

REPUBLIC OF SOUTH AFRICA

**IN THE HIGH COURT OF SOUTH AFRICA
SOUTH GAUTENG HIGH COURT**

CASE NUMBER : SS69/2022

REPORTABLE: NO
OF INTEREST TO OTHER JUDGES: NO
REVISED
10/2/2022

In the matter between:

THE STATE

and

MSHUBI LUCKY
MAMBILO THABO

ACCUSED 1
ACCUSED 2

JUDGMENT

DOSIO J:

INTRODUCTION

[1] The accused are arraigned on six counts. The counts are as follows, count 1 is a count of murder read with the provisions of s51(1) of the Criminal Law Amendment Act 105 of 1997 ('Act 105 of 1997'). Count 2 is a charge of housebreaking with the

intention to commit robbery and kidnapping. Count 3 is a charge of robbery. Count 4 is a charge of kidnapping. Count 5 is a charge of attempted extortion and count 6 is a charge of defeating the ends of justice.

[2] In respect of count one the State alleges that on 22 April 2021 at 0[....] Phumla Mqashi, Lenasia South, the accused killed Naadira Vanker. In respect to count two, the State alleges that on the same date, the accused broke into the house of the deceased at number [....] Grosvenor Street, Flat number 4, Lenasia South, with the intent to commit the crime of robbery and kidnapping. In respect to count three the State alleges that on the same date, the accused assaulted the deceased and then with force and violence took from her a motor vehicle, a laptop bag with documents, a hand bag with her contents, as well as the deceased's cellular phone. In respect to count four, the State alleges that the accused deprived the deceased of her freedom of movement by means of force and transported her to 0[....] Phumla Mqashi in Lenasia South. In respect to count 5, the State alleges that on the same date the accused induced and threatened Mohammed Genner by demanding money from him and uttering the words "or someone will die".

[3] Prior to the accused pleading, the court apprised both accused of the provisions of the minimum prescribed sentence of life imprisonment in respect to count 1. Both accused understood. The court also apprised the accused of their right to have an assessor as count 1, is a charge of murder. Both accused elected to proceed without an assessor.

[4] Accused 1 is represented by Advocate Milubi. Accused 2 is represented by Advocate Monare. The State is represented by Advocate Le Roux. The accused understood all six counts. Accused 1 pleaded not guilty to count 1 and 5 and pleaded guilty to counts 2,3,4 and 6. Accused 2 pleaded not guilty to all 6 counts. Advocate Milubi made formal admissions in respect to counts 2,3,4, and 6. Advocate Monare made no plea explanation in respect to all 6 counts.

[5] The formal admissions in respect to count 2,3,4 and 6 were read out by Advocate Milubi. They are as follows:

That the accused has made these admissions freely and voluntarily in his sound and sober senses.

Count 2

That on 22 April 2021, and at or near [...] Grosvenor Street, Flat no 4, Lenasia South and within the magisterial district of Johannesburg Central, he, together with accused 2, unlawfully and intentionally opened the dining room window of the premises and entered the abovementioned residence of the deceased with the intention to commit the crimes of robbery and kidnapping. He admitted that they had no permission to do so, and knew at the time what he was busy doing was wrongful.

Count 3

That on the same date and place referred to in count 2 above, he was with accused 2 inside the flat of the deceased, when he grabbed the deceased in order to overpower her, thereby unlawfully and intentionally assaulting her. They tied her hands together to disable her. Accused 2 pushed a piece of cloth in her mouth to prevent her from screaming. They then carried her to her car outside, which is the vehicle referred to in Exhibit C before court. They put her on the back seat of her car, and drove away with the deceased to his place of residence, at No [...] Phumla Mqashi, Lenasia South. They also took the deceased' cell phone with them. Apart from the cell phone, Exhibit 1 (the laptop bag with the content), Exhibit 2 (the bag containing stationary), Exhibit 3 (the DVD's and notebook), Exhibit 4 (the deceased' handbag) and Exhibit 5 (the bag with the word Singapore printed on it), were also removed by them from the motor vehicle belonging to the deceased. He admitted that Exhibits 1 to 5 were later found inside his house by the police, and that it was taken with force and violence from the deceased, without her permission, and as a result that she was robbed of these items, as well as her motor vehicle. He abandoned the motor vehicle later that same morning in Ennerdale. He admitted that by doing so, he had the intention to permanently deprive the deceased of the motor vehicle, her cell phone, and Exhibits 1 to 5. He knew at the time what he was doing was wrongful, and that he was busy committing the crime of robbery.

Count 4

He admitted that he, together with accused 2, unlawfully and intentionally deprived the deceased of her freedom of movement by means of force, by overpowering her in her home, at the address referred to above, and tying her up as described above, and then transported her to the address referred to in count 1, and kept her there captive against her will, thereby committing the crime of kidnapping. He knew at the time what he was doing was wrongful, and he had no permission to do what he did.

Count 6

He admitted that on 22 April 2021, and at his place of residence, he and accused 2 decided to bury the body of the deceased in his back yard, in order to hide the deceased's body, so that it could not be found, and by doing so thereby unlawfully and intentionally defeating or obstructing the course of justice. He admitted that the result of this act was that the deceased was already in an advanced state of decomposition when she was found, which had the direct result that her cause of death could not be determined. He knew throughout these events that what he was doing was wrongful, and that he was busy committing the crimes listed in counts 2, 3, 4 and 6.

Accused 1 added that he was working as a security guard at the block of flats situated at No. [...] Grosvenor Street and that the deceased and her husband made certain complaints against him which resulted in him losing his job. He had no further income and this made him angry and vengeful towards the deceased and her husband.

[6] As regards accused1's plea of guilty in respect to count 2, I am convinced that accused 1 admits all the elements of the offence of housebreaking with intent to commit robbery and kidnapping. In respect to count 3, I am convinced that accused 1 admits all the elements for the crime robbery in that he assaulted the deceased and with force robbed her of her motor vehicle and cellular phone with the intention of permanently depriving her of her possessions. In respect to count 4, I am convinced that accused 1 deprived the deceased of her freedom of movement and that he admits all the elements for the crime of kidnapping. In respect to count 6, I am convinced that by concealing the body of the deceased, accused 1 admits all the elements of the defeating the ends of justice.

[7] The court is therefore required to determine the guilt of accused 1 in respect to the murder charge on count 1 as well as the attempted extortion charge on count 5 as well as all 6 counts arraigned against accused 2.

[8] At the inception of the trial formal admissions in terms of section 220 of the Criminal Procedure Act 51 of 1977 (hereinafter referred to as the "Criminal Procedure Act") were handed in by agreement and marked as exhibit A. The contents of exhibit A are:

1. Exhibit B - The photo album marked as exhibit B which states that on 26 April 2021 Sgt G Ndzendevu, an official draughtsperson and photographer in the South African Police Service, attended to the crime scene at No. [...] Grosvener Street, Lenasia South in her official capacity. The said crime scene was subsequently photographed by her as per the attached photo album (photos 1 – 21) together with the key thereto. That exhibit B is a correct reflection of the condition of the flat on 26 April 2021.
2. Exhibit C – that on 28 April 2021 W/O JR Nkoatse, an official draughtsperson, photographer and forensic fieldworker in the South African Police Service, attended to the crime scene at No. [...] Phumla Mqashi Squater Camp, Lenasia South in his official capacity. The said crime scene was subsequently investigated and photographed by him as per the attached photo album (photos 1 – 64) together with the key thereto. That exhibit C is a correct reflection of the crime scene and the investigation that followed on the scene on the above mentioned date.
3. Exhibit D – That on 22 April 2021 Sgt Thabethe an official draughtsperson and photographer in the South African Police Service, attended to a scene next to No 27 Nephrite Street, Ext 5 Ennerdale, in his official capacity. The said scene was subsequently photographed by him as per the attached photo album (photos 1 – 10) together with the key thereto. That exhibit D is a correct reflection of the scene where the abandoned vehicle of the deceased which was found on the above mentioned date.
4. Exhibit E – The Post Mortem Report. That the person in Count 1 is the deceased referred to in the post mortem report DR 582/2021 Exhibit E, namely Naadira Vanker. That on 28 April 2021 Dr PJ Schutte performed a

post mortem on the deceased's body, and correctly recorded his findings on the prescribed form GW 7/15, Exhibit E referred to above. That the cause of death is reflected as "Could not be Determined". That the deceased sustained no further injuries which contributed to the cause of death from the moment when her body was discovered at the crime scene at No [...] Phumla Mqashi Squater Camp and transported to the mortuary in Sebokeng, Vereeniging on 28 April 2021.

[9] Additional exhibits were handed in, namely:

Exhibit F, which is the notice of rights of accused 2.

Exhibit G, which is the cell register and occurrence book in respect to accused 2.

Exhibit H, which is the pro-forma document in respect to accused 2.

Exhibit J, which is the confession of accused 1.

Exhibit K, which is the confession of accused 2.

Exhibit L, which is the guilty plea of accused one on counts 2,3,4 and 6.

[10] Both accused confirmed the admissions which were marked as exhibit A.

THE EVIDENCE

[11] The following witnesses were called by the state, namely Mr Mohammed Genner, Sergeant Mofokeng, Dr Shakeera Holland, Colonel Dhlamini, Captain Maremane and Sergeant Mofokeng. The State also led the evidence of sergeant Mofokeng and captain Maremane in respect to a trial within a trial in respect to the confession of accused 2. At the end of the State's case both accused came to testify.

Mohammed Genner

[12] This witness testified in respect to count 5 which is a charge of extortion. He stated that the deceased is his step sister. He stated that on 22 April 2021 he dialled the deceased's cell phone number and a man by the name of Mike picked up. This witness asked the man what he was doing with the deceased's phone to which the man replied in English that his wife had worked for the deceased and the deceased didn't pay her so he wanted money or "someone would die". This witness said he didn't know what the other man was talking about. This witness managed to ask this

man where he was from and the man replied he was from Johannesburg. The man then cut the call. This witness was unable to get through to the deceased's phone as it just rang. This witness then phoned his father to tell him what had happened. This witness stated he had never seen the two accused before court.

Sergeant Mofokeng

[13] This witness testified that he is the investigating officer in this matter and that on 27 April 2021 he was present when accused 1 was arrested at his premises. He testified that photo 6 is the grave where the deceased was found. He described the 6 real exhibits which were all found in accused 1's house, namely:

Exhibit 1 was a grey laptop bag where the documents of the deceased and her children's passports were found inside accused 1's house.

Exhibit 2 was the deceased's bag with her belongings

Exhibit 3 was a DVD and CD's and the deceased's note book

Exhibit 4 was a pink handbag belonging to the deceased.

Exhibit 5 was another bag belonging to the deceased with a further bag in it with the words "Singapore" written on it.

Exhibit 6 was a wallet which belongs to accused 1.

[14] This witness testified that he was also involved in the arrest of accused 2 on 17 May 2021. When he arrived at Phumla Mqashi, accused 2 had already been apprehended and was being assaulted by angry members of the community. This witness took accused 2 away from the crowd and noticed that accused 2 was bleeding on his head. Accused 2 was then taken to the hospital so that his injuries could be attended to. On 18 May 2021 accused 2 made a statement to Captain Maremane which he was of the view amounted to a confession. The admission of this statement was objected to and that is when the trial within the trial was held in respect to the statement of accused 2.

[15] I found that the confession made by accused 2 was admissible and that accused 2's Constitutional rights were not infringed during his arrest or by making the statement. I refer to the detailed judgment given in this regard. Although the order to rule the confession admissible was an interlocutory finding, I now confirm that finding.

[16] Sergeant Mofokeng was recalled and he stated that he went to the premises of accused 1 because he received information that the belongings of the kidnapped person are in the premises of accused 1. At this stage he still did not know the whereabouts of the deceased. They were 8 officers who went to the house of the accused 1. They went at night. The house was pointed out by an informant. They knocked and accused 1 opened up for them. They then requested to search his premises and he gave them permission. That is when the 6 real exhibits were found inside the shack. When they were about to leave the premises of accused 1, accused 1 called Colonel Nama aside and told him that the lady was by the corner. They couldn't see what he was pointing, it is then that accused 1 said he had buried the deceased and he pointed where. That is when they found the grave that had been recently covered. The deceased was exhumed. Accused 1 initially said he knew nothing about the real exhibits and said accused 2 had brought them. Later accused 1 confessed by saying he was together with accused 2 when this was done.

The post-mortem report

[17] Dr Schutte was the pathologist who had completed the post-mortem report. As regards why this witness was not called, the reasons afforded by the State were that Dr Schutte is 90 years old and that he was 89 years old when he completed the post-mortem report. The State advocate spoke to Dr Denver who is the director at the Forensic Pathology unit of the Vaal Triangle who informed the State advocate that Dr Schutte's mobility was severely impaired so much so that Dr Denver saw it a real challenge to get Dr Schutte from his house into the car and to court. Accordingly, the State Advocate phoned Mr Denver and asked him to give her a name of another pathologist who could give an expert opinion on the post-mortem report compiled by Dr Schutte. The State advocate was referred to Dr Holland with whom the State advocate then consulted. Having decided that Dr Holland could give an expert medical opinion on the post-mortem completed by Dr Schutte, this witness was then called.

Dr Shakeera Holland

[18] This witness testified that she had a degree in medicine and surgery obtained from the university of Cape Town. She obtained a masters in forensic pathology at

the university of the Witwatersrand in 2015. She has been working at the Special Forensic Pathology department since 2007. She is currently the head principal head specialist for the Diepkloof and Sebokeng cluster and has been in this position since 2019.

[19] This witness was asked by the State advocate as to certain observations made by Dr Schutte with specific reference to page 5 of the post-mortem report which states that Dr Schutte stated that he had no background information as regards the circumstances that the deceased was found in and which eventually led him to come to the conclusion that the cause of death could not be determined.

[20] The State advocate accordingly afforded background information to Dr Holland stating that the deceased was buried on 22 April 2021 and remained buried until her body was exhumed on 27 April 2021. The body was at this stage in an advanced stage of decomposition which led Dr Schutte coming to the conclusion that he could not determine the cause of death of the deceased.

[21] The State advocate advised Dr Holland that the evidence showed that when the deceased was kidnapped, her hands were tied behind her back and a piece of material cloth was placed in her mouth to prevent her from screaming. The State advocate accordingly sought an opinion from Dr Holland as to what would be the result if a foreign object like a piece of cloth was inserted in the deceased's mouth.

[22] Dr Holland testified that what was being described was called 'gagging' or 'gap smothering' which means that when a cloth is put into one's mouth it completely blocks the mouth. Due to the hands being tied behind the victim's back, the victim would be incapacitated and unable to remove the cloth. Accordingly, the only way for a victim in such a situation to breathe would be through one's nose. This witness continued to explain that the nasal passages are very small and what happens is that the nasal passages become blocked due to an accumulation of mucous or other fluids. This would happen especially if a victim was crying. This witness stated that the crying will hasten the blockage in the nose. As a result, due to the nasal passages becoming blocked, the victim would not be able to breathe and would die from a lack of oxygen. This witness stated that if the gag or cloth is forced far back

into the mouth it can block the nasal pharynx which is that space where the nose goes into the back of the throat and the trachea. In that way it also blocks the person from being able to breath.

[23] Dr Holland added that from the contents of paragraph 14 of the post-mortem report, the deceased was suffering from some heart abnormality. The large blood vessels to the heart were narrowed which would compromise the blood supply to the heart. This witness stated that anyone with this form of condition would not react well to any form of trauma as compared to someone with a normal heart. Accordingly, Dr Holland regarded this as a contributing factor relating to the cause of death. However, this witness added that even a person with a healthy heart who was kept under these same conditions and for the same period would still die from gagging. The contributing factor in the matter *in casu*, would mean that the narrow blood vessels would have meant the victim would have died faster. This witness stated that if it was a cloth blocking the nasal pharynx then the death would have occurred faster than if just the nasal passages were blocked. The death would have ensued between minutes to hours.

Colonel Dhlamini

[24] This witness came to testify about the confession he took down from accused 1. It does not seem that this confession is in dispute. The content of the confession states that accused 1 explained in detail how he worked at the flats where the deceased lived as a security guard and that three months back he had been accused by an unknown Indian female that he was sleeping on duty and that he was allegedly not opening the gate for her husband. Accused 1 was then fired and this made him extremely angry because his kids were suffering as they were starving at home. He 'organized' with accused 2 to rob the husband of the deceased. He said his intention was to grab the husband and demand money. They then got in through the window of the flat where the deceased was. He overpowered her, while Accused 2 was assaulting the children. They tied her up with plastic rope and accused 2 pushed a dish cloth in her mouth. They both then carried the deceased to her car and put the deceased on the back seat of the car. Accused 1 was driving and accused 2 opened the gate at the deceased's premises. They then drove off to Phumla Mqashi in Lenasia South to accused 1's house. Accused 1 left the deceased

and accused 2 at his house, so that accused 1 could go and get rid of the motor vehicle. Upon his return to his house, he found accused 2 sitting outside. They smoked dagga before he entered into the room where they had left the deceased earlier. He said to the deceased that she must not make a noise or he would kill her. He then discovered that she was dead. He tried to resuscitate her, without success. They then decided to bury the deceased. Accused 2 took the bank cards of deceased alleging that he would get someone to get the pins to the deceased's bank cards. Accused 1 stated that it was not his intention to kill the deceased as he only wanted money.

[25] Colonel Dhlamini confirmed exhibit J as being a true reflection of the statement made by accused 1. He did not add to, or leave anything out from what accused 1 conveyed to him.

Captain Maremane

[26] This witness is a captain in the SAP and he was responsible for taking down the confession of accused 2. He read out the statement of accused 2. Captain Maremane also did not add or leave anything out from what accused 2 conveyed to him.

[27] In essence accused 2 set out in detail the sequence of events that unfolded that morning. Accused 2 stated he arrived at 04h00 and waited for the husband of the deceased to leave with the bakery truck before they broke into the flat. Once inside the flat, accused 1 went straight to where the car keys were hanging. They then went straight to the bedroom, where accused 1 grabbed the deceased. They then tied her up. Accused 1 was the one who placed the cloth inside the deceased's mouth. They placed her in her car and drove off with her to accused 1's place. The deceased was placed inside the shack. Accused 1 left with the deceased's car. He returned between 08:00 and 09:00 and indicated that he abandoned the car around the Vereeniging area. Accused 1 had a pen and piece of paper with him. They went into the shack. Accused 1 indicated that he wanted the pin numbers to her cards. They then discovered that she was dead. Accused 1 tried to 'wake her up', to no avail. He left, but later returned and helped Accused 1 to bury her. Accused 1 gave him R150 cash for the job they had done.

[28] This ended the State's case.

Accused 1

[29] He testified that he was working as a security guard at a set of flats where he was employed for 4 months. His employment contract was terminated in the month of April 2021. He was accused of stealing diesel out of the trucks by the tenants at these flats as well of being accused of sleeping on duty. This led to the termination of his employment and he could no longer provide for his family. He tried to look for another job but could not find one. This led to him doing what he did. He found someone to help him carry out this deed against the tenants who did this to him. He wanted these tenants to give him money and then he would leave them.

[30] The accused stated that on the day of the incident he arrived with accused 2 at 06h00 and they opened the window and entered through that window into the flat of the deceased. He found the 4 children of the deceased asleep. They went straight to the deceased and grabbed her. She started screaming so they took a cloth and stuck it into her mouth. The children woke up and accused 2 grabbed them. They tied the hands of the deceased behind her back and also tied her legs together. They then took the deceased away and locked the children in the house. They put the deceased into the car that belonged to the deceased and drove to the house where accused 1 lives. When they arrived at accused 1's house, his wife and kids were there. He told them to go visit his wife's sister. His wife saw the deceased and her car and accused 1 told her that the deceased was the person disrespecting him as the deceased did not want to pay him his money. Accused 1 says he removed the cloth from her mouth but she made noise so he put it back in her mouth. The deceased was put in his house. He put the deceased on the floor and took out a blanket and covered her. He saw the deceased moving but he thought to himself that she was just trying to loosen herself, but he knew that she would not be able to break loose. He did not think of removing the cloth from her mouth as he was in a hurry to dispose of the vehicle. He believed that because the deceased's nose was not closed she would be able to breath. The accused states he never spoke to the deceased before he left. He only spoke to the deceased when she was already dead and he apologised to her and said to her that this was not his intention.

[31] The accused stated that he went to dispose of the vehicle at Ennerdale. On route back after dropping off the vehicle, someone called on the deceased's cell phone and he answered the call. The person who phoned asked him who he is and where was he taking that person and where was he. The accused replied he was in Johannesburg and then that caller kept phoning back. That is when the accused threw the cell phone out the window and it broke. It took the accused an hour and a half to get back to his house. When he arrived at his house, accused 2 requested him to smoke dagga with him which he did. Accused 1 then entered the room where the deceased was and he had a pen and paper with him in his possession as he wanted to get the pin numbers of the deceased's credit cards. He then removed the blanket and noticed the deceased was very quiet. He tried to move her. That is when Thabo told her him the deceased was already dead. Accused 1 then started to pump her on her chest to help her breath. Accused 1 says he was very confused and he then spoke to the deceased asking her to forgive him and that it was not his intention for her to leave her children behind. Accused 1 then went to buy liquor and because he was afraid that the community would find the deceased, they decided to bury the deceased in the garden of his shack at around eight that evening. He did not know how the deceased died but he assumed it could have been due to the cloth in her mouth.

[32] The accused 1 admitted that he did speak to someone on the deceased's cell phone, however he denied that he said "someone would die". He also denied telling Colonel Dhlamini in his confession that he told the deceased not to make a noise otherwise he would kill her. He states that he told Colonel Dhlamini that he would assault her if she made a noise and not that he would kill her.

[33] Prior to ending his evidence in chief accused 1 stated that he wanted to apologise to the family of the deceased as it was not his intention to kill the deceased.

[34] During the cross examination by accused 2's advocate, the following information was elicited, namely:

1. That when they were at the deceased's flat, as soon as the deceased started making a noise he asked accused 2 to get a cloth.
2. That when accused 2 came back with the cloth, it was accused 2 who put the cloth in the deceased's mouth as accused 1 was busy fastening the deceased's hands behind her back.
3. That when he left to dispose of the deceased's car, accused 2 was left behind to look after the deceased.

Accused 2

[35] Accused 2 started his evidence by denying the charge of attempt to commit extortion. He said he was not present when his co-accused received a phone call. Accused 2 further explained that accused 1 approached him to help him with a job that needed to be done. Although he initially indicated that accused 1 never explained what kind of job they were supposed to do, he later testified that accused 1 said there was an Indian male who hired him, but didn't want to pay him. Accused 1 said that they would grab him and demand money. He said he agreed to that, because he needed money. Accused 2 then described how they entered the flat through the window, which accused 1 opened with a wire. They went to the bedroom and found the deceased. Accused 2, grabbed the deceased and accused 1 tied her up with a rope. Accused 1 instructed him to fetch a cloth, which he did. Accused 1 said he must put it into her mouth. When he was too slow according to accused 1, accused 1 put the cloth into the deceased's mouth himself. The deceased was then put into the backseat of her car. Upon the instruction of accused 1, he opened and closed the gate as they were leaving. The cloth was still in the mouth of the deceased, and they never tried to remove it, because they were afraid that she would make a noise.

[36] They drove to the house of accused 1, where the deceased was placed in one of the rooms. Accused 1 took certain items out of the car of the deceased, and then left with the deceased' car. He never entered the room where the deceased was, whilst accused 1 was gone.

[37] After an hour and a half had lapsed, accused 1 returned. They smoked dagga. After that accused 1 went inside the room where the deceased was kept, because

he said he wanted the pin to her card. He was at the door. Accused 1 then shook the deceased, and she was not moving. He then informed accused 1 that the deceased was dead. Accused 1 was trying to resuscitate her. The cloth was still in her mouth. Accused 1 seemed to be in shock. Accused 1 then came up with the plan to bury her. They first had a few beers. They then buried the deceased in No. 1's backyard. He again stated that he did not kill the deceased. Upon being asked what had killed the deceased he said it might have been the cloth. His words in this regard were that "It was said she could not breathe properly". He further testified that although he was aware of the cloth in her mouth throughout the whole sequence of events, he was not aware of any damage the cloth may have caused to the deceased and it was never his intention to kill the deceased. At the end of his testimony he apologized to the family of the deceased.

EVALUATION OF THE EVIDENCE

[38] The witness Mohammed Genner impressed the court. He does not know either of the two accused and there is no reason for him to have said that the man on the phone had demanded money or "someone would die". When confronted by accused 1's counsel with the version that accused 1 admits that he answered the deceased's phone but that he denies that he asked for money, this witness was adamant that accused 1 had asked for money.

[39] The witness sergeant Mofokeng impressed this court. There is no reason for him to false incriminate either accused 1 or 2.

[40] Dr Holland impressed this court. During cross-examination she repeated her version that the heart condition alone would not be the cause of death, instead it would be a contributing factor. Counsel for accused 2 put it to her that it was not possible to determine a reliable cause of death, upon which she responded that based on the background given to her in her evidence in chief she had expressed her opinion.

[41] Colonel Dhlamini impressed this court. It is clear that he went through all the correct procedures before he took down the statement of accused 1. During cross-examination accused 1's counsel put it to this witness that accused 1 never uttered

the following words namely “if she makes noise I will kill her”, to which this witness stated accused 1 had told him that..

[42] Accused 1 although he made a confession and also testified in court, there are aspects that differ from his confession as opposed to his evidence in chief. This relates to the fact that during cross-examination he stated that the deceased never saw him as he was wearing a mask covering his face. When the State advocate asked accused 1 why he never mentioned this before accused 1 answered by saying “I was never asked about it.” In addition, no mention is made in the confession that accused 1 was going to release the deceased and neither is any mention made of this by accused 1 in his evidence in chief.

[43] As regards accused 2’s version, during cross examination by the counsel for accused 1, he was confronted with the aspect in his confession (at line 14 on p 7 of his confession [Exhibit K]), where he stated that accused 1 had grabbed the deceased, where as in his testimony in chief he stated that it was he, accused 2, who grabbed the deceased. His answer to this was that it was in fact accused 1 who grabbed the deceased first. He could not explain this discrepancy. The version given in his evidence in chief that he was too slow to put the cloth into the deceased’s mouth and that accused 1 then shoved the cloth into deceased’s mouth was never mentioned in his confession. Accused 2 was asked during cross-examination whether he was wearing a mask as well and he stated he was. This is also a recent fabrication as it was not mentioned in the confession of accused 2 and it was never mentioned in the evidence in chief of accused 2.

[44] Although accused 2 initially disputed the contents of exhibit K, he admitted during cross-examination that the contents of exhibit K were indeed correct. He also stated that he went to get a big dish cloth that was put into the deceased’s mouth. As a result of accused 2 admitting exhibit K, I am convinced that accused 2 admits all the elements for the crimes on count 2,3,4 and 6 as well. Although accused 2, during cross examination by the State, testified that they planned to extort money from their victim, it is clear that when the call came through on the deceased’ cell phone, accused 2 was not part of those actions by accused 1.

[45] There is a contradiction between the evidence of accused 1 and accused 2 in that accused 1 stated that at one point he tried to remove the cloth from the deceased's mouth, yet accused 2 during cross –examination states he never saw accused 1 doing this. This is an important contradiction which the court will deal with at a later stage. Accused 1 in his confession states accused 2 mentioned that he knew someone who could get the pin codes for the deceased's bank cards yet accused 2 denied this.

Probabilities

[46] When considering a criminal case it is important to consider the totality of the evidence and then to assess the probabilities emerging from the case as a whole. The court must evaluate the evidence of the State and the defence.

[47] Although accused 1 states that it was not his intention to kill the deceased, there are certain aspects of his evidence which does not add up and which makes this lack of intention to kill somewhat obscure. Firstly, he admitted during cross-examination that he was very angry with the deceased and that he wanted to get back at her. He also admitted that if a person cannot breathe, that person will die.

[48] Accused 1 did not impress the court. If he was so afraid that the community would find the deceased at his house why did he bring her there in the first place, especially when he knew that because he had electricity in his house many people would come to use the electricity. This doesn't make sense. If it was merely accused 1's intention to get the pins in respect to the deceased's credit cards, then he could have kept the deceased hidden in the boot of her own car until he had obtained the pins of the credit cards and then dispose of the car. At least the community who were using his house would not have seen the deceased.

[49] Accused 1 admitted that at some point he heard the deceased was struggling to breathe and he removed the cloth, yet, he put it back. If it was not his intention to prevent her from struggling why did he put the cloth back. Apart from her making a noise in the car, no one would have heard her screaming except accused 1 and accused 2 who were in the car with her. At least for the duration of the car trip,

accused 1 could have removed the cloth from the deceased's mouth, especially since she was struggling to breathe and he noticed this difficulty to breathe.

[50] The whole issue of the pins and credit cards does not add up. In accused 1's confession he states that accused 2 took all the Capitec and ABSA bank cards as accused 2 alleged that someone would help him to get the pin codes. This version of accused 1 going to the deceased with a pen and paper was never in accused 1's confession and it was also never put to Colonel Dhlamini for his comment when he testified. It is easy for accused 1 to state that he went with a pen and paper to get the pin codes as the State cannot dispute that. However, considering the totality of the evidence, and even accused 2's version in this regard, this version is improbable as from accused 1's statement, accused 2 had contacts to get the pin codes anyway. In addition, during cross-examination accused 1 stated that his intention was for the deceased to phone her husband so that the deceased's husband could deposit the money, so this version of getting the pin codes makes no sense as he was going to get the husband to deposit the money anyway. In addition, what makes this version of accused 1 even more improbable is that this version of wanting to phone the deceased's husband was not in his confession and from his evidence, it is clear that he also never tried to phone the deceased's husband. In fact, from accused 1's version he threw the deceased's cell phone out the window whilst returning to his home, therefore, even before returning home and even before being made aware of the deceased having died, he blocked all potential ways of phoning the deceased's husband as he no longer had her phone. When asked by the State advocate why he threw the phone away accused 1 replied it was "because it kept ringing". Surely the more it rang, the more accused 1 could ask for money. If accused 1 only wanted money, then why dispose of the car in Ennerdale. From accused 2's confession it is clear that accused 1 wanted to sell the car. Yet nothing is mentioned by accused 1 if he indeed did sell the car or not. If indeed it was accused 1's version that he merely wanted money and then he would release the deceased then what was the necessity to dispose and abandon the car in Ennerdale.

[51] The version of Mr Genner of accused 1 stating that he wanted money or someone would die is exactly what is stated in accused 1's confession. Accused 1's later version during cross examination that he was forced to tell Colonel Dhlamini

that he wanted money or someone would die happened when he was asked to go and point out where he had disposed the deceased's cell phone. This version was never put to Colonel Dhlamini and the court accepts it is a recent fabrication and the court rejects it as false. This court accepts the version of the State that accused 1 did indeed attempt to extort money from Mohammed Genner and that accused 1 did use the words "or else someone will die".

[52] Although accused 1 states that it was never his intention for the deceased to die, he admits that he left the deceased covered with a blanket and a cloth in her mouth for an hour and a half, especially when he was aware she was struggling to breathe. He saw the deceased was moving but he believed she was merely trying to loosen herself. He was in too much of a hurry to dispose of the car. This is not the actions of someone who is concerned about a victim's health or well-being. It is more the actions of someone who really does not care at all what will happen to the deceased.

[53] Accused 1 states that the plan was after he had obtained the money he was going to release the deceased. This does not make sense. The deceased would have known where the accused lived and would have alerted the police to have him arrested. Accused 1's version is that "I would go with her later that day and accompany her back home". This does not make sense. If the deceased was making noise before, she would surely make more noise when being accompanied by the accused back to her house. In fact, the deceased would have alerted all the people in Phumla Mqashi that accused 1 was her captor. The fact that accused 1 did not want the community to know the deceased was in his house and later is prepared to walk through Phumla Mqashi with the deceased does not make sense at all. This version of accused 1 became even more unrealistic as he stated that the deceased would not be able to point out his house as the deceased would be blindfolded. Surely the community of Pumla Mqashi would see that and would enquire what was happening and if the deceased was untied, as accused mentioned in cross-examination she would then surely alert the community. Accused 1 could have driven the deceased back home in her own car rather than walk with her back home and could still have blindfolded her. The fact that the deceased's cell phone as well as her car were disposed of are all actions to suggest that there was never an

intention to release her. This exculpatory version of accused 1 of wanting to release the deceased is rejected as false and not reasonably possibly true.

[54] This court cannot forget that it is due to an informer that accused 1 was tracked down. Accused 1's utterings of remorse made to the deceased stating that he was sorry and that it was never his intention to kill the deceased is purely an attempt to soften the very harsh, planned and premeditated capture and torture of this deceased. Had the informer not pointed out accused 1, the crimes committed by both accused would have remained concealed. It is important to note that accused 2 does not mention that accused 1 went up to the deceased and stated he was sorry after accused 1 found out the deceased was dead.

[55] I would like to now turn to the cause of the death of this deceased. As stated *supra*, accused 1 says he at one point tried to remove the dish cloth from the deceased's mouth. Accused 2 states he never saw this. Accused 2 confirms that he also heard the deceased battling to breathe and also that she was crying. It is common cause that this dish cloth was in the deceased's mouth for a considerable amount of time. Criticism has been levelled by the defence against the State's decision to lead the evidence of Dr Holland in the absence of a statement being obtained from her. There was nothing preventing the defence from getting its own expert opinion as to what the possible cause of death was, based on the available background information.

[56] The counsel for accused 1 argued that the evidence of Dr Holland must carry little weight in that she aligned her findings with the version of the State. As stated *supra*, both accused stated the mouth of the deceased was closed with a dish cloth and accused 2 saw the deceased crying. Therefore, their version corroborates Dr Holland's opinion that in such circumstance the deceased would have suffocated. Due to no countervailing medical evidence, the only evidence before this court is the opinion of Dr Holland as to a possible cause of death. Dr Holland is highly qualified and experienced and the court accepts her evidence as correct.

[57] It is true that no one was called to explain why Dr Schutte could not testify, however, this court doubts that the address by the State advocate that Dr Schutte

who is 90 years old and that he was unable to walk would have been any different had the investigating officer come to explain exactly the same set of facts. As stated supra, there is no countervailing medical evidence by the defence. It was argued by accused 1's counsel that exhibit E could have been given to Dr Schutte for him to comment and depose to an affidavit so that he could possibly explain his inability to determine a cause of death. It is important to note that on the basis of an affidavit no cross-examination would have taken place. Instead, with the presence and testimony of Dr Hollander both defence counsels were able to fully cross-examine Dr Hollander, which is a better option than merely handing in an affidavit of Dr Schutte

[58] I find no problem with the expression of a medical opinion as to the possible cause of death which was expressed by Dr Holland. Dr Holland stated that when a cloth is put into one's mouth it completely blocks the mouth and accordingly, the only way for a victim in such a situation to breathe would be through one's nose. Due to the small size of nasal passages if the nasal passages become bogged due to an accumulation of mucous or other fluids which could be aggravated by the victim crying, then the nasal passages would become blocked and this inability to breathe would inevitably lead to the death of the victim. Accused 1 confirms that he saw the deceased struggling to breathe. Although accused 1 says he removed the cloth temporarily from the deceased's mouth, accused 2 states he did not see accused 1 doing this. Accused 2 does state that he saw the deceased was crying. On the available evidence, the only inference this court can draw is that due to the lack of oxygen, this victim suffocated.

[59] Counsel for accused 1 argued that there is uncontroverted evidence to indicate that there was no intention to kill the deceased in that there is no evidence that the dish cloth was stuffed deep in the mouth of the deceased.:

[60] Both accused state that they thought if the mouth of the deceased was blocked with a cloth but the nose was exposed, the deceased would have been able to breathe. It is not disputed that for a least an hour and a half this cloth was in the mouth of the deceased. Both accused confirm that this cloth was effective in that the deceased was prevented from making any noise. This implies that the big dish cloth must have been effectively positioned in the mouth of the deceased preventing any

noise from being emitted by the deceased. A dish cloth is not a small cloth. In order for the dish cloth to have been inserted fully into the mouth, it means it must have gone quite far back into the deceased's throat. As stated by Dr Holland, if the gag or cloth is forced far back into the mouth it can block the nasal pharynx which is that space where the nose goes into the back of the throat and the trachea. In that way it also blocks the person from being able to breathe. From the evidence presented by both the accused there is no mention that part of the dish cloth was sticking out of the mouth of the deceased. Therefore, the full dish cloth was pushed far into the mouth and if this is the case, as stated by Dr Holland, if the cloth is forced far back in the mouth, it can block the nasal pharynx where it meets the trachea, which would have the result of smothering.

FINDINGS

[61] This court must consider on the totality of the evidence whether the State succeeded in proving beyond a reasonable doubt that the accused foresaw the possibility that by putting the cloth on the deceased's mouth that it would cause the death of the deceased and that they both reconciled themselves with that possibility.

[62] In the case of *DPP, Gauteng v Pistorius*¹, the Supreme Court of Appeal stated that:

‘Murder is the unlawful and intentional killing of another person. In order to prove the guilt of an accused on a charge of murder, the state must therefore establish that the perpetrator committed the act that led to the death of the deceased with the necessary intention to kill, known as *dolus*.’

[63] The question whether an accused acted with *dolus* is a factual one. It is settled law that intention may only be measured subjectively. (see *S v De Bruyn*²).

[64] The learned author Burchell in the Principles of Criminal Law stated that *dolus directus*, known as “intention in its ordinary grammatical sense”, is present when the accused's aim and object is to bring about the unlawful consequence, even should

¹ 2016 1 SACR 431

² 1968 4 All 211 (A)

the chance of its resulting be small. I find that even though the deceased's death occurred unexpectedly, that there is not enough to impute direct intent to either of the accused.

[65] The intent in the form of *dolus eventualis*, is present when the perpetrator objectively foresees the possibility of his act causing death and subjectively persists regardless of the consequences. This suffices to find someone guilty of murder. (see *S v Shaik and Others* ³.)

[66] As stated in the case *S v Ngubane* ⁴, the court stated that:

‘*Dolus eventualis* means the taking of a conscious risk. The accused foresees the consequences in question as a real possibility and yet persists in his conduct irrespective of whether it does result or not...’

[67] In the matter of *S v Makgatho* ⁵ the court described *dolus eventualis* as:

‘A person acts with intention in the form of *dolus eventualis*, if the commission of the unlawful act or the causing of the unlawful result is not his main aim, but he subjectively foresees the possibility that in striving towards his main aim, the unlawful act may be committed or the unlawful result may ensue, and he reconciles himself to this possibility’

[68] The Supreme Court of Appeal had an opportunity to pronounce on the form of *dolus* under very similar circumstances in the matter of *Tshabalala and 2 Others v The State* ⁶ per Smalberger, AJ. In that matter the appellants broke into the home of the deceased while the deceased was not home. Upon her unexpected arrival, they overpowered her and stuffed several socks in her mouth, which caused her to suffocate. The court on appeal found that *dolus eventualis* was present under these circumstances.

[69] In the matter in *casu*, Dr Holland testified that the heart condition possibly contributed to her death. She further said that ‘anybody who had this kind of

³ 1983 (4) SA 57 (A) at 62 A – B

⁴ 1985 2 ALL SA 340 A at 346

⁵ 2013 (2) SACR 13 SCA

⁶ case number 541/91 & 616/91 delivered on 05 March 1993 (unreported, decision).

condition would not respond as well to any form of trauma compared to anyone with a normal heart.’. Accused 1’s counsel argued that this court cannot find that the accused would have known of all these factors.

[70] It is important to note, that neither Dr Schutte nor Dr Holland ever pronounced on the fact that the heart condition was a cause of death and that this court can accept that it would amount to a *novus actus interveniens*. At most Dr Holland merely stated the heart condition was a contributing factor that may have led to the death of the deceased. Accordingly, this court must limit the enquiry purely by looking at the actions of the accused whilst manhandling the deceased. These facts are:

1. A large dish cloth, which one uses to dry dishes, is placed into the mouth of the deceased. There is no mention of any part of the cloth protruding the mouth of the deceased, which implies this cloth was pushed far back into the mouth and throat of the deceased.
2. The deceased’s hands are tied behind her back so that she cannot remove the dish cloth from her mouth.
3. Accused 1 states in his confession that he would kill someone if he didn’t get money. The facts show no one paid either accused 1 or 2 any ransom for the deceased.
4. The time period during which this dish cloth was in the mouth of the deceased is a minimum of an hour and a half, not including the duration in the deceased’s house and the trip in the deceased’s car to accused 1’s home.
5. Accused 1 concedes that he could hear that the deceased was struggling to breathe when they left the deceased’s residence. Although this cloth was momentarily removed, it was immediately put back into the deceased’s mouth.
6. Accused 2 sees the deceased was crying.
7. Notwithstanding that little oxygen is entering the deceased’s nose, the accused still covered the deceased with a blanket thereby limiting more intake of oxygen to the deceased.
8. Accused 1 and 2 concede that if someone cannot breathe they will die.

[71] It has been argued by the defence that the possible cause of death would have been beyond the comprehension of most sophisticated people in our society. Both accused insist that they never intended to kill the deceased, and that her death was an accident.

[72] This court disagrees. It is common sense that if a cloth is pushed back into one's throat, immediately one will feel overwhelmed to the extent that one would even want to vomit. Whether or not the accused were aware that the nasal passages of the deceased could be blocked due to an increase of mucous being formed is one of the factors that this court must consider in deciding whether the accused subjectively foresaw that death would ensue. From the points mentioned in paragraph [70] *supra*, the fact that the deceased was struggling to breathe should have been an immediate warning bell to remove the dish cloth. By leaving it in the mouth of the deceased, both accused took a conscious risk and subjectively foresaw the real possibility that the deceased may suffocate and that they persisted regardless of this, by leaving the dish cloth in the mouth of the deceased for more than an hour and a half and by covering the deceased with a blanket. It might be that the accused's main aim was to get money from the deceased or her family, however, from the facts mentioned previously, both accused subjectively foresaw the possibility that in striving towards their main aim, the unlawful act may occur. Accordingly, this court finds that the accused subjectively foresaw that the deceased might suffocate and that the accused reconciled themselves with the possibility that the deceased would die.

[73] The doctrine of common purpose allows for the imputation of the conduct of one party (the immediate party) to another party (the remote party) in either of two situations.⁷ The first is where there is an agreement or 'mandate', express or implied, between those parties to do the act in question, and the act falls within the borders of what has been so expressly or impliedly agreed upon⁸. The second is where, even if no actual agreement, whether express or implied, existed between the parties, the

⁷ See *Shange & others v S* [2017] 3 All SA 289 (KZP) at [45], where the court distinguished clearly between the two situations; see also *S v Sithole & another* (unreported, GP case no 777/15, 20 February 2017) at [24]; *Tshikila & others v Minister of Police* (unreported, GJ case no 16/06499, 23 April 2019) at [12].

⁸ *McKenzie v Van der Merwe* 1917 AD 41 46; *R v Duma & Another* 1945 AD 410 at 415; *R v Mkize* 1946 AD 197 at 205; *R v Shezi & Others* 1948 (2) SA 119 (A) at 128.

remote party actively associated himself with the conduct of the immediate party by actually committing some act of association with the intention of associating himself with the conduct of the immediate party⁹. In both forms of common purpose, it must be shown that the requisite *mens rea* or fault was present in respect of the remote party¹⁰. Where *mens rea* in the form of intention (or *dolus*) is required, as in the case of murder, either *dolus directus* or *dolus eventualis* will suffice¹¹.

[74] In *S v Mgedezi* 1989 (1) SA 687 (A) the court stated that in order for common purpose to be proved certain factors should exist:

1. The accused must be present where the violence was committed;
2. He must have been aware of the assault on the victims;
3. He must have intended to make common purpose with those perpetrating the assault;
4. He must have manifested his sharing of the common purpose with the perpetrators of the assault by himself performing some act of association with the conduct of the others;
5. He must have had the requisite *mens rea*.

[75] In the present case both accused played an active role. Even if it is not accused 2 who inserted the dish cloth into the mouth of the deceased, he in any event went to fetch it. The same applies to all the other actions of accused 1 opening the deceased's window with a wire to gain access into the deceased's house. All the actions of the one accused are imputed to the other on the basis of common purpose.

[76] In respect to count 5 the counsel for accused 1 argued that there is no evidence that accused 1 attempted to extort money from the family of the deceased. Mohammed Genner is a single witness and the court has approached his evidence with caution. This court finds no contradictions in his evidence or any motive to falsely implicate anyone. It common cause that this crime of kidnapping the deceased was to get money from the deceased or her family. This court finds Mr

⁹ *S v Safatsa & Others* 1988 (1) SA 868 (A), *S v Mgedezi & Others* 1989 (1) SA 687 (A) and *S v Singo* 1993 (1) SACR 226 (A).

¹⁰ *S v Sithole & Another* (supra) at [24] and [26].

¹¹ *S v Mgedezi & Others* at 705; *S v Papu & Others* 2015 (2) SACR 313 (ECB) at [14].

Genner to be a reliable witness. There is no reason for this court to side line what the main purpose of the accused was and that was to get money. The fact that it did not happen, does not detract from the fact that an attempt was made by accused 1 to extort money from Mr Genner.

[77] In the result, the following order is made:

Count 1

In respect to count 1, on the basis of common purpose both accused are found guilty as a co-perpetrator of the crime of murder on the basis of dolus eventualis.

Count 2

Both accused are found guilty of housebreaking with the intention to rob and kidnap the deceased.

Count 3

Both accused are found guilty of robbery

Count 4

Both accused are found guilty of kidnapping

Count 5

Accused 1 is found guilty of attempted extortion. Accused 2 acquitted.

Count 6

Both accused are found guilty of defeating the ends of justice.

D DOSIO

ACTING JUDGE OF THE HIGH COURT

Date Heard	8 February 2022
Judgment handed down	10 February 2022

Appearances:

On behalf of the State	Adv Le Roux
On behalf of the Accused 1	Adv Milubi
On behalf of Accused 2	Adv Morane