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**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

Case No: SS 69/2015

In the matter between:

THE STATE

Vs

BENNIE ADAMS

JUDGMENT DELIVERED ON TUESDAY 21 JUNE 2016

MAHOMED, AJ

INTRODUCTION

[1] The Accused, Mr Bennie Adams (Adams), is a 38 year-old male charged with: housebreaking with the intent to commit kidnapping and kidnapping, rape,

assault (common) and murder. The allegations arose from the events that occurred during 10 and 11 December 2014, within the district of Kuils River. Mr Caiger appeared on behalf of Adams, and Mr Theron together with Mrs Herbst represented the State.

- [2] The charges against Adams, arose from the allegations that: on or about 10 December 2014 and at 3 M S, H P, K R, in the district of K R, Adams, an adult male, unlawfully and intentionally, broke into the home of the complainant, Ms U N (Ms N), a 32 year old female, with the intention to commit kidnapping, and kidnapped Ms N by assaulting her and forcing her against her will to accompany him to his home at 4 C H S, K R (charge 1); on or about 10 and 11 December 2014 and at 4 C H S, K R, in the district of K R, Adams, an adult male, unlawfully and intentionally had sexual intercourse with Ms N, a 32 year old female by penetrating her vagina with his penis, without her consent in contravention of the provisions of Sections 1; 55; 56; 57; 58; 59; 60 and 61 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 and read with Sections 92(2), 94, 256 and 261 of the Criminal Procedure Act 51 of 1977 - (rape) read with the provisions of Sections 51 and 52 and Schedule 2 of the Criminal Law Amendment Act 105 of 1997, as amended (charge 2); on or about 10 and 11 December 2014 and at 3 M S, H P, K R and 4 C H S, K R, in the district of K R, Adams, an adult male, unlawfully and intentionally assaulted Ms N, an adult female, by hitting her with his fists (charge 3); and on or about 10 and 11 December 2014 and at 47 C H S, K R, in the district of K R, Adams unlawfully and intentionally caused the death of his minor son with Ms N, A D N, a two year and nine month old

male toddler, by hitting him with his fists and assaulting him in other ways which are unknown to the State. The Accused is charged with murder read with Section 258 of the Criminal Procedure Act 51 of 1977, read with the provisions of Sections 51 and 52 and Part II of Schedule 2 of the Criminal Law Amendment Act 105 of 1997, as amended (charge 4).

[3] Adams pleaded not guilty to charges 1, 2 and 4 and guilty to charge 3 and understood that the minimum sentence of 10 years imprisonment in terms of Section 51(1) of the Criminal Law Amendment Act 105 of 1997 read with Part III of Schedule 2 is applicable in respect of charge 2 (rape), and that the minimum sentence of 15 years imprisonment in terms of Section 51(1) of Act 105 of 1987 read with Part II of Schedule 2, is applicable in respect of charge 4 (murder), in the event that this Court finds him guilty.

[4] At the outset Adams made certain admissions in terms of Section 220 of Act in respect of charge 4 (murder). He admitted the name of the deceased minor as reflected in the charge-sheet; and that Dr. C I Herbst performed the autopsy on the body of the minor deceased on 15 December 2014, and that her findings are reported in the form WC 14-3034-14, marked as Exhibit C1-3.

BACKGROUND

[5] The substantial facts summarised were as follows:

- 5.1. During the night of 10 December 2014, Ms N and the minor deceased were asleep when they were abruptly woken up by Adams hitting her.
- 5.2. Despite locking the door with two slide locks from the inside before they went to bed, Ms N discovered that A had succeeded in opening the door. He had reached through a gap in the door, forced the slide lock open, and entered the premises together with his friend Velaphi (Wendell Kouter).
- 5.3. Adams handed the deceased to Velaphi, while he continuously assaulted her and forced her to accompany him to his home at 4 C H S, K R, against her will.
- 5.4. When they arrived at Adams' home, he chased Velaphi away and proceeded to assault Ms N and the deceased by hitting them with his fists and open hands.
- 5.5. Each time the deceased attempted to either look at his mother or go to her, Adams would assault the deceased repeatedly, saying words to the effect that he should take his hiding like a man.
- 5.6. Adams instructed Ms N to make up the make-shift bed on the floor with the additional mattress that he had in his home, and he further assaulted her and ordered her to undress, while the deceased lay on the bed in the same room.

- 5.7 Adams then proceeded to have sexual intercourse with Ms N without her consent while the child lay on the bed in the room. Ms N pleaded with Adams and expressed her wishes not to have intercourse.
- 5.8 The following morning at approximately 6.00am, Ms N fled to the K R P Station seeking help.
- 5.9 At the time, Ms N left the deceased with Adams, thinking that it would raise his suspicion if she left with the deceased and that Adams would follow them and force them to go back to his home.
- 5.10 Ms N went to the Kuils River Police Station. She was not assisted, turned away and told that she was under the influence of alcohol. I will return to this aspect later.
- 5.11 After spending all morning at the police station expecting to be helped in her hour of need, Ms N went to the Magistrates Court nearby. Sometime during the afternoon of 11 December 2014, Ms N with the assistance of Ms Judith Anne Du Preez, a crisis counsellor with Mosaic stationed at the Magistrate's Court, finally managed to obtain a Protection Order against Adams.
- 5.12 Despite the Protection Order, the police still refused to assist Ms N and after various attempts to seek help she then made her way to Adams'

home. She waited on the street corner nearby fearing that if she entered Adams' home he would assault her again.

5.13 While Ms N was waiting there her mother arrived with her older sister after receiving the news that her grandson had died. When the ambulance arrived Ms N discovered that the deceased had passed away and had visible and severe injuries, which were not there when she left him with Adams.

5.14 According to Ms N, both she and the deceased had been diagnosed with HIV when she gave birth to the deceased.

5.15 Ms Nicholas stated that she had contracted the HIV virus from the Accused.

SUMMARY OF STATE EVIDENCE

[6] The State relied on the evidence of nine (9) witnesses namely, Ms U N, the complainant (Ms N); Ms Judith Anne Du Preez, a crisis counselor in domestic violence employed by a non-governmental organisation (NGO) called Mosaic; Dr. Donovan Mark Andrews, who examined Ms N on the 12 December 2014 in regard to the rape incident; Constable Rhys Malcolm Jackson, a Detective Constable in the South African Police Services (SAPS) who was called to the crime scene on 11 December 2014; Mr. Dimitri Jonathan October, the paramedic who issued the Declaration of Death of the deceased; Dr. Celeste

Ingrid Herbst (Dr Herbst), who performed the post-mortem examination on the body of the deceased; Professor AB Van As, who gave an expert opinion based on the findings of Dr Herbst and his own experience and expertise as a Paediatric Trauma Surgeon; Colonel Edward Clark the SAPS detective who, in his capacity as Commander of the Detective Unit of the Kuils River Detective Services, arrested Adams on 12 December 2014 on the charges of murder (of the deceased) and rape (of Ms N); and Lieutenant Colonel Adriaan Pretorius, the SAPS detective stationed at the Blue Downs Cluster who was part of the investigation team.

- [7] The State also relied on various documents: the Application for the Protection Order in terms of section 4(1) of the Domestic Violence Act 116 of 1998; the J88 report; the post-mortem report and a portfolio of photographs of the minor deceased compiled by Dr CI Herbst as well as photographs of the crime scene supported by the affidavit of Constable Lauren Natalie Williams (the police photographer); the identification statement of Ms U N; the Forensic Pathology Identification and affidavits of the Forensic Officers Andre Roland Koopman, Na-eem Smith and Bradley Du Preez, in terms of section 212 of the Criminal Procedure Act 51 of 1977; and the written Medico-Legal Opinion of Prof AB Van As dated 2 October 2015, the Notice of Rights in terms of the Constitution; the Statement regarding the interview with the suspect; a further Notice of Rights in terms of the Constitution; and a warning statement by suspect.

- [8] The Defense called three (3) witnesses to testify, including Adams (the accused), Mrs O A (A' mother), and Ms N A (A' sister).
- [9] The State attempted to call a person known as Velaphi (Wendell Kouter) as a witness but he could not be traced.
- [10] The second witness to testify for the State was Ms Judith Anne Du Preez (Ms Du Preez), a crisis counsellor in domestic violence employed by an NGO called Mosaic. She testified that she was stationed in Room 14 at the Magistrate's Court in Kuils River on the afternoon of 11 December 2014, when she encountered Ms N who was concerned about the safety of her child and desperately seeking help from the police to fetch him.
- [11] Ms Du Preez confirmed that at the time Ms N presented herself, she was barefoot, unkempt, very emotional and deeply distressed but not under the influence of alcohol. She testified that the police had refused to help Ms N.
- [12] The evidence of Ms Du Preez established the basis for the "first report" of rape and she also confirmed Ms N' statement of the assault that took place on 10 December 2014.
- [13] Ms Du Preez was instrumental in assisting Ms N to obtain a Protection Order which was intended to solicit help from the police to fetch the deceased from the accused.

- [14] Dr Donovan Mark Andrews (Dr. Andrews), the doctor who examined Ms N at 03:40pm on 12 December 2014 and compiled the J88 form, gave evidence that he had noted approximately one week old injuries on her lower arms indicative of a previous assault reported by Ms N as an assault with a hammer in those areas.
- [15] Ms N reported to him that she was raped. Dr Andrews testified that while the vaginal and anal examination did not show injuries, the *“patient stated that the alleged attacker had not used a condom, she had bathed, washed, douched, showered, urinated or changes clothes prior to me examining her.”*
- [16] Dr Andrews further testified that it is usual when someone alleges rape that a swab is taken for DNA purposes. There was not enough DNA when he examined Ms N and he explained that could mean a number of things. A negative DNA swab would indicate a number of scenarios but it would be speculative as to what the reasons were. He stated, for example, that the attacker could have ejaculated outside of the vagina, or the attacker could've worn a condom, or the patient could have wiped or washed herself. In some women, the particular bacterial colony in the vagina actually destroys the DNA. He testified that the absence of physical signs of rape could be explained by the fact that Ms N was an adult, was sexually active and had already given vaginal birth twice. He concluded that there was no medical evidence that Ms N had been raped, but stated that he could not rule out rape or sexual assault.

- [17] Constable RM Jackson testified that he was on standby when he was called to the crime scene. When he arrived there he found Ms N was unable to speak and in a state of shock. He asked Adams what had happened and he responded that the deceased fell off the bed while they were sleeping and that the deceased had no injuries before they went to bed. In his opinion, it was impossible for someone to sustain the type of injuries on the deceased from falling off the bed. When he questioned Adams further about this he stated that Adams "*didn't want to speak to me anymore*".
- [18] Mr. Dimitri Jonathan October, was the paramedic who responded to the call that there was a two year old baby with respiratory distress and arrived at the crime scene on the 11 December 2014. He issued the declaration of the death of the deceased after examining the body at 18:45. He testified that the accused informed him that the deceased had been ill for a long time and that he may have sustained injuries from falling at the shebeen frequented Ms N when the deceased was with her. He testified that he could see, "*there were visible signs of trauma, there were some scratch marks on the baby's face, there was also a bluish discoloration just above the eye like a swelling*".
- [19] Dr Celeste Ingrid Herbst (Dr Herbst) was the Forensic Pathologist at Tygerberg who performed the post-mortem examination on the body of the deceased on 15 December 2014. She compiled the Report on the Medico-Legal Post-Mortem Examination, took the photographs marked exhibit C2 and disposed to the affidavit in terms of section 212(4)(a) of the Criminal Procedure Act 51 of 1977. In response to the question as to whether there

was any evidence of previous neglect or old abuse or old injuries to the body, she found that the deceased had no signs of old or chronic injuries and all injuries were noted as acute and recent. Her chief findings of the post mortem examination were that, *“all the injuries found at post mortem were acute and inflicted just before death”*.

[20] Dr Herbst found that severe blunt force caused the bruises, abrasions and lacerations to the head, brain, chest, face, mouth, eyes, abdomen and even perineum, with abrasions over the scrotum of the deceased. She testified that the deceased suffered blood loss as a result of the injuries. In her opinion, the cause of death was *“blunt force trauma to the head and body (unnatural)”*.

[21] Dr Herbst also noted that, *“the child had inflammation in the left lung, showing that the child was in fact ill, however the severity of this did not contribute towards the cause of death”*.

[22] Dr Herbst gave evidence that the deceased's stomach contained only approximately 5ml's of pale brown fluid, his liver appeared pale and weighed 460g, and his bladder was empty.

[23] Professor AB Van As, a Specialist Surgeon in the field of Paediatric Trauma at the Red Cross Children's Hospital, corroborated the findings of Dr Herbst. According to his evaluation, the deceased had a chronic lung infection which did not contribute to the cause of his death. He testified that, *“It is to me inconceivable that the wide range of injuries sustained in the deceased were a*

result from a simple fall. The extent of the injuries can only be explained by the mechanism of a non accidental injury". He defined "non accidental" as "violence or maltreatment on the child". He concluded that the deceased must have been severely assaulted over a prolonged period of time, and would only have had a chance of survival had he been rushed to the hospital immediately after the assault because, "the injuries were really very very severe". Professor Van As testified that the extent of the injuries would still have caused permanent brain damage in the unlikely event that the child had survived.

TRIAL-WITHIN-A-TRIAL

[24] During the testimonies of Colonel EW Clark and Lieutenant Colonel AM Pretorius, the detectives who investigated the charges, the Defense questioned whether Adams had properly understood his constitutional rights as a suspect and accused because he cannot fully appreciate English. This resulted in a trial-within-a-trial to determine the admissibility of the Statement of Interview with the Suspect marked exhibit "P", Notice of Rights in terms of the Constitution marked exhibit "Q", and the Warning Statement by the Suspect marked exhibit "R". After hearing the evidence presented particularly from the accused, I decided to accept and allow to be led into evidence the fact that Adams made a statement to the police, in particular, Lieutenant Colonel Pretorius, and the statement is marked exhibit "P"; also that Adams was informed of his constitutional rights set out in exhibit "Q" and that he was clearly advised of his rights and the contents of the statement are not in

dispute; and further, Adams received a warning statement marked exhibit "R" and that his signatures are appended to all these documents. Accordingly, I concluded that Adams understood his rights and admitted into evidence exhibits "P", "Q", and "R".

SUMMARY OF DEFENCE EVIDENCE

[25] Adams initially elected to remain silent and not testify, but during the trial he indicated through his counsel that he wished to testify in his own defense. The Defense also called his mother and sister as witnesses before closing his case.

[26] During examination-in-chief, Adams testified that on 10 December 2014, he opened the door of the place where Ms N and the deceased were sleeping by reaching through a small gap under the door and opening the lock. He entered the "*hokkie*", as he called it, without her permission. He therefore conceded that he had entered without consent and was guilty of housebreaking.

[27] Adams admitted that he assaulted Ms N while she was sleeping next to her child, in the process waking her up. He testified that he hit her with an open hand and stated that Ms N panicked in the darkness and screamed when he assaulted her.

- [28] When confronted with the injuries of the deceased in examination-in-chief, and how it came about that the child was severely injured, Adams simply stated “*geen kommentaar*” (no comment).
- [29] The Defence led evidence from Adams and Ms Olga Adams to the effect that Ms N was a terrible mother to such an extent that she contributed to the deceased’s death because of her drug addiction. Adams testified that he is a good father, and went to look for Ms N and the deceased because he was concerned that the child was ill and was not being cared for properly.
- [30] Adams wanted the Court to believe that Ms N voluntarily accompanied him and even initiated intercourse with him. He testified that she had made advances towards him for the purpose of having sexual intercourse on the evening of 10 December 2014 and denied that he had sexual intercourse with Ms Nicholas.
- [31] Adams testified under cross-examination that he had not given the deceased anything to eat or drink throughout the period that he was in his care. He testified that he found the deceased outside the door the following morning (11 December 2014), crying for his mother. The accused noticed an old abrasion underneath the deceased’s eye, but that his eyes were not swollen as yet. He picked up the deceased, discovered that he wet his pants and dried his bottom. He then placed the deceased on the bed where they slept further. Adams gave no account of any events for the remainder of the day until it was discovered that the deceased had died.

- [32] The accused testified, "*Toe ek wakker skrik het ek vir my ma n entjie gevra en vir my ma gesê om na die kind te gaan kyk want die kind lyk nie reg nie. My ma het toe opgelet dat die kind dood is.*"
- [33] Ms O A, the mother of the accused, was called to testify on his behalf. She gave evidence on the circumstances before the death of the deceased and confirmed that she had encouraged Adams to fetch the deceased because she heard that he was ill and concerned that his mother was neglecting him due to her drug problem. She stated that she was aware that Ms N and the deceased were in the accused's "*hokkie*" on the 10 December 2014. Under cross-examination she testified that she heard them having a verbal altercation - in her words it was "*'n stryery, nie bakleiry nie* ", implying that there were no signs of Ms N being beaten.
- [34] Ms N A, the Accused's sister, also testified on his behalf but her evidence did not take the case further in any material way. She testified that she became aware that the deceased had taken ill and that her mother wanted to fetch him. When Adams came out of work, her mother told him to look for Ms N and the child. That evening she thought she heard Ms N' voice but wasn't sure and did not look out of her window. She testified that Adams looked after his children and that they loved him. On the evening of 10 December 2014 she heard "*'n stryery*" but not "*bakleiry soos goed wat in the rondte val, sulke harde geluide nie*". She did not hear the child crying that evening. She could not say if Ms N had been beaten by Adams. She testified that she heard the

door to the “*hokkie*” open at approximately 06:00am on 11 December 2014, but was not sure who it was that left. She did not see the child all day because she went to work.

ARGUMENTS

The State

[35] At the close of the Defenses’ case, after all the evidence was presented, counsel for the State argued that Adams be found guilty on all 4 charges against him. They argued that the Court should have regard to all the evidence as a whole, and specifically that the deceased’s lung condition had no bearing on the cause of death. Adams had forcefully taken Ms N and the deceased to 4 C H S, K R, assaulted them, raped Ms. N and murdered his son with *dolus directus*, because Adams had testified that he was not under the influence of alcohol or drugs. The Court was asked to look at the surrounding circumstances and the fact that Ms N did not want to be at 4 C H S, K R with Adams. The question was asked, why then would Ms N initiate sex by sitting on Adams, while she had been deprived of her freedom, was concerned about her child and did not want to be there. Mr Theron argued that there are cases where fathers kill their children in a fit of rage often to punish the woman, and highlighted a recent case that appeared in the media involving a six-month old baby that was allegedly killed by the father. Having regard to the injuries, he submitted that it wasn’t a “*klap here or there*”, because it caused the swelling of the brain. Mrs. Herbst argued that the State

did not consider the evidence of Ms O A and Ms N A to be of any value that would add to the points in dispute because they were not present during the day of the assault and murder of the deceased, and assault and rape of Ms N. The State accepted that they did not add anything to the statements that they had provided in the initial consultations when the prosecution considered calling them as witnesses.

The Defense

[36] Mr. Caiger argued that Adams had admitted to the charge of assault on Ms N (charge 3). He conceded that the evidence presented by Adams confirmed his admission to committing housebreaking (charge 1) at the place where Ms N was residing on 10 December 2014. In his submission, the reason Adams pleaded not guilty was because he did not understand that if you just open a door or push a door open, that it amounts to housebreaking. Mr Caiger argued that with so little proof, the charge of rape came down to Adams' version as against Ms N' version, and that Adams did rise to the occasion and rebut the evidence against him. Adams version was that he denied raping Ms. N and that she wanted it. He conceded that Ms N testimony improved under cross-examination and he would not place much credit on Adams' version that she wanted it. In his view the charge of murder was based on circumstantial evidence, except for the doctors who gave evidence as to the injuries which caused the child's death, albeit without arguing another possible conclusion. He argued that Ms O A gave useful evidence on the surrounding circumstances of the child's death and the fact that she told

Adams to take the child – the reason why the child was fetched. She heard the argument that was going on which according to him, supports Adams' version that he argued with Ms N. Ms Adams said it was a "*n stryery, nie bakleiry nie*". He argued that this meant there wasn't any fists or hitting or anything.

[37] Mr Caiger submitted that it is not the practice of the Defense to put a useless or hopeless case when the case of the Defense is not a strong one. He argued that Adams did not want to comment on the death of the child and because of this the only version put forward by the defense is that the child slipped or fell off a bed. But he conceded that the injuries were inconsistent with this version.

[38] Mr. Caiger argued that he did not think that any father would commit a murder with *dolus directus*. He conceded that Adams might have gotten into a rage for some reason or other and therefore *dolus eventualis* was more appropriate in the sense that if one continues with these assaults death could have been foreseen. In his view *dolus directus* is an inference too far and that *dolus eventualis* was more consistent with the evidence.

[39] Mr. Caiger asked the Court to consider the evidence of other witnesses (Adams' mother and sister) who testified of his regard for his children and how well he looked after them. While Ms N had a lot to say about this, he asked the court to bear in mind that she had a particular grudge against Adams because he beat her. He conceded Adams' guilt in respect of housebreaking

and assault and asked the court to decide whether Adams was guilty or not of rape and murder.

THE APPLICABLE LAW

[40] It is axiomatic based on well-established legal principles that the guilt of Mr Adams must be proved beyond reasonable doubt. Plasket J enunciated the principle in **S v T 2005(2) SACR 318 (E) at p329 para [37]** as follows:

“The State is required, when it tries a person for allegedly committing an offence, to prove the guilt of the accused beyond reasonable doubt. This high standard of proof-universally required in civilized systems of criminal justice-is the core component of the fundamental right that every person enjoys under the Constitution, and under the common law prior to 1994, to a fair trial. It is not part of a charter for criminals and neither is it a mere technicality. When a court finds that the guilt of an accused has not been proved beyond reasonable doubt, that accused is entitled to an acquittal, even if there may be suspicions that he or she was, indeed, the perpetrator of the crime in question. That is an inevitable consequence of living in a society in which the freedom and the dignity of the individual are properly protected and are respected. The inverse-convictions based on suspicion or speculation-is the hallmark of a tyrannical system of law. South Africans have bitter experience of such a system and where it leads to.”

[41] In considering all the evidence and the submissions by counsel for the State and the Defense *in casu*, it is necessary to have regard to section 208 of the Criminal Procedure Act 51 of 1977, which requires the evidence of a single witness to be clear and satisfactory in all material respects. I am also mindful that not every inconsistency or error made by a witness affects his or her credibility, and the error or inconsistency does not ordinarily weaken the other testimony. (*S v Oosthuizen* 1982(3) SA 571 (T))

[42] In ***S v Stevens* 2005 (1) SCA** the Court per Navsa and Van Heerden JJA indicated that the correct approach to the ‘*cautionary rule*’ with regard to single witnesses is the one set out in ***S v Sauls and Others* 1981(3) SA 172 (A) at 180 E-G** by Diemont JA as follows:

“There is no rule of thumb test or formula to apply when it comes to a consideration of the credibility of the single witness (see remarks of Rumpff JA in S v Webber...). The trial judge will weigh his evidence, will consider its merits and demerits and, having done so, will decide whether it is trustworthy and whether, despite the fact that there are shortcomings or defects or contradictions in testimony, he is satisfied that the truth has been told. The cautionary rule referred to by De Villiers JP in 1932 [in R v Moekoena 1932 OPD 79 at 80] may be a guide to a right decision but it does not mean “that the appeal must succeed if any criticism, however slender, of the witnesses’ evidence were well-founded” (per Schreiner JA in R v Nhlapo (AD 10 November 1952) quoted in R v Bellingham 1955 (2) SA 566 (A) at 569.) It has

been said more than once that exercise of caution must not be allowed to displace the exercise of common sense.”

- [43] The court takes cognizance of Adams’ stark “*no comment*” response to the severe injuries found on the deceased’s body. In **S v Boesak 2001 (1) SA 912 (at para 22)** the Constitutional Court held:

“The fact that an accused person is under the obligation to testify does not mean that there are no consequences attaching to the decision to remain silent during the trial. If there is evidence calling for an answer and an accused person chooses to remain silent in the face of such evidence, the court may well be entitled to conclude that the evidence is sufficient in the absence of an explanation to prove the guilt of the accused.”

- [44] In order to establish *dolus directus* it is necessary to consider whether Adams had directed his will to causing the death of the deceased. Intention must not be inferred by hindsight from the fact of death. If Adams foresaw the possibility that his actions would cause the death of the deceased, and was reckless to such a result, then *dolus eventualis* may be found. The fact that objectively Adams ought reasonably to have foreseen the possibility of the death of the deceased is not sufficient. Subjective foresight may be proved by inference and to constitute proof beyond reasonable doubt that inference is the only one, which can reasonably be drawn. It cannot be drawn if there is a

reasonable possibility that subjectively the accused did not foresee. Per **S v Sigwala 1967 (4) 566 AT 570 B-E**.

[45] Similarly, Snyman (5th edition), refers to **S V De Bruin & Another 1968 (4) SA 498A at 501G-H** and explains:

“For dolus eventualis to exist a person must be proved beyond a reasonable doubt to have acted with the intention where the commission of the unlawful act was the causing of the unlawful result is not the main aim but he subjectively foresees the possibility that in striving towards his main aim the unlawful act may be committed and he reconciles himself to that possibility. In reconciling himself to the possibility the accused’s conduct may be described as reckless.”

[46] The State also made reference to **R v LEWIS 1958 (3) SA 107 (A) at 109**, that dealt with a deliberate act designed to be effective where the court held:

“...in order to be effective it had of necessity to be severe, continuous and of some duration.”

[47] In considering the States’ case against Adams, it is necessary to have regard to the issue of whether the State has met the ‘*ultimate requirement*’ referred to in **S v Mthethwa 1972(3) SA 766 (A) at p769D-F**:

“The ultimate requirement, of course, is proof beyond reasonable doubt; and this depends upon an appraisal of the totality of the facts, including the fact that he did not give evidence.”

CONDUCT OF THE POLICE

[48] The circumstances of this case compel me to comment on the conduct of the police at the Kuils River Police Station and their undignified treatment of Ms N, even after she had obtained a Protection Order on 11 December 2014. It is now well known that the police failed to carry out their duties and to assist Ms N in her desperate time of need. Had the police fulfilled their duties as a police service to the people they were actually meant to serve, and helped her when she first approached them, her son might still be alive today. I find the conduct of the police officers that were stationed at the Kuils River Police Station on that day especially regrettable considering the prevalence of violence and abuse of women and children in the context of the dire socio-economic conditions of communities within the district of Kuils River. In my opinion, such conduct is akin to an apartheid police “force” steeped in ignorant, discriminatory and exclusionary practices that are inconsistent with the values and precepts of a constitutional democracy.

[49] In *casu*, the events that unfolded on 10 and 11 December 2014, occurred during the official 16 Days of Activism against Gender Violence Campaign, a global awareness initiative that has been embraced by the government of South Africa. It occurred at a time when the police ought to have been

especially vigilant in protecting and serving the most vulnerable and marginalised in our society, namely women and children in poor and indigent communities.

[50] The 16 Days of Activism Campaign commences on 25 November (International Day for the Elimination of Violence against Women) each year and includes Universal Children's Day and World Aids Day, ending on International Human Rights Day in December. The facts of this case resonates with the Court in respect of all of these significant days in the global human rights calender, and highlights the need to review the police protocols in respect of the treatment of women and children and for the effective delivery of policing services to the most vulnerable in our communities. Where necessary remedial measures should be considered in collaboration with NGO's and should include proper community participation with the view to ensuring that women and children who find themselves in the position of Ms N and the deceased are respected and protected by the police. I am therefore directing the Registrar of the High Court to send a copy of this judgment to the Station Commander of the Kuils River Police Station, the Provincial Commissioner of Police in the Western Cape, the Independent Police Investigative Directorate (IPID), the Office of the Western Cape Police Ombudsman, the MEC for Community Safety and the Minister of Police for their consideration.

ANALYSIS OF EVIDENCE

[51] In analysing the evidence, on Adam's own version in regard to the charge of housebreaking (charge 1), the evidence indicates his guilt. Adams pleaded guilty to the assault charge and the Court accepts his plea. In all material respects Adam's evidence was corroborated by Ms N' version relating to the housebreaking and the assault. I am therefore satisfied with the accused's guilt on charges 1 and 3, which are closely related to the circumstances leading up to and including the rape of the complainant and murder of the deceased.

[52] It is necessary for the Court to consider the circumstances surrounding the rape of Ms N as well as the murder of the deceased and the testimony of the witnesses. This Court is mindful that Ms N is a single witness testifying about what transpired in the place where she and Adams were alone with the deceased on the evening of 10 December 2014 until approximately 06:00am on the morning of 11 December 2014. It was clear from the evidence given by Ms N that she was there against her will and that she did not want to have sex with Adams at any stage and told him that she did not want to have intercourse.

[53] I have considered and evaluated the surrounding evidence mindful of the inherent danger attached to single witnesses, and naturally also due to the fact that Ms N appeared traumatized about the death of her son, ostensibly at the hands of the accused. In spite of taking a cautionary approach to Ms N' evidence, I was impressed with her candid demeanour in the witness box, cogent and lucid in her replies and lacking any material contradictions in her

evidence pertinent to the rape and murder. Ms N did not come across as being aggressive or vindictive, and she stated the circumstances in a very factual manner without embellishing her testimony in any way. I found her to be truthful in her testimony, credible and reliable. Although quite ill when she testified, she was very open and honest with the Court, admitting to her own shortcomings and even to her use of drugs. Ms N made a sound impression as a credible witness in this court.

[54] It was clear to the Court that Ms N had been through an ordeal and was severely traumatised by the experience. She managed to contain her emotions particularly in regard to the circumstances surrounding the assault and rape, but understandably at times broke down in the witness box when speaking about the death of her son. Even when Mr Caiger put it to Ms N that she did not take proper care of the deceased and that her drug abuse rendered her incompetent as a mother, she maintained a dignified stance. This was her final stand, an opportunity to be strong for herself and her deceased son, and to confront the extreme abuse that she suffered at the hands of Adams and the circumstances of extreme poverty in which she and the deceased found themselves.

[55] It is common cause that no one else was present during the day while the deceased was in the care of Adams. During cross-examination, Adams testified that he would be extremely upset if anyone assaulted any of his children. However, when asked about the deceased's injuries, he merely stated that he did not know and denied any knowledge of assaulting the

deceased. Adams' version was inconsistent with the statement made to Lieutenant Colonel Pretorius wherein he admitted that he may have hit the deceased while he was hitting the complainant.

[56] In evaluating the evidence of the defense, I have considered the fact that Ms O A and Ms N A are closely related to the accused. In this context, I am of the view that their accounts of the events of the 10 and 11 December 2014 were similar and affected by bias or their relationship of affinity and was tendered to protect Mr Adams. They echoed similar words to the effect that there was "*n stryery, nie 'n bakleiry nie*" i.e. an argument not a fist fight between Adams and Ms N. Their testimony, although believable, appeared as though it was calculated to be careful not to implicate Adams or put him in a bad light.

[57] The J88 was not a neutral report and the evidence of Dr Andrews, who compiled the report, confirmed old injuries and scars that indicated Ms N had been beaten the week before with a hammer on her lower arms. The report did not indicate injuries from the vaginal and anal examination but confirmed that there was in fact some evidence of an assault upon Ms N that took place. The Court does bear in mind that the J88 report does not eliminate the possibility that Ms N was in fact raped.

[58] The "first report" given to Ms Du Preez at the Kuils River Magistrates Court on 11 December 2014, corroborates Ms N' testimony regarding the rape. Ms Du Preez confirmed that Ms N seemed highly upset and emotional when she recorded her statement marked exhibit "E", in support of the Protection Order

in terms of Section 4(1) of the Domestic Violence Act 116 of 1998. As stated before, Ms N is a single witness and impressed the Court as an honest, truthful and reliable witness, the Court is satisfied that she spoke the truth. Ms N' version of the rape that occurred on 10 December 2014 is therefore accepted.

[59] Ms Du Preez equally impressed the Court with her evidence and her clear and unambiguous recollection of the events at the Magistrate's Court on 11 December 2014. The Court is satisfied that she was honest and truthful in respect of what she remembered took place on 11 December 2014, and accordingly accepts her evidence.

[60] In respect of the murder charge, Adams simply refused to comment when confronted with the evidence of injuries that the deceased had sustained which ultimately led to his death, and he simply denied any knowledge thereof. A glaring silence in the face of substantial evidence of assault and trauma.

[61] The Accused testified that he was not under the influence of alcohol or drugs on 10 and 11 December 2014. This is an important fact in determining culpability and the Court is enjoined to consider Adams' intention when he carried out his assault of Ms N and the deceased. Mr Theron suggested that the reason for Adams' assault of the deceased was his discovery that she had gone and in a fit of rage he beat his son. The nature and extent of this beating was completely disproportionate to its object i.e. of expressing his

anger towards Ms N because she had absconded. This Court finds Adams to have a plausible motive.

[62] This Court further finds that the Accused left the testimony of the various state witnesses largely unanswered. Ms N did not implicate Adams directly regarding the murder charge. However, she testified that the deceased was not visibly injured when she left him in the care of Adams. If Adams was innocent of the murder charge, he would have put forward his own version of events that unfolded, and explained certain injuries that the deceased had sustained while in his care. Adams failed to rise to the challenge and to provide the Court with a single acceptable explanation for his behaviour or the events that unfolded in regard to the murder charge.

[63] The Court accepts the testimony of Dr Herbst, which is corroborated in all material respects by Professor Van As that the death of the deceased was caused by blunt force trauma to the body of the deceased child. Both doctors' evidence with regard to the extent of the injuries completely refuted Adams suggestions to the various witnesses at the scene of the crime that the deceased had fallen off the bed or near the door on a patch of sand, or at a shebeen. The Court finds the medical evidence credible and reliable.

[64] Adams left the *prima facie* case in regard to the murder to speak for itself and his silence is damning in the circumstances. There is no other conclusion to be drawn other than that he inflicted injuries on the minor which caused his death. Indeed there is nothing before the Court suggesting subjective ignorance by Adams in regard to the consequences of hitting Ms N or the

deceased with his fists repeatedly on the body and head. The only reasonable inference from the facts to be drawn is that Adams did subjectively appreciate the possibility that an assault over a prolonged period inflicted with his fists upon the tiny child aged two years and nine months would be fatal. His evidence regarding the events that took place on 10 and 11 of December 2014, is so unbelievable that the Court cannot place any reliance on this evidence in the circumstances. I am not persuaded that there is any possibility that his version can be accepted as probable and reject it.

[65] Taking into consideration the totality and weight of the evidence in conjunction with the Accused's silence, particularly in respect of the murder, the Court is left with the undisputed evidence that the Accused murdered the deceased with *dolus eventualis* at his home at 4 C H S, K R.

[66] In the circumstances, having regard to all the material evidence, the Court is satisfied that the State has discharged the onus to prove the guilt of the Accused on all the charges beyond reasonable doubt.

ORDER

[67] **Accused, Bennie Adams, you are found GUILTY on charges 1, 2, 3 and 4.**

MAHOMED, AJ

DATE OF START OF HEARING	30 MAY 2016
DATE OF JUDGMENT	21 JUNE 2016
FOR THE STATE	ADV J H THERON
FOR THE ACCUSED	ADV A G CAIGER
DATE OF SENTENCE	1 AUGUST 2016