sister of N., Nonzwakazi Gumede. They testified that they had had good relationships with N. until her disappearance on 4 March 2012. They had both maintained regular contact with her and at all material times she had kept them abreast of her movements.

[17] According to her mother and sister she was a tidy and jovial person with a pleasant disposition. Her sudden disappearance was in their opinion totally out of character with her personality. They had conducted searches for her in police stations, mortuaries, hospitals and made all possible enquiries about her without any success. All manner of communication including telephonic communication had come to an abrupt end on 4 March 2012.

[18] The next witness was a friend of N., Lungile Mohoatsane who upon learning of her absence from work and failing to reach her on the phone began making enquiries from mutual friends and colleagues. One of these friends was Sphelele Shongwe *(" Sphelele" )* with whom she ended up at N.'s house at number[ . . . . . ], A . E . , Centurion.

[19] Upon arrival they were granted access to the complex by security guards. They then tried to gain entry to the house by knocking on the doors and windows but there was no response. They called N.'s boyfriend, Oliver, who informed them of what had taken place the previous day between himself, the accused and N..

[20] They agreed to fetch Oliver with a view to getting him to make a report to the Police regarding the events of the previous day. They then drove to fetch him and together they went to make a report at the Wierdabrug Police Station.

[21] Thereafter, the witness Lungile, Sphelele, Oliver and two policemen proceeded to N.'s residence where the police members assisted by neighbours managed to break down the front door of the house after gaining entry through the window at the garage.

[22] The two policemen entered the house and conducted a search. The house was in chaotic state with clothes and various items strewn all over the floors. There was no sign of N.. Thereafter Lungile and Sphelele entered. Lungile took photographs of various items using her cell phone camera. They then vacated the house after the police announced that it was time for knocking off.

[23] Sphelele was also called to testify. She was also a close friend of N.. She had known the accused as N.'s boyfriend. N. had granted him registered access and keys to the house. At the time of N.'s disappearance, however, N. and the accused were no longer in a love relationship. She had been informed of this development by N..

[24] Sphelele further testified how on 25 February 2012 she and N. had attended a wedding at Marble Hall, Limpopo. At the wedding they met Oliver and his friend, David Modiba. They all became friends. Soon thereafter N. started a love affair with Oliver.\

[25] When they returned to N.'s residence on 26 February 2012, she entered the house

first and encountered the accused lying on the couch in the lounge. After a brief conversation between N. and the accused, N. decided to leave with Sphelele after she indicated to her that she was feeling uncomfortable to be left in the company of the accused. Sphelele testified that the accused was left outside the garage where he was going to be picked up by friends. From there N. proceeded to meet with her new boyfriend, Oliver.

[26] The State also presented the evidence of N.'s older brother, Z. M.*("Z.")*. He had also participated in the search for his sister after her disappearance. He confronted the accused at N.'s house about her disappearance and upon failure to elicit an explanation assaulted the accused. He was also the person who retrieved N.'s vehicle from Oliver and whilst doing so Oliver also gave him clothing items he was wearing on 4 March 2012 whilst he was at N.'s house.

[27] The next witness was Oliver who confirmed testimony of Sphelele as to how they met and became lovers with N. in Marble Hall on 25 February 2012. They agreed to meet with N. on 1 March 2012. N. fetched him from his place in Alexandra and they spent the night at N.'s residence and proceeded to their places of work the following day.

[28] N. and Oliver again agreed to spend time with each other on Saturday 3 March 2012 at no. [....] A. E.. It was also agreed that Oliver would bring his laundry for washing at N.'s place. On that evening and after placing the washing into the washing machine, the takkies in the bath and watching television they went to sleep.

[29] In the middle of the night he woke up and realised that there was another person in the bedroom. The light was on and the stranger was assaulting him by striking him on the head. He did not observe what the assailant used to assault him. He heard N. say "Zweli leave him alone". The assailant proceeded to assault N. with open hands.

[30] N. managed to grab Zweli and they then went on to talk in the lounge whilst Oliver tried to clean the blood on his head. He then tried to call some friends to take him to hospital but they could not help him. When N. suggested that they take Oliver to hospital, the accused refused. The accused then questioned Oliver regarding the love affair between N. and himself. Thereafter, Oliver was given the keys of N.'s vehicle to drive himself to hospital. Oliver took his laundry from the washing machine and whilst he was doing that, the accused took his watch and his cell phone and smashed them against the wall.

[31] Oliver drove off in N.'s and went to wake up his friend David Modiba to accompany him to hospital. Later that morning they met with another friend, Noel Ngwako *("Noah")* in Bramley. This was at about 07h30 am. Oliver used Noah's cell phone to call N.. N. responded and stated that the accused was still at her house and that Oliver should not call again. She promised to fetch her motor vehicle later that morning. At about 10 am that same morning Oliver received an SMS on Noah's phone from N.'s phone saying she would come later that day to collect the car and that Oliver should keep the calls low.

**Common cause facts**

[32] The following facts are common cause by virtue of not having been disputed or due to the fact that they were formally admitted during the trial.

32.1 The correctness of the photo albums exhibits B, C, D and E, the keys thereto as well as any reference therein to any evidential material collected by the relevant photographer at the time the photographs were taken.

32.2 The correctness of photographs 1 to 12 of exhibit B in that they correctly depict photographs of the accused's motor vehicle with registration number BC27WNGP which was during March 2012 the property of the accused at the time

of the taking of the photographs whilst in the lawful custody of the SAPS.

32.3 The correctness of photographs 13 to 20 of exhibit B in that they correctly depict photographs of a motor vehicle with registration number XNV665GP which was during March 2012 the property of N. which was at the time in the lawful custody of the SAPS.

32.4 The correctness of the swabs taken by Warrant Officer Ross-Marsh as indicated by him in exhibit B.

32.5 That N. was during the period 1 to 4 March 2012 was residing at Sedge Close[.....], A. E., Rietspruitlaan, Wierdabrug (N.'s house). The photographs in exhibits C and D and the exhibits referred to therein in the testimony of Warrant Officer Maladze and Captain Jones were taken from and collected from this house.

32.6 The correctness of the section 212 statements by Captain Mashogoane and attachment exhibits F, G, J and H.

32.7 The cellular phone numbers placed on record during testimony of witnesses belonging to N. (0....), Zwelibanzi Kidwell Zungu (the accused) (0....), Noel Ngwako (0....), David Modiba (0....), Z. M.(0....), Sphelele Shongwe (0....; 0 . . . . ), Oliver Matlala () and Nolwazi Barn (0....).

32.8 The correctness of the cellular phone data charts compiled by Captain Beetge contained in exhibit M1 to M6.

32.9 The correctness of the cellular phone data charts and maps compiled by Mr Everson reflecting the positioning of the cellular phone towers as well as the communication and movement of the cellular phones with the cellular phone numbers indicated.

32.10 Cellular communication movements indicated in exhibit N1 and N5.

32.11 The correctness of exhibit L which is an extract from downloads done by Warrant Officer Chioma from a telephone belonging to Noel Ngwako and that it correctly depicts an SMS sent from N.'s phone to the said phone on 4 March 2012 at 08h20.

[33] Also not in dispute are the exhibits P1 to P6 which are photographs taken by Lungile Mohoatsane on 5 March 2012 at N.'s house which photographs the said Lungile Mohoatsane then emailed to Bongiwe Khumalo of eNews Channel Africa (eNCA).

[34] It is also not in dispute that N. operated several bank accounts with the **FNB** Bank, namely an **FNB** Platinum Cheque Account, a 32 Day Interest Plus Account, a Credit account, a bond account and a Petro card account all of which have been non-operational or dormant since 4 March 2012.

**Hearsay evidence**

[35] Some of the state witnesses gave evidence of conversations with N. prior to 4 March 2012 and it is necessary to comment on that and put matters in perspective prior to evaluating the body of evidence presented in this case.

[36] The admission of hearsay evidence is governed by section 3 of the Law of Evidence Amendment Act 45 of 1998 which provides as follows:

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

*(a) each party against whom the evidence is to be adduced agrees to the admission thereof as evidence at such proceedings;*

*(b) the person upon whose credibility the probative value of such evidence*

*depends, himself testifies at such proceedings; or*

*(c) the court, having regard to-*

*(i) the nature of the proceedings;*

*(ii) the nature of the evidence;*

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

*(iv) the probative value of the evidence;*

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

*(vi) any prejudice to a party which the admission of such evidence might*

entail; and

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

*(2) The provisions of subsection (1) shall not render admissible any evidence which is inadmissible on any ground other than that such evidence is hearsay evidence.*

*(3) Hearsay evidence may be provisionally admitted in terms of subsection (1)*

(b) if the court is informed that the person upon whose credibility the probative value of such evidence depends, will himself testify in such proceedings: Provided that if such person does not later testify in such proceedings, the hearsay evidence shall be left out of account unless the hearsay evidence is admitted in terms of paragraph

(a) of subsection (1) or is admitted by the court in terms of paragraph (c) of that subsection.

*(4) For the purposes of this section-*

'hearsay evidence' means evidence, whether oral or in writing, the probative value of which depends upon the credibility of any person other than the person giving such evidence;

'party' means the accused or party against whom hearsay evidence is to be adduced, including the prosecution."

[37] In **casu,** the defence has placed on record that they consent to the admissions of evidence of hearsay forthcoming from N.. Evidently, the State has lead this evidence to prove the truthfulness thereof in light of the fact that N. could not herself present such evidence. This was done with the intention of making submissions on the basis thereof at the conclusion of the trial.

[38] In **S v Waldeck** 2006 (2) SACR 120 (NC) the following was said:

"[12] There was not even a semblance of a demur or objection from the appellant's two legal representatives, who operated in tandem, to the adduction of this evidence. There could not have been the remotest doubt in their collective mind that the prosecution adduced the hearsay evidence to prove that the contents were the truth of what was portrayed, and not merely that what was said was in fact said. On the contrary, if truth be told, the defence embraced the hearsay evidence with a great measure of enthusiasm, if not alacrity.

For Mr Bergh went on to cross-examine both Mrs Mouton and Mr Markgraaff on the presented hearsay evidence, with no holds barred over almost 12 pages and 58

pages, respectively, and in the process traversed virgin territory untouched by the witnesses' evidence-in-chief.

*[13] It is a settled principle or rule of our law of evidence that an accused person may adduce hearsay evidence for his/her own purposes, by giving such evidence himself/herself or calling a witness to give such evidence, as the appellant attempted to do with the discarded evidence of Ms Oamoense (referred to above), or an accused person may elicit hearsay evidence by way of cross-examination, as the defence has done in this instance (as will be demonstrated hereinafter). Evidence adduced in this manner is admissible, and an adducer thereof cannot try to wiggle out of it when the shoe pinches.*

See ***R v Bosch*** *1949 (1) SA 548 (A) at* 553 - *4;* ***S v Mthembu*** *1988 (1) SA 145 (A) at 150;* ***S v Mokoena*** *1978 (1) SA 229 (O);* ***S v O/ifant*** *1982 (4) SA 52 (NC);* ***S v Minnie*** *1986 (4) SA 30 (E); and, generally, Law of Evidence by* C. *W Schmidt and R Rademeyer (loose-leaf) at ch 13-20-13-21"*

[39] Similarly to the Waldeck matter the defence **in casu** cross-examined the witnesses and as it became apparent, the theme in their evidence regarding conversations with N. was in regard to N.'s relationship with the accused.

[40] I accordingly accept that the hearsay evidence forthcoming from N. must be accepted as admissible.

**Discussion of the evidence**

The love affair

[41] A critical thread in the tapestry of the state case has been the nature or state of the relationship between N. and the accused who had been known to be in a love relationship

some time before March 2012.

[42] Doris Mbizane (Doris) testified that she had been informed by N. in January 2012 that she no longer loved the accused.

[43] Sphelele, a close friend of N. also testified that during the weekend at the wedding on 25 February 2012 N. informed her that she no longer wanted the accused and that about three weeks before her disappearance the accused had broken her phone and her vase. They had had an argument about the accused coming to her house without permission. The breaking of the phone and the vase was confirmed by the accused even though he gave a different version for the breaking of those items.

[44] Julia Mokoena, a neighbour who was a friend and confidante of the accused had discussed the existence of a girlfriend who resided in the Pretoria/Midrand area. By means of Facebook she knew what the girlfriend looked like and she identified the person portrayed in exhibit HH as the girlfriend the accused had spoken about. Julia Mokoena testified that the accused informed her in mid January 2012 that he was no longer on good terms with the said girlfriend and that they no longer had a love affair. When confronted with this version the accused's response was that she misunderstood him. The accused confirmed that he had never had any problem with Julia Mokoena. There seems therefore to be no plausible reason why Julia would lie to the court on an innocuous fact such as the break-up of a relationship. Moreover, the coincidence that N. told her mother in mid-January 2012 that she no longer loved the accused and the accused told Julia Mokoena in mid January that he had broken-up with his girlfriend speaks to the truth of what the state of affairs was between the accused and N..

[45] The absence of a love affair between the two is further bolstered by the evidence of Sphelele when she testified that when they returned from the wedding and when they

found the accused in N.'s house, N. told her that she was afraid to stay behind alone with the accused. As a result, she left with Sphelele, leaving the accused behind, and later went to join her new boyfriend Oliver.

[46] Taking the evidence of Doris, Julia and Sphelele into account and the admissions by the accused in relation thereto, the probabilities favour only one conclusion, namely, the love relationship between the accused and N. had come to an end during or about mid-January 2012.

**Evidence that N. is deceased**

[47] In **casu** there is no direct evidence that N. is deceased and the State has presented circumstantial evidence from which it seeks the court to draw an inference that she is deceased.

[48] The following facts emerge from the testimony of Doris. N. has not been heard of since March 2012. She would not disappear without letting her relatives know. She had close ties with her family. She was happy within the family. There is no apparent reason why she would disappear for a period or about three and a half years as she had never done so in the past. N. would never leave South Africa without telling her. N. was a happy person and she was happy within the family. Doris had to pay R63 000.00 for the blue Polo vehicle which N. had bought on hire purchase. The bank has repossessed the townhouse situated at Sledge Close 110, Arundo Estates.

[49] Doris' evidence is corroborated by the evidence of Nonzwakazi Gumede whose testimony is to the following effect. She has not heard from N. from 5 March 2012. Their household was a happy and peaceful household. N. had at some stage resided with her in Pretoria and at that stage N. had reported to her and kept in contact at all material times. Even after this witness had moved to Durban, she and N. kept regular contact. After her disappearance she participated in searches for her, **inter alia,** at Baragwanath Hospital. All searches were in vain.

[50] Sphelele also testified and further corroborated N.'s family testimony in that N. was a jovial easy going person. They had been best friends since 2006. She was not aware of any quarrel between N. and her family members. She could not think of any reason why N. would want to disappear as this had never happened before.

[51] Nolwazi Barn confirmed that she was a close relative of N. and that she had not heard

from her since 5 March 2012. The disappearance of N. received a lot of publicity in the media. N. was a tidy person who would never leave her house in a chaotic state. She had searched at hospitals for N. without success. She entered N.'s house on 5 March 2012 and found N.'s handbag on the floor. Inside she found N.'s wallet, driver's licence and bank cards.

[52] Z. Mbizane, her brother, also testified that he had not heard from N. since 5 March 2012.According to him N. was a jovial person who would not disappear without letting relatives know. The disappearance of N. received great publicity in the media but nothing resulted from the publicity. He had taken part in searches for N. in hospitals, mortuaries and other places without success. He had filed a missing persons report at a police station on 5 March 2012.

[53] The evidence of Magcino Radebe and Brian Kekana was to the following effect: N. had worked with Magcino Radebe since 2011. She was a respectable, responsible and dedicated person who regarded her work as important. She was punctual and always informed them when she was running late. She took pride in her work and was studying law at the time of her disappearance. She would know of no reason why N. would disappear and not report for work since 5 March 2012.

[54] Captain Beetge confirmed the correctness of the cell phone data charts she compiled in evidence exhibit M3: Frequency Chart of 3 calls and more between N. and others. The chart shows that from 1 January 2012 until 4 March 2012 at 8:20:59 that more than 400 calls were made to and from N.'s phone during this period and that from exhibit M2: Frequency Chart of calls to and from N. and others. From 4 March 2012 at 8:20:59 to 31 March 2012: The chart shows that numerous calls were made to N.'s phone during this period and that she did not respond to any of them.

[55] Captain Kruger testified that: a photo and details of N.'s disappearance were circulated to the Gauteng Provincial SAPS office and mortuaries within their police area. A reward of R50 000.00 was offered for information about N.. At least 11 field searches were conducted in the areas surrounding N.'s place of residence as well as other identified areas. None of these attempts to find her bore any positive results.

[56] Captain Mashogoane who testified regarding the DNA evidence stated that he found N.'s blood in a piece of cloth which Warrant Officer Maladze cut from the night frill of N.'s bed. He also found her blood on the finger of the glove 82 and found female blood on a swab taken from the boot of the vehicle of the accused by Warrant Officer Ross-Marsh.

[57] The status of her bank account indicated that they had become non-operational and dormant after 4 March 2012.

[58] Taking into account all this evidence which is undisputed, the only inference that can be drawn is that she cannot possibly be still alive. The only conclusion which is consistent with the proven facts is that N. Mbizane died on 4 March 2012.

**Evidence regarding the guilt of the accused**

**Car wash witnesses**

[59] It is common cause that Napo Sediane and Lebogang Sathekge are strangers to the accused. Both witnesses testified that the accused brought his silver Golf motor vehicle to 'This is it' Car Wash where they were employed. Napo Sediane washed the outside of the vehicle whilst Lebogang Sathekge washed the inside. After the accused fetched the car Lebogang told Napo that he saw blood in the vehicle. When cross-examined Lebogang denied it when it was put to him that the red substance he had cleaned was engine cleaner as he is quite familiar with engine cleaner. It was further suggested under cross-

examination that the version they had given had been suggested to them when police statements were taken from them. They denied this and persisted with their testimony. It is submitted by State counsel and I accept that it is only one of them, not both, who states he saw blood which is indicative of the absence of a conspiracy between them and/or the police to fabricate evidence against the accused. They had no reason to falsely accuse the accused. Absent that conspiracy and coupled with the later evidence of Captain Jones and Warrant Officer Ross-Marsh, it ought to be accepted that it was blood that was found in the boot of the accused's vehicle.

[60] Lucas Tsoari also owned a car wash business. His evidence was that he had been friends with the accused for a long time and that they had an agreement that he would wash the accused's vehicle regularly for a fee of R200.00 per month. He testified that he washed the vehicle on 3 March 2012 which was a Saturday and that there was no blood in it. He denied it when it was put to him that he had spilt engine cleaner in the boot of the vehicle and stated that there was no stench in the accused's vehicle on the date in question. According to Tsoari the accused had never complained to him or discussed the issue of engine cleaner spilt into the boot of his vehicle at any stage in their relation.ship.

[61] Tsoari further testified that the accused had told him that on Thursday he found his girlfriend with another man. His girlfriend had explained that the man was a co-worker and he had left them alone. He further testified that a similar incident had happened again on Saturday and he had assaulted the man, who then left. Tsoari denied that he had been threatened by the police. The accused denies that he made those reports in the manner testified by Tsoari. It seems however improbable that Tsoari would fabricate these reports which would fit in with the facts that have objectively emerged from the evidence tendered in this case. The Saturday report seems to corroborate the version given by

Oliver in his testimony. Tsoari had no reason to falsely implicate the accused, his friend and client. I find his evidence to be credible and reliable.

**Other testimony**

[62] I found Nolwazi Barn also to be an honest witness. She stated that whilst people were assaulting the accused, the accused stated that if they kept on assaulting him, they will never know where N. is. Whilst this may be inferred to be an admission that the accused had knowledge concerning what had happened to N.; I have had to apply the cautionary rule to this piece of evidence. Information obtained under duress which implicates the accused in the commission of a crime is not admissible. Moreover, Nolwazi Barn was a single witness in relation to the statement allegedly made by the accused.

[63] Warrant Officer Ratlabyana testified that he had been informed by an ADT officer that N. had left the complex on Saturday 3 March 2012 and had never been seen since then. That this information is incorrect can be seen from the CCTV footage dated 3 March 2012 at 19:01 when N. is seen leaning out of the vehicle to place her finger on the fingerprint access tab whilst entering the premises. Moreover what Ratlabyana was told is hearsay which was never confirmed by any testimony.

[64] Another significant testimony for the state was the evidence of Mfanafuthi Zungu who stated that he was a cousin of the accused. He testified that he saw the accused's vehicle, a silver Golf being washed at 'This is it' Car Wash on 4 March 2012. He had personal knowledge that the accused washed his car at Tsoari's the previous day on 3 March 2012. On 5 March 2012 whilst in the company of the accused, he told him and Tsoari that he had caught N. cheating on Thursday, 1 March 2012 and that he fought with the new boyfriend and left them both at N.'s house. Mfanafuthi was cross-examined at length but he stuck to his version that the accused told him about fighting the new boyfriend on 1

March 2012 and about seeing the accused's vehicle at the other car wash on 4 March 2012.

**Mutually destructive versions**

[65] The versions presented by Oliver and the accused as to what happened on 4 March 2012 are mutually destructive in that only one of the two versions can be true. This however does not shift the onus from the State. The State still bears the onus to prove the guilt of the accused beyond reasonable doubt whilst the accused remains presumed innocent until proven guilty.

[66] This remains a substantive principle of criminal law and it is encapsulated in the well-known decision of **R v Difford** 1937 AD 370 at 373 as follows:

> *"[I]t is not disputed on behalf of the defence that in the absence of some explanation the court would be entitled to convict the accused. It is not* a *question throwing any onus on the accused, but in these circumstances it would be* a *conclusion which the court could draw if no explanation were given. It is equally clear that no onus rests on the accused to convince the court of the truth of any explanation he gives. If he gives an explanation, even if that explanation be improbable, the court is not entitled to convict unless satisfied, not only that the explanation is improbable, but that beyond any reasonable doubt it is false. If there is any reasonable possibility of his explanation being true, then he is entitled to his acquittal.. ."*

[67] Oliver Matlala *(" Oliver" )* is the only witness who places the accused inside N.'s house and who states that he left N. alive with the accused. Oliver is a single witness regarding the accused arriving at N.'s house whilst he and N. were sleeping as well as subsequent events until he left the scene in N.'s vehicle.

[68] It is possible for an accused person to be convicted on the evidence of a single but

competent witness in terms of section 208 of the Criminal Procedure Act 51 of 1977.

[69] In **S v Webber** 1971 (3) SA 754 (A) the Appellate Division stressed that there is no magic formula which determines when a single witness's testimony may warrant a conviction in every case. What may be said, however, is that the evidence of a single witness has to be approached with caution. His or her merits as a witness must be weighed against factors which militate against his or her credibility. Thus the mere fact that he or she has an interest or bias against the accused will not, of itself, obviate a conviction. It is necessary to assess the intensity of the bias in the light of the totality of the evidence.

[70] Corroboration of the fact that Oliver was injured inside N.'s house is to be found from the fact that his blood was found on the bed as well as the facecloth that was found inside the house. It is common cause that he was wearing exhibits 2 and 3 (boxer shorts and khaki pants) when he left N.'s house. It is also common cause that these clothing items were stained with his blood. It is therefore not in keeping with the probabilities that Oliver would say that he was injured by the accused who was not known to him at the time if he was injured by someone else.

[71] Oliver also states that there was no cigarette butt in any of the bathrooms when they went to bed. A cigarette butt was however found in one bathroom and the accused's DNA was found on it. Upon being shown the picture of the cigarette butt in exhibit C, Oliver stated that he did not see it upon entering the house on 5 March 2012 after the door had been broken down but that it could have been there. From his demeanour it was apparent that he was not on a mission to implicate the accused falsely. He was not prone to exaggerate his evidence.

[72] One of the most significant aspects of his testimony however in identifying the

accused as the person who injured him on 4 March 2012 was the description of the clothes that person was wearing. He testified that the accused wore a grey pair of trousers as well as a shirt that had blue on the sleeves. The accused's own evidence was that he wore a grey pair of trousers and a shirt with blue dots. If he did not see the accused he would not have been able to give this description. The probabilities are against simply ascribing this to a mere co-incidence. On this aspect therefore, Oliver's version finds what one can only describe as almost absolute corroboration from the accused's own version.

[73] After he was injured Oliver decided to send a call back to David Modiba. David called him and he, Oliver, asked David to call Babiki. Babiki called Oliver but could not help him. These facts are borne out by the information contained in exhibit M1 which shows that the last call was an incoming call from a number at 03:55:04.

[74] The version given by Oliver is also corroborated by the CCTV footage in exhibit TT, the USB memory stick which shows N.'s vehicle leaving the premises at 03:56:33 to 03:57: 15. This is corroboration by objective evidence.

[75] Oliver is also corroborated regarding his movements after he left N.'s place by David Modiba and Noah Ngwako. They corroborated the fact that he was injured. Noah testified that Oliver told him that N.'s ex-boyfriend broke his phone.

[76] Oliver testified that he used Noah's phone to call N. on the morning of 4 March 2012. He spoke to her twice. These calls are confirmed by cellular phone chart exhibit N which indicates calls from Noah's phone to N.'s on 4 March 2012 at 07:02:54 and 07:05:02. Noah confirmed overhearing Oliver asking N. if the ex-boyfriend was still there.

[77] Oliver stated that the accused threw his cell phone against the wall and that it broke into three pieces. He did not pick up the pieces. This aspect is confirmed by objective evidence in exhibit N3 which indicates GPRS (internet) activity on Oliver's phone on

04:06:07 and 07:59:24 on 4 March 2012 which went through the Kolgans tower close to N.'s place of residence. When correlated with the times recorded in the CCTV footage in exhibit TT it is clear that these activities took place after Oliver had left the scene at 03:56:33.

[78] Oliver has given a favourable impression in the witness box and he delivered an honest account of how he remembers the incident between himself and the accused on that fateful morning of 4 March 2012. His demeanour even under exacting cross-examination was not found wanting.

[79] There remains an aspect that still needs to be dealt with concerning Oliver's evidence. According to the evidence of Captain Mashogoane, he found a mixture of Oliver's as well as N.'s DNA on swab H1 which Warrant Officer Ross-Marsh took from the carpet behind the driver's seat as well as from the door skirting of N.'s vehicle. Oliver could not explain this part of the evidence. What has been established beyond doubt is that when Oliver left N.'s house on his way to hospital he was bleeding. He testified that N. was not bleeding at the time.

[80] In considering this matter reference needs to be made to the evidence of Warrant Officer Maladze and Captain Mashogoane with regard to cloth stain D which was a piece of cloth cut from the bedding. This cloth was cut and referred to by Captain Mashogoane as cloth D stain 1 and cloth D stain 2. Captain Mashogoane found N.'s blood on cloth D stain 1 and Oliver's blood on cloth D stain 2. Counsel for the State, Mr Kruger submits that the only reasonable inference to be drawn from the finding of two sets of DNA on the cloth is that N. was probably also bleeding at the time of the assault and that Oliver did not observe this as he was also busy bleeding. It is noted that it was part of Oliver's testimony that N. was also assaulted after the assault on himself. Oliver also testified

that N. did walk him out as he left and that Oliver did open the back door when putting his washing inside the car. Nothing further can be said as there was no further evidence in that regard.

[81] What is important is that the court must not consider the evidence on a piecemeal basis but must consider the evidence as a whole in order to come to a decision.

[82] A trial court must have regard to the complete picture that emerges from the tapestry of all the evidence in deciding whether an accused's version is reasonably possibly true and whether the onus upon the State has been discharged.

See **S v Govender and Others** 2004 (2) SACR 381 (SCA) at para [26].

**The evidence of the accused**

[83] In his evidence the accused stated that he visited N.'s house on the evening of 1 March 2012 after 22h00. The CCTV footage does not support this assertion by the accused. It was placed on record by consent that the accused was not seen entering or exiting the premises as from 22h00 on 1 March 2012 until 04h00 on 2 March 2012.

[84] During cross-examination the accused narrated the sequence of his visits as from 1 March 2012. He stated that he went on 1 March 2012 after 22h00 and stayed till the early hours of 2 March 2012. He visited again on 2 March 2012 during the evening after 20h00 and stayed for about 2 to 3 hours. His next visit was on the morning of 4 March 2012 during the early hours. Footage as recorded on exhibit TT shows that he entered the premises on 3 March 2012 at 00:55 and left on 3 March 2012 at 03:53. His version is therefore not supported by objective evidence.

[85] Regarding cellular phone communication data chart exhibit N2, the evidence places the accused in the vicinity of Kolgans/Rossway/Ultra City towers from 02:29:52 on 4 March 2012 until 10:02:41. This is supported by exhibit TI, K1 and K which show him leaving the premises on 4 March 2012 at 10:34. N.'s phone sent an SMS to Noah's phone on 4 March 2012 at 08:20:59 through the Ultra City tower. The undisputed evidence of Mr Everson was that these towers are in the vicinity of N.'s house. If she sent the SMS herself shortly after she had spoken to Oliver through Noah's phone, the likelihood is that she was still alive at 08:20:59 and that she must have been home. The accused alleges that he woke up next to her house in the parking space which adjoins her garage between 08h00 and 09h00 which is very close to the front and back doors of the house. This can only mean that the accused was sitting only a few meters away when N. was being murdered inside the house yet he never heard or saw anything that was happening.

The proximity of where he was parked to the front and back doors of the house was quite evident during the inspection-in-loco by the court. Viewed in this light, the version given by the accused bristles with improbabilities.

[86] Oliver's phone was hit against the wall after he had been assaulted by the accused. The phone fell into three pieces. The cellular communication data maps show that this phone moved from N.'s area later that morning of 4 March 2012. Its movement is evident from the evidence of Mr Everson in exhibit N3 which indicates that this phone was picked up by Koppieskraal tower at 11:48:36 and 11:49:27 on 4 March 2012. Exhibit N2 indicates that the accused's phone was picked up by Koppieskraal tower at 12:09:41 on the same day. When confronted with this reality, the accused's response was not convincing. He attributed the movement to Oliver.

[87] According to Mr Everson, Mailola Park tower and Ngoza tower are close to each other and also close to the accused's place of residence. The accused's phone was picked up by Mailola tower at 13h25 on 4 March 2012 and Oliver's phone picked up by Ngoza tower at 12h15 on 4 March 2012. The accused was evasive when confronted with this evidence.

[88] On the two versions presented by both Oliver and the accused, there were only three persons at all material times that morning of 4 March 2012, namely Oliver, N. and the accused. The phones, logically, could only have been moved by one of the three. By process of elimination N. could under the circumstances not have done so because she is not seen exiting the house. Oliver had exited at about 03h56 and the accused exited at about 1Oh34. The only logical inference in light of the other objective evidence already referred to above concerning Oliver's movements is that Oliver's phone left N.'s house in the possession of the accused.

[89] Another hurdle in the accused's way is his statement that whilst outside N.'s house, when he was not able to find his key and after he tried to wake N. up by knocking, he peeped into the garage and saw that N.'s vehicle was not there. This is in direct contrast to the evidence in exhibit TT, K1 and K which show the vehicle leaving the scene at 03h56 after the accused had entered. This can only mean that the vehicle was in N.'s garage for not less than 1, 5 hours whilst the accused was at the house. There is no plausible explanation from the accused on this point. The only inference is that the accused is being mendacious in this regard.

[90] Yet another riddle in the accused's version is his explanation concerning his lost key. According to the accused, he locked the house when he was there on 2 March 2012 and the next time he wanted to go in was on 4 March 2012 when he discovered his key was missing. He stated that he had no idea what he did with the key. In cross-examination in the bail application about his discussion with General Sibiya when he stated as follows *" We went there but the initial agreement was because I had told him I had forgotten my key at the complainant's place was first he wants to see if the key is in actual fact there and two he just wants to see the crime scene."* When confronted with this version the accused was evasive. Quite clearly, the accused has more than one story concerning the lost key.

[91] When asked about why he did not phone N. when he realised his key was not there his first reaction was that he was not going to phone at 3 am in the morning. He then changed to say there was no signal and his battery was flat. When confronted with the fact that the cell phone data charts show activity on his phone while he was there he once more became evasive. One of the witnesses he called, Malusi Gwala, contradicts him in this regard. Gwala says he was informed by the accused that the accused tried to call

N. but N.'s phone was off. This is another demonstration of the accused's mendacity.

[92] The CCTV footage shows that the accused was not wearing the same shirt when he left as when he entered. The accused admits this fact but explains that it was hot and stuffy and he then took the top shirt off. Counsel for the State has submitted that this was a suspicious act on the part of the accused and that the probabilities are that the shirt was taken off because it was blood-stained. Unfortunately, the mother of the accused who allegedly washed the shirt could not testify due to ill health. In the circumstances blood stains on the shirt are not the only inference that the court can draw regarding the accused taking off his shirt without supporting evidence.

[93] It is also true that according to DNA evidence presented by Captain Mashogoane and Warrant Officer Ross-Marsh female blood was found on the bottom part of the boot flap inside the boot of the accused's vehicle. Lebogang Sathekge testified that he did not clean the bottom part of the boot flap and that is probably why traces of blood were found there. According to the accused there is no way N.'s blood could have been found inside his vehicle. He also explained that the previous owner of the vehicle was a female. In the bail application he had stated that it could have been his own blood. The fact is, however that the blood on the boot flap was not proved to be N.'s blood.

[94] The accused was confronted under cross-examination with the testimony of witness, Tsoari, Mfanafuthi, Julia Mokoena and Lebogang Sathekge. He was invited to explain why people who were either his friends, relatives, acquaintances or even strangers would conspire to have him implicated in the commission of serious crimes but he could not present the court with a satisfactory explanation in that regard.

[95] A yellow glove is one of the items that were recovered from N.'s house and it is visible in exhibit C. It was identified as exhibit B1 by Captain Mashogoane when he

testified and presented a DNA report. A similar glove was also found and identified as B2. Captain Mashogoane testified that he found the accused's touch DNA inside the glove B1 and N.'s blood on glove B2. The accused testified that he never wears gloves and that he had never worn the gloves that were found inside N.'s house. He was unable to explain how his DNA landed inside the glove B1.

[96] The state also led evidence about the behaviour of the accused during or about the time of N.'s disappearance. During March 2012 he was employed at Unitrans Pick 'n' Pay, Longmeadow. He was on and off work from March 2012 until he ended up not going back to work after 14 April 2012. As a result, he was dismissed in his absence. Further, on his own version it appears that he disappeared for a while after the incident not to be found by the police because he was afraid of them. This supports Colonel Senona's evidence to the effect that notices were distributed via the media with a reward for information regarding the whereabouts of the accused. He admitted that during the time he was not residing with his parents in Vosloorus where he was normally resident but with his uncle in Katlehong. The question is what prompted the abnormal behaviour? If the accused was innocent, why did he go and hide at his uncle's place?

[97] The accused called witnesses, Miss Shezi, Ayanda Dlamini and Malusi Gwala. They did not advance his case any further. If anything some of them tended to dent the credibility of his case. According to Miss Shezi, the accused was lying to her since 2011 pretending that he had broken-up with N.. According to Malusi Gwala, the accused called N. on the morning of 4 March 2012 upon realising that he did not have the keys to enter the house but N.'s phone was off. This is a direct contradiction of what the accused said in this regard. He could not phone because his battery was flat.

[98] The defence challenged some of the evidence and images presented regarding CCTV

footage by Mr Kevin Hazel recorded on exhibit TT on 1 March 2012 at 14h33 and 2 March 2012 at 18h25 regarding the exit and entrance side at the security gates of Arundo Estates. The court went on an inspection-in-loco and found that the images portrayed on 1 March 2012 at 14h33 as well as on 2 March 2012 at 18h25 are in fact images of the exit side. The court also observed the pipe as is appearing on the images on1 March 2012 at 14h33 as well as on 2 March 2012 at 18h25 are on the exit side. The court also observed a faded arrow on the inside of the property on the exit side with the point of the arrow pointing to the left, which is in line with the evidence of Mr Hazel who testified regarding the arrow point pointing in the wrong direction as a person cannot turn left after exiting as it is a cul-de-sac in that direction. The challenge to his evidence by the defence was therefore found to be erroneous and unfounded.

[99] The accused did not present the image of a reliable witness in the witness box. He tended not to give direct answers to questions and was evasive. The accused is an intelligent person but he was prone to give long-winded answers when it was not necessary to do so. He contradicted himself on a number of instances in his evidence and he was prepared to challenge even what was clearly incontrovertible objective evidence. It would seem that he deliberately took the risk of giving false evidence in the hope of being acquitted.

[100] Counsel for the defence, Mr Tlouane has criticised the police for their conduct in not properly preserving the crime scene as required. The State, while conceding the correctness of the criticism has argued, and this was not disputed, that none of the item examined for DNA were shown to be contaminated. I accept that this is the correct statement of the position with regard to those items. The defence has also made submissions regarding some contradictions between some state witnesses. I have examined these and found them to be non-material. By way of example, the contradiction between Oliver and Sphelele regarding the boxer shorts and khaki pant (exhibits 2 and 3) is not material because the fact that those clothing items were worn by Oliver on 4 March 2012 was not disputed by the defence.

[101] As far as the contradictions are concerned, it is trite that:

> " There is no obligation upon the State to close every avenue of which may be said to be open to an accused. It is sufficient for the State to produce evidence by means of which such a high degree of probability is raised that the ordinary reasonable man, after mature consideration, comes to the conclusion that there exists no reasonable doubt that an accused has committed the crime charged."

See **S v Phallo and Others** 1999 (2) SACR 558 at 559 a-b.

[102] Where there are two mutually destructive versions presented to the court it is not sufficient for the court to be only satisfied that the version it accepts is true and the other false.

> *"[I]t is quite impermissible to approach a case thus: because the court is satisfied as to the reliability and the credibility of the State witnesses, that, therefore, the defence witnesses, including the accused, must be rejected. The proper approach in a case such as this is for the court to apply its mind not only to the merits and*

*demerits of the State and defence witnesses but also to the probabilities of the case. It is only after so applying its mind that* a *court would be justified in reaching* a *conclusion as to whether the guilt of an* accused has been established beyond all reasonable doubt."

See **S v Singh** 1975 (1) SA 227 (N).

[103] In **casu,** I have given attention to the detailed criticisms of the evidence of the state witnesses. I have evaluated them in the context of the entire body of evidence before the court and assigned appropriate weight to them in the light of all the evidence and inherent probabilities and improbabilities of the case. Where caution was needed, it was exercised. By way of example, I have had to apply the cautionary rule to the evidence of Oliver in those respects in regard to which he was a single witness. I have also not placed reliance upon evidence for the State which might not be accurate such as the statement allegedly made by the accused when he was being assaulted at Arundo Estates. I have ruled that statement inadmissible.

[104] In the evaluation of evidence the correct approach was enunciated in the case of **S v Hadebe and Others** 1997 SACR 641 at 645 h - i as follows:

*" (T)he approach which commended itself in Moshephi and Others v R (1980-1984) LAC* 57 *at* 59 *F - H seems appropriate in the particular circumstances of the matter:*

*'The question for determinations is whether, in the light of all the evidence adduced at the trial, the guilt of the appellants was established beyond reasonable doubt. The breaking down of* a *body of evidence into its component parts is obviously* a *useful aid to* a *proper understanding and evaluation of it. But, in doing so, one must guard against* a *tendency to focus*

*too intently upon the separate and individual parts of what is, after all, a mosaic of proof 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.'"*

[105] Having regard to the complete picture that emerges from the tapestry of all the evidence and more particularly the evidence of Oliver Matlala, the objective expert evidence such as that contained in exhibits TT, K1 and K regarding the CCTV footage, exhibit G regarding DNA evidence, the cellular communication data charts and maps, and having weighed this against the evidence of the accused I have no hesitation in coming to the conclusion that the State has proved its case beyond reasonable doubt. I have also concluded that the version presented by the accused is not only not reasonably possibly true but that it is false.

[106] The evidence shoes that the accused, having been partly resident at N.'s house knew of the CCTV cameras at the security gates of Arundo Estates. He was aware that he would have to explain his ingress and egress on the morning of 4 March 2012. He decided however, that he would have to keep himself out of N.'s house at all costs at that critical time for purposes of his explanation with the hope that he would, to use a colloquial phrase, leave the albatross on Oliver's neck. He has come to court with what I can only

refer to as the most implausible explanation which is riddled with improbabilities and which, in my view, amounts to nothing but a tissue of lies.

[107] In the result the accused is found guilty as charged on all counts.

**Sentence**

[108] The accused has been convicted of very serious crimes. Even though the body of the deceased has not been recovered with regard to count 3 of murder it is quite apparent from evidence before this court that the way her life was ended was quite vicious. The blood on the bed, the blood on the glove and the chaotic state in the house is evidence of the violence that must have occurred during or just before her life was terminated.

[109] Even the violence meted out in count 1 and 2, even though lesser than in count 3 is indicative of a mind that was bent on destruction on that early morning of Sunday 4 March 2012. The intention seems to have been; no one is going to be spared. The attacks were totally unprovoked and they took the victims by surprise.

[110] Mr Tlouane has addressed the court on mitigation of sentence and has made reference to the accused's personal circumstances which the accused has testified about. The accused is a 33 year old male.

He was 30 years old at the time of the commission of the offence. He is not married but is a father of two boys who live with their grandmothers in KwaZulu Natal. He was employed at Unitrans, Longmeadow but has been unemployed since his arrest. He was then earning about R 12 000.00 per month. He is now self-employed buying and selling goods. He has registered a company which earns him on average R15 000.00 per month. He supports his young children and his pensioned mother. The accused has stated that he cannot express any remorse for crimes he did not commit. His counsel, Mr Tlouane has

therefore expressed an inability to make any submissions regarding any substantial and compelling circumstances due to the stance taken by the accused. Counsel for the State submits that the accused's personal circumstances are ordinary circumstances which do not amount to substantial and compelling circumstances.

[111] I have considered the personal circumstances and other factors outlined by the defence counsel. I have weighed the possible cumulative effect thereof, but in my view those do not amount to substantial and compelling circumstances that could persuade me to deviate from the minimum sentences prescribed by law.

[112] Both the State and defence counsel accept the applicability of the provisions of section 51 (1) of the Criminal Law Amendment Act 105 of 1997, which provides for a minimum sentence where an accused is convicted of an offence referred to in part 1 of schedule 2.

[113] The crimes committed in this case would appear to be planned - due to the methodical manner in which they were executed. The accused knew that he would most likely find the victims asleep and he knew who he would attack first and he must have had a purpose to somehow get Oliver out of the way and then execute the rest of the plan.

[114] The cold-blooded and deliberate manner in which they were carried out exacerbates the heinous nature in which especially count 3 was executed. The manner in which the body of the deceased has been successfully concealed thus far indicates the meticulous planning of a seriously criminal mind.

[115] The killing of a human being is usually followed by devastating consequences both emotional and otherwise. It creates victims also of the grieving next of kin. Their grief is multiplied when the body of the deceased is concealed and they cannot even mourn

properly, say their goodbyes and create a space for closure. This therefore constitutes an act of extreme callousness and cruelty not only to the victim but also to the family.

[116] Taking these factors into account, the court in passing sentence has to give effect to both the deterrent and retributive aspects of punishment in protecting the interests of society.

[117] In **S v Malgas** 2001 (1) SACR 469 (SCA) (2001 (2) SA 1222; [2001] 3 AllSA 220) at 470 d the court held:

> " The specified sentences are not to be departed from lightly and for flimsy reasons. Speculative hypotheses favourable to the offender, undue sympathy, aversion to imprisoning first offenders, personal doubts as to the efficacy of the policy underlying the legislation, and marginal differences in personal circumstances or degrees of participation between co-offenders are to be excluded.

[118] Having considered the evidence and submissions by counsel, I have come to the conclusion that the appropriate sentence is as follows:

118.1 On count 1 of assault with intent to do grievous bodily harm the accused is sentenced to a term of five (5) years imprisonment.

118.2 On count 2 of assault the accused is sentenced to a term of twelve (12) months imprisonment.

118.3 On count 3 of murder the accused 1s sentenced to a term of life imprisonment.

118.4 On count 4 of theft the accused is sentenced to a term of two (2) years imprisonment.

118.5 On count 5 of malicious injury to property the accused is sentenced to a term of twelve (12) months imprisonment.

118.6 It is further ordered that the sentences in counts 1, 2, 4 and 5 will run concurrently with the sentence in count 3.

118.7 The accused is declared unfit to possess a firearm in terms of the Firearms Control Act of 2000.

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**S. A. M. BAQWA**

**JUDGE OF THE HIGH COURT OF SOUTH AFRICA**

**GAUTENG DIVISION, PRETORIA**

Heard on: 05 October 2015 - 13 November 2015

Delivered on: 13 November 2015

For the State: Adv. C. Kruger

Adv. N. Maphalala

Instructed by: The State Attorney

For the First Respondent: Adv. K. P. Tlouane

Instructed by: Legal Aid