IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA (BENONI)

CASE NO: CC10/2020
DATE: 2020.11.23
REPORTABLE:NO
OF INTEREST TO OTHER JUDGES:NO
REVISED
DATE:23/1/2021

In the matter between

THE STATE
and
M[...] S T ACCUSED

J U D G M E N T

BROODRYK, AJ: The Court will now proceed to deliver judgment in the case of the State versus M[...] S T. Case No. CC10/2020 in the High Court sitting here at Benoni.

The accused, a [...] year-old female and a Lesotho citizen residing at [....] District, Lesotho is charged with two counts as per the indictment and I quote:

> "Count 1 is that of murder, read with the provisions of section 51(1) of the Criminal Law Amendment Act 105 of 1997 in that upon or about 18 October 2019 at or near [...] Street, [...],[...] in the District of Benoni, accused did unlawfully and intentionally kill R L M[...] a [...] old male.
>
> Count 2: In that upon or about 18 October 2019

and at or near [...] Street, [...] in the District of Benoni, the accused did unlawfully and of intent to defeat or struck the course of or the administration of justice, commit an act to wit pretending that she was attacked by three males and that the deceased was kidnapped by the same persons which act defeated or obstructed the course or administration of justice".

Mr Maimela, before I proceed, I forgot to ask you, you do not require this to be interpreted at this time?

MR MAIMELA: Not at this time M'Lord.

COURT: At the end when I make the findings that can be interpreted

MR MAIMELA: As the court pleases.

COURT: Very well.

The accused pleaded not guilty and no section 115 plea explanation was provided. She exercised her right to silence. Mr Maimela on behalf of the accused informed the court that the minimum sentence legislation in respect of count 1 was explained to her. The accused confirmed this.

The state called 14 witnesses as follows: (1) M N M[...], the aunt of the deceased. (2) Dr Fortunato Beccia, the pathologist. (3) Dr Spencer Brian Probert, a doctor who treated the accused at the Far East Rand Hospital. (4) L D M[...], the mother of the deceased. (5) T P N[...], a witness who saw the accused on the 18th October 2019 at 14:30. (6) T T K[...], a friend of Siyabonga. (7) B M[...], a friend of S[...]. (8) S M S[...], a neighbour implicated by the accused. (9) S V[...], an aunt of Lerato and the one who found the needle. (10) M P T[...], a court interpreter who provided a translation of the screen shots of the whatsapps sent by the accused, marked EXHIBIT H. (11) B P M[...], S[...]'s uncle and the golf player. (12) Dr Sunday Joseph Algabodian, a medical doctor who treated the accused upon her admission at the Far East

Rand Hospital on the 18th October 2019. (13) S M N[...], he testified in respect of a section 212 statement, EXHIBIT L, that dealt with the downloading of the Whatsapps and then lastly, (14) F W M[...], that is the aunt of Siyabonga.

The accused testified in her own defence. The normal admissions were made in terms of the provisions of section 220 of the Criminal Procedure Act 51 of 1977 and embodied in a written document styled EXHIBIT A, wherein the normal admissions were made, including the causal chain.

It furthermore referred to EXHIBIT B, the post-mortem report, EXHIBIT C, a photo album of the scene and EXHIBIT D, a photo album of where the needle was found was formerly admitted into evidence.

The following appeared to be common cause or were not disputed at all:

(1) That the accused was a child minder for the deceased and had been employed as such by the mother of the deceased. She had been employed as such since 3 April 2018. See in this regard EXHIBIT G, the service contract.

(2) She had no other domestic duties and was provided with a bedroom in the house as well as food and sustenance. According to the contract, she would be paid R1 800 per month, but in fact the deceased mother paid her R2 000 a month.

The mother of the deceased L M[...] and the aunt M M[...] worked shifts at the airport. If they worked morning shifts, starting at 05:00, the deceased would sleep with the accused in her bed.

(3) The day before, that is the 17th October 2019, the mother of the deceased was not at home. She was away on a course. The aunt who was working morning shift the next day, that is the 18th October, she got up at 03:30 and was about to leave at 04:45 when she heard the deceased crying. She heard the flask clicking and the accused giving the baby milk.

The bedroom door of accused was closed at that stage.

(4) She left the house that is now M M[...], at 05:10. She locked the door and the security door. She and Lerato returned to the house at 15:40 or 15:50 that same afternoon. During the day she called the accused at 10:35 on the cell phone, however she could not reach her.

(5) On her returning to home, they found all was quiet and no one outside. Usually the accused and the deceased would be paying outside. No one answered when they called.

(6) The burglar door which leads to the house was closed and locked. The door itself was closed but not locked. There were two sets of keys for the house. One was held by the accused and the other one was held by the aunt M[...]. M[...] opened the security door. She saw the keys inside the house on the floor marked X in photograph 3 of EXHIBIT C.

(9) They walked in screaming and calling out the name of the deceased, L[...].

(10) The aunt and the mother of the deceased followed each other into the house.

(11) Accused was found in the bedroom. She was sitting on the ground next the cupboard. She was half naked. Her upper body being unclothed. When the mother asked her where is the child, the accused said: “The child had been kidnapped.”

(12) The accused complained of stomach cramps and she was in a crouching position.

(13) The accused had scratch marks on both arms on the inside as well as on her chest. The scratches were not deep and not bleeding. On each arm there was more than one, but less than five per arm.

` (14) When the aunt asked her where is the child, she stated as follows: “I heard voices of people after you left. One of the voices was that of S[...], a neighbour. She opened the door. S[...] was in the company of two other males. They

then overpowered her and pushed her away. She ran to the room to fetch the baby and try to abba her on her back. She said she was fed a poison as well as the child. She did not say how they were poisoned. They took the child alone with them."

(15) The blinds and curtains at the front of the house were closed. The bathroom window was open. These blinds and curtains would normally be opened by the accused.

(16) Nothing was missing from the house and it was not ransacked.

(17) A bandaged was found next to the accused on the floor as well as a whitish powder next to the cupboard.

(18) That bandage was usually kept in the top drawer of the cupboard in photograph 27 of EXHIBIT C.

(19) The police and thereafter the paramedics arrived on the scene.

(20) The accused was in an emotional state but could talk and she was complaining of stomach cramps.

(21) The paramedics then examined the accused, but stated that they could not take her along as she had defecated on herself and requested that she be bathed.

(22) The aunt M[...] then went into the storeroom, immediately adjacent to the bedroom of the accused to go and fetch the basin.

(23) This storeroom is marked A1 and the bedroom of the accused is marked B on the sketch plan in EXHIBIT C. On photograph 17 and 18 of EXHIBIT C, the door of the bedroom of the accused is on the left. The orange door to the right leads to the storeroom. There are clearly immediately adjacent.

(23) The door to the storeroom was closed but not locked.

(24) The deceased was found on the floor lying on his back on a blanket.

` (25) She picked up the baby, ran outside of the room and put the baby on a stretcher.

(26) There was a bandage over the mouth to the back of the head of the baby, the deceased.

(27) The paramedics informed her that the deceased had died.

(28) She also found the cell phone of the accused under her bed. It was slightly covered with bedding.

(29) In respect of photograph 1 and 2 of EXHIBIT C, accused bedroom is the one to the left. If you scream from there, someone should be able to hear you.

(30) The two bandages that is now the one around the mouth of the deceased as well as the one found next to the accused and in respect of some evidence around the neck of the accused were usually kept in a drawer in the bedroom of the accused. After the incident, the bandages were found not to be there. In all the time, the accused had worked there for the mother of the deceased, she had had an excellent relationship with them and there were no problems whatsoever.

(31) It is common cause that the deceased died of a fractured neck with asphyxia.

(32) The most probable mechanism that caused the death is external pressure applied on the neck as well as asphyxia. The external pressure would have to be applied to the mouth and the neck area probably more in favour of the neck.

(33) There were no bruises on the muscles of the neck, but for a child of that age, not much force is required and it can happen that there is no external appearance thereof on the skin or the muscles.

(34) There were no symptoms of poisoning found during the post-mortem as there was no granules found in the stomach contents or any indication of gastritis which means a burning of the stomach wall.

(35) As to the asphyxia which means a cut-off of blood supply to the body, the pathologist found superficial petechial bleedings in the heart and the lungs consistent with the finding of asphyxia.

(36) As to the hyoid bone been found intact during the post-mortem, that confirms that not a lot of force was applied to the neck.

(37) The white milky substance found in the stomach of the deceased, would have been there for between four to six hours.

(38) Death would have ensued very quickly with a fracture of a neck. In respect of asphyxia, up to three minutes. If it is a combination of the fracture and the neck and asphyxia, death would ensue in a period of less than three minutes.

(39)The deceased was admitted to the Far East Rand Hospital on 21 October 2019.The hospital records were handed in by consent as Exhibit F.

(40) Dr Spencer Brian Probert saw the accused on her discharge on Monday the 21st October 2019. The accused had very superficial soft tissue injuries referring to injuries on the inside of both arms. See EXHIBIT F in this regard.

(41) These wounds were indicative of being self-inflicted due to the pattern and depth thereof.

(42) The needle visible in photograph 6, 7 and 8 of EXHIBIT D, could have caused the injuries to the arms.

(43) No abnormalities in the blood test of the accused were detected and there is no indication of any substances being found. The liver functions were normal.

(44) These blood tests did not indicate any substance ingestion which would have caused a loss of consciousness.

(45) The neighbour, S S[...] grew up with the mother of the deceased, Lerato and she knew him all her life. He was referred to as a family friend.

(46) This S[...] would at times do odd jobs for the mother of the deceased, such as washing her car and then be paid therefore. No amount was fixed.

(47) T K[...] and B M[...] were friends of S[...]. On 18th October, they met up with him at his house at about 07:30 to 08:00. They were in his company for the next five to six hours. During that time, they never went to the house of the deceased. Thereafter S[...] was fetched by P M[...] at about 11:30 to go act as his caddy while he was playing golf in Springs. L[...], the mother of the deceased called him there at 17:00 on his cell phone to come to her house.

(49). Both T K[...], B M[...] and B M[...] does not know where S[...] was between 05:00 and 06:00 of 18 October 2019.

(50) On 19 October 2019, that is a Saturday, one S V[...], an aunt of the deceased found a needle stuck in a mattress of the accused bed. See in this regard EXHIBIT D, photograph 4, 6 and 8. This needle was stuck into the mattress and it was under a blanket.

(51). Mpunisi Patience Chauke, a court interpreter at Benoni, drew up a translation of EXHIBIT H. That is a screen shot of the Whatsapps sent by the accused. Her translation was handed up as EXHIBIT H2.

(52). Dr Sunday Joseph Algabodian examined the accused on 18 October 2019 at the Far East Rand Hospital and compiled a medical report, a J88 marked EXHIBIT K.

(53) Simon Mukushe Mkukwana. He confirmed a section 212 affidavit, EXHIBIT L, which was *inter alia* about the relevant Whatsapp messages in EXHIBIT H. The reference to the time as 04:29:40 am UTC means universal coordinated time. In respect of South African time you have to add on to that, two hours. In other words, in respect of the two whatsapps that would have then been made at 06:29 and in respect of a later one which was marked at 04:30:52 would then be at 06:30:52.

(54) Lastly F W M[...], the aunt of S[...] who lives on the same premises said she saw him at 07:00 on the morning of 18 October 2019 when he went to the toilet, which was right next to the room where she and her husband were staying. She could hear his door which was made of corrugated iron when he opened it as it makes a scratching sound. She was asleep between 05:00 and 06:00 the morning and heard nothing. She stated that S[..]'s friends came there at 07:30. That deals with the common cause evidence or the evidence which was not disputed.

From what has been stated above, it is abundantly clear that the state and the defence case are largely common cause and the dispute is really on a very narrow basis.

I now proceed to deal with the evidence of the state and defence witnesses outside the above parameters. I only do so when I find it necessary for a further exposition and evaluation of the evidence of the witness outside the common cause narrative.

I firstly deal with the evidence of M N M[...]. That is the aunt of the deceased. Except for the common cause facts alluded to above, she was also confronted with a statement EXHIBIT E in some respects. It was put to her that she did not refer to the fact in her statement that she did not say there that she found the accused praying. She however maintained that she did find her praying and she did say so although it is not contained in the statement.

It was put that she did not state in the statement that the accused said she will not see her family and the child again. She however maintained that she did say so.

It was put that she never said in her statement that she picked up the child from the floor upon finding him. She however maintained that she did pick up the child and said so. She maintained that no one said that accused did something to the child and that she does not know for a fact that accused

killed the child.

She denied that accused told her that S[...] and his two friends had knives. She also never told her she was grabbed and put to the ground. She also denied that accused told her that she had lost consciousness. She also denied that accused told her she saw “three guys”, snatching the child from the bed. She maintained that accused had said she ran to fetch the baby. She wanted to *abba* the child on her back and she and the child were then fed the poison.

It was put to her that accused does not know what the three men did to the child. She however maintained that accused said they fed her and the child poison.

I will then deal with the evidence of the mother of the child, L M[...] further to the common cause facts referred to above. She testified further that the blinds in the kitchen were closed and that usually they were opened by the accused. She also testified that she found the accused praying in her room. She stated that accused stated that upon her opening the door, they... that is now the attackers, pushed her. She tried to strap the child onto her back but they forced her and the child to drink the poison and they then locked her in the house.

I should pause here to state that very strangely, I should state that the accused said that they threw the keys inside the house, once they had closed the door and locked the security door and then left.

It was put to her that the aunt never mentioned such as she did that the accused had a bandage around the neck. She was however adamant that it was around the neck and that the aunt must have forgotten about it. Her statement dated 23 October 2019 was put to her and was formerly proven. EXHIBIT J was handed in. It was put that there was no reference in paragraph 5 of her statement that the child was poisoned. She conceded that, but stated that although she was upset, accused told her about the child being poisoned.

To her credit, she did use the word “drugged” in paragraph 5 of EXHIBIT J, I should remark her that the word “drugged” was spelt D R U G E D. I will return to this later.

She also denied that accused stated that S[...] and two others charged at them with knives. She also specifically denied that the three grabbed her and threw her on the ground. She denied that the accused ever used the word “throw”. It was put that she was forced to drink a liquid concoction to which she answered that she, the accused used the word poison. She also denied that accused said they took the child from the bed. Upon it then put that accused would deny killing the child, she stated that was just her assumption.

It was put that accused thought she would die. The witness however replied that she could have asked assistance from the window in her room facing the street plus how could she then manage to send all those whatsapps. She lastly stated upon a question of the court that accused never gave any explanation about the upper part of her body being naked.

The next witness which on the face of it is a crucial piece of the puzzle is that of T P N[...]. She stated that on 18 October 2019, at 14:30 in the afternoon, she was on her way to one L[...]’s house (this is now another L[...]), not the mother of the deceased, when she passed the house of the deceased. She saw the accused standing at the small gate visible in photograph 1 of EXHIBIT C.

She described her, that is the accused as “the caregiver”. She described her as being orderly and not disturbed and dressed in a short-sleeved T-shirt. She was a lone and uninjured. When she returned from L[...]’s house being unsuccessful in her quest to go and see somebody there, five minutes later, accused was busy returning i.e. walking to the house.

Later that same evening, she heard of the deceased passing. Under cross-examination she stated that she was

one and a half metres from the accused when she saw her, the accused for the first time. She saw her from across the street which was about three metres away. She stated that she had seen the accused six to seven times before.

On one occasion the accused was walking with her aunt to the mall and at other times she would see her in the yard. On this day, she did not speak to the accused. As she came closer, the accused turned her head sideways and that she did not greet her. She made a statement three weeks later after she was called by Lerato. They did not tell her anything and she denied she is making a mistake as to the identity of the accused and that she is not truthful. She importantly stated that the accused did not appear “weak” to her.

I then need to summarise the evidence of S M S[...]. According to his evidence, he was asleep in the main house. That is where he was a neighbour to the house where the accused was employed. He woke up at 07:00. He went out to the toilet and saw his uncle’s wife. That is now Winnie Molefe. She requested him to perform some task as to cold drinks.

He told the court that his door is a corrugated zinc door which makes a scratching sound if you open it. He then went back into the house to prepare a case for the cold drinks. He heard someone whistling and then someone knocked at his window. It was T[...] and B[...]. It was then about 07:20.

It is not in dispute that he then spent the next five to six hours in their presence. Later,he acted as a caddy for Mr B M[...] at a golf course in Springs when L M[...], that is the mother of the deceased, called him there at 17:00. He went to her house at about 19:00.

He denies ever going to L[...]’s house earlier that day. Under cross-examination, he stated that he had a very good relationship with L[...]. He washed her car on occasions. Probably two times per week. Although she owed him money

on the 18th October 2019, she would pay him “like thanksgiving.” It is out of gratitude. He stated that if she paid him R20 he would be happy with that. Normally however she would pay not more than R200 per month.

He emphatically denied the version of accused that he and two “friends” were at accused place of work. He denied she heard his voice and stated that he was not there. He disputed that he and his friends charged at her, that is the accused, with knives, followed her to the bedroom, threw her on the ground, forced her to drink a concoction and that he and his friends then took the child.

He stated that he has never had a problem with the accused and did not know why she would accuse him. He disputed T[...]’s evidence that he was asleep when the latter knocked his window. He said he was awake. He specifically disputed the assertion that he and his friends went to the place of the deceased to rob, because he was not happy with his payment. He also denied that he and his friends attacked the child as “a way of revenge”.

I must pause here to already state that I find this an amazing and startling assertion. Attacking a child to get revenge on someone else. He did not dispute the assertion of the accused that she loved the deceased, plus that she had no reason to attack the child and stated that the family of the deceased treated accused well.

On questions of the court, he again repeated that he was still asleep after 05:00 of 18 October 2019. He usually only gets up at 07:00. He also stated that there was no formal arrangement as to him being paid by L[...].

The evidence of Dr Spencer Brian Probert then requires some further elucidation except to the common cause facts already referred to above. During 2019, he did his internship at the Far East Rand Hospital after he had obtained his medical degree. His MBChB in 2018 following a BSc which he

had obtained in 2014 at the University of the Witwatersrand.

As stated during 2019, he did his internship at the Far East Rand Hospital. He started there in January 2019. By 18 October 2019, he had treated a high number of assaults cases. Poisoning was not so common but substance abuse is. He saw the accused on a discharge on 21 October 2019. His evidence is to the effect that the injuries on the inside arms are very superficial and consistent with something else than a knife attack. The needle visible in EXHIBIT D, photograph 6, 7 and 8, he finds that it is possible that that could have caused the scratches.

He noted that the depth and the pattern of the scratch wounds were more indicative of being self-inflicted. He found that the accused was malingering as to her alleged stomach ache. There was no tenderness on examination. Her vital signs were normal, so there was no indication of any stomach pain. He also stated that there was no loss of consciousness noted. Her liver and kidney functions were normal, so there was no indication of the impact of any poisonous substances.

Under cross-examination, he agreed that he did not have much experience, but that he had in this case discussed his findings with his seniors. It was put to him that the accused does not know how the scratches were inflicted, but they were not self-inflicted. He stated that due to the pattern of her scratches, it was suggestive thereof that it was self-inflicted.

Upon being put that she was forced to drink an unknown substances, he answered that that her blood tests did not indicate same.

As to the evidence of Dr Fortunato Beccia, the pathologist. His evidence was not disputed at all. I then turn to the evidence of Dr Sunday Joseph Algabodian. He testified as to an examination of the accused upon her admission. He also completed a J88 which is marked EXHIBIT K. I need to

refer to his evidence in some detail.

He stated that he received his first degree in Nigeria. That is in 2002 and that was a Bachelor of Medicine degree. In 2007, he received a post graduate diploma in ophthalmology and he received his third degree here in South Africa which was a diploma in general practice. In 2014 /. 2015, he obtained a diploma in occupational health and safety in Cape Town. His fifth medical degree, was a Master of Science in medicine, majoring in emergency medicine from the Wits University which he completed in the year 2019. As to the diploma, he received in general practice, that was from the Foundation for Development in Pretoria and the diploma in Occupational Health and Safety was with the Oxbridge Academy in Cape Town.

He stated that he has an effective 18 years of medical practice. In October 2019 he was a full-time employee of the Department of Health and he was assigned to work in the Far East Rand Hospital and a senior emergency medical officer. A J88 report was shown to him marked EXHIBIT K. He indicated that he had completed this report on the 19th October 2019 after seeing... After examining the accused on the 18th October 2019.

The examination was on the 18th at 19:30 in the evening. He stated that in the course of his work, in the emergency unit, saw one T M[...] S. That is the accused before court. This examination was done in the presence of other junior medical doctors. The patient came in with a history of being injured and forced to drink and he queried that as a poison.

He stated that the accused was quite conscious and alert and orientated in time, place and person. When he examined her, clinically, she was stable. Her vital signs were stable and she showed multiple superficial injuries on both her upper limbs, on the outer surface anteriorly. On question of

the court, he indicated that that referred to the inside of the arms in the area of the elbow.

He stated that the pattern of this injury and the irregularity and the depth of the injury arose suspicion in his part because if it was inflicted by a third party, most of the injury would have been on the outer parts of the arm and not so regular as it was found to be in this case.

He stated that she came in and pretended to be having some severe pain, excruciating pain on the upper part of her abdomen and he indicated that she sort of held her arm over her abdomen and was crouched over. She was then examined and he found nothing to correlate with the degree of pain she complained of.

He testified that he saw the powder which she claims to have drunk and that was seen on her left shoulder. Mostly importantly not in her mouth He described that this white powder was dried, powdery and soft. A whitish powder.

He stated that when he ties the history of no abdominal pain and saying that she drank something, to him there was no evidence that there was anything in that which went through her or so as far as to her stomach that could cause some form of poison, so he made the final diagnoses which he noted in the J88 and where he stated “multiple superficial injury with a question mark. Query, attempted self-suicide”. So, which implies that those injuries were self-inflicted and they were very superficial which can be caused by a very small object such as a pin.

In summary he stated, that he wish to say that this is a case of a patient who came alleging that she was assaulted with self-inflicted wounds on herself with no clinical evidence suggestive of being assaulted by a third party or be forced to drink anything that resembles the poison.

He stated that as to the superficial wounds on the arms, he meant that it was not bleeding profusely and it was like

scrape wounds. He stated that it made him suspicious that these wounds were on the inside of the arms and not the outside. Asked about her level of consciousness. He stated from admission to the time she was taken to the ward, her level of consciousness was alert conscious and alert over 50 by way of a medical grading. He stated that on the last page of EXHIBIT K, he made some notes on the sketch and he stated that he refers to the marks on the arms.

He was referred to the fact that there is also a note in respect of the stomach and he stated yes, that is correct, he noted a tender, that place is called supra pubic. That was the tenderness he had referred to. That is mild tenderness. He was put to him by the state that another doctor who had discharged her had testified that there was nothing in the blood results of the blood test. That was with reference to Dr Probert.

He stated that yes, it is so, that before they would refer the accused to a medical team, they would run some basic tests to check if there were any problems with the liver or the kidneys. He stated that these blood tests and the outcome thereof confirmed his clinical examination that there was no poison that she had ingested or that somebody had forced her to ingest.

He was then cross-examined by Mr Maimela at length. He confirmed that he was the one who had examined the accused upon her admission to casualty. He was asked what did she say was the problem. He stated that she told him that she was forced to drink? some poison and that somebody also inflicted an injury on her hands.

He also confirmed that upon his examination of the accused, he discovered minor wounds on her limbs. He was then asked about the wound on the chest and he stated that there was no wound on her chest. The only thing is that she was holding her chest that she is having a severe pain that she

suffering from a severe pain on her upper abdomen.

He stated that he had marked it in the last page of the J88 as tender and he stated again supra pubic that that area is called supra pubic region in medical terms and when he said tender, he meant that when he touched her, you know when a person winces, that he is feeling pain. He stated “okay, you appear to be tender”, but when he matched it up with her clinical picture, it did not correlate.

He stated that the mark he had fixed on the chest was not a physical wound. He just referred to that upper part of her stomach. He also stated that the poison that is most common in this environment does not cause abdominal pain. He stated that most of these poisons are organo phosphates or blue deaths. The do not cause abdominal pain. Rather what they cause is continuous profuse vomiting and diarrhoea and they would be salivating. They would be unable to breathe.

He also stated that their vital signs would not be very stable. The blood pressure, the pulse, the pulse rates and the respiratory would not be as stable as when they would normally examine someone. Advocate Maimela then questioned him about so called excessive vomiting that is self-induced. He stated that yes, that could cause upper pain, but he also stated that excessive vomiting is a consciously induced.

It depends on the course. Vomiting can induce pain on the upper part of the abdomen, but that vomit must accompany blood, because there is a tear between the junction of the stomach and the oesophagus and that is where the pain comes from and on the question of the court he stated that he found no blood. He stated that well there was no vomit and there was no blood.

As to, he was then questioned by Mr Maimela at length about the vomiting. He stated that classically when we see a patient in the case that when they vomit, you see that the

vomit flow from their lower abdomen down onto the body. That is the front part of the body, but he stated in this case when accused came in there was a powdery substance on her left shoulder as he had indicated on the J88 when he state witness her. He stated that that bothered him as to where he found it.

He stated that it bothered, because if you say somebody forces you to drink poison and thereafter you try to vomit, you will not consciously choose on your left shoulder. He stated that when they see a case of suspected para-suicide or that somebody attempted himself or herself self-harm or self-inflicted injuries, they would normally admit such persons to be observed for over 12 to 24 hours.

It was put to him by Mr Maimela that whether he agrees that if the injuries that he found or which he saw on her limbs whether it is possible that they were inflicted while she is un conscious referring or whether she is unconscious, referring to the wounds on her arms. He stated that in his clinical examination, that there was no evidence that the accused, this patient had lost any consciousness.

He stated that right from the time she was attacked, she was conscious and alert to the time of the presentation when he saw her. He stated that when she came she was conscious and alert, orientated in time, place and person and was able to communicate with him and if the patient had suffered some form of unconsciousness that there would be some indication of a loss of memory, which he did not find in this case.

It was then put to him that the accused would say that she was forced to drink poison just after 05:00 early in the morning and then Dr Algabodian only saw her around 19:00 when she had regained consciousness. He stated that when a patient drinks poison, a type that renders them unconsciousness, it would start acting between 50 and 30 minutes and that if the so called patient induced unconsciousness in this patient, referring to the accused, there

is no ways that she would have regain consciousness before coming to the hospital.

He once again confirmed that he did not find any indications that she had lost consciousness. He was specifically asked that whether in his 18 years of practice he has ever treated a patient who has consumed blue death and he stated that he had seen them every day. He was asked how long does it take for a person who has consumed blue death to regain consciousness, to which he answered for that, before a person has consumed blue death to go into unconsciousness, it would take a minimum of 30 minutes.

And he further stated that if such a patient lapses into unconsciousness, there is no way that the patient would regain consciousness without using an antidote and being stabilised or else the patient would have died. He stated that in respect of this particular patient, referring to the accused, that there was no evidence that she had vomited.

It was put to him that if a person had lost consciousness 10 hours before he was examined, that he would not be able to pick that up that he had lost consciousness. To that he answered that now we are talking of chemical poisoning and if chemical poison induces a loss of consciousness, the patient will pass out or die.

He stated that clinically she would have died because the degree of poison that would case unconsciousness is targeting five major organs in the body that are responsible to keep life stable. He confirmed that she would have been dead if she had lost consciousness due to chemical poison.

It was then put to him by Mr Maimela that the reason why the accused person did not die from the poison is because she vomit it out. To which he replied that that means, she never lost consciousness and that if she is telling the court that she lost consciousness, then she is telling a lie. It was then put that the accused would come and testify that she was

forced to drink a concoction that she felt weak and she also felt drowsiness and this was put to Dr Algabodian. He gave the following answer and I quote just to show the spontaneity thereof. His answer was referring to Mr Maimela “My brother, even if anybody could drink a cup of blue death now, in the next 10 to 15 minutes, the person will still be talking. He will not feel dizzy or unconscious immediately.

He then went further and stated that the patient will still be active going around, because first of all, this poison goes and stays in the stomach. Mr Maimela then put it to him, that she will further give evidence that she does not know what was mixed in the concoction. It could have been blue death, mixed with methylated spirits or anything else poisonous. He stated that clinically, when he examined this patient, there was no evidence of any chemical poison ingestion.

He was asked how he came to the conclusion that she had not consumed any poisonous substance, he stated well they took blood samples in this regard. Clinically, she did not... There was no indication that she had been poisoned and the blood samples also did not... The blood samples or a chemical investigation did not indicate any poison. The liver was stable. The kidney was stable and there was no trace. If they assess something such as blue death, that would have been visible in the blood samples, but the blood samples did not show it.

He confirmed that when it was put to him, the earlier evidence of Dr Probert when asked in re-examination by Ms Scheepers that the blood tests were performed and no abnormalities were found in the blood tests, Mr Maimela then asked the question that the accused will... No sorry, this previous reference to Ms Scheepers was as to something which Mr Maimela had put. It was not re-examination .

Mr Maimela lastly put that the accused person would come and give evidence that she does not know how she

sustained the injuries that he saw on her limbs, to which Dr Algabodian testified that in the course of his medical training and experience, he had attended a course in forensic medicine, injuries and both injuries and assault representation. He stated that self-inflicted injuries are mostly found on the outer surface of the body that is facing the patient. In other words where the injury intruded by a third party as in when somebody is assaulting you, that is what they call the body as an unconscious defence mechanism, that makes you to even put your forearms out and this injury will not form regular patterns, so he can confidently state that the injury he found on this patient which he examined, was self-inflicted because (1) it is regular and (2) it is superficial. That concluded his cross-examination.

On the question of the court, he was referred to EXHIBIT C, photograph 27 that indicated the position where the accused was found and on it was visible a white substance. He commented that the only thing he could say that it was similar to the substance he had found on her shoulder. More on that, he could not say. That concluded the evidence of Dr Algabodian

I see it is now 11:45. The court will adjourn for 15 minutes.

MS SCHEEPERS: As it pleases the court.

MR MAIMELA: As it pleases the court.

COURT ADJOURNS: [10:37]

COURT RESUMES [10:53]

COURT: Accused may be seated.

I then proceed with my judgment. Before the adjournment dealt with the evidence of Dr Algabodian. The next witness I need to deal with is M P T[...]. She is a court interpreter here at Benoni Magistrate's Court. She has been an interpreter for five years. She has attended a four week's court at the Justice college. She interprets from various

languages including Southern Sotho, the language the accused speaks, hailing from Lesotho. She provided a translation of the screen shots visible in EXHIBIT H. The translation was marked EXHIBIT H2.

Under cross-examination, she stated that she grew up in Kagiso and although her mother tongue is Shangaan, 90% of the people there speak Sesotho. As to the Whatsapp of 06:42, EXHIBIT H, her interpretation in respect of the Whatsapp, she did not agree with the translation that the translation does mean the person close to my heart and not the wound in my heart. She was adamant in respect of the latter.

As to the Whatsapp of 06:52, in 'H2' she conceded that the interpretation "P[...] is not going to pick my dead body/corpse" but rather "pick up my remains". Any other state witnesses not dealt with in a further summary will become evident when I deal with their evaluation. That concluded the evidence of the state.

Mr Maimela then called the accused to the stand. She started testifying on Wednesday the 4th November 2020. She testified that she is a Lesotho citizen who came to South Africa in 2014. She had been working for the mother of the deceased Lerato for almost two years. They had a good relationship and she described her as almost a sibling. On the night of 17 October 2019, the deceased slept with her. On the morning of 18th October 2019, the aunt, that is M M[...], the first state witness went to work after 05:00. The mother of the child, L[...], was not there.

Once the aunt had left, she was on the bed asleep, but cold hear what was happening. After 05:00, she heard a knock and the voice of S[...]. She unlocked and opened the door and the burglar door. She saw [...] and two other males who had knives with them. Their faces did not appear to be happy and they looked in a fighting mood.

She ran to the bedroom and they followed her into the

bedroom. S[...] however remained in the kitchen. The two males grabbed her and pressed her down. S[...] came from the kitchen with a jug. It contained some liquid. He gave it to the other two males to let her drink it. S[...] took the child from the bed and took the child out of the bedroom. They held her arms and with their hands pressed open her mouth. She swallowed.

After that, she felt being stabbed with something sharp on both arms on the inside. Thereafter, she felt dizzy and her tongue was stuck. He knees were cramped and she saw everything in darkness. She heard the voice of one of the males who stated “where is the money”. She could not speak.

These two then left her bedroom. She was dressed in her pyjamas. S[...] had left with the child, before she was forced to drink the liquid. She could see in the darkness when the two left the bedroom. She was left on the floor. She could not scream. She crawled and managed to get a hold of her cell phone. She recalled that the phone was under her pillow. She was now shaking. She Whatsapped her sister R[...] in Lesotho. She could not remember the time. She Whatsapped her sister as she felt that she was dying. She could not Whatsapp L[...], because she saw her friend S[...] taking the child and fleeing with the child.

Her thoughts were that S[...] was saving the child and I emphasise “and he wanted her to be killed.” She thought the plan was with L[...] to save the child so that she could be attacked. She could not understand that as he, referring to S[...] was a friend to Lerato. She could remember the contents of the Whatsapp.

She told her sister to tell P[...], that is her younger brother to come and pick up her corpse, because she felt she was dying. When L[...] and her aunt found her, she had excess stomach cramps. When she was referred to photograph 27 in EXHIBIT C, with the white substance on the floor, she

confirmed that that was her room.

She stated that her upper body was in fact naked when she was found. She was weak and felt her body sweating and burning. As to the needle, visible in EXHIBIT D, photograph 6, she does not know how it got there or who put it there, but it is her bedroom.

Startlingly, that is now Lerato and her aunt, did not ask her where the child was. They asked her nothing. Upon questions being put to her by Mr Maimela, during evidence-in-chief, he looked like a dentist extracting teeth at that stage. She remembers telling Lerato three males attacked her after being asked where the child was. She surprisingly answered that she told S[...], their sibling, when the latter undressed her later that day that “they” – I emphasise plural, had taken away the child.

Immediately thereafter she said, “I was saying S[...] took the child.” She amazingly did not speak to L[...] or the aunt. She does not remember discussing anything with Lerato and the aunt. She only remembers speaking to the aforesaid S[...]. A drip was inserted in her arm by the paramedics and she was taken to hospital and thereafter she was placed on a stretcher by the paramedics.

She stated that she loved the child as her own. Her feelings are disturbed and it haunts her. In hospital, a second drip was inserted and she confirms that blood samples were taken of her. One of the doctors told her that the child had died. A sister helped her to climb onto the bed. She was arrested on the 21st October 2019. That concluded her evidence-in-chief.

She was then cross-examination by Ms Scheepers. I find it convenient to deal with the cross-examination when I evaluate the evidence later. I now turn to the evaluation of the evidence. Firstly M[...] and L M[...], I find it convenient to deal with them together. I first deal with the evidence of the aunt,

M M[...] and the mother L M[...].

I found them both to be impressive witnesses who stuck to their versions under cross-examination. Their evidence is logical, inherently probable and they corroborate each other. Both were also confronted with their statements in respect of M[...] with EXHIBIT C and in respect of L[...] with EXHIBIT J, respectively.

I have considered the so-called contradictions, but I do not find them to be material to affect their credibility. Interestingly, it should be noted that both statements were taken down by the same officer. It is Detective Warrant Officer Patrick Obodu on different dates. EXHIBIT E, that is the statement of M[...], marked "A2" was taken on 18 October 2019 at 22:55. That is the same day as the incident and the statement of Lerato EXHIBIT J, A19 in the docket was taken on 23 October 2019 at 13:00. That is four days later, which is of course in their favour. The slight difference point to an absence of collusion.

By way of example, it was put to Miriam that she did not refer to the accused praying in her statement, yet she maintained that she did. That is off-set by L[...] who corroborated Miriam in her evidence that she heard the accused praying and also stated so in her statement. The accused said "God what is it that I have done?" And she states so in paragraph 4 of EXHIBIT J. Both denied that the accused ever told them that attackers had knives. Both similarly denied that the accused said she was grabbed and thrown to the ground. Both are also adamant that although they did not refer to the word poison, M[...] used the word unknown liquid in EXHIBIT E in paragraph 5, while Lerato used the word in paragraph 5, in EXHIBIT J, drugged, but drugged spelled D R U G E D.

They were adamant that accused said that she and the deceased were fed poison. If I consider the statements, they

are not of the best quality. Replete with bad grammar and atrocious spelling, the court should be very careful to overly emphasise the value of the statements, especially of such a traumatic event.

Such statements are also not taken down by way of cross-examination. See in this regard, *State v Mafaladiso* 2003 (1) SACR 583, a judgment of the Supreme Court of Appeal at 593e – 594h. See also *State v Bruiners* 1990 (2) SACR South Eastern High Court Local Division 537e. Similarly, the apparent contradictions as to the one bandage, Miriam did not refer to it, but Lerato stated it was in fact found around the neck of the accused.

It is however clear on photograph 27 of EXHIBIT C that the bandage was found on the floor next to where the accused was. So, the bandage was there. The contradiction is more apparent than real. I accept the evidence without any hesitation.

The next witness I need to deal with is T P N[...]. I watched this witness carefully and I was impressed with her demeanour and the quality of her evidence. It is so that she is a single witness. As to identification and I must treat her evidence with caution. Her identification was made in broad daylight and in ideal circumstances. One and a half to three metres away in the middle of the day in broad sunlight.

Her identification is also strengthened by the fact that she knew the accused before. There appears to be no motive to lie as she really has no interest in the matter. I find her evidence to be truthful and reliable. I have no hesitation in accepting it. That places the accused outside the house at 14:30, fully dressed and apparently in good health.

She, the accused did not at that stage report anything such as an alleged kidnapping to her. If her evidence is true, the accused was lying about this but I will deal with that later, when I deal with all the evidence including the accused

I then deal with the evidence of T K[...] and B M[...]. These are the two friends of S[...] who was with him from approximately 07:20 / 07:30 to 08:00 on the morning 18 October 2019 and for the next five to six hours. Both cannot really say where S[...] was between 05:00 and 06:00 and I therefore do not deem it necessary to discuss the evidence any further as it was not attacked. I accept it. I should add that T K[...] is the one who informed S[...] about the fact that L[...] is looking for him. It is significant to note that both say that S[...] is a person who loves his sleep and they both say or one of them said that they actually woke him up.

I also find it instructive and strange that it was never put as one would have expected that they were the two friends with S[...] as to the attack next door. The question is who were these two friends referred to by the accused. This was not put to S[...]. It was only put that he alone was there. It is clear to this court however that they both thought it could not have been S[...] as they inferred he was sleeping. Both definitely thought so.

The next witness is S V[...]. She is the aunt of Lerato who found the needle stuck in the mattress on the 19th October 2019 when she was cleaning the room of the accused. Although it was put to her in cross-examination that the accused does not know how the needle got stuck there and then it was also put that she had never... that is now the accused used the needle before that.

Suffice it say that I accept her evidence as she has no reason to lie and the finding of the needle itself is not attacked by the defence. It was just put that the accused knows nothing about it. This needle will later prove to be significant as to the scratches of the inside arms of the accused.

F W M[...], her evidence as to the fact that she saw S[...] at 07:00 was not disputed at all, except for the fact that she could not unequivocally exclude that S[...] could have left

earlier if he left the door and he had left quietly. Her evidence was not disputed. She was however adamant that she did not hear anything, except for the above, which I will deal with on the basis of probabilities later. I accept her evidence.

As to the witness B P M[...], the golf player, his evidence is not disputed and I accept it. S M N[...], his evidence is of an expert nature, as reflected in EXHIBIT L, by way of a section 212 affidavit. His evidence is that the first Whatsapp which was sent at 04:30 that that should be at 06:30 referring to the difference in time and international time and South African time.

This evidence was not disputed and the evidence is accepted. See in this regard on page 33, the last entry where the address [...] Street, [...] is provided. It is common cause that is the house where the incident occurred. See also in this regard the entry at page 34 of EXHIBIT L, the top entry starting with the words “Keng Hoo.”

I then turn to deal with evidence of S M S[...]. He is the neighbour who was implicated... Who was allegedly implicated in the attack on the accused on 18 October 2019 and that she saw him after 05:00. This witness made an excellent impression on me in the witness box. He was logically and forthright in his answers and stuck to his version under cross-examination. His evidence is also inherently probable.

The question is, why would he attack the hands that feeds him and be recognised in the process with disastrous consequences. Furthermore, it is not clear what the purpose of his attack on accused would be. If it was because he was not happy with is payment, it does not make sense as there is firstly no such evidence and it was not put to L[...] that he was unhappy with the payment. Secondly, nothing was stolen or taken from the house, so it was an unsuccessful robbery or theft of what. That is not even clear. Thirdly, on all the evidence, he got on well, not only with L[...] the mother of the

deceased, but there is also evidence that he looked after the baby on occasion.

He was a family friend and there has been no bad blood. Fourthly his initial answer that he does not remember that Lerato owed him money is instructive as it shows that the money was not important to him at all as it was a mere gratification. He stated, if you paid him only R20, he would be happy.

Fifthly, L[...] testified and this was not disputed that when she related the accused version about him being the attacker, he looked surprised. Sixthly, the motive suggested about the money for a car wash seemed so insignificant an unconvincing and highly improbable. Eighthly on the probabilities he was probably asleep as his friends seem to believe so. They alleged he loved his sleep. According to him, he usually only gets up at 07:00. His aunt W M[...] testified that she would normally hear the door open. She only heard it on that day for the first time at 07:00. She also saw him at 07:00. If it happened at 05:00, she heard nothing. No doubt, the probabilities favour the version of the Siyabonga that he was in fact at home of the morning of 18 October 2019 at 05:00 and that he was asleep.

Nine, the assertion that the child was attacked by him for revenge is a startling and improbable assertion. Ten, suffice it to say at this stage that the later evidence of the accused about S[...]'s role in the attack kept on changing and that must lead to a negative credibility finding, bearing in mind as an important factor in a holistic approach to the accused, to all the circumstantial evidence.

Eleven, even more damning for the accused is that in her Whatsapp to assist her soon after the attack, she does not mention S[...]'s name at all. To this court, that is the *coup de grace*. At the end of the day, I am satisfied that the evidence of Siyabonga has the ring of truth is inherently probable and

that he has no reason to lie or that no motive has been shown to attack the deceased. As I will indicate later, he was just a convenient scape goat. I accept his evidence.

I then deal with the evidence of Dr Spencer Brian Probert. As to the evidence of Dr Probert, I should state that although he was still inexperienced as a doctor, he impressed me as a witness. He clearly already has extensive experience of assault cases and cases relating to substances. He provided reasons for all his opinions and he qualifies as an expert and his evidence was not really attacked. I accept his evidence as Dr Algabodian would also later corroborate it.

As to the evidence of Dr Fortunato Beccia, the pathologist as I stated earlier, his evidence is undisputed and I accept it.

I then deal with the evidence of Dr Sunday Joseph Algabodian. Algabodian saw the patient on admission on 18 October 2019 and noted his findings in the J88, EXHIBIT K. I found him to be an excellent witness. Well qualified and with 18 years of experience. A true expert witness. Of that there can be no doubt. I have no hesitation in accepting his findings. If one has regard to his evidence, it is clear that accused was malingering upon admission and clinically and chemically did not present the picture of being poisoned.

He stated that there was no clinical signs of losing consciousness and the wounds on the inside of her arms are self-inflicted and not due to an assault. He corroborates Dr Probert as well. The result of the above expert evidence is of course objectively speaking... I repeat that. The result of the above expert evidence is, of course objectively speaking, fatal to the version of the accused, which will be indicated later as she clearly then lied when she averred that she was injured and poisoned, but I will deal with that later.

M P T[...]. I was impressed with this witness and I accept her interpretation as the Whatsapp in EXHIBIT H sent

at 06:42 as there is nothing to controvert it. What Mr Maimela put is not evidence and accused never testified about that. As to the interpretation of the 06:52 translation of the dead body or corpse to with the word 'remains' is neither here nor there as she in any event conceded the other translation proffered to her. Interestingly accused in her evidence used these exact words.

I now turn to deal with the evidence of accused in some detail. Firstly, I should make an observation that I watched the accused carefully throughout the trial. The trial had started the Monday 26 October 2020. By Wednesday the next week, 4 November 2020, the accused started testifying. During the first week of the trial, the accused sat quietly, confident in the accused dock. The next week Wednesday, the moment she climbed into the witness box, her demeanour and posture changed. Suddenly she started swaying from side to side. When that was raised by the court, she stated that she was "not in a good state". When asked again about the swaying, she answered almost irrelevantly, "my memory goes back." The court then adjourned briefly.

When we came back, the first question of the prosecutor was "are you okay?" To which she replied, "yes." Her cross-examination continued for some time on 4 November 2020 until after the tea adjournment which was from 11:30 to 11:45. Soon thereafter, the accused continued swaying in the meantime. She suddenly asked the court to stand down for two days as she was not "feeling okay." She complained of strains at the back of her neck.

The court stood down until the next day, that is the Thursday the 5th November, after ordering that she be seen by a doctor. According to the doctor's report EXHIBIT M, compiled by Dr Pasha, she was clinically stable and healthy. As the report was not clear, the court ordered that Dr Pasha be subpoenaed for the next day. That is 6th November 2020. In

the meantime, she did not continue with the cross-examination.

Dr Pasha then testified that there was no medical problem, but as he was not sure what the court required, he noted that if the court wants a psychological and psychiatric report, the accused needed to be sent to Themba Memorial hospital for such. The remark was therefore conditional. As he had completed a basic course in psychiatric evaluation, he found no psychological problems in the accused.

Under cross-examination, he stated with a reference to EXHIBIT M on the second page that the capital A circled meant assessment and the capital P circled meant plan. He said accused... He was asked whether the accused complained of neck pain. He stated that she told the doctor that she had pains on the side of her neck. When he queried her, she said she was in court and she was tired.

He was adamant that the accused did not need any further evaluation. The court hen ordered the trial to proceed. When cross-examination resumed on that day, that is now the 6th November at 09:55, the swaying mirabile stopped. That was just an early indication of her manipulative nature which was to come. She was clearly malingering. Drawing sympathy from the court. Be that as it may, cross-examination was completed on that day. That is Friday the 6th November 2020.

As stated, having watched the accused carefully during the trial, her performance in the witness box can only be described as pathetic. She was a spectacular bad witness. Her evidence was vague and she tended to give long rambling and irrelevant answers. She can rightly be described as a disinterested witness especially when confronted with incriminating evidence.

She was also most evasive at time and questions often had to be repeated and she had then to be instructed by the court to answer those questions. She was also a contradictory witness who contradicted her own evidence as well as her

instructions. At times her evidence was laughable and absurd and it was akin to a fairy tale. Her version was not just only improbable but measured against certain objective facts, such as the medical evidence as to the poisoning and the self-inflicted scratches, her version was nothing else than a pack of lies.

As stated earlier, the evidence of the accused was fraught with inconsistencies, vagueness, contradictory, improbable and in fact a lying version to such an extent that looking at the merits and the demerits of all the witnesses that the version just cannot reasonably possibly be true by any stretch of the imagination.

Ms Scheepers in her heads of argument in paragraph 4 referred to certain improbabilities and I quote from paragraph 4.1:

> "4.1 It is highly improbable that all the witnesses for the state falsely implicated the accused. All the witnesses indicated that they never had any problems with the accused. This can also be seen in the fact that Ms M M[...] answered to a question put to her during cross-examination that she is not saying that the accused killed the child. She was only testifying about what she experienced that day.
>
> 4.2 It is respectfully highly improbable that the mother of the deceased, L M[...] and the neighbour S S[...] planned the incident. If they planned it as the accused wants the court to believe that S[...] has to rescue the deceased and get rid of accused, the deceased would not have been killed.
>
> 4.3 It is respectfully submitted that it is further highly improbable that the accused was able to send messages to her sister in Lesotho, but not seek help from anyone else in South Africa who will be able to help her.

4.4. It is highly improbable with respect, that accused was forced to drink a concoction that left her unconscious. Dr Algabodian testified that if she swallowed any substance that caused her to become unconscious, she would have died, if she did not receive the antibodies.

4.5 It is respectfully submitted that it is highly improbable that the accused would swallow the substance. It is further highly improbable that she would drink a lot of the substance not knowing what it is.

4.6 It is highly improbable that the attackers will know where to find any substances in the house that can be used to poison the accused and then after they prepared the substance, they will replace the containers on the exact same spots where they were initially found.

4.7 It is further highly improbable that the attackers knew where to get the bandages used to tie around both the deceased and the accused mouth and neck respectively.

4.8 It is highly improbable that Siyabonga will commit this offence to take revenge due to dissatisfaction with money owed to him and then nothing was stolen during the incident.

4.9 It is further highly improbable that S[...] will rescue the baby as part of the plan by him and the mother of the baby, but then kills the baby and leaves him inside the house"

I agree with the submissions in this regard. To that I would add a few more. Firstly, if Lerato got rid of her, the accused, she could not explain who would then look after the child. This is highly improbable.

When pressed about her reason why would L[...] would

want to get rid of her, her answer being that it was to rescue the child and there is no reason therefore, she became extremely evasive and did not want to answer the question.

(2) She conceded that it was easier to fire someone than to kill someone in her own home, so if it was L[...]'s plan, it is improbable to embark on such a course. The accused averment is improbable and false.

(3) On the version of the accused, she only heard S[...] saying "knock, knock." How she could recognise his voice from that is unconvincing and improbable. She appears far too keen to implicate him as soon as possible.

(4) Her assertion that when she heard S[...], she thought it might be M[...], the aunt, that has sent him to pick up something she forgot, is a surprising allegation and does not make sense. Not only is it improbable, but she never testified about that in chief nor was it put to M[...] the aunt.

(5) She stated that she had a long-sleeved pyjama top on. How she could then feel being stabbed I find highly improbable especially as we now know, it was probably caused by a needle or pin and that it was only scratches.

(6) The biggest improbability of all is that she opened up for S[...] without asking what he wanted at that time, 05:00. Her answer that she opened, because "he is allowed as a child in the house" (and he was therefore trusted), flies in the face of his subsequent attack on her.

(7) The fact that she first unlocked and opened the wooden door, then saw the other two males, but yet continued to open the security door "quickly", sounds highly improbable and nonsensical, especially as she testified the faces of the two unknown men changed once she had opened the burglar door.

(8) Her assertion that she only saw the knives when they were rushing her, as they came in (and not earlier when she opened it), how she could see that only once she started

running away, sounds similar, highly improbable. In any event, she has contradicted her evidence-in-chief where she stated that that she saw them with the knives already outside once she had opened the door. She could not explain the shift from outside to inside the house as to when she saw the knives. Her answer when this contradiction was put to her is not only laughable but improbable.

She compounded the improbability of the above scenario by suddenly coming up with a description of these knives, i.e. that they were okapi clasp knives.

(9) Of course the knives landed her in even further trouble as she could not explain the improbability thereof where they were when she described them grabbing her at the wrist and she could not say what had happened to the knives in the meantime. The fact that one of them also held his hand over her mouth is even more improbable. This scenario of them holding her by her hands does not leave any possibility that they could have knives at that stage.

(10) The concoction she was forced to drink was smelling and bad, yet she drank it all. That is a highly improbable action. The fact that the jug is nowhere to be seen on the photographs is just another glaring improbability.

(11) She could not explain the glaring improbability, if she was lying on the ground with her fists held in front of her, how they were then able to “stab” her as she alleged she felt it.

(12) We know now it was not stab wounds, but self-inflicted scratches on the inside of her arm. It is in any event improbable that she could have sustained them if her hands were held in front of her as if she was defending herself as she alleged. She could not explain this. In fact it can be factually found to be a lie and her description must therefore fall by the way side as impossible.

She conceded it was put to S[...] that he and his friends

came to the deceased place to rob them and she told her advocate so. I pause here to state that I find this choice of words “friends” interesting. Why would she describe them as friends. His friends were B[...] and T[...]. Yet apparently, they were not there. Quare, who were they?

It was put to Siyabonga that they went to the deceased place to rob and as stated, she told her advocate so. When asked why it was not put as a result of taking revenge and whether she told her advocate so, she became extremely evasive and did not want to answer the question. Clearly it was not put as such and as it is such an important part of her version, the mere fact that it was not put, must lead to a negative credibility finding in that regard.

(14) She could not remember if her hands were tied, which is already strange and improbable, but then she could not explain where the bandages came from. Her answer that she did not see is not only improbable, but false. The bandages were clearly there. See EXHIBIT C, photograph 27 as well as the fact that the bandage around the mouth of the deceased was never disputed in evidence.

(15) Her totally inability to explain why she did not call for help or contact the police. Her answer being “It did not come to my mind.” It is so ridiculous, it must be rejected. Her reference and concern for the baby is belied by the whatsapps as there is absolutely not reference to the baby in it. Not much needs to be said as to her explanation that the word “blackmail” in EXHIBIT H, was meant to be an attack. It is rejected out of hand as to be improbable and false. In fact, I find it is a lie. The fact that the “blackmail” is used in the vernacular, she could not explain as well as the fact that there was no reference to S[...]’s name being mentioned in the Whatsapp, EXHIBIT H. The fact that according to her, neither M[...] or L[...] asked her where the child is, cannot be true, as it is just not reasonably possibly true. It is so improbable.

There are far more improbabilities, but the above would suffice. Ms Scheepers in paragraph 5 of her heads of argument, briefly deal with some contradictions in the version of the accused. I quote from paragraph 5.1 to paragraph 5.3:

> "5.1 accused version that the mother of the deceased, planned this incident was never put to any of the witnesses in order for them to answer to it.
>
> 5.2 the accused testified that the witness S S[...] stayed in the kitchen while the other two men followed her to the bedroom and that he only came to the bedroom later, carrying a jug filled with a substance which he gave to the two men to give to her. That was never her instruction to her legal representative as it was put to the witnesses that all three men followed her to the bedroom and that S[...] was the one that forced her to drink the substances.
>
> 5.3 it was accused instructions to her legal representative which instruction was put to the witnesses that accused does not know how she sustained the injuries on the her arms. The accused however testified that while the men were busy forcing her to drink the substance, it felt like she was stabbed by a sharp object."

I agree with these submissions made by Ms Scheepers and I find accordingly. It is significant that both in respect of M[...] and L M[...], both were adamant that the accused used the word poison in describing what she was forced to drink. By the time she testified, she stayed very far away from the word poison and said she was forced to drink a liquid or words such as a concoction.

Clearly it is an inference, because she was now aware of the medical evidence in that regard as to the ingestion of

poison. In fact, it is not only significant, but once again, she clearly told the court a lie. I reject her whole version of being attacked by S[...] and his two friends on the morning of 18 October 2019 just after 05:00 and that she was forced to drink poison.

I reject her version of being forced to drink anything and especially not poison by S[...] and his cohorts. I reject her version that she was ever attacked by knives and that caused the injuries to her arms on the inside. There were no knives. The court finds that as a fact. I find that the wounds on her arms were self-inflicted and on a balance of probabilities was caused by the needle visible in photograph 6 – 8 of EXHIBIT D. I reject her version that S[...] kidnapped and took the deceased from her bed and out of the house. I found that S[...] was not there and was in fact at his home sleeping.

I reject her version that the accused ever lost consciousness although I must state that under cross-examination, she vacillated so much between whether she had lost consciousness or not, that it was not clear exactly what she was trying to say to the court.

I reject her version that she was not seen outside the house at 14:30 on 18 October 2019 by T P N[...]. I find that she was there dressed in a short-sleeved T-shirt. I specifically find that stepping back and looking at all the evidence in totality, that accused deliberately lied about the following: Being attacked by S[...] and his friends, that she was forced to drink a poison, that she was injured in the attack on the inside arms by the attackers. That S[...] kidnapped the child, that she did not know that the deceased was still in the house and that she lied about causing the death of the deceased.

I then need to make some findings: As to that this case is based on circumstantial evidence. Before I ever do that, I need to set out the legal position dealing with circumstantial evidence as well as the proof of intent and motive.

I first deal with circumstantial evidence. (1) Circumstantial evidence is not necessarily of less value that direct evidence. In certain circumstances, it can carry more weight than direct evidence. See in this regard, *State v Tshabalala* 1966 (2) SALR 297 (AD) at 299B – C. (2) Deductions are made from circumstantial evidence and therefore logical rules must be followed in order to avoid speculation. (3) The court must not consider each circumstance in isolation. In *Rex v de Villiers* 1944 (AD) 493 at 508 – 9, Davis AJ of Appeal was reported to have said the following:

> "But I should not leave this point without dealing shortly with an argument pressed upon us by Mr M[...], that in a case depending on circumstantial evidence, 'the court must take each factor separately, and, each of them is possibly consistent with innocence, then it must discard each in turn'
> This argument is fallacious.
> It is in the first place inconsistent with my brother Watermeyer in *Rex v Blom* 1939 (AD) at p 202:
> 'The proved facts should be such that they exclude every reasonable inference from them, save that one sought to be drawn.'
> It is not each proved fact that must exclude all other evidence, the facts as a whole must do so.
>
> I then refer to the quotation of *Best Evidence* the 5th edition:
> 'Not to speak of greater number; Even two articles of circumstantial evidence- though each taken by itself weigh but as a feather, join them together, you will find them pressing on the delinquent with the weight of a mill-stone... It is of the utmost importance to bear in mind that where a number of

> independent circumstances point to the same conclusion, the probability of the justness of that conclusion is not the sum of a simple probabilities of those circumstances, but the compound result of them.'

See also *Evans* in respect of *Pothier on Obligations* (paragraph 2.242 and *Wills on Circumstantial Evidence 7th Edition page 46):*

> "The court must not take each circumstance separately and give the accused the benefit of any reasonable doubt as to the inference to be drawn from each one so taken. It must carefully weigh the cumulative effect of all of them together, and it is only after it has done so that the accused is entitled to the benefit of any reasonable doubt, which it may have as to whether the inference of guilt is the only inference which can reasonably be drawn. To put the matter in another way; the Crown must satisfy the court, not at each separate fact is inconsistent with the innocence of the accused, but that the evidence as a whole is beyond reasonable doubt inconsistent with such innocence."

This is all still a quotation from *Rex v de Villiers* 1944.

(4) When reasoning by way of inference, there are:

> "There are two cardinal rules of logic"

Which have to be followed, as set out by Watermeyer, Judge of appeal in *Rex v Blom* 1939 (AD) 188 at 202 – 203:

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

(2). The proved facts should be such that they exclude every reasonable inference from them save the one sought to be drawn. If they do not exclude other reasonable inferences, then there must be a doubt whether an inference sought to be

drawn is correct."

(5). The application of these rules was reinforced by Smallberger, acting judge of appeal, as he then was in *State v Mtsweni* 1985 (1) SALR 590 (AD) at 493E:

"[Afrikaans] [02:08:57]"

The *opmerkings* from Lord Wright in *Caswell v Powell Duffryn and Associated Colliers Limited* (1939) 3 All England Reports 722 at 733: "[Afrikaans] [02:09:40]"

> "Inference must be carefully distinguished from conjecture or speculation. There can be no inference unless there are objective fact from which to infer the other facts which is sought to be established. In some cases the other facts can be inferred with as much practical certainty as if they had been actually observed. In other cases, the inference does not go beyond a reasonable probability, but if there are no positive proved facts from which the inference can be made, the method of inference fails and what is left is merely speculation or conjecture."

Then further on, the same quotation at 594 of the *Mtsweni* judgment [Afrikaans] [02:10:50]

In other words the mere fact that the accused is found to be a liar does not necessarily mean he has committed the offences. I then turn to deal with further aspect as to the proof of motive and I refer here to the well-known minority judgment of Malan, AJA in *Rex v Mlambo* 1957 (4) SALR 727 (AD) where he is reported to have said the following about the proof of intent in such circumstances at 737 C to F:

> "Proof of motive for committing crime is always highly desirable, more especially so where the question of intention is an issue, Failure to furnish absolutely convincing proof thereof, however, does not present an insurmountable obstacle because

even if motive is held not to have been established, there remains the fact that an assault of so grievous a nature was inflicted upon the deceased that there have resulted either immediately or in the course of the same night. If an assault "using the term in its widest possible acceptation is committed upon a person which causes death, either instantaneously or within a very short time thereafter and no explanation is given of the nature of the assault by the person whose knowledge it solely lies, a court would be fully justified in drawing the inference that is was of such an aggravated nature that the assailant knew or ought to have known that death might result. The remedy lies in the hands of the accused person and if he chooses not to avail himself thereof, he has only himself to blame if an adverse verdict is given."

Then at 738 a-d:

"in my opinion, there is no obligation upon the crown to close every avenue of its escape which may be said to be open to an accused. It is sufficient for the Crown 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 committed the crime charged. He must in other words, be morally certain of the guilt of the accused. An accused`s claim to the benefit of doubt when it may be said to exist, must not be derived from speculation, but must rest upon a reasonable and solid foundation created either by positive evidence or gathered from reasonable inferences which are not in conflict with, or

> outweighed by, the proved facts of the case. More over if an accused deliberately takes the risk of giving false evidence in the hope of being convicted of a less serious crime or even, perchance, escaping conviction all together and his evidence is declared to be false and irreconcilable with the proved facts, a court will, in suitable cases, be fully justified in rejecting an argument that notwithstanding that the accused did not avail himself of the opportunity to mitigate the gravity of the offence, he should nevertheless receive the same benefits as if he had done so."

Ms Scheepers, Mr Maimela I need another 15/20 minutes. Can I proceed or must we adjourn at this stage?

MS SCHEEPERS: I have no objection if we proceed M'Lord.

MR MAIMELA: I have no objection M'Lord.

COURT: Thank you.

I then turn to make the following factual findings:

1. Accused was the only person in the house with the deceased shortly after 05:00 on the morning of 18 October 2019. She was found in her bedroom at 16:00 that same day. Her hands were not tied and her upper body was naked.

2. The deceased was found in a storeroom marked A1 in EXHIBIT C, immediately adjacent to the bedroom of the accused, marked 'B' in the sketch plan EXHIBIT C. He was found there by Miriam Mnguni soon after 16:00 on 18 October 2019. The deceased was lying on the floor.

3. There was a bandage around the mouth of the deceased to the back of the head of the deceased.

4. The deceased died of a fractured neck with asphyxia.

5. The cause of death was caused by external pressure supplied to the mouth and neck area.

6. There were no signs of poisoning found in the deceased body at the post-mortem.

7. Death would have ensued very quickly with the fracture. With asphyxia it would be less than three minutes. If there is a combination of the fractured neck an asphyxia the time would be less than three minutes.

8. The house was locked and the keys were found inside on the floor marked ‘X’ on photograph 3 of EXHIBIT C.

9. Nothing was missing or stolen from the house.

10. The blinds and curtains at the front of the house was closed. They were usually opened by the accused. From the window, to the left of the house visible in photograph 1 of EXHIBIT C, if you scream from there, you will be heard.

11. A bandage was found around the neck of the accused and this bandage is visible on the floor next to where she was found next to the cupboard in photograph 27 of EXHIBIT C.

12. The accused was found praying saying “God what is it I have done?”

13. Both the bandages found around the mouth of the deceased, around the neck of the accused and on the floor next to the accused, came from a cupboard in the room of the accused.

14. The accused was found to have self-inflicted scratch marks on the inside of her arms. The needle visible in photograph 4 of EXHIBIT D was found in her room stuck inside her bed.

15. The accused was found not to show any signs of poisoning. She was not poisoned.

16. S[...] and his two friends did not attack her on the morning of 18 October 2019 just after 05:00. The deceased was not kidnapped and taken by S S[...]. He and his two friends were not in the house at the time. The court finds he was at home sleeping.

17. Accused was seen at 14:30 on 18 October 2019 outside the house at [...] Street [...] by Tshwarelo Petunia

Ntuli. Accused was wearing a short-sleeved T-shirt and was physically normal.

18. She sent Whatsapp messages, the first at 06:29 on 18 October 2019 as per EXHIBIT H and the translation, EXHIBIT H2. (This is just a remark. The contents of these whatsapps are ominous. They for example refer to the word "blackmail", but there is no explanation given therefore. The court cannot make any finding in that regard.)

19. The accused lied to M[...] and L M[...] about being attacked by S S[...] and two friends at 05:00 on the morning of 18 October 2019. She lied about being forced to drink poison and or being poisoned. She lied about the deceased being kidnapped by S S[...]. She lied about being injured on her inside arms and she lied about the knives. She also lied about not being outside the gate at 14:30 on 18 October 2019.

Bearing in mind all of the above, the only reasonable inference from the proved facts to the exclusion of all other inferences is that the accused and she alone is responsible for the death of the deceased.

It matters not that there appears to be no clear motive and that it is not known exactly how the deceased was killed as our law does not require the same. The contents of EXHIBIT H, the screen grab of the Whatsapp messages and H2 the translation thereof, is ominous.

> "My heart bleeds. It is better I die than being blackmailed."

She later refers to her dead corpse and also refers to boys being paid. The word blackmail also appeared in the vernacular. Usually blackmail and kidnapping is found hand in hand, but there is no explanation by the accused in this regard as she does not even use the word kidnapping in EXHIBIT H.

With reference to the earlier case of *Rex v Mlambo*, the accused had the key in her pocket to tell the court what really happened. She chose not do so and she must now suffer the

consequences thereof.

As to the form of attention, according to Dr Beccia who performed the post-mortem examination EXHIBIT B, external pressure must have been applied to the mouth and neck area but he states more in favour of the neck. With a fracture to the neck, death would have ensued very quickly and with asphyxia, up to three minutes. A combination thereof would take less than three minutes. Bearing that in mind, the only form of mens rea can be that of *dolus directus*. In this regard I refer to the case of *Rex v Lewis* 1958 (3) SALR 107, a judgment of the appellate division.

This case deals with strangulation and I quote from a judgment of Malan, Judge of appeal:

> "If death had been caused by strangulation, it would have involved the application of pressure to the windpipe for a period of from three to five minutes and would have had to be sufficiently severe to exclude air from the lungs completely for that period."

I then quote further with reference to the actions of the accused. In that case, Malan, Judge of appeal stated further:

> "His decision to apply pressure to the throat, was therefore, a deliberate act designed to be effective and in order to be effective, it had of necessity to be severe, continuous and of some duration."
>
> Momentary seizure followed by immediate release would obviously have served little or no purpose." I quote further:
>
> "The inherent danger of the application of pressure to the throat and neck for even a very brief period, must be present to the mind of even the most dull witted individual and, apart from explanation, in performing such an act, the assailant either realises this, or recklessly disregards it's probable

consequences. The application of pressure manually as in the case before us is an aggravating circumstance, because the assailant throughout not only fully alive to the degree of force exerted by him he is, by reason of his manual contact with the throat, warned of the victims reaction to the pressure applied."

The accused has been charged with murder in respect of count 1 read with the provisions of section 51(1) of Act 105 of 1997. That means planned or premeditated murder. On the facts before me and Ms Scheepers and Mr Maimela, both concede this, I find that there has not been any planning. A conviction of murder read with the provisions of section 51(2), that is murder other than planned murder of Act 105 of 1997, should follow.

As to the second count, there can be no doubt that the accused should be convicted of defeating or obstructing the course of justice. Accused must stand.

Ms T[...], you are convicted of:

(1) Murder read with the provisions of section 51(2) of Act 105 of 1997.

(2) Defeating or obstructing the course of justice.

BROODRYK, AJ
JUDGE OF THE HIGH COURT
DATE: 2021.01.23

For the State : Adv S Scheepers instructed by the Director of

Public Prosecutions, Gauteng Division, Pretoria

For the Defence : Adv Maimela