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**IN THE HIGH COURT OF SOUTH AFRICA  
KWAZULU-NATAL DIVISION, PIETERMARITZBURG,  
NORTH WESTERN CIRCUIT**

Case No: CCP42/2021

In the matter between:

**THE STATE**

And

**MBUSO MNCUBE**

**ACCUSED**

**JUDGMENT**

**MOSSOP J:**

**Introduction**

[1] At the beginning of this trial, Mbuso Mncube, hereinafter referred to as ‘the accused’, stood charged with seven counts. They were:

- (a) Three counts of rape;
- (b) A count of robbery with aggravating circumstances;
- (c) A count of housebreaking with intent to commit rape;
- (d) A count of theft; and
- (e) A count of murder.

Greater particularity of these allegations will be provided as I deal with each of the counts in this judgment.

### **The plea**

[2] When the charges were put to him, the accused pleaded not guilty to all of them. He was represented at trial by Mr MADIDA, who confirmed that the pleas were in accordance with his instructions and who then read a statement in terms of section 115 of the Criminal Procedure Act 51 of 1977 (the Act) into the record. In essence, the accused elected not to disclose the basis of his defence but made certain admissions in terms of section 220 of the Act in a separate document. These admissions related to two photographic albums and a sketch plan and a post mortem report pertaining to the victim in the murder count, being count 7 to the charge sheet.

[3] The seven charges put to the accused cover a wide span of years. The earliest offence was alleged to have been committed by him in October 2012 and the last offence in November 2019. There was a considerable number of witnesses who were called to testify at his trial, 19 in all, and the evidence was heard over a continuous period of four weeks.

### **The section 174 application**

[4] At the closure of the State case, Mr MADIDA brought an application in terms of section 174 of the Act in respect of all seven charges that the accused then faced.

[5] Section 174 of the Act reads as follows:

‘If, at the close of the case for the prosecution at any trial, the court is of the opinion that there is no evidence that the accused committed the offence referred to in the charge or any offence of which he may be convicted on the charge, it may return a verdict of not guilty.’

[6] Mr Sokhela, who appears for the State, did not oppose the application in respect of counts 1, 4, 5 and 6. The reason for the State adopting that position is understandable: it presented a substantial volume of evidence on these counts but none that implicated the accused in any of those charges. The position fell squarely within the provisions contemplated in section 174 of the Act: no evidence was presented that the accused committed those crimes. The application for a discharge was consequently granted in respect of:

- (a) Count 1, being a charge of rape allegedly committed on 28 October 2012;
- (b) Count 4, being a charge of housebreaking with intent to commit rape, allegedly committed on 22 April 2017;
- (c) Count 5, being a charge of rape allegedly committed on 22 April 2017; and
- (d) Count 6, being a charge of theft allegedly committed on 22 April 2017.

[7] The application for a discharge was, however, opposed by Mr Sokhela in respect of counts 2, 3 and 7. The submission by Mr MADIDA that there was no case for the accused to answer on those counts was quite frankly, astonishing, and, in my view, failed to show an appreciation of what evidence had, in fact, been led through multiple witnesses. After hearing both counsel, I declined to discharge the accused on those three counts. Thus the accused was placed on his defence on:

- (a) Count 2, being a count of rape of Ms N [...] A [...] K [...] (Ms K [...]), allegedly committed on 27 April 2013;
- (b) Count 3, being a count of robbery with aggravating circumstances where the complainant is also Ms K [...], allegedly committed on the same date; and
- (c) Count 7, being a count of murder in which the accused is alleged to have murdered a Ms C [...] L [...] ( B [...]) on or about 31 October 2019. The charge sheet initially stated the date in respect of this charge to be 11 November 2019 but an application for the amendment of the charge was

brought by the State to reflect that date as being 31 October 2019 and was granted.

[8] When discharging the accused, I briefly gave reasons for doing so. I see no reason to expand upon those reasons. Two complainants who were allegedly separately raped by the accused could not identify him and the State failed to produce any forensic evidence linking him to either of those rapes or the other offences that were alleged to have occurred at the same time to those complainants. There literally was no evidence that the accused committed those crimes. I attempted to ascertain later during argument from the State how the accused had been linked to those offences in the first place in the absence of any evidence implicating him. I am not sure that I understood what I was told and I remain uncertain how this occurred. I see no profit in narrating and analysing in this judgment the evidence led on those charges in respect of which the accused was discharged. I shall, however, have more to say about the discharge of the accused at the end of this judgment.

[9] I shall then deal only with the evidence that was led in respect of counts 2, 3 and 7. In doing so, I shall not deal with this evidence in the sequence in which the evidence was led, but in sequence with the charges as they appear in the indictment. As a matter of fact, at the trial the State first led evidence on the last count, count 7, before dealing with the other counts.

## **The evidence**

### **Counts 2 and 3**

[10] Count two was a charge of rape, the State alleging that the accused had raped Ms K [...] on 27 April 2013. Count 3 was a charge of robbery with aggravating circumstances, the State alleging that the accused had, on the same day, robbed Ms K [...] of two cellular telephones and R3 000 in cash.

[11] Ms K [...] testified that she resided at Phase 3, Glencoe and that on 27 April 2013 she had returned home from working for two months in Ladysmith. She alighted from her bus at the Emadeleni bus stop at about 16h00. She was burdened with some parcels that she was carrying and a male person approached her, greeted her by her first name, and asked if he could assist her with her parcels. At the time, she thought that she knew the person and thought he was someone who went by the name of 'Bafana'. Throughout her evidence she referred to this man as 'Bafana'. She greeted him by calling him 'Bafana'. The man did not correct her and say that was not his name so she continued in the belief that he was, indeed, the person that she knew as 'Bafana'. I shall continue to refer to him, as Ms K [...] did throughout her evidence, as 'Bafana'.

[12] Bafana helped her by carrying her bag while she carried the parcels. She eventually reached home and her arrival was a joyous moment in her family's life. Everyone was happy to see her after her absence in Ladysmith. She was in a happy mood and later thought it would be a good idea to go out and celebrate that evening with friends. She changed her clothing and met three of her friends at a tavern called 'Ebareni', which is to be found in the same location where she resides. She arrived at the tavern at about 20h00 hours and bought some drinks for her friends. She was, however, hungry and after approximately an hour she left the tavern to go to a nearby tuck shop to get something to eat. On her way to the tuck shop, she again encountered the man who she believed to be Bafana. He asked where she was going to and she explained and he then followed her. She continued to believe that the person she was walking and conversing with was Bafana. She described the tuck shop as being about a ten-minute walk away from the tavern. At the tuckshop, she met her friend, Mr S [...] M [...] (Mr M [...]) who worked at the Glencoe Magistrate's Court and she spoke with him. He asked her whether she knew the person who had accompanied her to the tuck shop and she said that she did and that his name was Bafana. Mr M [...] then called Bafana into the tuck shop and warned him not to do anything to Ms K [...] because, so he claimed, he knew her very well. Bafana laughed and said that he would do nothing to her. Ms K [...] and Bafana then left the tuck shop and both proceeded back to the tavern.

[13] The man believed to be Bafana did not, however, join Ms K [...] and her friends at the tavern. Around midnight, Ms K [...] suggested to her friends that it was time to go home but her friends wanted to carry on drinking. Ms K [...] did not want to remain and so she said her goodbyes and left the tavern. Outside the tavern, she encountered Bafana again and he walked over to her holding a bottle of alcohol, later described as a bottle of beer. She asked him what he wanted. He said he was going to accompany her. She responded by saying that she had not asked him to do so. However, she disclosed to the court that because she still believed the person to be Bafana, a person she knew, she allowed him to accompany her. Bafana suggested a different route home, to which she ultimately agreed. The route that he favoured took them on an unlit road close to the cemetery.

[14] In the vicinity of the cemetery, Bafana suddenly assaulted her by slapping her in the face and she fell to the ground. He then dragged her by her feet across the tarred road into the cemetery. She screamed and tried to fight back, to no avail. In the cemetery, Bafana ordered her to undress but she refused to do so. He then produced a knife and said that if she did not comply with his instructions he would kill her. He then placed the knife on the right side of her neck and she had no option but to comply. She undressed. He instructed her to lie on her back on the ground and he then inserted his penis into her vagina and had intercourse with her. He then stopped and instructed her to assume a different position on her side. She complied and he then had intercourse with her again in that position. Before he had intercourse with her for a third time, she suggested to him that he should use a condom because either of them could be 'sick'. He had condoms with him and put one on and then had intercourse with her in a style that she described as 'doggy style', that is while she was on her hands and knees he penetrated her from the rear. Thereafter, Bafana removed the condom, threw it to the ground, but then instructed her to lie on her stomach. He put on another condom and penetrated her again in that position until he was finished. He removed the second condom and cast it onto the ground.

[15] Ms K [...] dressed herself and they left the cemetery together. She explained that she tried to keep calm, always conscious of the fact that Bafana was armed with

a knife. The route home chosen by Bafana took them through a hostel. En route to the hostel, Bafana told her to hand over her new Nokia cellular telephone. She did so. Upon arrival at the hostel, Bafana announced that they were now going to go to his place. Ms K [...] initially remained quiet upon hearing this but then saw a couple standing next to a motor vehicle and screamed to them that she had just been raped by the person that she was with. The people standing by the motor vehicle asked what had happened and she explained. Bafana fled. The couple took her to the Glencoe Police Station where she reported the matter and confirmed that she believed her rapist was Bafana. She was then taken to Dundee Hospital, where she was examined. The medical report revealed tears to lower part of her labia majora and tears around the anus. An evidence collection kit was used to preserve specimens taken from Ms K [...]’s body.

[16] Ms K [...] testified that she was in pain after her ordeal, especially when urinating. She was given some painkillers and some tablets ‘to clean my womb’. The South African Police Services (SAPS) came to her home later that day and she mentioned to them the two condoms in the cemetery. She was then taken to the cemetery and the two condoms were located and placed in a plastic bag by a member of the SAPS.

[17] Ms K [...] sincerely believed that her rapist was Bafana and she pointed him out to the SAPS when they decided to arrest him. Bafana denied that he had done what Ms K [...] alleged.

[18] Under cross-examination from Mr MADIDA, Ms K [...] denied that the cemetery was used either as a public thoroughfare or as a dumping site. It was also put to her that in one of two statements that she made to the SAPS, she stated that she had been raped 10 times. This fact is also recorded on the medical examination form. She said that she could not recall if she had said that, but, if she did, it was incorrect. She confirmed that she had been raped four times.

[19] As regards the other items mentioned in count three, no reference to a second cellular telephone was made by her and she was extremely vague about

whether she had been robbed of R3 000. She could not remember being in possession of that amount of money and said that if she was, that it was possible that it may have fallen out when she was dragged across the tarred road to the cemetery by Bafana.

[20] Mr M [...], whose full names are S [...] A [...] 1 M [...], is a former court interpreter at the Glencoe Magistrate's Court. He testified that he knew Ms K [...] from the location where they lived. On a date that he could not remember, but which he was certain fell within the year 2013, at around midnight, he was at a tuck shop. Ms K [...] walked in to the tuck shop. He was there because his friend, a Mr Ramogoti, was running the tuckshop that evening and had telephoned him to tell him that it was almost closing time and that he required Mr M [...] to come and fetch him. After Ms K [...] entered the tuck shop, Mr M [...] chatted with her as he knew her and asked her who she was with at that late hour of the night. She replied that she was with a male person. Mr M [...] could not remember the name that she mentioned but confirmed that he had recorded the name in a statement that he had made the day prior to him testifying. His memory was refreshed from the statement and he confirmed that Ms K [...] had said that the man's name was 'Bafana'. The man Ms K [...] was with did not immediately come into the tuck shop so Mr M [...] walked out of the tuck shop to see Bafana and called him to come into the tuck shop. When he saw the man come into the tuck shop he said to himself that it was Mbuso Mncube, the accused.

[21] Mr M [...] testified that he knew the accused from the Sithembile location. He had known him for a long time which he estimated being longer than six years. Mr M [...] greeted the accused and said to him:

'Mbuso, now that you are in the company of this lady please do not do anything harmful to her.'

The accused just smiled in response.



[22] Mr M [...] testified that he knew what type of person the accused was. This was because he often observed him at his place of employment, the Glencoe Magistrate's Court. He watched as the accused and Ms K [...] then left the tuck shop. Mr M [...] said that he thought that the accused might be courting Ms K [...] and was using the name 'Bafana' or that it was a name that he used that Mr M [...] was not aware of.

[23] According to Mr M [...], approximately three or four weeks after this encounter with Ms K [...], she arrived at his house and said that she had been raped by the person who she was with on the night that she saw Mr M [...] at the tuck shop. She confirmed that she had opened a case with the SAPS. Mr M [...] confessed that he had not actually known Ms K [...]’s name prior to her coming to his house but had only known her by sight. Having been told by her what had happened, Mr M [...] testified that he then explained to her that the person she was with was not Bafana but was the accused. She was surprised to hear this. He confirmed that he was never approached by the SAPS until the day before he was called to give his evidence.

[24] Mr MADIDA commenced his cross examination by asking Mr M [...] to describe his relationship with the accused. Mr M [...] said that there was no bad blood between the two of them and that he knew the accused as being a youngster from the location but noted that he was frequently in court as a suspect in cases. A number of questions were put to him about why he had not approached the SAPS with the information that he possessed. He said that upon being told by Ms K [...] of what had occurred and that she had opened a case with the SAPS, he expected that the SAPS would come to him and take a statement from him, but they never did. Mr MADIDA said that the accused would deny ever having spoken to Mr M [...] at the tuckshop and later a more expanded version was put to Mr M [...] in which it was indicated that the accused would deny having been at the tuck shop or that he had spoken to Mr M [...] or that Mr M [...] had seen him on that day. Mr M [...] indicated that if that was what he would say, then the accused would be lying.

[25] The court ascertained from Mr M [...] that the tuck shop was fitted with electric lighting and that when he had spoken to the person introduced to him as 'Bafana', he was standing about half a metre away from him.

[26] The State did not call the medical practitioner who examined Ms K [...] at the Dundee Hospital. Instead, a certificate in terms of section 212(4) of the Act, completed by Dr Charmaine Hlatwayo, was handed in without any significant objection from the defence.

### **Count 7**

[27] The State alleges that the accused murdered one C [...] L [...] ( B [...]) (the deceased) on 31 October 2019 at [...] M [...] 1, Sithembile Township, Glencoe. She was at the time of her death a young girl of 15 years, yet it was alleged that she was the girlfriend of the accused, a male presently aged 30.

[28] The deceased's aunt, Ms Z [...] B [...] (Ms B [...]) who raised the deceased from the age of 9 months, testified that the deceased was, unfortunately, a wilful child who had left her homestead in favour of staying either at her friend's home or at her uncle's home. At the time that she met her demise she was thus not residing with Ms B [...].

[29] On 5 November 2019, Ms B [...] received a report that her niece may have been murdered by the accused. She went home and addressed a family meeting and it was resolved that the family would first attempt to look for the deceased themselves before the SAPS were informed of the family's suspicions. A search of the area yielded no positive result, but Ms B [...]’s nephew, Mr S [...] N [...] 1 B [...] (Mr B [...]), however, did come across the accused on a road in the area while conducting the search for the deceased. Ms B [...] was later informed by Mr B [...] that the accused denied any knowledge of the deceased's whereabouts. The family was not able to locate the deceased and consequently, the next day, 6 November 2019, Ms B [...] escalated the matter and reported her suspicions to the SAPS.

[30] Mr B [...] testified and confirmed that he went looking for his cousin on 5 November 2019. He knew the accused and suspected that the accused was in a love relationship with the deceased. At around 16h00 on that day, he went to a house that he knew was occupied by the accused's friends but did not find the accused there. He returned home and was leaving home at about 18h30 the same day to go to gym when he encountered the accused in the company of one S [...] 2, whose real name is S [...] 1 P [...] and one S [...] 3 M [...] 2. Mr B [...] asked to speak to the accused but was told that he would have to wait as the accused was going to visit at a next-door house. Mr B [...] waited and the accused did return. Mr B [...] asked the accused of the whereabouts of the deceased. The accused said that he had not seen her for quite a while but when he had last seen her there had been an altercation between the two of them. During the altercation, the accused had assaulted the deceased. This had occurred inside a house in an area known as M [...] 1 which he and the deceased then occupied (the M [...] 1 house). Having assaulted the deceased, the accused informed Mr B [...] that he had locked her in the house and left. He advised that upon his return to the house the deceased was gone, apparently having exited through a small window taking all her belongings with her. The accused informed Mr B [...] that he had heard that the deceased was staying at the home of another of her boyfriend's, namely a gentleman named 'Lucky', whose surname was unknown to him, at a place known as eMadosheni.

[31] Mr B [...] did not let matters lie and followed up on what the accused had told him. The next day, 6 November 2019, he went to eMadosheni and tracked down the person known as 'Lucky'. Lucky informed him that he was not the deceased's boyfriend but was merely an acquaintance of hers. He did not know where she was staying, having last seen her in eMadosheni a week before Mr B [...] had tracked him down.

[32] Under cross examination. Mr B [...] confirmed his aunt's evidence that the deceased was, unfortunately, a troublesome child. Mr MADIDA informed Mr B [...] that the accused denied ever speaking to him and that he would deny that he had quarrelled with the deceased or locked her in the M [...] 1 house. He would also deny mentioning the name 'Lucky' to Mr B [...]. Mr B [...] was unphased about these

previews of what the accused would allegedly say. He said that he had not known who Lucky was and he had only tracked him down because of what the accused had told him.

[33] Ms B [...] 1 M [...] 2, who was referred to by her nickname of 'S [...] 4' and who is the biological sister of the accused, testified. To avoid confusion, there being two Ms M [...] 2s who testified, I shall refer to her in this judgment as she was referred to at trial, namely as 'S [...] 4'. S [...] 4 was called as a witness in terms of section 204 of the Act and was warned regarding the evidence that she was about to give. She stated that she understood what was required of her.

[34] She testified that she knew the deceased, who was in love with the accused. She knew this to be the case because the accused would bring her to the family home where the deceased would occasionally overnight. The deceased, furthermore, told her that she was the accused's girlfriend. The deceased was known to her by the name of 'N [...] 2'.

[35] S [...] 4 testified that on 31 October 2019, the accused had telephoned her at around 09h00 and asked her to come to him. She found him at some shops with friends of his and the accused then informed her that he had killed the deceased and that this had occurred 'before the previous day'. S [...] 4 asked him what they had quarrelled about and the accused said that he had found the deceased in his house with another man. The accused instructed her to go to the M [...] 1 house alone and informed her that if word got out about what had happened there he would know that she had been the source of the leak as she was the only one who knew what had happened. The accused refused S [...] 4's suggestion that he takes the deceased's body to the deceased's home, because he said that her family would then know that he had killed her.

[36] The accused then gave her a key to the M [...] 1 house. The reason for her being given the instruction to go there was not revealed at this juncture. She agreed to comply with the accused's instruction. However, after leaving the accused, she came across a friend of hers who she referred to as 'Fidodo'. Notwithstanding that

she had recently been warned by the accused to go on her own, she requested Fidodo to accompany her to the M [...] 1 house, which Fidodo agreed to do. At the M [...] 1 house, S [...] 4 gave the house key to Fidodo and asked her to unlock the door and go inside. Fidodo did so. In a bedroom, Fidodo discovered a body lying on a bed, or as S [...] 4 stated, 'she found a person sleeping.' The body was entombed under blankets and was lying on its back with its eyes open, staring at the ceiling. The blankets were partially removed by Fidodo but she did not expose the lower body of the person on the bed. When S [...] 4 entered the room she saw that the upper part of the person's body was clad in a sweater. A white foam had been extravasated from the body's mouth. S [...] 4 recognised the body as being that of N [...] 2, the deceased.

[37] S [...] 4 explained further in her evidence that she and the accused, while being family, were always at loggerheads with each other and that she, generally, was afraid of him. She later conceded under cross examination that her relationship with the accused could accurately be described as 'toxic'.

[38] Having found the body of the deceased, S [...] 4 returned home with Fidodo, who urged her to tell S [...] 4's mother. S [...] 4 did so and her mother's response was that the accused must immediately hand himself over to the SAPS. The witness then took the house key back to the accused and relayed their mother's instruction to him about surrendering himself to the SAPS. The accused declined to do so but said that they would be able to see through the deceased's eyes as to who she had last seen before dying.

[39] S [...] 4's evidence was that she lived at the home of her stepfather, as did her mother. Later on the evening of 31 October 2019, S [...] 4 was at home when the accused telephoned her and indicated that he wanted food. He did not come into the home to get it but said that he could be located outside. Food was taken to him by S [...] 4 and her boyfriend, S [...] 2. S [...] 2 apparently did not know of the events of earlier that day. The three of them thereafter went to the M [...] 1 house. At the M [...] 1 house, the accused instructed S [...] 2 to take the blankets off the body of the deceased and place them on the floor. The two of them then tried to shift the

deceased's body and place it on the blankets on the floor. The accused, however, concluded that the deceased was too heavy. The witness noted at that stage that the deceased was naked from the waist down. The accused then stated that what was needed was a wheelbarrow. Accordingly, at 23h30 that evening, a wheelbarrow was located and fetched from the home of a Mr M [....] 4 Z [....] 1 (Mr Z [....] 1) and two motor vehicle tyres were purloined from another neighbour's home.

[40] S [....] 4 testified further that the deceased's body was wrapped in blankets and placed on the wheelbarrow and she was wheeled away to an area known as KwaDamane. The two tyres purloined from the neighbour were carried by S [....] 4, allegedly on the orders of the accused. S [....] 2 and the accused took turns in pushing the wheelbarrow. At the appointed spot, the deceased's body was taken off the wheelbarrow and placed on the ground. One tyre was placed around the head, neck and shoulders of the deceased and the other tyre was placed around her upper legs. Using some wood, the body and the tyres were set alight. It burnt from approximately 01h00 until 05h00 on the morning of 1 November 2019, when what remained was put in a plastic packet that was found nearby. The remains were then thrown into a place where dead cows are apparently thrown. S [....] 4 went home, apparently with the intention of telling her mother of precisely what had occurred but did not do so until the accused had left the general area of Glencoe sometime later. The witness then said that she had, in fact, told her mother earlier some time before 11 November 2019, being the date upon which the accused and S [....] 4 were arrested. S [....] 2 was also arrested that day. When she was arrested, she saw the accused in the SAPS van and she pointed out who S [....] 2 was to the SAPS.

[41] When questioned by the SAPS, S [....] 4 testified that she initially denied any knowledge of what became of the deceased. However, she later pointed out where the deceased's body was burnt. Before she did so, she stated that she had been assaulted by the police who had come to arrest her.

[42] Under cross-examination by Mr MADIDA, S [....] 4 confirmed that despite the knowledge that she acquired from her brother, the accused, concerning his wrongdoing she had at no stage approached the SAPS independently to report what

he had told her. She also confirmed that she did not mention her and her boyfriend's role in the destruction of the deceased's body. She mentioned a further detail, not previously mentioned in her evidence in chief, that when the SAPS arrived to arrest her in addition to the assault on her that she had previously mentioned, which consisted of slaps to her head leaving her with a ringing noise in her ears, she also had a rubber tube pulled down over her head and face. After this occurred, she then pointed out the place where the deceased's body was. S [...] 4 stated that before she effected the pointing out, the SAPS had told her that she needed to:

‘speak the truth for me to be freed.’

[43] Mr MADIDA put it to S [...] 4 that the accused had been severely assaulted by the SAPS but her response was that she had no knowledge of that because he was already in the custody of the SAPS when they arrived at her home to arrest her. An interesting proposition was then put to the witness by Mr MADIDA. He suggested that the accused had not made any statement to the SAPS because he knew nothing of the allegations that he was facing whereas S [...] 4 had spoken freely to the SAPS because she had independent knowledge herself of the death of the deceased. This brought an angry outburst from the witness who said that the accused could not deny what he had done. She said, further, that she was only in the position that she was in because of the accused's conduct. Everything that she knew of the matter had been obtained from the accused.

[44] Mr MADIDA stated, further, that his instructions were that the accused never made any statement to the SAPS and because the relationship between him and her was admittedly toxic, she was not the person to whom he would have confessed if he had, indeed, done anything wrong. The accused would also deny that he had killed the deceased and it was further suggested by Mr MADIDA that the witness and her boyfriend, S [...] 2:

‘may best answer who killed the deceased’.

The court intervened at this point and asked if it was now being put to the witness that she and her boyfriend had killed the deceased. This was not what the accused was saying according to Mr MADIDA. Mr MADIDA then put it to S [...] 4 that it would have been 'disingenuous' for the accused to kill the deceased in a place where he would be a suspect and then confess to the witness, with whom he did not have a good relationship. S [...] 4 was adamant that her knowledge of the matter was derived entirely from the accused. She said that she barely knew the deceased, had nothing against her and only knew her through the accused's association with the deceased.

[45] An issue that had perplexed the court in her evidence in chief was clarified by S [...] 4 in her cross-examination by Mr MADIDA. She stated that she had been sent to the M [...] 1 house by the accused on the morning of 31 October 2019 in order to ascertain whether the deceased was actually dead. In her view, when she saw the deceased with Fidodo, the deceased was dead because she was not breathing.

[46] A second interesting proposition was then put to S [...] 4 by Mr MADIDA. It went along these lines:

'It's because of the toxic relationship you had that you had to drag in the accused to get rid of him.'

Again, the court sought clarity from Mr MADIDA on whether he was alleging that the witness and her boyfriend were the true murderers of the deceased. After certain submissions were made by Mr MADIDA, which do not need to be dwelt on, it again emerged that it was not being suggested that S [...] 4 was the true murderer.

[47] Mr MADIDA then put it to the witness that the accused could not have been involved in a murder at the M [...] 1 house because he had been ordered to vacate that place by a protection order issued by a court that had been granted in favour of his mother. This was roundly rejected by the witness who said the accused always wanted things his way and always wanted to have the last say. She was, however, unable to say why the accused had not been arrested for breaching the protection



order when he later assumed occupation of the house, contrary to the terms of the order.

[48] S [...] 4 confirmed under cross examination that when they went to the M [...] 1 house on the evening of 31 October 2019, the accused had been the person who made the decisions and gave the instructions. It was the accused that instructed that a wheelbarrow be obtained and all three of them had gone to the homestead from which it was acquired. The accused had personally entered the home of the lender, Mr Z [...] 1. S [...] 4 initially stated that a human body could not fit into the wheelbarrow that they acquired from Mr Z [...] 1. She later qualified her evidence on this aspect and indicated that the body could be transported by wheelbarrow as it overhung the edges.

[49] Mr MADIDA suggested to S [...] 4 that she, indeed, possessed keys to the M [...] 1 house and that she and S [...] 2 lived there. She denied this and said that the accused had taken the house keys away from their mother. It was also put to S [...] 4 that there was bad blood between the accused and S [...] 2, her boyfriend, that ultimately led to each knifing the other in a street fight. This was vehemently denied by S [...] 4.

[50] An unsworn statement that S [...] 4 admitted making was then introduced and later handed up. In the statement, the witness stated that she had not been telephoned by the accused on the morning of 31 October 2019 and nor did she possess his telephone number and the accused did not know her number. When confronted with the statement, S [...] 4 stated that she had been confused but admitted that it contradicted her oral evidence. The statement was undated and despite everyone's best efforts, it was not possible to ascertain when it had been made.

[51] The witness was then taken through her formal section 204 statement in granular detail by Mr MADIDA. She conceded that there were several mistakes in the statement. For example, there was no reference to her friend Fidodo proceeding to the M [...] 1 house with her. There was, to be accurate, a reference to Fidodo in

the statement after the events at the M [...] 1 house were narrated, but the version captured in the statement made it appear that the witness had proceeded by herself to that house.

[52] S [...] 4 then revealed that before she was arrested, the SAPS had come to her house and questioned her. She also revealed that the accused had instructed her to delete his cellular telephone number from her cellular telephone in case her telephone was checked. She indicated, further, that whilst the body of the deceased was being burnt she had moved away from the accused and sat next to a tree, stating that she could not watch someone being burnt in front of her.

[53] Mr MADIDA then put the accused's version to the witness. This was the first occasion that the court was apprised of what it was that the accused said happened and I accordingly mention the initial version put in some detail. The version that was revealed was that the accused had been arrested in February 2019 on two counts relating to the erstwhile counts seven and eight, which were withdrawn at the commencement of the trial. The murder count then became count 7. He remained in custody on those counts until August 2019, when the charges against him were withdrawn. In September 2019, whilst at his father's home at Matiwane, near Ladysmith, he was arrested on the murder charge, that is count seven in these proceedings. The accused remained in custody until an undisclosed date in 2020 when, the murder charge was withdrawn and he was released. Having been released from custody he went to his father's home, only to be told that the SAPS were looking for him and he was then arrested on the same day that he was released and charged with counts one to four that form part of this trial. Whilst he was in custody, the murder charge, count seven in this matter, was reinstated.

[54] Thus it was put to S [...] 4 by Mr MADIDA that the dates that she mentioned, namely 31 October 2019 and 1 November 2019, being the dates upon which she discovered the deceased's body at the M [...] 1 house and the date upon which the body was disposed of, were both 'improbable and impossible' because the accused was allegedly in custody at those times. The defence as fully revealed was thus an alibi, it being averred that the accused could not have been involved in the murder of

the deceased, and the subsequent disposal of her body, because he was not in the area as he was in custody. This version was denied by S [...] 4, who said that the accused was not in custody.

[55] At the conclusion of her cross examination, the court sought clarity from S [...] 4 on certain aspects of her evidence. The first aspect was how the deceased's body was carried in the wheelbarrow. The witness explained that the body hung over the edge of the wheelbarrow and did not fit within the bin of the wheelbarrow. Finally, the witness was asked how the remains of the body had been handled before being disposed of in the light of the fact that the body had been burning for some five hours before it was ultimately discarded. The witness explained that using bits of wood the accused had put the unburnt pieces of the body into the wheelbarrow and had then placed the body in a dam to cool off where after it was disposed of.

[56] S [...] 4's evidence was followed by the evidence of Mr Z [...] 1, whose full names are M [...] 4 N [...] 3 Z [...] 1, the owner of the wheelbarrow that was allegedly used to transport the deceased's body. Mr Z [...] 1 confirmed that he had been asleep when he was awakened by a telephone call from S [...] 4. He was asked where he was and he replied that he was at his house, asleep. S [...] 4 said she was standing on his veranda and asked him to open up. He put some clothes on and opened the kitchen door, having first switched on the lights. He saw S [...] 4, her boyfriend, S [...] 2, and the accused outside his house. All of them then entered his kitchen. He was told that they required to borrow his wheelbarrow as the accused's mother had chased him from her house and he needed to transport his belongings to a shack that was then being occupied by S [...] 2. The accused said to Mr Z [...] 1 that he, Mr Z [...] 1, knew his mother and that she:

'has lots of stories'

and that he was required to leave his mother's house failing which she would call the SAPS. Mr Z [...] 1 asked why the accused then did not use the wheelbarrow that he knew was at the accused's stepfather's house and the answer that he received was that the wheelbarrow was kept at a place where the accused's stepfather keeps his

goats and sheep and he did not want to risk any of them escaping at night while he retrieved the wheelbarrow. Mr Z [...] 1 was initially reluctant to hand over his wheelbarrow because he was concerned that stolen items might be transported in it and that might lead to him getting into trouble. All three of his nocturnal visitors then begged him to change his mind and he ultimately relented. He told S [...] 2 where to find the wheelbarrow in his house and S [...] 2 then fetched it. It was agreed that the wheelbarrow would be returned to him later in the morning of the next day.

[57] The return of the wheelbarrow did not occur as promised and in the afternoon of the next day, Mr Z [...] 1 saw S [...] 2 in front of his house and asked where his wheelbarrow was. At about 21h00 that night the wheelbarrow was returned to him by S [...] 4 and S [...] 2. Mr Z [...] 1 then saw that his wheelbarrow was damaged in two ways: the bin area had been widened and there were now holes in the base of the bin that allowed him to observe the front wheel through the base of the bin, which was not the case before he lent the wheelbarrow to his nocturnal visitors. He also observed that there was a black coating on the inside of the bin. He requested an explanation from S [...] 4 and S [...] 2 and was told that two sacks of coal had been loaded into the wheelbarrow.

[58] A few days later, Mr Z [...] 1 testified that he smelt an unpleasant odour in his home. To him it smelt as though the smell was emanating from inside his home rather than entering his home from an outside source. He finally determined that the smell was coming from the wheelbarrow. He indicated that the smell was like the smell that is caused when a rat is poisoned and subsequently dies. He removed the wheelbarrow from the inside of his house and approached S [...] 4's mother, complaining that the wheelbarrow had been returned to him in a stinking condition. He was most anxious that S [...] 4's mother come and smell the wheelbarrow. She was not prepared to do so and simply told him to wash the wheelbarrow down with some sheep dip. Mr Z [...] 1, in fact, said that the wheelbarrow smelled like 'nyarrastag', a word that the interpreter was not familiar with but which Mr Z [...] 1 said meant it smelt terrible. He further described the substance coating his wheelbarrow as being like a liquid from a leaking engine. He did not follow the advice of S [...] 4's mother of simply washing the wheelbarrow with sheep dip but went

home, got out his bicycle and pedalled off to the police station. At the police station, he was attended to, he explained why he was there and was then taken home by the SAPS who then left with his wheelbarrow. He made a statement to the SAPS that day, which was 27 November 2019. No further evidence was led by the State regarding the examination of the wheelbarrow.

[59] Mr Z [...] 1 was asked by the court if he required the wheelbarrow to be returned to him at the conclusion of the trial. Unexpectedly, he burst into tears and said that he could not have it back because of what had occurred with the wheelbarrow. It would also bring bad luck to his home if he took it back.

[60] Under cross-examination from Mr MADIDA, Mr Z [...] 1 denied that he was not on good terms with the accused. No amount of questioning on this point could get him to change his views on this aspect. In fact, he displayed physical signs of amazement at the proposition. When told that the accused would deny that he had come to his house in order to obtain the wheelbarrow, Mr Z [...] 1 would again not be moved, stating that three people came to his house and the accused was one of them.

[61] Mr Z [...] 1 stated that the wheelbarrow was taken from his home on 2 November 2019 in contradistinction to the date provided by S [...] 4, namely 31 October 2019. Mr MADIDA put it to Mr Z [...] 1 that the accused could not have been present in his house on the night that the wheelbarrow was taken because he was already in custody. This was disputed by Mr Z [...] 1, who said that all this had occurred before the accused was incarcerated. It was also put to Mr Z [...] 1 that the reason why the accused and he were on bad terms was that Mr Z [...] 1 had chased his nephew away from his home and his nephew had gone to the accused for assistance. The accused had then confronted Mr Z [...] 1 about this. Mr Z [...] 1 categorically disputed this, saying that he had not chased his nephew away at that time, it only being done recently, and that the accused had consequently never approached him over this issue.

[62] Finally, Mr Z [...] 1 was asked by Mr MADIDA whether the deceased's body could have been accommodated in his wheelbarrow. To assist in this exercise a photograph of the deceased, while she was still alive, was handed in as an exhibit. Mr Z [...] 1 said that he believed that his wheelbarrow could carry something like a body.

[63] Next to testify was the person who was referred to by the other witnesses as 'S [...] 2'. He, as was S [...] 4, his girlfriend, was introduced by the State as a section 204 witness. He was accordingly warned by the court that he would be required to incriminate himself but that if he answered all questions truthfully and frankly, he would be indemnified against further criminal prosecution. He stated that he understood.

[64] He commenced his evidence by revealing his real names. They are S [...] 1 Agrippa Agreement P [...] , but I shall continue to refer to him as 'S [...] 2', which name is apparently derived from a nickname that he bears, namely 'S [...] 2lity'. He is in a relationship with the accused's sister, S [...] 4, and referred to the accused as his brother-in-law. He knew the deceased as 'N [...] 2'.

[65] He confirmed that his involvement in the matter had commenced on 31 October 2019. He had gone to his girlfriend's home and when he arrived she was busy on a telephone call from the accused. The accused wanted her to bring him something to eat and he went with S [...] 4 to deliver the food to the accused. The accused was given the food when they found him and he and S [...] 4 then walked to a store at KwaGogo to buy some cigarettes. When they returned from the store, they again encountered the accused. He then demanded that they accompany him to the M [...] 1 house. S [...] 2 was reluctant to go there due to the lateness of the hour but he ultimately did go because of two factors: firstly, he saw that the accused was in possession of a knife and secondly, because his girlfriend instructed him not to decline the invitation to proceed to M [...] 1.

[66] At M [...] 1, the house was unlocked, and S [...] 2 and S [...] 4 waited in the kitchen while the accused went into a bedroom. The accused then emerged and said

that a wheelbarrow was needed. S [...] 4 then telephoned Mr Z [...] 1 and confirmed that he was at home. S [...] 2 apparently had no idea at this stage why a wheelbarrow was required. All three then proceeded to Mr Z [...] 1's home. On the way there, S [...] 4 managed to inform him why the wheelbarrow was needed, explaining that the accused had killed his girlfriend and he needed a wheelbarrow to move her dead body. At Mr Z [...] 1's home, all three entered the home and the accused humbled himself when talking to Mr Z [...] 1, according to the witness. The accused explained that he needed to remove his items from the M [...] 1 house and to do so he required a wheelbarrow. The wheelbarrow was ultimately secured from Mr Z [...] 1 and they then returned to the M [...] 1 house. The wheelbarrow was due to be returned to Mr Z [...] 1 later the next day according to S [...] 2.

[67] Back at the M [...] 1 house, the wheelbarrow was placed in the kitchen and the accused entered a bedroom. He asked S [...] 2 to help him carry the deceased's body. S [...] 2 helped carry the body to the wheelbarrow, the body being rolled in a bed spread. The accused then instructed him to push the wheelbarrow and made S [...] 4 carry two tyres that had been taken from a neighbour's home. S [...] 2 indicated that when he stopped pushing the wheelbarrow from time to time he would receive a kick from the accused, who would order him to carry on pushing. The witness indicated that he was afraid of the accused and described him as a troublesome person in the area. They walked along the road and eventually entered a gate at the farm belonging to Damane. After having entered a second gate on the same farm he was told to stop and the body was taken out of the wheelbarrow. Sticks were fetched as well as offcuts of trees, which were quite long and heavy according to S [...] 2. The accused then took the two tyres and placed one on the upper and one on the lower part of the deceased's body. Using paper taken from his pocket, the body was set alight by the accused, who was talking to himself as he did so. As the fire burned, the accused added more wood to it. When it was about to get light, the accused tilted the wheelbarrow and put the body into it again and then took it to a dam and put it in the dam to cool off. He then put it in a plastic bag that he found there.

[68] S [...] 2 testified further that whilst the body burnt, the accused would hit its head with a piece of wood and, generally, strike the burning body. After the body was disposed of, they all went home. He did not report the matter to the SAPS because he was afraid of the accused. His fear was inspired by a threat allegedly made by the accused who told him that if whatever had happened that evening ever came to light, he, S [...] 2, would follow the deceased. After the events in question, he and the accused would meet from time to time but the matter was never discussed.

[69] S [...] 2 indicated that he was subsequently arrested on 11 November 2019. The SAPS asked him where the deceased's body was buried but he responded that she was not buried but had been burnt and then told them where this had occurred. The SAPS took him to the place where the burning occurred but when they arrived there the SAPS canine unit was already in attendance and had already recovered the deceased's remains. He made a section 204 statement to the SAPS the same day and remained in custody for a week, after which he was released.

[70] Cross examined by Mr MADIDA, S [...] 2 denied that he had interacted with the deceased's body before the wheelbarrow was fetched, as previously testified to by S [...] 4. He would not be swayed by the previous evidence of his girlfriend and rejected her evidence on this point. He also deviated from her evidence when he said that two phone calls had been made to Mr Z [...] 1, one to see if he was at home and the second to inform Mr Z [...] 1 that they were standing outside his house. He corrected himself when he initially testified that Mr Z [...] 1 had fetched the wheelbarrow after having decided to lend it to them but, on reflection, he agreed that he had been advised by Mr Z [...] 1 where to find the wheelbarrow and he had fetched it when they were inside Mr Z [...] 1's house. Regarding why he had never reported the events to the SAPS on the night in question, he said that it was dark, it was late, and it was not easy for him to get to the police station. Mr MADIDA put it to him that he could have used a cellular telephone to telephone the SAPS but S [...] 2 said that he did not have one.



[71] S [...] 2 denied the suggestion put to him by Mr MADIDA that he and his girlfriend resided in the M [...] 1 house. With regard to the accused's allegation that he acted as though it was his own home when he had not paid ilobolo, S [...] 2 stated that he worked with the accused's stepfather doing plumbing work and, as a consequence, the accused's stepfather permitted him to enter his residence, not the M [...] 1 house, which belonged to the accused's mother. He categorically denied that he ever resided at the M [...] 1 house. He also denied Mr MADIDA's suggestion that he had been in a fight with the accused or that he had stabbed the accused. But he did agree with Mr MADIDA that the relationship between the accused and S [...] 4 was toxic. S [...] 2 described the version put to him by Mr MADIDA that the accused could not have done the things he was described as doing because he was incarcerated as a 'lie'. He also denied that S [...] 4 had a key to the M [...] 1 house.

[72] The next witness called by the State was N [...] 4 L [...] N [...] 5, also known as 'Fidodo'. As with S [...] 2, I will call her by the name by which she was most frequently referred to in evidence, namely 'Fidodo'.

[73] Fidodo stated that she knew the deceased, who was the girlfriend of the accused, and said that she knew her as 'N [...] 2'. She testified that she was called by S [...] 4 sometime during 2019 who told her that she had a problem. The accused had allegedly sent two boys to her to give her the key to the M [...] 1 house because 'water had allegedly come into the house'.

[74] At this point the interpreter, Ms van Wyk, very correctly in my view, informed the court that the exact words used by Fidodo were the following:

'Sekungene amanzi endlili',

which is a phrase that can have both a literal and figurative meaning. Literally, it does mean that water has entered the house, but it may also figuratively mean that trouble, or death, has entered the house. Both counsel, who are isiZulu speaking, confirmed this meaning.

[75] Fidodo knew the house S [...] 4 was referring to but not its number. It was the M [...] 1 house. She also knew that it belonged to the accused's mother and that the accused occupied that house. She and S [...] 4 set off for that house. As she opened the door to the house, S [...] 4 said that the accused had had a fight with his girlfriend and that he had found her in the company of another man. He then stabbed his girlfriend and the other male. Fidodo explained that as a consequence of this information she thought that when she entered the house she would find two injured persons and would have to call an ambulance. She rather presciently stated that she no longer expected to find flooding in the house.

[76] In the second room that she went into in the M [...] 1 house she saw someone sleeping on the bed. She touched the person's legs and then moved up towards the head. The person was covered and she could not see who it was. She then moved the blankets covering the person to the side and saw that the person's eyes were wide open and that she had an injury to her right temple on which there was some tissue paper. The body was naked but the body's clothing was placed on the side of the body. She recognised the person as N [...] 2, the deceased. She waved a hand over the deceased's face to detect breathing, but there was none.

[77] She testified further that she called S [...] 4 into the bedroom but she was unwilling to come close to the bed. They then exited the house. In her view, S [...] 4 did not appear to be shocked whereas she described herself as having:

'a fast-beating heart'.

Having left the M [...] 1 house, Fidodo said that she gave the house key to S [...] 4. They then returned to the latter's home where they found S [...] 2 and S [...] 4's mother. S [...] 4 told her mother of what they had discovered at the M [...] 1 house. S [...] 4's mother said S [...] 4 must call the accused and tell him to surrender himself to the SAPS.

[78] S [...] 2 left the home and returned with the accused. S [...] 4, her mother, the accused and S [...] 2 then went into the house and Fidodo remained outside. The accused then exited the house, uttering the word:

‘Abagcwali’,

which apparently means ‘I will not do what they tell me to do’ in Tsotsi language. Fidodo then left her friend’s home. She did not report the matter to the SAPS as she knew the accused had a relative who worked at the Glencoe Police Station and thought that this person would report to the accused if she, Fidodo, reported what she knew to the SAPS.

[79] Fidodo testified that she had been threatened by the accused two days after she saw the deceased’s body. The accused stated that she was sticking her nose into other people’s matters, which she should not do and suggested that they might destroy evidence ‘using Fidodo’, whatever that may mean. She relocated to Johannesburg shortly thereafter. She revealed that it was she who got a message to the first state witness, Ms B [...], the aunt of the deceased, advising her of where to look for the deceased. The message was relayed to Ms B [...] through Fidodo’s sister.

[80] Under cross examination, Fidodo said she regarded S [...] 4 as a sister and that this affinity may have been the reason why S [...] 4 requested her to accompany her to the M [...] 1 house. She disagreed that the accused had been in custody at the time that she went to the M [...] 1 house. She responded further that he was not in custody but he had ‘conditions’ that he was required to sign that would come to an end in January. Asked how she knew this, she said the accused was like a brother to her and she liked to hang out with him when he was smoking.

[81] The mother of the accused is Mrs S [...] 5 P [...] 1 M [...] 2, who I will refer to as ‘Mrs M [...] 2’. She was the next witness to testify. She confirmed that she knew the deceased, who she knew as ‘N [...] 2’. She indicated that she was aware that S [...] 4, her daughter, had received a telephone call on 31 October 2019. S [...] 4 left

the home after terminating the call and returned about 1,5 hours later. When she returned, she was with Fidodo. She was informed by S [...] 4 that both of them had gone to the M [...] 1 house and discovered the deceased there. After hearing what S [...] 4 told her, she informed S [...] 4 that she should tell the accused to hand himself over to the SAPS. She gave this instruction remotely as she is personally afraid of the accused. S [...] 4 left the house and later returned with the accused and she, S [...] 4, S [...] 2 and the accused, then entered the house to discuss the matter further. She confirmed that the accused did not take her instruction to surrender himself to the SAPS well and uttered the word 'Asigcwali' as he left the house.

[82] Mrs M [...] 2 testified further that at around 20h00 that evening, after the television programme 'Uzalo' had just finished on the television, S [...] 4 had received a telephone call and heard her say

'Are you not coming to have food at home?'

A short while later, S [...] 4 and S [...] 2 took a lunch tin filled with food and left the house. She did not know who had telephoned S [...] 4 but assumed that it was the accused. She did not see S [...] 4 or S [...] 2 again that evening.

[83] She testified that the next day, 1 November 2019, S [...] 4 arrived home between 06h00 and 06h30, looking tired, dirty and shocked. S [...] 4 told her how the body of the deceased had been disposed of. Asked by Mrs M [...] 2 why it had been necessary for this to happen, S [...] 4 said the accused had said that he was 'destroying evidence'. Upon hearing this, Mrs M [...] 2 stated that she did not feel well.

[84] Mrs M [...] 2 said further that she did not see the accused again but confirmed that Correctional Service officials would come to her house for the accused to sign something from time to time. Mrs M [...] 2 testified that the accused stayed at the M [...] 1 house and that he had the keys to that house. She did not have keys to the house. The SAPS also came to her house periodically, asking about the disappearance of the deceased. She told them nothing because of her fear of the

accused. S [...] 4 apparently adopted the same approach to the SAPS, denying any knowledge of the whereabouts of the deceased.

[85] At one stage, Mrs M [...] 2 testified that she had gone with the SAPS to the M [...] 1 house. As she lacked keys to unlock the house, she authorised the SAPS to break the lock on the door, which they then did, using a piece of iron. The house was searched and some items were seized by the SAPS, apparently to be taken to forensics for examination. She also saw some items that appeared to be blood stained.

[86] After she was taken home by the SAPS, Mrs M [...] 2 testified that she telephoned the accused's biological father, who lives at Ladysmith, and asked him if he knew where the accused was. She was told that the accused was with him. She then telephoned the accused who took her call and said that, contrary to what his father had told Mrs M [...] 2, he was at eMondlo, near Vryheid. She advised him to hand himself over to the SAPS as they were now worrying her. He apparently agreed to do so.

[87] Mrs M [...] 2 then took a taxi to the Glencoe Police Station to give them the accused's father's telephone number. She told the SAPS that they would find the accused's father at work at a place called 'Sharp Sharp' and he would then give them instructions on how to find the accused. The next morning, the accused's father telephoned her and told her that the accused had been found by the SAPS.

[88] Mrs M [...] 2 said that not much time passed and then she saw eight SAPS vehicles arrive at her house. She was informed that they were looking for S [...] 4 and S [...] 2. S [...] 4 and S [...] 2 were then placed in separate vehicles and they all left. She heard the accused calling 'Mother, mother' from a police van and she responded by saying that he should no longer call her as things had gone wrong. She did not see him again although he did telephone her from time to time.

[89] Mrs M [...] 2 testified further that the accused had once assaulted her, grabbing her with both his arms and pushing her. She managed to break free from

his hold and fled. The accused allegedly said to her that killing her was nothing and that he would not even invite his friends to do that.

[90] Under cross-examination from Mr MADIDA, Mrs M [...] 2 confirmed that she had not initially reported what she knew to the SAPS. She changed her mind concerning the date upon which S [...] 4 and S [...] 2 were arrested, after having initially said that it was 1 November 2019 she changed the date to 11 November 2019. This came about, she explained, because she had reflected on the issue overnight, her evidence continuing over a period of three days. I must add that they were not three full days but were truncated days shortened due to load shedding. Responding to a series of questions posed by Mr MADIDA about who stayed in the M [...] 1 house, Mrs M [...] 2 ultimately answered that the accused stayed there. She stated, specifically, that during September, October and November 2019 until he was arrested, the accused stayed at the M [...] 1 house. She confirmed that she had obtained a court order over the M [...] 1 house that required the accused to leave it, but she confirmed that he had not done so and had remained there: 'due to his stubbornness', as she put it.

[91] Mrs M [...] 2 denied Mr MADIDA's suggestion that she did, indeed, possess a key to the M [...] 1 house. She also denied that S [...] 4 and S [...] 2 stayed at that house and she stated emphatically that S [...] 4 had never lived there although she might stay over for a night from time to time. It was put to her that S [...] 2, in fact, resided at the house and acted as if it was his house yet had not paid ilobolo for S [...] 4. This was denied. Mrs M [...] 2 did concede that it irked the accused that S [...] 2 had not paid ilobolo but she said that it had nothing to do with the accused. The accused's stepfather was an adult and owned the house that they lived in and could decide who came to the house, and not the accused. Mr MADIDA postulated that Mrs M [...] 2 had obtained a protection order because of this, but she said it had nothing to do with her husband's home – it involved the M [...] 1 house.

[92] Mrs M [...] 2 admitted that S [...] 2 came to the house where she resides but that he had never spent the night there. She confirmed that S [...] 2 is regarded as a

family member. It was put to her that S [...] 2 and the accused were not treated equally by the family. She denied this. Mrs M [...] 2 stated that she knew nothing of an event when S [...] 2 allegedly stabbed the accused but she confirmed that the accused had previously taken S [...] 2's money and a pair of jeans belonging to him and stated that the accused always caused the trouble. Mrs M [...] 2 also knew nothing of a protection order allegedly obtained by her long-term partner, Mr P [...] 2 G [...] M [...] 5 (Mr M [...] 5), with whom she has resided for 16 years, against the accused. Mr MADIDA stated that because of this protection order, the accused had been rendered homeless and had to go and stay with his biological father. Mrs M [...] 2 agreed he had gone there but denied that it was because of the existence of a protection order obtained by Mr M [...] 5.

[93] Mr MADIDA put it to Mrs M [...] 2 that the accused had been arrested at his biological father's home in September 2019. The answer he received to this proposition was that the accused had been arrested many times. It was then put that the accused was released from custody in 2020 but was re-arrested the same day that he was released. Mrs M [...] 2 knew nothing of this. She strongly denied that when the accused was allegedly released in 2020 she had paid for a metered taxi to take the accused to his father's home at Matiwane, Ladysmith. She also denied that the accused was in custody on 31 October 2019 and 11 November 2019. When it was put to her that there was a civil disturbance about the whereabouts of the deceased, who at that stage could not be located and that members of the disgruntled community had come to her house and one S [...] 3 M [...] 2, also known as 'Khehla' or 'Yellowman', was shot, she stated that he had been shot but that had nothing to do with the civil disturbance and the shooting had happened before that event.

[94] An involved proposition was put to Mrs M [...] 2 by Mr MADIDA that rather than having assaulted her, the accused had been her saviour when she had been attacked by Mr M [...] 5 with a hammer. She had allegedly escaped the assault as a consequence of the accused's intervention and fled and had been taken to hospital by ambulance. Mrs M [...] 2 denied this vehemently, stating that the only time she

had been in an ambulance was when she had fallen from a ladder at her place of employment.

[95] Warrant Officer Stanley Frank Holloway is employed by the SAPS and is in charge of the canine search and rescue squad, based at Newcastle. He received a request from the Station Commander of Glencoe SAPS to use his dog to attempt to locate the body of the deceased at a place called KwaDamane. He agreed to assist and his dog located a place at KwaDamane where certain charred bones were discovered. His dog then picked up a further smell which led him to some abandoned silos not too distant from the place of the burning. In the one silo, at a depth of about 5 metres below ground level, he observed a plastic package teeming with maggots. After he had repelled down into the silo, he removed the plastic bag with the maggots and ascertained that what appeared to be inside it was the charred remains of a human being. The photographs admitted by consent reveal that a substantial portion of a body was recovered. It is difficult to be certain as no expert evidence was called by the State, but it appears that what was recovered was part of the torso of a body.

[96] Lieutenant Colonel Bongiwe Ngobese is the station commander of SAPS Glencoe. Whilst on duty on 6 November 2019, she heard on the radio that a complaint of a missing child had been made at her police station. She immediately returned to the police station and interviewed the first state witness, Ms B [....]. She activated certain police officers as a result of what Mr B [....] told her and they proceeded to the M [....] 1 house. The house was locked. Looking through the windows as best as they could, they were not able to detect that anything was amiss. Certain other police divisions were activated and the matter was investigated further. On 10 November 2019, a Sunday, members of the Local Criminal Records Centre (LCRC) joined Col. Ngobese at the M [....] 1 house. Mrs M [....] 2 was also present and she gave permission for the lock on the front door to be broken because she did not possess a key to unlock the front door.

[97] Col. Ngobese testified further that the lock was broken and once in the house the LCRC, who were in attendance at her request, darkened the house by drawing



the curtains on the windows in order that a substance might be used to determine if there were traces of blood present. The colonel was advised by the LCRC that the test had been successful and that blood splatter was detected in the house. More specifically, it was found on a sofa and on a bed in one of the bedrooms. After that test was done the toilet area was inspected and a black plastic packet was found. In it was a towel that appeared to have blood-like spots on it. Also seized were a pair of grey tracksuit pants which were dirty. All the exhibits were collected for onward transmission to the laboratory.

[98] Col. Ngobese testified further that the next day, Monday, 11 November 2019, after receiving a telephone report, she telephoned Warrant Officer Holloway and requested his services. She then proceeded to call KwaDamane and spoke to the owner of the farm and received his permission to investigate further on his property. She confirmed that at the farm Warrant Officer Holloway had released his dog, who had found a place where it appeared that a body had been burnt and where bone fragments were located. Col. Ngobese called police officials to preserve the scene whilst the search continued further. She testified that it appeared as though some of the bone remains found were from the part of the body where the leg and the hip joined each other. Warrant Officer Holloway's dog then led them to an abandoned silo complex where a plastic packet infested with maggots was observed. Warrant Officer Holloway went into the silo and retrieved that packet and the witness observed some bones as well in the packet which she thought may also be bones from the hip area.

[99] Col. Ngobese testified that she then contacted the accused's mother, asking her where the accused was and was told that he was at Matiwane, near Ladysmith, about 40 kilometres from Glencoe. The accused's mother said that Col. Ngobese should contact the accused's father at a place known as 'Sharp-Sharp', where he both resided and worked. Col. Ngobese and her team then proceeded to Sharp-Sharp in three police vans. She located the accused's father's workplace and made contact with him. He confirmed that the accused was at his home. She asked him to telephone his son to make sure that he was, indeed, still at his home but the accused's father did not have any airtime. Using her cellular telephone, Col.

Ngobese purchased some airtime for him and the accused's father then telephoned his son and confirmed that he was still at his home.

[100] On the way to the accused's father's home, the resourceful Col. Ngobese stopped her convoy of SAPS vehicles at a taxi rank and persuaded a taxi owner to transport her officials in his taxi to the accused's father's home. This was done to avoid alerting the accused to the fact that the SAPS were there to arrest him. A taxi with tinted windows was graciously supplied by its owner. In this fashion, the accused was found at his father's home and was taken into custody without any resistance. His rights were explained to him by Col. Ngobese. The accused was then taken to Glencoe SAPS. The colonel testified that she then went back to KwaDamane while a separate detachment went to arrest S [...] 4 and S [...] 2 in Glencoe.

[101] Back at KwaDamane, Col. Ngobese noted that a photographer and a mortuary van had arrived and a short while later the canine van arrived with S [...] 4 and S [...] 2 in it. She thought for a minute that something had gone wrong but was advised that they had requested to be taken to KwaDamane as they wanted to point out where the deceased's remains could be found. Col. Ngobese explained that she read them their rights so that they might withdraw from the exercise if they wish to do so. They did not wish to do so.

[102] Col. Ngobese testified further that certain community members were now present at the scene and in order to assist S [...] 4 and S [...] 2, and to protect them from any possible community aggression, she put them into the back of her double cab motor vehicle and covered them with her jackets before taking them to the police station. She testified that she did not personally charge S [...] 4 or S [...] 2. She confirmed that the accused, S [...] 4 and S [...] 2 made their first court appearance on 13 November 2019. When Mr Sokhela put the accused's version to her that he was already in custody prior to 31 October 2019, Col. Ngobese replied firmly that that was a lie. The cross examination of Col. Ngobese by Mr MADIDA revealed nothing of any significance.

[103] At the insistence of the court, the alibi relied upon by the accused was put to Col. Ngobese. The alibi postulated the arrest of the accused in September 2019, and his continued detention in SAPS custody until his release from that custody at an undisclosed date in 2020. Throughout the period of his incarceration, which covered several months, it was now revealed that he had allegedly been kept in detention at the Wasbank Police Station. Col. Ngobese stated that it was not possible for an accused person awaiting trial to be kept in detention for months at a police station.

[104] Brain (not Brian) M [...] 4 Mngomezulu (Warrant Officer Mngomezulu) is a warrant officer in the SAPS and is stationed at Glencoe. He has 13 years' experience. He was part of Col. Ngobese's team and accompanied her to Matiwane to arrest the accused. He personally did not enter the home of the accused's father but confirmed that the accused was found at that home. He was later involved in arresting S [...] 4 and S [...] 2 at S [...] 4's residence. After he had arrested them, he took them to KwaDamane, at their request, because they wished to point out where the deceased's remains could be found. They then assisted in showing where the remains had been located already. Thereafter, S [...] 4 and S [...] 2 were taken to Glencoe SAPS and detained.

[105] Warrant Officer Mngomezulu was confident that the arrests had been carried out on 11 November 2019. He confirmed that when S [...] 4 was first confronted with the allegations against her, she declined to co-operate or respond. Mr MADIDA put the accused's version to Warrant Officer Mngomezulu, namely that on 11 November 2019 the accused was already in custody. This was denied. It was also suggested that the accused had been severely assaulted and had now been taken both to Wasbank Police Station and Elandslaagte Police Station where the assault occurred under Warrant Officer Mngomezulu's watch. This was denied by Warrant Officer Mngomezulu.

[106] Sikhumbuso Prince Allan Moloi (Mr Moloi) is an employee of the Department of Correctional Services. He is the head of the Community Corrections unit in Glencoe. The unit that he heads up deals with former prison inmates who have been paroled after serving a portion of their sentence. He disclosed that on 18 December

2018, the accused had been placed on parole and his final liberation day was fixed as being 18 May 2020. His liberation day would be the day upon which his period of parole came to an end and he would finally be a free man. Mr Moloi confirmed that he had dealt personally with the accused.

[107] Mr Moloi testified that a parolee is required to perform some form of community service whilst on parole and is required to subject himself to monitoring by his unit. On the issue of community service, the evidence of Mr Moloi was most confusing. The documentation that he provided, to which he made frequent reference while testifying, indicated that when required to perform community service there had not been a violation, which to a reasonable person's understanding would mean that the community service had been done. This, however, was not the case: according to Mr Moloi, the community service had not been done notwithstanding the fact that the records showed that there had been no violation. He was never able to explain this disconnect satisfactorily. But the fact of the matter is that the accused had not done any community service.

[108] As regards monitoring, he testified that there are various types of monitoring. When a person is eligible for parole, it is necessary to first classify him or her as being either high risk or some lesser form of risk. The accused, when he became due for parole, was classified as being high risk. As a consequence, the accused would receive four visitations at his nominated monitoring address by Mr Moloi's unit per month. In addition, he was required to attend the Department of Correctional Services offices in Glencoe once a month. The accused would thus be subject to five incidents of monitoring in any month. Practically, this did not occur.

[109] In all, Mr Moloi's unit monitored the accused on 11 occasions between 30 December 2018 and 24 October 2019, paying visits to his nominated monitoring address, which was the address at which his mother and sister, S [...] 4, lived. On each occasion the accused was allegedly found to be present at that address. On each occasion he signed a form confirming the monitoring visit and his presence when the visit had occurred. Clearly, the full force of the monitoring program was not visited upon the accused: he ought to have been monitored on at least 55 occasions,

as a high-risk parolee, but was not. Significant among the 11 occasions when he was subject to monitoring are the dates of 10 October, 13 October and 24 October 2019. On each occasion, the accused was at his nominated monitoring address. The significance of these dates is that the accused's alibi was that he was already in custody at the Wasbank Police Station over this period. Mr Moloi testified that the first instance when the accused was found to be in default was on 11 November 2019, which is the date that Col. Ngobese stated that she had arrested the accused.

[110] As regards the accused's visits to the Correctional Services' offices, according to Mr Moloi, the accused made only four over the period 22 December 2018 to 27 October 2019. He thus clearly did not comply with his obligations in this regard either. Interestingly, his last two visitations were made on 13 October 2019 and on 27 October 2019. These are significant dates, as he was allegedly already in custody then.

[111] Under cross-examination from Mr MADIDA, Mr Moloi confirmed that he lacked personal knowledge of the accuracy of the information captured in the documentation to which he referred in his evidence. The functionary involved in capturing the information was either a Mr Groenewald, alternatively a Ms Sahib. He confirmed that he was not able to authenticate any of the information in the document upon which he relied. He also confirmed that some of the information in his documentation was incorrect: on 28 October 2019 the document recorded that no violation had been committed by the accused, when it ought to have shown that he had violated his parole conditions. Mr MADIDA put it to Mr Moloi that the accused had, in fact, made no visits to the offices of the Department of Correctional Services as he was required to do because he was unaware that he was obliged to do so. This was disputed.

[112] Mr MADIDA then put a further version to Mr Moloi on behalf of the accused, stating that whilst the accused's parole was intended to be complete on 18 May 2020, he had in fact received the benefit of a Presidential Amnesty in February 2020, but he nonetheless remained in custody as an awaiting trial prisoner. Mr Moloi disputed the claim of a Presidential Amnesty, stating that the offence in respect of

which the accused was placed on parole was not the type of offence that would have attracted a Presidential Amnesty. In fact, it was specifically excluded. Mr MADIDA confirmed his client's version that he had later been released from custody when the charge upon which he was being detained, being the charge of murder, was withdrawn. Mr Moloi had no knowledge of this. Mr MADIDA also put it to Mr Moloi that the accused had been in custody from 13 February 2019 to August 2019 and that Mr Moloi's information in his documentation was therefore not accurate. That information recorded that the accused had been subjected to monitoring visits at his home and was, on each occasion, present. Mr Moloi said that the information in his documentation was accurate. Under questioning from the court, Mr Moloi confirmed that the raw data that underpinned the information in his documentation would be the forms signed by the accused on each occasion that he was monitored at his home and which he would be called upon to sign confirming his presence at the time of the monitoring visit. He confirmed that these documents still existed and were contained in his unit's archives.

[113] Mr Mandla Z [...] 1 is the person selected by the State to deal with the relevant documents extracted from the archives referred to by Mr Moloi. To avoid confusing him with the other Mr Z [...] 1 who testified about his wheelbarrow, I shall refer to him as 'Mr Mandla Z [...] 1'. He confirmed that he was a monitoring official employed by the Department of Correctional Services, Dundee and, more particularly, was in the Community Corrections unit. He knew the accused as he was a parolee that had to be monitored and he dealt with him. He was provided with a copy of the documentation relied upon by Mr Moloi. He confirmed that when a visit was paid to the accused's nominated monitoring address, the accused would have to sign a document confirming that he had been present when the monitoring visit had occurred. Apparently, this was not a document devoted only to the accused but would feature the details of other parolees as well who would all be visited on the same day. Mr Mandla Z [...] 1 had extracted all the records of visitations made to the accused's nominated monitoring address and bundled them together. This was received as an exhibit.

[114] It is perhaps advisable to describe what this document is comprised of. There are up to five persons' details recorded on each page. The information about each person is separated from the next person's information by parallel lines across the page. Each person's information is recorded between those parallel lines and that information includes addresses, programs that the person is on, last status date, prison number, date of birth and the like. Each person's photograph also appears in the block recording his personal information. If the visitation is uneventful and the person being monitored is present at the time of the visit, the person being monitored signs in the block where his personal information is recorded, as do the official or officials doing the monitoring.

[115] Mr Moloi's documentation recorded, inter alia, that the accused had been monitored on 11 occasions between 30 December 2018 and 24 October 2019 and that on each occasion the accused had been present at his nominated monitoring address. This, however, was refuted by Mr Mandla Z [...] 1. Of the 11 visits referred to by Mr Moloi, only six had actually occurred. Mr Mandla Z [...] 1 could not explain why Mr Moloi's records reflected more visits to the accused than had actually occurred.

[116] The visits that had occurred, according to Mr Mandla Z [...] 1, had taken place on the following dates: 27 January 2019, 10 February 2019, 11 February 2019, 24 February 2019, 3 October 2019, 13 October 2019 and 7 November 2019. The last-mentioned date was not a date on Mr Moloi's list. The accused was present on each of the monitoring visits, except the last date, when it was recorded that he was not at home. Thereafter, he was never at home, with each subsequent entry recording that the accused was 'Detained in Ladysmith.'

[117] Mr Mandla Z [...] 1 was cross examined by Mr MADIDA. He revealed that, according to his records, the accused had been arrested during March 2019 and was detained thereafter at Ladysmith Prison. Mr MADIDA confirmed this and said that he was detained as an awaiting trial prisoner. Mr Mandla Z [...] 1 confirmed that awaiting trial prisoners are kept at the prison. He did not, however, know when the accused had been released from custody. He confirmed that his colleague, Khanyile,

did the inspections on 3 October and 13 October 2019. Whilst Mr Mandla Z [...] 1's signature and personal information does not appear on the form that the accused was required to sign when visited, he asserted that he had been present on both 3 and 13 October 2019 with some students for whom he was responsible. He lacked any objective proof of his presence on those two dates. Mr Mandla Z [...] 1, rather confusingly, testified that the name of the official who appeared on the visitation form is not necessarily the person who actually carried out the monitoring visit. He confirmed that even where his name appeared, it did not mean that he had actually visited the person being monitored.

[118] Further under cross examination, Mr Mandla Z [...] 1 stated that the accused's parole had been revoked in December 2019. More specifically, this had occurred on 9 December 2019. The accused then became a sentenced prisoner even though he was, at the same time, still awaiting trial on certain charges.

[119] The version of Mr Mandla Z [...] 1 was not too different to the accused's version, although there were some notable differences. Mr MADIDA put the accused's version to him, which initially was that in November 2019 the accused had been in the Ladysmith correctional facility as an awaiting trial prisoner. And it is in that month, not December 2019, that his parole had been revoked. Mr Z [...] 1 was firm that it had been revoked on 9 December 2019. The initial version put was then expanded upon by Mr MADIDA. Prior to the accused's parole being revoked in November 2019, so this version went, there had been an earlier visit by correctional services employees to the accused who was imprisoned in October 2019. In that month, the first attempt was made to revoke his parole but the accused had argued with the correctional officials, saying that he had not yet been convicted of any offence that would permit his parole to be revoked. In the face of that argument, the officials had blanched and had left without revoking his parole. But they returned in November 2019 and formally revoked his parole. The version proceeded further and Mr MADIDA stated that the accused's sentence was due to lapse in May 2020, but in 2020 he received the benefit of a Presidential Amnesty. His status then changed and he was no longer a sentenced prisoner but reverted to being an awaiting trial prisoner. Thereafter, the charge upon which he was awaiting trial was withdrawn and



he was released on an unknown date. The version was again expanded upon and Mr MADIDA stated that the accused had remained in custody after being arrested in February 2019 until August 2019 when the charges were withdrawn against him. However, in September 2019, he was arrested by the police and remained in custody in Ladysmith until November when his parole was revoked.

[120] Mr MADIDA further disputed on behalf of the accused all of the home visits allegedly made to the accused's nominated monitoring address on the basis that the accused was in custody. The only visit the accused acknowledged as having occurred, was one made in January 2019 but otherwise Mr MADIDA asserted that there were no other home visits, ever. He also disputed that the accused's signature appeared on the monitoring forms in respect of which Mr Mandla Z [...] 1 testified. Mr Mandla Z [...] 1 said that the accused had signed them in his presence when he had been the monitoring official and consequently disputed the accused's version. Finally, Mr MADIDA asserted that the accused would deny that he had made any office visits as he was required to do as part of his parole conditions. Mr Mandla Z [...] 1 produced the registers of both the Glencoe Police Station and the register from his offices in Dundee which showed that the accused had signed at the Glencoe Police Station on 24 February 2019 and at the Dundee office on 13 October 2019.

[121] Captain Caiphus Mazibuko is currently the investigating officer of the three rape cases before the court. He was not the original investigating officer in respect of those offences but has taken over the investigation of those three counts of rape. He confirmed that none of the complainants in those three charges were certain of who the person was that had raped them. Ms K [...] had expressed a view that the person who attacked her was 'Bafana', not the accused. This witness's evidence was very awkwardly dealt with by Mr Sokhela. There was a reason for this. The reason was startling, even shocking. The State had no deoxyribonucleic acid (DNA) evidence that they could produce to the court that linked the accused to any of the rape victims, this notwithstanding that specimens had been taken from each complainant after their respective ordeals and certain physical evidence, used condoms, had been found in the cemetery following the attack on Ms K [...]. While

these specimens all existed there was no admissible evidence in respect of the buccal specimen apparently taken from the accused. That such a specimen was taken permits of no doubt. But when and where that specimen was taken is apparently unknown to the State and cannot be established. The court suggested that the matter could be resolved by simply, but carefully, taking another specimen from the accused and delivering it to the relevant laboratory. Capt. Mazibuko said he had already thought of that and had done it. He has been waiting for the analysis results since July 2020. In nearly three years, he has not received the results of the requested analysis.

[122] Notwithstanding this devastating evidence on behalf of the State, and the concomitant beneficial results for the defence, Mr MADIDA still saw it necessary to cross examine Capt. Mazibuko, a potentially dangerous decision that could have backfired spectacularly. As chance would have it, it did not. Indeed, a significant fact emerged namely that the seal number of the specimen obtained from Ms K [...] had also not been recorded on the form used to record the chain of custody of the specimen.

[123] After seeking an amendment of the charge sheet in respect of the seventh count, the proposed amendment reflecting that the date of the murder was 31 October 2019 and not 11 November 2019 as then reflected on that charge, which amendment was granted, and after four weeks of evidence and the calling of 19 witnesses, the State closed its case.

[124] As is to be expected, Mr MADIDA then moved an application in terms of section 174 of the Act in respect of all seven charges that the accused was facing at that stage. I have already dealt with the results of that application earlier in this judgment.

[125] After the ruling on the section 174 application, an application for an adjournment to the next trial day was moved by Mr MADIDA. It had three legs at its foundation but a fourth was also mentioned. The accused wanted an opportunity to consult with a witness he wished to call, one S [...] 3 M [...] 2, also known as

‘Yellowman’, who had previously been mentioned in the evidence relating to count 7, and he also wished to consult with a State witness, one Lucky Justice Dlamini, apparently a police officer. The third ground was that the accused was not feeling well with an upset stomach, a complaint that had been raised at the commencement of the day’s proceedings. Mr MADIDA mentioned, in passing, a fourth ground, namely that he wanted time to consider the effect of the refusal of his application for a discharge of the accused on all counts. I granted the application and adjourned the matter to the next day and directed that the accused receive medical treatment for his stomach ailment overnight.

[126] The accused appeared the next day without complaint about his health and took to the witness box. As an opening observation, it would be accurate to state that Mr MADIDA took the accused through his evidence in granular detail. Mbusomusha Tokyo M [...] 2, being the full names of the accused, informed the court that he did not know the complainant on counts 2 and 3, Ms K [...], nor did he know Bafana Shange, who Ms K [...] identified as her rapist. He confirmed that he did know Mr M [...] and described him as a person that he had grown up in front of in the location. He also knew the tavern that Miss K [...] mentioned in her evidence but he had never been there because as he put it, he doesn’t:

‘mix up with alcohol’.

[127] On count seven, the murder count, the accused confirmed that he knew the deceased, having been in a love relationship with her which relationship commenced in 2018. On the very first occasion that he met the deceased he had proposed love to her and she accepted his proposal. This had occurred whilst they had both been smoking in what he termed ‘my house’. This was a reference to the house at M [...] 1. He, however, described the relationship that had then developed as not being a ‘good one’, because while he was professing to only be in love with the deceased, that was not true and the same applied to the deceased, namely that she professed to only be in love with the accused but that that was not true either. He described it as a ‘cheating’ relationship.

[128] The accused testified that he resided with S [....] 4 and S [....] 2 in the M [....] 1 house yet described his relationship with S [....] 4 as also not being a good one and blamed the presence of S [....] 2 for that fact. His complaint was that S [....] 2 had not paid any ilobolo for S [....] 4 and a further complaint was that his, the accused's, food would be given to S [....] 2 and he would get nothing to eat. He consequently had a fight with S [....] 2. This commenced with a fist fight and then progressed to a knife fight. S [....] 2 allegedly drew a knife first, and the result was that the accused ended up being stabbed on his left shoulder. When his mother came out of the house to see what was going on, the accused told her that this was all happening because S [....] 2 was allowed to enter 'our premises'.

[129] The accused described his mother, sister and S [....] 2 as having lied in their evidence and said that they were all involved in falsely implicating him in the charges that he faces. The accused testified that after his mother had obtained a protection order against him, he had never gone back to the M [....] 1 house.

[130] There did not appear to be any carefully thought-out presentation of the accused's evidence and his testimony was adduced in an erratic manner that rendered it difficult to comprehend what the version was that was actually being put forward. For example, the accused's evidence on events in 2020 was first led in preference to events that had occurred in 2019. I do not understand why that was the preferred method of delivery of his evidence and it certainly did not assist the court in comprehending what it was that the accused adhered to. Be that as it may, the accused testified that he had been released from custody in August or September 2020 when the murder charge had been withdrawn against him. The charges were withdrawn at the Glencoe Magistrate's Court and as he exited the courthouse he went immediately to a house across the road from the courthouse where he knew some boys resided. There he managed to secure the use of a telephone and called his mother. She told him that he was not to show himself in public but said that she would instruct a metered taxi to pick him up and take him to his father's home in Matiwane. The accused allegedly asked her what his sin was when told this. He was duly picked up by a metered taxi but was only taken as far as Wasbank, as that was the extent of the payment made by his mother to the taxi

driver. His mother had, however, given the taxi driver R150 to give to the accused to enable him to hike from Wasbank to Ladysmith.

[131] He testified that he eventually arrived at his father's homestead and met a woman who he described as 'MaNcwane', who he had never previously met. She apparently did not know where the accused's father was but gave him R20 to purchase some airtime so that he could contact his father. He took the money proffered, notwithstanding that he personally had money to make that purchase. He walked to the shop to purchase the required airtime and was joined by a boy known as Sambolo. Sambolo then received a call on his cellular telephone from MaNcwane that was cut short. But the message was capable of being delivered before this occurred and was to the effect that there were members of the SAPS at his father's home looking for him. He returned home and found three people in attendance, two of whom were SAPS officials: a Sgt Dlamini and a female SAPS member and her husband. He was advised that he was being arrested on eight counts of rape. He was taken to the Dundee Police Station and he argued with his arrestors that there was no evidence to link him to these offences. He was nonetheless charged with eight counts and appeared in the Glencoe Magistrate's Court and since the day of his arrest he has remained in custody.

[132] The accused, in essence, denied all the evidence of his sister and S [...] 2 and stated that the owner of the wheelbarrow previously mentioned by those two State witnesses, Mr Z [...] 1, was also part of the conspiracy to frame him. He confirmed that he did not have a good relationship with Mr Z [...] 1 and ascribed this to the fact that he had confronted Mr Z [...] 1 after Mr Z [...] 1 had expelled his nephew from his home.

[133] By virtue of the fact that the accused denied virtually all the evidence that had previously been led by the State, he denied ever meeting the second State witness, Mr B [...], on 5 November 2019. He mentioned a fight that had allegedly occurred between his stepfather and his mother that led to his mother being injured and being taken to hospital by an ambulance and asserted that because he had come to the assistance of his mother during that fight, his stepfather had obtained a protection

order against him and had subsequently informed him that he could no longer support the accused. He was thereby rendered homeless. When this fight and the subsequent events allegedly occurred was never mentioned.

[134] Dealing with the events of 31 October 2019, the accused testified that he was in prison at Ladysmith awaiting trial on that date. He had been detained in respect of the charge of murder pertaining to the deceased that he presently faces in these proceedings. That charge was ultimately withdrawn in August or September 2020. He confirmed that he had been in custody on the charge of murder from September 2019. He had been arrested at his father's house at Matiwane by many SAPS officials, but Col. Ngobese was not one of them. He was assaulted when arrested and was then taken to the police station at Elandslaagte. There he was tubed and was asked about the whereabouts of the deceased. His response was that he had left her at Glencoe and that she could:

'be found all over Glencoe'.

He was then subjected to further tubing for a period of about 30 minutes. He said there were approximately 50 SAPS vehicles at the police station and he saw a list that had the names of four persons on it, which included his name, his sister's name, S [...] 2's name and the name of S [...] 3 M [...] 2. He was then taken to his mother's home where his sister and S [...] 2 were arrested and they were then all taken to the canine unit which is apparently on the way to Dundee. There, the four of them were separated and made to sit in a straight line. He was tubed again and apparently asked of those doing that to him whether he had to be:

'crucified like Jesus for the sins of others?'

This apparently had the desired effect as the police officials thereafter left him alone. He explained that he told the SAPS nothing because he knew nothing.

[135] The State provided Mr MADIDA with a copy of the charge sheet relating to the count of murder in the lower court. It recorded that the accused had been arrested

on 11 November 2019 and that his first appearance had been on 13 November 2019. When advised of this, the accused denied this and said it was 'a fraud'. He insisted he had been arrested in September 2019.

[136] Going back further in time, the accused testified that from January 2019 to September 2019 he was 'still signing', this apparently being a reference to the monitoring to which he was subjected as a consequence of his parole. However, in February 2019 he stated that he was arrested on charges of rape and robbery. He had been held in custody in Ladysmith for six months awaiting DNA analysis results. As regards when he was released from this incarceration, he made the positive statement that:

'I recall clearly I was released in August 2019'.

He went to his mother's home upon his release.

[137] The accused disputed the State's evidence relating to his monitoring at his nominated address and denied, save for one, all the signatures that appear on the document presented by Mr Mandla Z [...] 1 in his evidence. He testified further that he had been arrested in September 2019 and was in custody in September and October 2019. He indicated that the monitoring officials had come to the prison in November and indicated that his parole was to be revoked. He had argued with them that they could not do this and had allegedly said that there were a lot of parolees in prison and asked why they had not started with those persons before they came to him and purported to revoke his parole. In December 2019 the monitoring officials returned, allegedly with five members of the parole board, and his parole was formally revoked. The accused continued to assert that he had thereafter received the benefit of a Presidential Amnesty and was consequently released from custody in the year 2020. He went home. He denied killing the deceased or raping Ms K [...] or robbing her.

[138] Mr Sokhela then commenced his cross examination of the accused. The accused's attention was drawn to the evidence of the first State witness, Ms B [...],

and the evidence of the second State witness, Mr B [...]. Both had testified that the first information that they had received that something may have happened to the deceased was on 5 November 2019, when they had carried out their own search for her. When nothing came of it, Ms B [...] reported the deceased's disappearance to the SAPS on 6 November 2019 and came into contact with Col. Ngobese. The accused confirmed that he had been arrested for the murder of the deceased in September 2019. Mr Sokhela put it to the accused that he had therefore been arrested when the deceased's family was unaware that anything was amiss with her and when no report had been made by them to the SAPS about her disappearance. In short, he was arrested for a murder that had not yet occurred and had not been reported to the SAPS. The accused was asked how this was possible. He was unable to provide a sensible answer, but merely repeated his version that he had been arrested for the murder in September 2019. The proposition was put to him many times, in various forms, but the accused's answer never improved and, ultimately, no satisfactory answer was provided by him.

[139] Dealing essentially with the same point, it was put to the accused that the registration number of the Glencoe murder case was 17/11/2019, the inference being that there was no police docket in existence pertaining to the murder in September 2019. As Mr Sokhela pointed out, before 6 November 2019 not a single person had filed a statement with the police relating to the deceased. The accused said that he did not disagree with that proposition but stood by his version. When asked whether, due to human fallibility, he might be mistaken as to the month in which he was arrested, the accused declined to agree that this was possible.

[140] The accused stated that upon his release from prison in 2018 he had gone to stay at his mother's house, which is actually his stepfather's house. He then stated that he had changed his nominated monitoring address from that house to the M [...] 1 house. This had never previously been mentioned by him and had not been put to the monitoring officials when they testified. Their documentation recorded that they monitored him at 367 Ekuthuleni Street, Sithembile Location, Glencoe. That is not the address of the M [...] 1 house. He explained to Mr Sokhela that he had informed Mr Mandla Z [...] 1 of his change of address when he was monitored by him on a



visit. He explained that this visit had occurred in January 2019, and then confirmed to the court that Mr Z [...] 1 had then monitored him at the M [...] 1 house. Shortly before this, the accused had stated that he had been in residence at the M [...] 1 house in December 2019, but then disputed that he had actually said that. He agreed that he had not informed Mr MADIDA of these facts. The court then drew to his attention that he had previously testified that there had only been a single monitoring visit to which he was subject and that was at his stepfather's house. He now said that he had also been monitored at the M [...] 1 house.

[141] Mr Sokhela then reverted to the accused's first appearance at court on 13 November 2019. Surprisingly, the accused now agreed that he had made his first appearance on that date. It was put to him that he had responded to a series of questions from his counsel in his evidence in chief saying that he had not made an appearance on that date and everything that suggested that he had, was a fraud. Departing from this version, the accused now confidently stated that he had made his first appearance on 13 November 2019 but persisted with his version that he had actually been arrested in September 2019 and had been held for over a month without making a court appearance.

[142] As previously mentioned, at the commencement of the defence case, Mr MADIDA had informed the court that he intended calling certain witnesses in defence of the accused. One of the witnesses mentioned by Mr MADIDA was S [...] 3 M [...] 2, also known as 'Yellowman'. I shall continue to refer to him by that moniker. Mr Sokhela then embarked upon a series of questions concerning Yellowman. The accused testified that he had learnt of the shooting of Yellowman when he telephoned home from prison and a relative, one S [...] 6 N [...] 6, had informed him that Yellowman had been shot. This had apparently occurred after Yellowman had seen the accused at court the previous day. The shooting had allegedly happened at 19h00 on the day following that meeting at court. Mr Sokhela then asked the accused whether he had, in fact, made a court appearance in September, contrary to his earlier evidence that he had been held without making such an appearance until 13 November 2019. The accused denied that he had said that he had seen Yellowman at court. As a matter of fact, the accused had said those words. The

accused then sought to explain, in a complicated fashion, that he had not gone personally to court but that a fellow prisoner who was going to court had agreed to meet with Yellowman and transport toiletries back to the accused in prison from Yellowman. The accused then denied that he had said that he had been at court but when the court said that he had said that and offered him the opportunity for the record to be replayed so that he could satisfy himself of this, he declined to allow this to occur and said that the court was correct.

[143] For a reason that is not immediately clear to the court, the defence placed great stock on the fact that Yellowman had apparently been attacked by the community and shot in the belief that he had been, somehow, involved in the disappearance, and death, of the deceased. On the version advanced by the defence, this shooting had occurred sometime prior to the arrest of the accused. Mr Sokhela put it to the accused that, in fact, the shooting had occurred on 19 November 2019. On the State's version, this was after the arrest of the accused. The accused said he would not disagree with this.

[144] Adverting to the murder charge, Mr Sokhela asked a number of questions regarding the age of the deceased. The accused denied knowing that she was a minor and was shown a photograph that had been received by the court as an exhibit. The court made the observation that he continuously turned the photograph over so that he could not observe the deceased. The accused indicated that he started living with the deceased in 2018. He confirmed that the deceased spent nights at the M [...] 1 house.

[145] On the issue of his relationship with Mr Z [...] 1, the owner of the wheelbarrow, the accused explained that he had had a conversation with him concerning Mr Z [...] 1's decision to expel his nephew from his home. The accused was also asked why he had become involved in that issue, which did not concern him at all. The accused's response was that the explanation for his conduct provided by Mr Z [...] 1 was that

'we come home late and knock on the door and smoke dagga.'

Despite questioning from the court on this issue, it was not clear whether the accused was stating that he had been included in the allegations made by Mr Z [...] 1 by use of the word 'we'. The accused denied that he had said 'we'. Another dispute erupted over whether he had spoken in the plural. The accused stated that what Mr Z [...] 1 had said 'hit me in my heart'. It was pointed out to him that he had admitted both selling and smoking dagga. The accused then shifted the point of emphasis by denying that he ever came home late at night. From what was described by the accused as having occurred between himself and Mr Z [...] 1, it appeared to be that nothing more transpired other than a conversation without any confrontation and accordingly how this could have resulted in the development of a toxic relationship between the two remained entirely obscure. Sight must not be lost of the fact that Mr Z [...] 1 denied ever speaking to the accused on this issue.

[146] The accused indicated that upon his release from prison in 2018, he had gone to reside at the M [...] 1 house. He also confirmed that before he went to stay at his father's house in September 2019, he had resided at the M [...] 1 house. He claimed that all the furniture in the house was his and he confirmed that he had a key to that house. He explained that when he left the house, he gave the key to S [...] 4. When this was pointed out as being a previously undisclosed revelation, the accused's answers became difficult to comprehend.

[147] In re-examination, Mr MADIDA asked the accused whether he was ever given proof of the fact that he had been arrested. The accused told Mr MADIDA that he was never given any proof of this. But then, unexpectedly, he stated that each time he was arrested his rights had been explained to him and he had been given a document recording this. The obvious question that arose from this was where was the piece of paper recording his rights when he was allegedly arrested in September 2019 for the murder of the deceased. Mr MADIDA never asked him to produce that document or where it was. A statement of rights had previously been handed in as an exhibit at the behest of the defence. It related to the arrest of the accused on 11 November 2019.

[148] Having previously described his relationship with the deceased as a 'cheating' relationship, the accused also conceded to Mr MADIDA that he had no proof that this was the case in respect of the deceased. He said that perhaps he assumed that she cheated on him. He, however, confirmed that he had cheated on her.

[149] Upon completion of his re-examination, the court then asked the accused to assist it to understand his alibi by chronologically setting it out, which he the accused then proceeded to do.

[150] At the completion of the accused's evidence, Mr MADIDA informed the court that the defence was dispensing with two of the three witnesses that the accused intended to call, but still intended to call a member of the SAPS concerning the arrest of the accused in August 2020. After the intervention of the court it transpired the SAPS member intended to be called had previously been a State witness. The State was accordingly aware of what that witness might say in his evidence. Mr Sokhela stated that the State did not dispute what that witness might state. As a consequence, in order to dispense with the necessity of calling the witness, the State made an admission in terms of section 220 of the Act which read as follows:

'On 4 August 2020 in respect of Glencoe CAS number 70/11/2019 the accused was released from court at Glencoe as a result of the matter being removed from the roll by a magistrate in court on the said date.

The State admits that on the same day, 4 August 2020, the accused was arrested again at Matiwane in Ladysmith in connection with the rape charge and detained in respect thereto.'

[151] With this formal admission, Mr MADIDA dispensed with the calling of the SAPS witness and also admitted the correctness of the charge sheet that the State wished to hand in regarding the events at the Glencoe Magistrate's Court on 4 August 2020. That charge sheet which had previously been provisionally received as an exhibit, was then formally received as an exhibit.

[152] Mr MADIDA then closed the accused's case.

[153] The matter then stood over for argument. Later, Mr Sokhela called for the conviction of the accused on the three remaining counts that he faced, whilst Mr MADIDA argued that the accused was entitled to his acquittal on those counts.

## **Evaluation of the evidence**

### **Counts 2 and 3**

[154] There can be very little doubt that the complainant in these two counts, Ms K [...], was raped and robbed on 27 April 2013. The medical examination carried out on her after her ordeal supports her oral evidence that she was sexually assaulted. The injuries that she sustained to her vagina and anus are recorded on the medical examination form. The only issue is who the rapist, and therefore the robber, was. The State alleges that it is the accused. The accused denies that it was him but offers up no other defence. He does not say, for example, as he does in relation to the murder charge that he faces, that he was someplace else and could not therefore be the rapist.

[155] The unchallenged evidence of Ms K [...] is that she was sexually penetrated on four occasions on the evening in question, against her will, and during the latter two acts of penetration the rapist was persuaded by her to put on a condom. She testified that those two condoms were discarded in the area of the cemetery where she was raped. They were subsequently recovered by the SAPS, presumably for the purpose of being subjected to DNA analysis. The State therefore potentially had a powerful source of evidence through which it could have determined the identity of the rapist beyond any doubt. By this I mean that if the analysis revealed the accused to be the person who left samples of his DNA in the two condoms then he would undoubtedly be the rapist, regard being had to the fact that the accused has never suggested that he had been having intercourse with anyone in the cemetery around the same time as the rape of Ms K [...] occurred. On the other hand, if the DNA

samples in the condoms revealed DNA foreign to that of the accused, then it would have been established beyond reasonable doubt that the accused could not be the rapist.

[156] The State, however, led no forensic evidence establishing that anything of significance had been extracted from the two condoms, or indeed from the specimens obtained from Ms K [....]'s body when she was examined by a medical doctor after being raped. Capt. Mazibuko gave very confusing evidence as to why this is the case. It is not necessary to repeat that evidence, which in its purest form was that there were difficulties with the specimen extracted from the accused for comparative purposes. To my mind there were many ways in which this difficulty could have been overcome but there appears to have been no desire on the part of either the SAPS or the prosecution services to decisively overcome this difficulty. Instead, it was deemed more expeditious to do nothing but rather point the finger of blame at the SAPS laboratory services for their inability to analyze specimens and report on their findings. I do not find this to be acceptable, and I intend doing something about it.

[157] There is thus no objective evidence linking the accused to the rape of Ms K [....]. Even Ms K [....] does not say it was the accused who raped her. She consistently throughout her evidence stated that the person who raped her was one 'Bafana'. We know that the person's full names are Bafana Shange. When asked by Mr MADIDA whether she knew the accused, Ms K [....] said that she did not. This is a significant piece of evidence. Ms K [....] did not only have the time in the cemetery within which to form an impression of the identity of the person raping her. In saying as much, I acknowledge that this would have been a most harrowing time for her and not ideal circumstances within which to make a definitive observation of the man attacking her. But she had other opportunities during the day on which she was raped to observe her rapist. This occurred when she alighted from the bus, in daylight, when the person she believed to be 'Bafana' helped carry her bag as she proceeded on foot to her home. She again encountered this person later that evening when she left the tavern that she was at with her friends and proceeded to the tuck shop to purchase some food. She walked both to the tuck shop and back to

the tavern with Bafana and conversed with him as she did so. The walk took ten minutes each way according to Ms K [...]. Later, when she departed from the tavern she met up with him again. Thus there were multiple opportunities for her to satisfy herself as to the appearance and identity of the person who would later rape her. Yet her evidence in the witness box was that she did not know the accused. She did not even state that the accused looked something like 'Bafana', who she stated had actually been the rapist. The State also did not call Bafana to allow the court to assess whether there was any similarity between the two men.

[158] The only evidence that potentially links the accused to Ms K [...] and the horrific events in the cemetery, is the evidence of Mr M [...]. He testified that on an unidentified day in the year 2013, whilst he was at the very tuck shop to which Ms K [...] says she proceeded to on the night that she was raped, he saw her in the company of a man who he identified as the accused. It was common cause that the two men knew each other well, with Mr M [...] saying that he had known the accused for in excess of six years. On that evening, he had stood close to the accused under an electric light in the tuck shop when he spoke to him. He was sure that it was the accused that he had addressed. He testified further that several weeks later, Ms K [...] had come to his house and informed him that she had been raped on the evening that she had seen him at the tuck shop. Unfortunately, Ms K [...] did not testify about this visit to Mr M [...]’s house.

[159] Several things perturb me about Mr M [...]’s evidence and cause me concern. The first is that he cannot say when he was at the tuck shop. The best he can get to is a year. In my view, even that must be open to doubt given that Mr M [...] was never interviewed by the SAPS until the day before he gave his evidence in the trial. Given that the rape occurred in 2013, ten years had elapsed between the event in question and the date on which he was asked to recall those events and record them in an affidavit. I mean no criticism of Mr M [...] in stating as much: he was never approached by the SAPS and he stated that he thought that he would be once the SAPS did its investigation. He was justified in thinking that. But the truth is that he was never asked at an earlier stage to record his version of events. It is common cause that in the affidavit to which he deposed he did not even mention the year

when the meeting at the tuck shop had occurred. The reference to the year of 2013 was an embellishment that only emerged in his oral evidence. A further disquieting aspect of his evidence was that he stated that he had been at the tuck shop at around midnight, having been summoned to pick up his friend who was the person in charge of the tuck shop. This does not accord with the estimate of time provided by Ms K [....]. She mentioned that she had gone to the tuck shop about an hour after arriving at the tavern. That would have put her at the tuck shop at around 21h00. A further point of concern is that Mr M [....] allegedly told Bafana that he knew Ms K [....] well. As a matter of fact, it appears that he did not know her all that well. Mr M [....] later conceded that he actually did not know her name but only knew her by sight. As a witness Mr M [....] was confident and presented himself well and I have no doubt that he believes what he told the court.

[160] But the fact of the matter is that Ms K [....] does not state that the accused is her rapist. Mr M [....] had a brief moment in time to form his views of who the person with Ms K [....] was on that terrible evening. Ms K [....] had much longer to ascertain the identity of her assailant and yet she still stated that it was Bafana. She even pointed Bafana out to the SAPS as her rapist and permitted him to be arrested. She now, reluctantly it appears, seems to acknowledge that her rapist was not Bafana. Her views in this regard have apparently been molded by what others have told her about the true identity of the rapist. How those other persons, who were not present at the critical moment, could be of any value in identifying the rapist is not immediately clear to me. Ms K [....] appears to be willing to concede that these views may be correct but I gained the very real impression that she still considers Bafana to be the person who raped her. Her positive statement that she did not know the accused is a true reflection of her views on the matter. I am, at the same time, acutely mindful of the sparsity of any detail in the accused's defence on this count. It simply is that he is not the person who perpetrated this vile act and the associated robbery. While Mr M [....]'s evidence is the critical link to the identity of the rapist, I am of the view that I cannot elevate it above the observations of Ms K [....], who was firmly of the view that the rapist was Bafana.



[161] There must in such circumstances be reasonable doubt as to the identity of the rapist. I am, therefore, unable on the evidence before me to conclude, beyond reasonable doubt, that the accused was her rapist.

### Count 7

[162] This is the count of murder that the accused faces. There is no direct evidence that the accused murdered the deceased. Her body was found on a bed inside the locked M [...] 1 house. How she met her fate was not observed by any witness called by the State. The State asks that through a process of inferential reasoning it be found that the accused was the murderer. The accused, on the other hand, says that it is impossible for him to be the murderer, stating that at the time of the murder he was deprived of his liberty by being incarcerated. His incarceration commenced in September 2019 and he remained so detained until sometime in 2020. As Mr MADIDA put it, it was not just unlikely that he was the murderer, it was impossible that he was. I shall revisit this version shortly.

[163] The principles in relation to reasoning by inference are well established in our law. Both counsel drew my attention in argument to the oft quoted matter of *R v Blom*,<sup>1</sup> which laid out what is often referred to as the two cardinal rules of logic, namely:

‘In reasoning by inference there are two cardinal orders of logic which cannot be ignored:

- (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 the inference sought to be drawn is correct.’

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<sup>1</sup> *R v Blom* 1939 AD 188 at 202 to 203.

[164] What this means is that the facts from which the prosecution invites the court to draw the inference of guilt must be not be consistent with any other inference. If there is another possible inference, then the guilt of the accused has not been established beyond reasonable doubt. There must be some evidential foundation to support the inference to be drawn, and speculation, conjecture or the faintest glimmer of a distant possibility will not be sufficient to establish that foundation. This is because the inference sought to be drawn is determined against the strength of the facts adduced at the trial. That evidence must be considered as a whole, and not by way of a piece-meal approach.<sup>2</sup>

[165] Sight must also not be lost of the fact that the State at all times shoulders the burden of proof and the accused is not required to establish that another inference should be drawn nor is he or she required to establish other facts that support that other inference.

[166] Both counsel in argument mentioned that what evidence is available is largely circumstantial in its nature. This is correct. In *Tom v The State*,<sup>3</sup> van Zyl J stated:

‘The fact is that the law draws no distinction between circumstantial evidence and direct evidence in terms of its weight or its importance. Either type of evidence or a combination of both may be sufficient to meet the required standard of proof in the factual context of a particular case.’

[167] In the English case of *R v Taylor Weaver and Donovan*,<sup>4</sup> Hewart LCJ discussed the value of circumstantial evidence, remarking as follows:

‘It has been said that the evidence against the applicants is circumstantial: so it is, but circumstantial evidence is very often the best. It is evidence of surrounding circumstances which, by undesigned coincidence, is capable of

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<sup>2</sup> *S v Reddy* 1996 (2) SACR 1 (A) 8C-D.

<sup>3</sup> *Tom v The State* [2022] ZAECKMHC 98 (29 November 2022) at para 13.

<sup>4</sup> *R v Taylor Weaver and Donovan* 21 CR App R20 at 21.

proving a proposition with the accuracy of mathematics. It is no derogation of evidence to say that it is circumstantial.’

[168] Virtually every fact advanced by the State through its witnesses on this count is denied by the accused. If the State contends that the accused resided at the M [...] 1 house, the accused denies that; if the State alleges that the accused was at a certain place on a certain date and time, the accused denies it. It needs to be determined whether these are meritorious denials or not.

[169] Are there any facts that are common cause to both protagonists? There are a few. Firstly, there is the admission by the accused that he was in a love relationship with the deceased shortly before her death. Secondly, it has not been denied by the accused that the lifeless body of the deceased was discovered in a bedroom of the M [...] 1 house. Thirdly, it is admitted by the defence that the burnt and skeletal remains that were discovered at KwaDamane were those of the deceased, who was aged 15 at the time of her death.

[170] The veracity of evidence adduced at a trial is often closely dependent upon the source of that evidence and the quality of the witness who discloses that information. The three principal witnesses relied upon by the State to establish the guilt of the accused are S [...] 4, S [...] 2 and Mrs M [...] 2. I am mindful of the fact that S [...] 4 and S [...] 2 are witnesses who themselves have committed criminal offences. Both of them testified as section 204 witnesses. I am further mindful of the fact that such witnesses, by virtue of their intimate knowledge of events, can easily distort or change a few facts to shift culpability from themselves to another. The cautionary rule applicable to the evidence of an accomplice was explained as follows in *S v Hlapezula and Others*:<sup>5</sup>

‘It is well settled that the testimony of an accomplice requires particular scrutiny because of the cumulative effect of the following factors. First, he is a self-confessed criminal. Second, various considerations may lead him falsely to implicate the accused, for example, a desire to shield a culprit or,

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<sup>5</sup> *S v Hlapezula* 1965 (4) SA 439 (AD).

particularly where he has not been sentenced, the hope of clemency. Third, by reason of his inside knowledge, he has a deceptive facility for convincing description—his only fiction being the substitution of the accused for the culprit. Accordingly. . . there has grown up a cautionary rule of practice requiring (a) recognition by the trial court of the foregoing dangers, and (b) the safeguard of some factor reducing the risk of a wrong conviction, such as a corroboration implicating the accused in the commission of the offence, or the absence of gainsaying evidence from him, or his mendacity as a witness, or the implication by the accomplice of someone near or dear to him... Satisfaction of the cautionary rule does not necessarily warrant a conviction, for the ultimate requirement is proof beyond reasonable doubt, and this depends upon an appraisal of all the evidence and the degree of the safeguards aforementioned.'

[171] S [...] 4 and S [...] 2 have been offered indemnity by the State in terms of section 204 of the Act if they testify honestly and frankly. Having heard their evidence, I have no hesitation in finding that S [...] 2 was the better witness of the two. He testified calmly and logically and did not speculate. He admitted his own wrongdoing without any compunction or hesitation, although he had an explanation for such conduct. It is not difficult to understand why his nickname is 'S [...] 2lity'. I found him to be an excellent witness. If there is any discrepancy between his evidence and the evidence of S [...] 4, and quite frankly there are differences, I would favour his version.

[172] In so saying, I do not find S [...] 4 to have been a dishonest witness. It must have been a difficult proposition for her to testify against her brother both because of her link to him and because she stated that she feared him. Her evidence was not delivered in the fluid manner that characterised the evidence of S [...] 2. As Mr Sokhela put it in argument, she did not appear to be the sharpest tool in the shed. I agree with that observation. I cannot hold her delivery against her. The content of her evidence largely conformed with the evidence of S [...] 2 and is supported by facts established by other witnesses. I refer to her evidence about not having a key to the M [...] 1 house and the loan of the wheelbarrow from Mr Z [...] 1. Her

evidence was often confusing and difficult to understand. In so saying, I do not suggest that she was not honest or frank in what she said. But I find her, for reasons not necessarily related to her honesty, to be less reliable than her paramour, S [....] 2. Overall, however, I find them both to have been satisfactory witnesses, who were frank and honest.

[173] While acknowledging that the two section 204 witnesses have themselves committed a crime, that crime is not the crime in respect of which the accused is charged. Their crimes relate to what happened after the death of the deceased and relate to their conduct in helping dispose of her body. There is no evidence that they themselves were involved in any manner with the deceased's death, despite certain innuendos raised in that regard by the accused, to which greater reference will shortly be made.

[174] Much of what S [....] 4 and S [....] 2 testified to was confirmed by other witnesses. Mrs M [....] 2, the accused's mother, provided such confirmatory evidence. Mrs M [....] 2 came across as a long-suffering woman who has attempted to maintain her family notwithstanding the trials that she has been put to by the accused and his conduct. That they have a fractious relationship is established by the fact that Mrs M [....] 2 was compelled to obtain a protection order against her own son. She was undoubtedly an honest witness. It, too, cannot have been easy for her to testify against her own son, yet she did so, but not without showing the strain of doing so. She was an emotional witness and tears came easily to her, but this was quite understandable in my view. I found her to be a truthful witness whose evidence impressed me.

[175] Importantly, Mrs M [....] 2 testified that the accused had resided at the M [....] 1 house during the months of September, October and November 2019. She also confirmed that the only person who had keys to that house was the accused. That this must be so is evidenced by the testimony of Col. Ngobese who testified that, with the consent of Mrs M [....] 2, the lock to the front door of the M [....] 1 house had been broken off to permit the SAPS to gain access to that house. If there was a key available, it would surely have been used. The existence of other keys was a version

propagated by the accused, but the facts narrated by both his mother and Col. Ngobese render that version unlikely.

[176] The State is unable to say with any precision when the deceased died or how she died. Its narrative essentially commences with the deceased's lifeless body being discovered by S [...] 4 and Fidodo. S [...] 4 states that the accused confessed to her that he had killed the deceased:

‘before the previous day’.

She testified that this confession had been made to her on 31 October 2019. Literally, the accused was informing her that before 30 October 2019 the deceased had died. I am satisfied that this constitutes the offence being committed on or about the date mentioned in the amended charge. That this is when the death of the deceased occurred seems likely given the fact that none of the three witnesses who saw the deceased's body remarked on its putrefaction or any unacceptable odour coming from it. In other words, the body had not lain for a lengthy period of time before its discovery.

[177] That the deceased was murdered and did not die from natural causes, again, seems entirely probable. Mr B [...] testified that the accused had informed him that he had had an altercation with the deceased in the M [...] 1 house and had assaulted her before locking her in the house and leaving. On his return he allegedly found that she had escaped through a small window with all her belongings. That statement constituted an admission by the accused that he had visited physical violence upon the person of the deceased. I have no reason to reject the evidence of Mr B [...]. He was no supine spectator to the events that were unfolding. Based on information that the accused provided him with, he tracked down the person named ‘Lucky’ who the accused had told him about. He could not have made this evidence up, because his investigations did not lead him to discover the fate of the deceased. It, instead, led him to a dead end that then resulted in the family informing the SAPS of their suspicions. If he was going to make something up it would have been

something that incriminated the accused. His devotion to his deceased cousin was admirable, despite her troublesome behaviour.

[178] The overwhelming detail of the evidence led by the State establishing that the accused had the opportunity to commit this offence, and that he had admitted committing the offence, is met with the defence of the accused that he could not be the person responsible for the death of the deceased as he was in custody and not at liberty amongst the general populace at that time.

[179] The accused's alibi defence was not consistent, nor was it put to all the witnesses to whom it should have been put. Mr B [...] testified that he encountered the accused at a public place on 5 November 2019, when on the accused's version he was already detained in custody. The existence of the alibi was not put to Mr B [...]. A denial that the meeting between the two was put, but in my view that was insufficient. It is one thing to simply deny a fact, it is a very different thing to explain why that fact cannot be correct. This was not done.

[180] The accused's alibi constantly grew in detail and morphed in its form as the trial progressed. It was inconsistent in its content. At the end, it was difficult to determine exactly what facts populated the alibi. The court thus asked the accused, in point form, to set it out. This the accused did. In that truncated form of the alibi he stated that when arrested in September 2019 for the murder of the deceased, he had been held at Elandslaagte Police Station, was then taken to Glencoe and from there to Wasbank Police Station, then back to Glencoe and was then detained at Ladysmith prison until he was finally released. It was, however, put to Col. Ngobese that the place where the accused had been detained and kept was at the Wasbank Police Station. The court checked with Mr MADIDA when that version was put that it was intended by this version that the accused had been kept at Wasbank Police Station for the entirety of his incarceration. He took an instruction from the accused and confirmed this. This, however, was not the alibi as it had been originally put.

[181] That having been said, I acknowledge that there is no onus on an accused person to establish their alibi. It is the task of the State to disprove it. In *R v Mokoena*,<sup>6</sup> the court held that:

‘If the onus is upon the Crown to rebut the alibi, as it certainly is, then the evidence as a whole must be considered and the fact that the accused and his witness told stories, which in some respects disagree, does not mean that the Crown case has been proved beyond reasonable doubt ... . (The) evidence for the Crown was that of a single witness, ... the opportunity for accurate identification was not satisfactorily proved and ... there was no onus upon the accused to prove his alibi, considering the evidence as a whole ... the case was not sufficiently proved.’

[182] If the alibi might be reasonably true, the accused must be acquitted. The correct approach is to consider the alibi in the light of the totality of the evidence presented to the court, as stated in *Mokoena*. In evaluating the defence of an alibi, in *R v Hlongwane*,<sup>7</sup> Holmes JA stated as follows:

‘At the conclusion of the whole case the issues were: (a) whether the alibi might reasonably be true and (b) whether denial of complicity might reasonably be true. An affirmative answer to either (a) or (b) would mean that the Crown has failed to prove beyond a reasonable doubt that the accused was one of the robbers.’

For the court to convict an accused who has raised an alibi as a defence, that alibi must be proved to be false beyond a reasonable doubt.<sup>8</sup>

[183] The Supreme Court of Appeal in *S v Musiker*<sup>9</sup> stated that once an alibi has been raised, it has to be accepted unless it is proven that it is false beyond a

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<sup>6</sup> *R v Mokoena* 1958 (2) SA 212 (T) 217.

<sup>7</sup> *R v Hlongwane* [1959] 3 All SA 308 (A); 1959 (3) SA 337 (A) at 339C-D.

<sup>8</sup> *Shusha v S* [2011] ZASCA 171 para 10.

<sup>9</sup> *S v Musiker* 2013 (1) SACR 517 (SCA) para 15-16.



reasonable doubt. In *S v Burger and others*,<sup>10</sup> the same court held that it is worth noting that mere lies for an alibi defence or for alibi evidence does not warrant 'punishment for untruthful evidence.' However, where an alibi is presented and it contradicts evidence presented before the court, and the alibi later turns out to be a lie or a falsehood, the lie together with the other evidence of the accused as a whole may point towards his or her guilt in certain cases.

[184] The alibi of the accused, if truthfully raised, means that he could not at the relevant time have been at the M [...] 1 house and have killed the deceased. He insists that on an undisclosed date in September 2019, he was arrested and remained in detention until his release in August 2020. In the period mentioned by the accused, the deceased met her demise. If the accused was in custody, he could not have been the party responsible for her death.

[185] There is significant compelling evidence that establishes that the accused was not in custody over the period that he claims he was incarcerated. In truth, it is found virtually in all the evidence of the lay witnesses who were called to testify. Mr B [...] testified that he met the accused on a public road on 5 November 2019. The accused's sister says she saw him on 31 October 2019, as does S [...] 2. Mr Z [...] 1 says he saw the accused in his own home on 2 November 2019 when he made available his wheelbarrow. Col. Ngobese, who was a fine witness and exemplified everything that an excellent police officer should be, testified that she arrested him on 11 November 2019 at his father's residence at Matiwane. Mr Mandla Z [...] 1 testified that the accused had been at his nominated monitoring address when visits were paid there on 3 October and 13 October 2019. The accused himself insisted on the statement of his rights that was given to him on 11 November 2019 when he was arrested be handed in as an exhibit. This records his arrest on that date, a date upon which the accused asserts he was already in custody and which arrest did not occur. The accused simply denies that all these witnesses are correct. The court must simply accept that all these witnesses are incorrect and that he, alone, is correct.

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<sup>10</sup> *S v Burger and others* 2010 (2) SACR 1 (SCA) para 30.

[186] But the very essence of the accused's alibi is in truth and in fact not undermined entirely by the strength of this evidence, as powerful as it might be: it is undermined by the accused himself. He testified that the reason why he was in custody from September 2019 was because he had been arrested then for the murder of the deceased. The version is, with respect, inane. No one suspected for a minute that in September 2019 the deceased had been killed. There is no evidence that this is when she had been murdered. The evidence of her family, which was not controverted, was that they first developed a suspicion about the deceased's fate on 5 November 2019 and ultimately reported those suspicions to the SAPS on 6 November 2019. Only at that latter date did the SAPS begin to investigate. I am simply not able to accept that the SAPS had already arrested the accused a month prior to this when there was in September 2019 no complaint about the whereabouts or fate of the deceased. While it would be amazing if the SAPS was able to predict the occurrence of crimes before they occur, human experience and reality dictates that this does not occur. The SAPS, already overburdened as they are, are not able to investigate matters that have not been reported to them.

[187] The accused's alibi appears to have been constructed to ensure that he was removed from community life over the period in which the deceased was killed. Further evidence of its artificiality came to light when the charge sheet utilised in the lower court in respect of the murder charge was produced. It recorded that the accused had made his first appearance at court on the murder count on 13 November 2019. The accused denounced the charge sheet as 'a fraud' and refused to accept its accuracy. The next day, as his cross examination continued, he said that it was correct. But he continued to adhere to his version that he had been arrested for that offence in September 2019. This then meant that he had been detained, unlawfully, for over a month without being brought before a court. This is what happened, he explained. Of course that version had never been put to Col. Ngobese who had arrested him. It could not have been put because it had only recently been thought of by the accused.

[188] In argument, I inquired from Mr MADIDA what profit the Department of Correctional Services would gain from falsely recording that a person they were

monitoring was present at his nominated monitoring address when he, in truth, was not there. I was promised an answer by Mr MADIDA. I regret that I am still waiting for that answer. The inescapable answer is that despite the incredible chaos and confusion that seems exist in that department, there is no benefit to it for such conduct to occur. However, this is what the accused would have the court believe occurred. I can think of no plausible explanation why this conduct would occur. I accept that where the accused was monitored and signed the monitoring form, he was physically present at his monitoring address.

[189] Generally, as a witness, the accused was abominable. He is a quick thinker but his hastily contrived answers to predicaments that he found himself in in the witness box often did not gel with earlier evidence that he had given. He slouched in the witness box and had an air of menace about him. He was argumentative and denied saying things in his evidence that he had clearly said. He bought time to think by having questions repeated. He complained about an alleged reaction to his evidence by Col. Ngobese who was present in the public gallery after she testified. Instead of focussing on his own evidence he was prepared to try and distract the court with inconsequential trivialities. He answered questions the way he wanted to answer them and paid no mind to the substance of what he was being asked. He was constantly trying to predict why a question was being asked of him and tried in this way to second guess Mr Sokhela when he was cross examined by him.

[190] I could not help but notice his behaviour when his mother was called to testify. He steadfastly refused to look at her in the witness box, let alone look her in the eye, over the several days that she spent in the witness box. I specifically noted his continued gaze was at the floor of the accused dock while she testified. Once she exited the witness box he gazed around the court room as he had done before his mother entered the witness box. Once her evidence was done and she had left the courtroom, he had no qualms in branding her an unmitigated liar when he gave evidence.

[191] In all, the accused was a singularly unimpressive witness and I am convinced that he is serial liar who will say anything regardless of its truth as long as it benefits

him to some degree. It follows that where the evidence of the accused conflicts with, and is at odds with, a State witnesses' evidence, I reject the accused's evidence.

[192] The accused argued that he would not have confessed to S [...] 4 because of the alleged 'toxicity' of his relationship with her. Mr MADIDA suggested that it would have been 'disingenuous' of the accused to unburden himself to someone that he did not get on with. I do not share that view. Virtually every person who testified at the trial was, according to the accused, in a toxic relationship with him. It does not take much analysis to realise that the common factor in these allegedly 'toxic' relationships is the accused himself. He did not appear to have many people that he could call upon to assist him. His sister was the obvious one to turn to. If she betrayed his confidence, he could simply blame her for the murder. That is precisely what he has done. It was put to S [...] 4 by Mr MADIDA that she and S [...] 2 would know better what happened in the M [...] 1 house. And then it was put to her that because of the toxic relationship between herself and the accused, she had dragged the accused in 'to get rid of him'. Each of these propositions occasioned me to ask Mr MADIDA whether he was alleging that S [...] 4 and S [...] 2 were the true murderers of the deceased. I was assured on each occasion that this was not what was being put. But it is impossible to understand the latter proposition as being anything other than an allegation that S [...] 4 had set up the whole scenario to ensure the downfall of the accused. The suggestion was without any merit. No evidence was led in this regard. There was no suggestion that S [...] 4 knew the deceased other than through the accused or that she had any motive to kill her.

[193] Even without the confession from the accused to S [...] 4 about killing the deceased, I would have been prepared to make the finding that the deceased did not die of natural causes because of what happened to her corpse. Had there been a natural explanation for her expiration none of the events on the night of 31 October 2019, as testified to by S [...] 4 and S [...] 2, would have been necessary. The accused also explained that in attempting to incinerate the deceased's body to ashes he was 'destroying evidence'. That is what he was doing. He was destroying evidence of his involvement in the death of the deceased.

[194] The accused's alibi is false beyond a reasonable doubt and is accordingly rejected. In coming to this finding, I caution myself with the realisation that the fact that he has advanced a false alibi does not necessarily mean that he is guilty of the offence of murder. It is notionally possible that he could have any number of reasons for advancing his palpably false alibi.<sup>11</sup> For instance, he might be innocent but is unable to remember where he was at the critical time and so he advances a false alibi to protect himself in the face of seemingly incriminating evidence. I am also mindful of the fact that usually when an accused tells lies in evidence, this does not constitute corroboration of the State's evidence. It merely weakens or destroys the value of the evidence which the accused has given. In *S v Shabalala*<sup>12</sup> Nestadt AJA stated as follows:

'Finally, there is the appellant's evidence as to his whereabouts on the night in question. It was rejected as false .... This reflects adversely on the appellant's credibility. As was pointed out in *S v Mtsweni* 1985 (1) SA 590 (A), caution must be exercised in attaching too much weight to the fact of an accused's evidence being untruthful. An innocent person may falsely deny certain facts because he fears that to admit them would be to imperil himself (*S v Oladla* 1980 (1) SA 526 (A) at 530D). Nevertheless, it is a factor of significance because appellant's evidence, in support of his alibi, having been rejected, he is in the same position as if he had given no evidence on the merits (*R v Ohlollo* supra; *R v Oladla and others* supra 311D-E).'

[195] Having found the accused's alibi to be false, I must find, as I do, that he was at liberty in his community in October 2019, when the deceased died. I find that he was in an intimate relationship with the deceased, who was but a child of the age of 15. I find that he solely possessed the key to the M [...] 1 house and that he and the deceased resided together there. The deceased was found in that house, dead. I find that the accused gave a false explanation to Mr B [...] about the deceased's whereabouts on 5 November 2019. I find, also, that the accused was the driving force behind the disposal of the deceased's body and that he was the active

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<sup>11</sup> *R v Gumede* 1949 (3) SA 749 (A) 755.

<sup>12</sup> *S v Shabalala* 1986 (4) SA 734 (A) 751.

participant in its destruction. The only reasonable inference to be drawn from those facts is that the accused murdered the deceased. That he admitted to S [...] 4 that he had killed her merely serves to confirm the correctness of the inferences drawn from the abovementioned findings. To that body of evidence, the accused has raised a false alibi and has sought to convince the court that all those who testified to seeing him in the community at the critical moment are mistaken and wrong. In my view, this is a case where the raising of a false alibi points to the guilt of the accused, as adumbrated in *Burger*, referred to earlier in this judgment.

[196] In a criminal trial, a court's approach in assessing evidence is to weigh up all the elements that point towards the guilt of the accused against all that which is indicative of the accused's innocence, taking proper account of inherent strengths and weaknesses, probabilities and improbabilities on both sides and having done so, to decide whether the balance weighs so heavily in favour of the State as to exclude any reasonable doubt about the accused's guilt.<sup>13</sup> Having guided myself accordingly, I am satisfied that the guilt of the accused has been established beyond a reasonable doubt. His false evidence and his contrived alibi merely reinforces the compelling evidence adduced against him by the State.

[197] Finally, something needs to be said about the failure of the State's case on the charges of rape put to the accused. The failure to produce DNA results is the reason for the collapse of those charges. In making these remarks, I must not be understood to be stating that the accused would have been convicted on those charges had there been DNA evidence. That is not what I am stating. I have no idea whether his DNA can be linked to any of the specimens in the State's possession. The truth is that without that evidence, we will never know whether he was involved in those offences. This type of policing and investigation is a slap in the face of the citizens of this country and, more particularly, the three complainants in this matter. Ms K [...] testified how she had been physically shaking in the cemetery prior to her being raped. I cannot even begin to imagine how terrifying her experience must have been. She has apparently suffered psychological consequences as a result of her

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<sup>13</sup> *S v Chabalala* 2003 (1) SACR 134 (SCA) para 15.

ordeal. I am not surprised. Ms K [...] waited 10 years to give her evidence: one of the other rape complainants waited 11 years. In being brave enough to report what had happened to them and to come to court to testify about a most sensitive personal violation they were probably seeking closure on a very frightening moment in their respective lives. They are to be denied justice by the disgraceful investigation of their cases. They are denied that closure by the unacceptable length of time it takes to get DNA analysis performed by the SAPS laboratories. Having been victims once, they are now victims for a second time. Quite frankly, the prosecution services also needs to do better. They cannot sit back with their arms folded while their cases disintegrate. They must become proactive in demanding and securing laboratory results. This trial was a long time coming. There was sufficient time available to the State to ensure the DNA analysis results were available for the trial. They failed to ensure that they were. This type of approach cannot be tolerated. It is not what the average citizen of this country expects or is entitled to. In short, it is shameful. This woeful failure needs to be brought to the attention of those who have the power to make sure that this type of failure never happens again.

[198] I accordingly conclude as follows:

- (a) The accused is found not guilty on counts 2 and 3;
- (b) The accused is found guilty on count 7;
- (c) In terms of the provisions of section 204(2) of the Criminal Procedure Act 51 of 1977, the state witnesses Bongisa M [...] 2 and S [...] 1 Agrippa Agreement P [...] are both discharged from future prosecution on a charge of being an accessory after the fact to a charge of murder involving the deceased, Ms C [...] Lumphondwana ( B [...]); and
- (d) A copy of this judgment is to be dispatched to the Minister of Police and the Director of Public Prosecutions by the Registrar of this court for their consideration and action.

**MOSSOP J**

## **APPEARANCES**

Counsel for the State : Mr. S Sokhela  
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Counsel for the accused : Mr P. M. MADIDA  
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Dates of Hearing : 17 to 20 January 2023; 23 to  
27 January 2023; 30  
to 3 February 2023; 6 February  
to 10 February 2023; 13 February 2023.

Date of Judgment : 15 February 2023