

**3IN THE HIGH COURT OF SOUTH AFRICA**  
**WESTERN CAPE DIVISION. CAPE TOWN**

**CASE NO: CC68/2020**

**DATE: 2023.10.03**

In the matter between

**THE STATE**

and

**MARVIN MINNAAR**

**Accused**

**JUDGMENT**

**NZIWENI J:**

[1] This tragic case arises out of a horrific killing of a boy. The deceased, S[...]D[...], ("S[...]"), a 12-year-old boy who went missing on Wednesday, 26 February 2020. His grandmother last saw him alive at their home at Goniwe Street in Imizamo Yethu, Hout Bay on Wednesday, 26 February 2020 at 3 P.M. S[...]’s grandmother has since passed away.

[2] The evidence produced in this trial reveals that S[...]was last seen alive in the presence of Mr Minnaar, hereinafter referred to as the accused, on 26 February 2020 around quarter to 7 P.M. On Thursday, 27 February 2020, S[...]’s grandmother filed a missing person report to the police at the Hout Bay Police Station. The disappearance of S[...]sparked extensive search operations involving the police and community members.

[3] At some point, the accused also took part in the collective effort to try to find the missing boy. Two days later, on Friday morning of 28 February 2020, after scouring the horse trail and its surrounding areas for hours, the police found off a horse trail in the reeds in Manchester Road, Hout Bay, the completely naked body of S[...]. The medical evidence reveals *inter alia* that the body had a contusion in the anal area and the neck had ligature marks around it. The postmortem report reveals further that S[...]died due to strangulation.

[4] The area where the body was found is a wetland with dense and thick reeds. The body laid face down on the stomach with arms slightly underneath the body. The postmortem also shows the rest of S[...]s body also had multiple abrasions and a blunt force injury to the left eye. Various items of clothing were found strewn near the surrounding area where his body was found. The clothing was identified as belonging to S[...], save for the underpants.

[5] The accused, who also lived with his grandfather and his uncle in Imizamo Yethu, was arrested on Friday, 28 February 2020. The witnesses in this trial have used the area name "Imizamo Yethu" and "Mandela Park" interchangeably throughout this judgment. At the critical time, the accused was the coach of the Snipers (basketball team) of Hout Bay.

[6] The State preferred three charges against the accused. The first count is that of kidnapping of the deceased. Count 2 is that of rape and count 3 is that of murder. In respect of counts 2 and 3, the state invoked the provisions of Section 51(1) of the Criminal Amendment Act, Act 105 of 1997. Thus, the state alleges life imprisonment is applicable to both counts 2 and 3. Accused, represented by Mr Brand throughout these proceedings, pleaded not guilty to all the charges preferred against him. Pursuant to the accused's not guilty pleas, he, the accused, elected not to tender any plea explanation as contemplated in Section 115 of the Criminal Procedure Act 51 of 1977, the Criminal Procedure Act hereinafter referred to as the act.

[7] Admissions were, however, made on behalf of the accused. Predominantly, the admissions made by the accused were formal admissions

pertaining to the identity of the deceased, where the deceased stayed, the deceased's last sighting by the family, the contents of the postmortem report, photographs of the crime scene and the deceased's body as found on the crime scene, injuries on the body of the deceased, exhibits collected by Sgt Avontuur at the crime scene.

[8] The State, in its endeavours to prove its case against the accused, called 17 witnesses and presented, amongst others, evidence of pre-trial statements made by the accused, CCTV footage from the horse trail and still photographs that the police took from the horse trail, CCTV footage, photographs depicting the Snipers of Hout Bay basketball teams 2015 kits and maps of roads.

[9] During this trial, various trials-within-a-trial were held to determine admissibility of the evidence that the state intended to present. The evidence involved a confession, a pointing out and a search at the house of the accused for the clothes that the accused wore on 26 February 2020. After the parties had presented evidence and argument in the various trial-within-a-trials, I then intimated that reasons for the ruling would be furnished in this judgment.

[10] At the conclusion of the trials-within-the-trial, both parties expressly agreed that the evidence of the witnesses in the trial-within-a-trial could be incorporated and carried over to the main trial. Consequently, in this trial, the evidence of various trial-within-a-trial forms part of the main trial. Thus, it was not necessary to recall some of the state witnesses who testified in the trial- within-a-trial to come and repeat their evidence in the main trial.

[11] Turning to the evidence which was led by the state in the main trial. S[...]’s father, W[...] N[...], testified that at the relevant time, S[...] was staying with his mother. He last saw S[...] alive sometime on Wednesday between 2 P.M. and 3 P.M., at the end of school day, when S[...] was on a school transportation *en route* home. On Thursday, he received a call from his mother telling him that S[...] did not sleep at home. No one in his family knew where S[...] slept. His mother was the last one to see S[...] going to play.

[12] He joined the search team looking for S[...]. They also went to look for the accused and they met him on the street. At a critical time, he [S[...]'s father] was not well acquainted to the accused. He only knew the accused from seeing him around in Imizamo Yethu. He found out where the accused lived during the search for S[...]. To get to the accused's house, from his mother's home, a person passes two houses. Then a person walks around the corner and passes two streets. The accused's house would be found on the left.

[13] According to him, the accused's house is located as depicted in Exhibit "K". There are two alternate routes to get to his mother's house from the police station. One route is to go through the Main Road and the other one is through the informal settlement. In either route used, his mother's house would be the first one to be reached compared to the one of the accused.

[14] During the search, the accused approached him. They informed the accused that they were looking for him as they believed that he was the last person to be seen with S[...]. Amongst other things, the accused informed them that he separated with S[...] at the police station. The accused said he used the steps, the route through the informal settlement, and S[...] used the Main Road. When he asked the accused why they separated at the police station as they were going towards the same direction, the accused did not give any clear response.

[15] The accused joined the search team. He and the accused both walked to the police station. At the police station, they met the police officer who was part of the search. After the police officer had spoken to the accused, they went to the house of the accused to conduct a search.

[16] The accused and his stepfather came to his S[...]'s grandmother's house Friday morning to inquire whether they had found S[...]. He was the one who opened the door for them. He knew the accused stepfather very well. S[...]'s body was found by the police on Friday. He identified the clothing item depicted on Exhibit "D" as belonging to S[...], save for the underpants. Briefly, that was his testimony.

[17] The state called Bryn Mbulawa who testified that he has been living in

Imizamo Yethu since 2009. He knows the accused very well, even before they established the basketball club. At that juncture, they used to practice basketball informally. The accused would come with other children and join them in their practice. That was around 2013. The accused developed a passion for basketball. According to him, a basketball team has 12 players. The player numbers start from four to 15.

[18] The basketball club called Hout Bay Snipers was formally established in 2015. In the same year, they received their first kit with their club's name. The vest of the team had the team's traditional colours that were royal blue and an orange number on the front left-hand side of the chest and at the back. The vest was a V-neck with white trims around the V-neck outline. The vest had orange stripes on both sides. The sleeveless vest had white trims on the armholes. The 2015 kit had one number seven vest. He identified the 2015 kit as the one depicted in Exhibit "2".

[19] The kit also included a pair of shorts with numbers on the front. The 2015 kit size was a mistake because it was not the size for the children. The size was an adult male size. After one season, the oversized kit was changed as it embarrassed the children. Most of the 2015 old kit was returned to the accused to keep at his house. In 2017 and 2018, the boys team got new kits. In 2018, the accused became the coach for the under 12 and the under 14 boys. In 2020, the team had three coaches that included the accused, himself and Ronald.

[20] In 2020, the practice sessions started at 5 P.M. at Hout Bay Sports Complex. During summer season, they train from 5 P.M. until 7 P.M. The sport complex is right opposite the police station. On the Main Road there is a small gate to access the sport complex. Then there is a main gate which is normally used by vehicles. On 26 February 2020, there was a practice. He arrived at the practice between 20 past 5:00 P.M. and 5:00 P.M. When he arrived at the sports complex, there was chaos. Both the accused and Ronald were not at the premises. He did not know why the other two coaches were not there.

[21] After he had restored order, he went to the girls team and the senior boys were busy with the junior boys. When he looked at the direction of the small gate,

he noticed the accused entering the gate and coming towards the direction of the court where they trained. He thinks he saw the accused before 6 P.M. He estimated that the time to be 5:30 P.M. or 5:40 P.M. When he saw the accused entering through the small gate, he [the accused] wore their old basketball kit that is depicted on Exhibit "2", their first kit. He specifically remembers this.

[22] According to him, the accused was the only coach who still wore the old vest. Though he did not pay too much attention to the accused, he noticed the accused coming and passing through the basketball court and heading towards the direction of the skateboard park. That was the last time he saw the accused that day. As he was the only coach present, the older boys had to monitor the under 12 and the under 14 teams that were supposed to have been coached by the accused. About 10 to 15 minutes later, Ronald arrived and came to greet him. Ronald went to coach the girls and he went to the boys. According to him, had the accused coached the children that day, he would have seen him.

[23] He also testified that normally, when one of them arrives and finds another one already there, the one arriving late would go and greet. On Thursday, the police came to his work. One of the police identified himself as Mpateni. He was informed that one of his players was missing. When he was informed that the missing player was S[...] he did not recognise that name as belonging to a member of his club. On the same day, when he came from work, he found the accused and Ronald at the basketball court. The police were questioning the accused. The accused told him that he went with S[...] to the pharmacy and they parted ways at the police station. That evening, training was cancelled due to the weather.

[24] He, the accused, and Ronald joined the search party looking for S[...]. He knows where the accused and S[...] stayed. Their houses are not far from one another. The houses are two streets away from each other and they are on a straight line. A person on either yard can see another from their respective yards. When Exhibit "2" was shown to him, he testified that the vest worn by the person depicted on picture '9' looks exactly like the vest of their basketball kit. According to him, this is so because he could identify the logo of their club on the vest depicted on the picture, the number seven, as well as the white sleeves. Everything on the vest

depicted in picture number '9' is the same as their vest.

[25] On picture '13', he could clearly see that the number depicted on it is number 'seven'. On picture number '14', he could clearly identify the top as theirs. He could even see the orange stripe on the side. According to him, this is so because the camera was focused above the individuals. On picture '15', he identifies the orange number seven as their 2015 kit. On picture '17', he identifies number seven on the vest. However, according to him, the camera made the number seven to look whitish instead of orange. He also testified that he could not clearly see the logo and the word "Snipers" on the vest depicted on Exhibit "2". However, when looking at the logo depicted on the vest in image '21' of the Exhibit, he gets an impression that it is their logo. It is his testimony that even though there is a blurred black mark in the image where the Sniper's logo is supposed to be on the vest depicted in the image, image '21', there are still sufficient features of resemblance that made him to believe that the vest depicted in the image is the one of their old 2015 vest. He mentioned the reddish flame and the orange ball, the word "Snipers" are visible on image '21'. He also testified that in the past five years he had never encountered a basketball team with a vest like theirs.

[26] The next witness for the State was Ronald Ningomashe. It is his testimony that he was also a coach for Hout Bay Snipers. On 26 February 2020, he arrived late at the training. When he arrived at the training, Mr Mbulawa was already at the training. He saw the accused arriving at their training place. He stated that he noticed the accused standing at the big gate and that was the last time he saw him [the accused], that day. He saw the accused again the next day around 3 P.M. at a high school training.

[27] On the same day the accused and him met up with S[...]s family while on their way going to the sports complex and returning from the high school training. S[...]s family stopped them and they said they were looking for S[...]. They told the accused that they heard that he was the last person to be seen with S[...] and asked him to go to the neighbourhood Watch with them. The accused told the neighbourhood Watch people that he parted ways with S[...]at the police station and they then went their separate ways.

[28] The accused was asked to go to the police station and everyone went with the accused to the police station. At the police station only the accused and S[...]’s family went inside. After that they went to the sports complex and training was dismissed. They then helped with a search. It was his testimony that before you get to the accused’s place, you go past S[...]’s house and that is the safest route.

[29] The state also presented evidence of Gregorio Biagi. At this trial Biagi testified under oath by way of video conferencing because he could not travel to trial. Biagi was studying full time in Italy during this trial, hence he could not attend the trial. In the instant case, both the defence and the state did not have any objection or reservations to the use of the procedure. The Court was also satisfied that, in the circumstances, it would be convenient and necessary to save costs to make use of video conferencing. Thus, this Court used its discretion to order that the evidence of Biagi be heard by video conferencing.

[30] Through the video conferencing, this Court and the parties could fully observe Biagi as he testified. Biagi testified that at the relevant time, he knew the accused, as the accused used to coach basketball at his school. He was familiar with the accused because he used to go frequently to the skateboard park. On 26 February 2020, he finished work at 5:00 P.M. He then went to the skateboard with friends. He arrived at the skateboard park between 5:15 and 5:20 P.M. Whilst at the skateboard park, he saw the accused walking from The reeds [horse trail] towards the skateboard park.

[31] When the accused went past the skateboard park, they greeted each other and he, the accused, headed towards the basketball court. Around quarter to 7:00 **P.M.**, he finished skating and proceeded to his car in the parking lot. The accused, who was in company of an unknown boy, came to his car and asked for a lift to Clicks. He gave the accused and the boy the lift and they sat in the back seat. The boy appeared to be stressed or anxious. He thought that this was because the child was uncomfortable getting a lift from someone he did not know. The boy did not greet and was quiet throughout the trip.



[32] The accused informed him that the boy was his little brother and that he needed to buy an asthma pump for his grandfather. The accused was wearing the Sniper's basketball vest that was blue and orange. He cannot recall what pants he was wearing. He dropped the accused and the little boy off at Mainstream Mall where Clicks was. The boy was still very quiet, uncomfortable, and looking down. When he heard about the missing boy in Hout Bay, he did not immediately make a connection between that and the boy who was in his car.

[33] On Sunday, he heard that a basketball coach was arrested, but still he did not make any connection between what happened on 26 February 2020 and the arrest. He became aware of the accused's arrest on Monday when he saw a post on social media of the murdered child. He recognised him as a boy he gave a lift to.

[34] Turning to the testimony of the pathologist. The pathologist, Dr Bronwyn Afton Inglis, testified that she specialises in forensic pathology. She has been practicing as a pathologist since 2018. She has performed thousands of autopsies. She was called in by the police to attend a death scene in Hout Bay. On Friday 28 February 2020, at 2: 21P.M., she visited the crime scene. She stated that the death scene was amongst tall reeds off Manchester Road in Hout Bay. S[...]s body was pointed to her by Warrant Officer Lesch.

[35] On the crime scene, she observed linear marks all the way around the neck, consistent with ligature marks. There were also abrasions to the neck. According to her, the linear marks were in keeping with when a ligature or some object that can go around the neck, had been in contact with the neck. She opined that the linear marks were not consistent with manual strangulation. There was no evidence of manual strangulation. Some of the linear lines on the neck had crisscrossed each other. It appeared as if the object that was used to tie around the neck went around it twice.

[36] According to her, a thin piece of material would be able to go around the neck more than once and it could possibly crisscross it. She found a hemorrhage directly underneath where abrasions were on the skin. It was her testimony that the pressure that was applied to S[...]s skin had extended to the underlying muscle. As a result, the underlying muscle was injured by the force that was applied to the neck

and that is why there was blood in the neck muscle.

[37] It was her testimony that there must have been some sort of force applied in order to be able to injure the muscle around the neck like that. She also observed abrasions to the back, the right arm, the right thigh, as well as the buttocks. The abrasions were scattered over a significant part of the front and the back of S[...]’s body. The pathologist concluded that the surrounding vegetation where the body was found most likely cause the abrasions. She stated that this was in keeping with a naked body in struggle contacting a rough surface.

[38] She also testified that the numerous abrasions inflicted on various parts of S[...]’s body suggest some sort of movement and motion during their infliction. The injuries were consistent with a struggle on the ground. She opined further that the infliction of the abrasions caused S[...] to suffer obvious pain. She conducted an autopsy on the body of S[...] on 2 March 2020. Signs of decomposition were present. When she examined the anus at the scene, it appeared to be dilated. The anus looked wider than it was supposed to. Upon inspection of the anal canal and the rectum at the autopsy, she observed a purple contusion or bruise measuring four millimetres by two millimetres.

[39] The contusion was noted at the one o clock region. With the body on its back, the contusion would appear at the one o clock position. Above the contusion, there was a little bit of redness in the mucosa and that was what she described as a congestion. The congestion was located on the right-hand side in a nine o clock position. Her training has taught her that in children congestion could be a soft sign of some sort of injury to the mucosa of the vagina or a rectum, but it can also be non-pathological. The contusion was located inside the anus in the rectum.

[40] She stated that it was an unusual place to find a bruise because it is a protected area of the body that is unlikely to be internally injured. She stated that in her experience, the only thing that comes out of the rectum in the opposite direction is the stool. She testified further that the stool does not typically cause a focal bruise or a contusion like that on the rectum. Although she acknowledged that there could

be chronic injuries to mucosa in the rectum, she stated that a chronic injury would present a laceration or a healed scar. The laceration could happen when a person passes a hard stool. When a chronic injury is fresh, it presents a laceration and when the laceration has healed, it will present a scar.

[41] It was her testimony that in this case, she examined the anus of the child. When she examined the anus of the child, she did not see any laceration. She concluded that in this case, it can be excluded that a stool had caused the contusion. It was her testimony that a contusion is caused by an applied blunt force that causes injury to the underlying blood vessels and this causes blood to ooze into the surrounding tissue. She concluded that there was evidence of penetration of the anus by an external object penetrating into the anus. She also testified that the penetration by penis or digital [finger] cannot be excluded.

[42] Dr Inglis stated that the injuries she observed on S[...]’s body did not have any evidence of healing. She opined that all the injuries she observed on S[...] were fresh or recently inflicted on the body. However, she could not give any exact or specific time. She concluded that the cause of death was consistent with ligature strangulation and the consequence thereof.

[43] I now turn to deal with State witness Marco Alfino Avontuur. He testified that he works for the unit of the South African Police Service called the Provincial Crime Scene Investigation. His work involves collection of evidence of crime scenes. He got information about a body of a boy that was found in between the reeds in Hout Bay. He visited the crime scene in Manchester Street, Hout Bay. He arrived on the scene at 11:40 A.M. At the scene he met Warrant Officer Lesch and Warrant Officer Oosthuizen.

[44] On the scene he did a walk through and then he took a video recording, Exhibit "Y", and photos of the crime scene. The scene had reeds which were about 2.5 metres long. He saw S[...]’s body on the scene and the body was surrounded by reeds. He also collected evidence on the scene. The collected items were:

1. toilet paper, approximately four metres from S[...]’s body;

2. a child blue tracksuit pants;
3. a child size navy blue shirt;
4. a pair of black, red and green slippers, approximately 30 centimetres apart; and
5. child underpants.

[45] He also discovered a body which was in the same path as the toilet paper and the blue tracksuit pants. The distance between the navy-blue T- shirt and the blue tracksuit pants was about five metres. The distance between the navy-blue T-shirt and the toilet paper was approximately 1.5 metres. Shortly, that was his testimony.

[46] The next witness for the state was Warrant Officer D Lesch. He testified that he is stationed at the Hout Bay Police Station. When he started work on 28 February 2020, they were briefed about the missing 12-year-old boy. The sports field is two minutes from the police station. He and other police officials did foot patrols at the reeds in a wetland area with dense reeds. According to him, the wetland area is quite big and isolated. There is also a horse trail on it. He testified that members of the community walked through the area from Victoria Road to Princess Road and ride horses.

[47] As they were doing patrols, they went past the sports field. They also went through the horse trail and got to the grass footpath that led up to Manchester Road. Their team then split and walked towards different spots. He went into a path and four metres into the path he noticed a pair of blue tracksuit pants. He stopped at the tracksuit pants and when he looked up he saw a naked body lying face down. The time was about 7:40 AM.

[48] He thought that it was the missing boy. He then handed over the scene to Warrant Officer Oosthuizen. He left the scene around 2:00P.M. It was his testimony that people frequently use the horse trail to walk through it from Victoria Road to Princess Road. He testified that the Mainstream mall is close to Princess Road and Imizamo Yethu is close to Victoria Road. He also testified that it will be a long way for people from Imizamo Yethu to use the path through the reeds to walk from the

shopping center to Imizamo Yethu. By foot it takes an extra eight to 10 minutes from Imizamo Yethu to the Mainstream Mall.

[49] According to him, the quickest road to take to go to Imizamo Yethu from the Mainstream Mall is through the Main Road. Notwithstanding that, there are people who use the path through the reeds to walk from Imizamo Yethu to the Mainstream Mall. Shortly, that was his testimony.

[50] Sgt Van Der Westhuizen testified that she is a member of South African Police Service stationed at Hout Bay Police Station. She works as an exhibit management official. There are two routes from Mainstream mall to Imizamo Yethu. The Main Road is shorter than the route through the reeds. The walk from Mainstream Mall along Main Road at the beginning of Imizamo Yethu, takes between 20 to 30 minutes. On the other hand, a walk from Mainstream mall along the horse trail to Imizamo Yethu takes between 30 and 40 minutes.

[51] On Friday, 28 February 2020, she was also part of the team that went to search for S[...]. She was present when S[...]'s body was found. Whilst at the crime scene, they were informed that a suspect was taken in for questioning. On her arrival at the police station, angry community members had gathered there, seeking answers. That's a brief synopsis of her testimony.

[52] Lieutenant Colonel J Lawrence then testified. He testified that he is a member of the South African Police Service, stationed at Muizenberg Police as an Acting Station Commander. At the time of the incident, he was stationed at Hout Bay Police Station and his rank was that of captain. On 28 February 2020, around 20 to 8 A.M., he received a message from Lesch that they had found the body. He proceeded to the crime scene. The crime scene area is notorious for being used by criminals. As a result, the neighbourhood watch had recently installed surveillance cameras to monitor criminal activities. A security company based in Hout Bay monitored the cameras. According to him, the installation of the cameras within the horse trail improved its security.

[53] He then instructed a detective, Detective Oosthuizen, to go and determine

from the security company whether there is any video surveillance footage of the area available. It was also his testimony that in terms of safety, it would be recommended to use the trail with the cameras during daytime. During cross examination, he testified that a walk from Hout Bay CBD to Imizamo Yethu through the Main Road is a shortcut and quicker than a walk through the horse trail. Briefly, that was his testimony.

[54] The state also called Warrant Officer Alistair Claassen. He testified that he is a member of the South African Police Service attached to the Investigative Psychology Unit. His duties entailed providing investigative assistance to detectives. In this case, he was requested *inter alia*, to create a timeline connected to the movements for the person that the State alleges to be the accused in the footage concerned. He made use of Google Earth and Google Maps to point out certain key points that were provided by the footage.

[55] He also received the address of the accused and that of S[...]. He also used CCTV footage. It is his testimony that from the evidence provided to him, he provided possible routes that were possibly taken. He testified that the shortest route from the skateboard park to Mainstream Mall is 1.88 kilometres. The skateboard park is at Mandela Park, also known as Imizamo Yethu, and the mall is in Princess Road. Using a vehicle, the shortest route would be to go down the Main Road. The drive with a motor vehicle would be less than two minutes.

[56] The mall can also be reached by taking an alternate route, by turning left into Mandela Road, then going left down Empire Road. This route leads straight down to Princess Road again. If a person turns left into it, it will take a little bit longer because the distance is mapped down to 2.49 kilometres. If a person walks from Clicks to Mandela Park, the shortest route is through Main Road. An alternative route for walking from Clicks is through the horse trail. Along Princess Road there are surveillance cameras. Before the footpath where the body was found, there is also a surveillance camera placed there.

[57] If a person goes into that footpath, where the body was found, the person will end up in Manchester Road. There is also another CCTV camera looking down into

that path. According to him, the surveillance footage, which had timestamp of 6:01:56 **P.M.** showed the footpath towards Manchester Road leading to the scene of the crime.

[58] The first image in the vicinity between the reeds is that of a suspect with an unknown boy as depicted in picture 2 of Exhibit "J". At the time stamp, 6:03 **P.M.**, the footage from Manchester CCTV camera depicts the suspect and an unknown child walking towards Manchester Road. The footage also depicts that the suspect had his arm around the child's neck. The suspect is wearing a blue vest and shorts. The unknown child is wearing shorts.

[59] He testified that a few minutes later the suspect and the unknown child turn around. According to Claassen, when the suspect in the footage turns around coming back, a number that looked like seven is depicted at the back. The suspect and the unknown child are depicted on the footage continuing on a horse trail in the direction of Princess Road.

[60] At timestamp 6:34P.M., they are captured by the camera that faces towards the footpath in the direction of Mandela Road. The camera captures them coming from Princess Road towards Mandela Road and the skateboard park. According to him, as depicted by picture 9 to 11 of Exhibit "J", [ the still images from the surveillance video], this is the last image of the two individuals in the footage.

[61] He testified further that around 40 minutes later, the surveillance video depicts the same suspect in company of a different child. The second child is taller than the first one and had different clothing on. The video surveillance footage shows that at approximately 7: 30 P.M., the suspect with a second child, they were walking from Princess Road direction towards Mandela Road. The suspect was wearing the same clothes, a blue vest with the number seven on the back. The child had on blue or turquoise tracksuit pants as shown in image 16 of EXHIBIT J.

[62] The timestamp 7:14 P.M. depicts the suspect walking on the horse trail towards Mandela Road with the child. As they walked, the suspect placed his arm around the neck of the child in a similar position as the first child. They passed the

footpath to the crime scene and continued walking towards Mandela Road as depicted in picture 22 of Exhibit "J".

[63] A timestamp 7:16 P.M., the footage shows the boy running towards Princess Road. The suspect also appears in the footage running behind the boy. After running, the suspect paused for a moment to take off his shoes and then continued running.

[64] After the chase, at 7:22 P.M., the footage depicts the boy and the suspect coming back from Princess Road in the direction towards Mandela Road. The suspect is holding the boy's wrist with his [suspect's,] hand. At 7:23P.M., the footage shows the suspect and the boy entering the footpath towards the crime scene as depicted by photos 23 and 28. According to him, the last sighting of the boy and the suspect on the footage disappearing in the reed is at timestamp 9:25:19.

[65] He testified further that the surveillance cameras in the wetland cover certain areas and there are areas that are out of reach of the cameras. It was his testimony that closer to the side of Mandela Road there are no cameras. According to him, it is possible to exit the reeds without being captured on the surveillance footage. That is a brief synopsis of Claassens's testimony.

[66] Warrant Officer Mpateni testified that he is stationed at Hout Bay Police Station. He testified that he knew the accused prior to the incident of 26 February 2020. He used to work with a relative of the accused. He knows the accused from having seen him when he went to drop the accused relatives at their home [accused's home].

[67] On the day S[...] was reported missing, he was on duty. After the missing report had been filed, they went to search for the child. The accused and S[...]s father came to the police station. S[...]s father informed him that the accused was the last person seen with S[...]. They then went to the accused's place to look for S[...].

[68] He obtained permission to search the house from the accused and his



grandfather. They did not find the child. The following day, Friday, after S[...]’s body was found, he received information to go and pick up the accused. He picked up the accused and took him to the police station. He kept the accused at the holding cells for an interview with the investigating officer.

*The trial-within-a-trial pertaining to the search for the clothing worn by the accused on 26 February 2020.*

[69] Sgt Mpateni further testified that Const Thimba told him that they had to go to the accused's home and collect clothing he [the accused], was seen wearing on the CCTV footage. At this juncture, the defense raised an admissibility issue. Principally, the objection related to the accused consent to a police search of his [the accused], bedroom for clothing. In the objection, Mr Brand, on behalf of the accused, contended that there was no permission sought or given by the accused to go and search his room.

[70] Additionally, in his objection, counsel for the accused stated that in terms of Section 22 of the Criminal Procedure Act, a search must be with the consent of the person concerned to search his room, although his room was in his grandfather's house. The argument continued that the accused is an adult and the room was his domain. In essence, it was argued that the search was unlawful. The defense thus requested this court to determine whether the condition precedent to the admissibility of the proposed evidence were met. In particular; whether the consent of the accused was obtained before the search was conducted.

[71] In the circumstances, the State conceded that the Court had to proceed with a trial-within-a-trial. This Court agreed that the objection raised by the defense warranted that a trial-within-a-trial should be conducted to determine the lawfulness of the search conducted by Mpateni and Thimba, in the bedroom of the accused. In the trial-within-a-trial, the state proceeded and called its witnesses and the accused testified.

[72] Mpateni, in the trial-within-a-trial testified that he accompanied Thimba to go to the accused house. This was after Thimba asked him to travel with him to the

accused house.

They went together in the same car. In the car it was him, the accused and Thimba. After he agreed to go along to look for the clothing of the accused, Thimba went to the holding cell to fetch the accused. Thimba informed him that the accused agreed that they should go and fetch the clothes. They got into the vehicle and proceeded to the accused's house. When the accused came to the car, he appeared normal and they spoke with each other. He did, however, notice that the accused was frightened.

[73] In the car, they talked about the impending search. They spoke to him so that the accused could be aware of what was going to take place. They asked the accused where they were going to find the clothing. The accused did not indicate that he did not want to go to his bedroom. According to him, the accused gave his permission by saying, "the clothing are *[sic]* in my room. Let us go fetch it in the room." It was his testimony that the accused gave them permission to go and fetch the clothing.

[74] When they left the police station, the accused had an agreement with Thimba and when they were in the car, the accused did not show any problem. The accused was cooperating with everything they were doing. On their arrival at the place of the accused, Thimba spoke with accused's grandfather and explained the purpose of their visit. The accused's grandfather also gave them permission so they could proceed. They then proceeded straight to the accused's bedroom. It was his testimony that the trip to the accused's place was a matter of fetching the clothing. Shortly, that was his testimony in the trial-within-a-trial.

[75] Still in the trial-within-a-trial, the State called Sgt Thimba who testified as follows. He is stationed at the Hout Bay police station. At the time of the incident, he was tasked with gathering information. On 28 February 2020, Friday, he was informed by Warrant Officer Oosthuizen that they were going to go and watch a video footage at a neighborhood watch. They then went to watch the footage of a person seen walking with a child.

[76] After viewing the footage, they went back to the police station. He heard

that a suspect, suspected to be the person that walked with a boy was held in the holding cells. He went to the holding cells and introduced himself to the accused. He asked him what he was wearing when he last saw the child. The accused told him that he was wearing a navy basketball vest and short gray pants. When he talked to the accused, the accused was relaxed. The accused told him that the shirt had the word "Snipers" inscribed on its front. The clothing fitted the clothing he saw on the video clip.

He then asked the accused the whereabouts of the clothing. The accused told him that they were at his place. He then asked the accused to go with them to get the clothing. The accused gave him permission to go with him to get the clothing. They then went to the place of the accused. He was satisfied that the accused was exercising his choice as he did not show any problems that he did not want to do that. According to him, the accused came across as a person that was not inclined to refuse. The accused also told him that he also assisted in the search for the boy.

[77] He did not have a discussion with the accused in the car. He did not hear what the accused and Mpateni were talking about in the car. He cannot recall talking to them about clothing in the car. At the house of the accused, after speaking to the grandfather, the accused's grandfather gave them consent to go into his house. The accused directed them to his bedroom. The accused, Mpateni and him went into the accused's bedroom. He did not know where the clothing was. The accused told them where the garments were and they could also see where they were.

[78] From the questions by the Court, he testified that he did not go to the accused's house to search for clothing. They simply went there to fetch the clothing.

[79] After the State closed its case in the trial-within-a-trial, the accused took the witness stand. He denied that he ever gave the police permission to go and search his house for his clothes. He testified that Thimba came to him in the cells and asked him about a missing child. Thimba then told him about the friends of the child who told him [Thimba] that he was the last person to be seen with the child. Thimba interrogated him about the child, where he [the accused] was headed to and what he

was wearing that day.

[80] He told Thimba what he wore. He did not tell Thimba where the clothes were. He also does not recall giving Thimba a description that was on the sweater. After Thimba spent 10 to 20 minutes with him in the cells, he left. Thimba returned a few moments later with handcuffs, took him to a car and then was already in the car. They never told him where the car was going. He does not recall having a conversation with Mpateni in the car. He denies that he ever had a conversation with Mpateni. According to him, he only spoke with Thimba.

[81] They drove to his grandfather's place. He only realised that they were going to his grandfather's house when they arrived there. He did not know why they went to his grandfather's house. At his grandfather's place the police spoke with his grandfather in the living room. He does not know what they were talking about, as he was not listening. It is not that he was not listening on purpose. He was trying to process what was happening. He was shocked and traumatised.

[82] After they had spoken to his grandfather his grandfather showed them his room. Thimba and Mpateni proceeded to his room. Thimba then called him about the clothing they found in his room. He went into the room and Thimba asked him as to whether the clothes on the bed were the ones he wore on that day. He said yes. The clothes were put in a bag. They then left for the police station. He testified that Thimba is correct when he says he was cooperative that day. It was also his testimony that, had Thimba asked him for consent, he would have given it to him. That's a brief synopsis of the evidence led in that particular trial-within-a-trial.

[83] As I intimated before, the reasons for the finding were reserved for this judgment. The reasons now follow.

[84] The issue in this trial-within-a-trial hinged on whether the accused had indeed given consent to the police to go to his house and get his clothes from his bedroom. In this trial-within-a-trial this Court was faced with two diametrically-opposed versions of events which occurred before and when the accused was taken to his grandfather's place by Thimba and Mpateni.

[85] On the one hand, the accused claims that he was simply taken to his grandfather's place without being told he was being taken there and for what purpose. The accused further claims that at his grandfather's house the police simply spoke with his grandfather and thereafter simply proceeded to his bedroom without first obtaining consent from him [the accused]. On the other hand, the police maintained that from the police station the accused had consented to give them the clothing. For that matter, in their evidence the two police officers concerned never relied on the consent of the grandfather to obtain the accused's clothing from the bedroom. Moreover, it is the version of the police that it was the accused who went to the bedroom, took the clothing and handed it to them.

[86] In this trial-within-a-trial at hand, the State presented two witnesses. I did not get the impression that they were colluding against the accused. For instance, Mpateni testified that he was not present when the accused gave Thimba consent to search. Similarly, Thimba testified that he did not hear the conversation between the accused and Mpateni *en route* to the house of the accused's grandfather. Clearly Mpateni and Thimba did not give a photocopy version of each other's testimonies. Plainly, the two state witnesses did not tailor or shape their testimony so that such testimony is consistent and fits with the testimony given by the other witness. In my mind this is the hallmark of the truth in their testimony. The evidence of Mpateni supports the testimony of Thimba that consent was obtained from the accused. They also corroborated each other regarding what happened at the house of the accused's grandfather.

[87] What I find striking about the testimony of the accused is that he [the accused], testified that if Thimba had asked for consent, he would have given it. By this testimony the accused admits that he was amenable to give consent. This testimony of the accused cannot be looked at in isolation. The evidence also tends to show that the accused, if he was asked, he would have given his consent for the search. As such this evidence could be viewed as supporting the State's version that the accused was cooperating all along. For that matter, the accused also agrees that he was cooperating. If the accused was showing signs of cooperation, what then would make the police to play secrets with the accused? Clearly if the accused was

cooperative, there was no reason for the police not to play open cards with the accused. The evidence of the state witnesses that the accused gave his consent makes sense and accords with the version of the accused that he would have given consent if he was asked and the fact that he was cooperative with the police.

[88] To begin with, it goes without saying that when a house has multiple occupants and the affected occupant is present, the police cannot obtain consent to search the room of an affected occupant from one of the other occupants of the house when the affected occupant is present. The consent to search his/her room should also be obtained. Clearly the consent to search may be obtained from other occupants when the affected occupant is absent. In the instant case, the accused was present at his grandfather's house, therefore the accused's consent to the search could not have been dispensed with.

[89] It is significant to note that the evidence of Mthimba reveals that his interview with the accused stemmed from the fact that he had earlier on watched a crime scene video footage depicting a person walking with a child wearing a particular garb. Therefore, he knew, even before he had spoken to the accused, as to what type of clothing he was looking for. On the accused's version the police did not tell him where they were going, as he only realised where they were going when they arrived at his grandfather's place. The corollary of this is that on the accused's own version the police independently knew the location of the residence. The question that aptly arises is why the police would take the accused to his grandfather's house if they already knew where they could possibly find the garb they were looking for and they also had an idea what the person seen on the footage walking with the child wore.

In my view the removal of the accused from the police station for purposes of getting the clothing on its own strongly suggests and supports the version that his [the accused's], consent to get his clothing was obtained even before they left for his grandfather's place. This I say because, given the fact that Thimba already knew what he was looking for, it would have been quite pointless to take the accused with to his grandfather's house if the police did not get consent or the required accused's consent.

[90] Even on the accused's own version his role during the whole exercise of getting his clothes was limited only to the aspect of confirming whether the clothes discovered by the police in his room were the correct clothes. It thus seems obvious to me that in the circumstances of this case the police did not need the confirmation of the accused, hence I find that in the context of this case if the police did not seek the consent of the accused first, it would have been pointless then for the police to take the accused with them to the grandfather's place.

[91] In other words, the accused wants to create an impression that he was simply handcuffed, driven to his grandfather's house without being told that they were going there and no-one in the car they were travelling in said anything to him. This is despite the common-cause evidence that the accused was cooperating with the police, sat with Mpateni at the back of the car and that Mpateni was known to the accused.

[92] Additionally, the accused testified that at his grandfather's place he was left in the living room and the police simply went to his bedroom and proceeded to search his room on their own. In addition to that, they searched the accused's room without the assistance of the person they brought there. This incredible version of events by the accused became even more far-fetched when he testified that he was left in the living room. Why would the police go an extra mile and take an extra precaution of handcuffing the accused when travelling with him in a car, yet then both leave the person unattended at his own home? This is totally unlikely.

[93] In the context of this evidence led in this trial-within-a-trial it is unlikely that the police would act in such a manner. Such an unlikely situation, if indeed happened, may be indicative of sloppy police work. It would make no sense to remove from detention a person who is suspected of committing very serious crimes to simply leave him unattended in his own home and neighbourhood without even saying anything to him. For instance, it's unlikely that the police would not have considered their safety and for that matter the safety of the accused.

[94] The claim that the police would ignore the subject matter who was in a better

position to help them and go and seek consent from the grandfather is a blatant, outright lie. The logic and the lack of it in this claim by the accused is colossal. In addition, I find it highly improbable that the accused did not hear the conversation between the police and his grandfather whilst they were talking in his living room, particularly in the light of the accused's testimony that he did not know why he was taken there in the handcuffs. Meanwhile, the accused made no inquiry concerning the actions of the police. This is just a shocking lack of curiosity about a lot of important details.

[95] This Court rejects the version of the accused that he chose to shut his ears and eyes because of shock and trauma. According to human experience and logic, the lack of curiosity from the accused is inconsistent with the conduct of a person who was traumatised and shocked by what was unfolding in front of him. Surely, in the circumstances as described by the accused, the normal human reaction would dictate that a person be curious as to what it was the police wanted from his home and why he was brought there. For that matter, if he did not know why the police were there with him, why he did not ask them.

[96] The accused's lack of curiosity does not inspire belief in his version. I find the version of the accused unsatisfactory and incredible on that score. I also find it unlikely that none of the police would say anything to the accused during their trip to his grandfather's place. Moreso, if the accused was cooperating with the investigation. I am unable to accept the accused's evidence in this regard. His evidence lacks the ring of truth.

[97] I am not unmindful to the fact that at times a version that sounds inherently improbable may in actual fact be the truth. Having said that, I cannot ignore the numerous glaring improbabilities that exist in the accused's version in that trial-within-a-trial. Similarly, I found the version of the accused to be scant and not forthcoming when he testified about the journey to his grandfather's house and what happened at his grandfather's house. The evidence in this particular inquiry manifestly shows that the police obtained the consent of the accused. I have no difficulty in accepting that. The incredible version of the accused then stood to be rejected, as this Court did.



[98] Following my ruling in the trial-within-a-trial concerning the consent to search, Sergeant Thimba came back and testified in the main trial. He testified that the accused pointed a pair of shorts and a sweater. The sweater was on something that looked like a cover and the shorts were on top of the bed. He then took the items and placed them in a plastic bag. He then registered the items in the SAP.13 Register. He testified that the items he retrieved from the bedroom of the accused were a blue basketball shirt with the number seven at the back and it had an inscription in front, "Hout Bay Snipers".

[99] The second item from the house of the accused was a green basketball pair of shorts with white stripes and number 36, Exhibit "5". The State then produced two garments in Court; the shirt had the number 7 both in front and at the back. The shirt's armholes had white borders. It also had a V-neck and at the bottom of the V there is a horizontal white line.

[100] Thimba also testified that the shorts which he obtained from the accused are differently coloured to the shorts he saw when he watched the video footage of the crime scene. He testified that the shorts that were worn by the person on the footage were greyish or towards black in colour. The top which he got from the accused did match what he saw on the footage. He did not look for the matching shorts which he saw on the footage, as he was not at the accused's place to search but to go and collect.

[101] Then the State proceeded and called Captain Phillips, who testified that he was requested to go to Hout Bay Police Station to see Warrant officer Oosthuizen, the erstwhile investigating officer of this matter and who has since passed away. He was informed that the suspect wanted to confess. He then went to the cell and found the accused.

[102] Counsel on behalf of the accused at that point raised an objection to the effect that when the confession was obtained, the accused was never informed of his constitutional rights. The State submitted that the evidence it intended to lead was that of a confession and pointing-out. This Court then ordered that a trial-within-a-

trial be conducted to determine whether the constitutional rights of the accused were explained to him before the confession and pointing-out were taken.

*Trial within a trial in respect of confession and pointing out.*

Evidence pertaining to the pointing out

[103] Mpateni also came back and testified that after they seized the garments, Exhibit "5", at the accused's place, they went back to the police station and the accused was taken back to the holding cell where the suspects are kept.

[104] When the investigating officer returned from the scene where the body was found on the very same Friday, 28 February 2020, the accused told him something. He relayed the information he obtained from the accused to the investigating officer. The investigating officer then instructed him to arrest the accused. At this point, he placed the accused under arrest and he read him his constitutional rights as contained in the SAP.14(A) form, Exhibit "O". The accused understood his rights and they both signed the SAP.14(A) form and he handed him [the accused], a copy.

[105] It was also his testimony that on Sunday, 01 March 2020, the accused claims he was given a stack of forms to sign. He was not on duty.

[106] Captain Phillips testified in this trial-within-a-trial that on a Friday around 5.00 P.M., he found the accused at Hout Bay police station and he introduced himself to the accused. When he started to explain to the accused his constitutional rights, the accused told him to stop and the accused informed him that his rights were already explained. He then asked the accused if he understood his rights. The accused confirmed.

[107] Nonetheless, he explained to the accused that he had a right to an attorney and if he cannot afford one, he can apply for a Legal Aid attorney at the State's expense. The accused indicated that he does not need an attorney. He also informed the accused that everything he says to him can be used as evidence against him. He also told the accused that if he does not want to speak, he can

decide and he would leave immediately. The accused then said to him, "*Ek* is sorry."

[108] He told the accused that his confession would be taken by somebody else and that it's going to be done in front of a camera. He also informed the accused that he would be taken to a district surgeon. The accused out of the blue asked him how many people were outside the police station. The accused told him that he feared for his life. He then informed the accused that he would arrange that he be taken to a different police station, Claremont Police Station. The accused begged to be taken to another police station. According to him, approximately 50 people were standing outside of Hout Bay Police Station. He then made arrangements for the taking of the accused's confession and pointing-out and for the video recordings. He also arranged that the accused be seen by a district surgeon and for the transfer of the accused to Claremont.

[109] He made all the arrangements and on Sunday he once again explained the rights to the accused and took the warning statement of the accused. In his warning statement the accused intimated that he would stay with what he stated in the confession. The accused signed his warning statement [Exhibit "M"].

[110] Colonel Ngxaki testified that he was a Branch Commander for the detectives in Elsies River. On 28 February 2020, around 5.00 P.M. he received a call from Captain Phillips requesting him to assist with the pointing-out. He was informed that the accused was still busy with the confession. He then suggested that he should conduct the pointing-out on 29 February 2020.

[111] On 29 February 2020, he went to Hout Bay and he was in possession of an unfilled pointing-out form. He introduced himself to the accused. The photographer took photos of the blank pointing-out form. He also testified about the process he followed in filling out the form with the accused. It was his testimony that the constitutional rights of the accused were also explained to the accused in both isiXhosa and English.

[112] It was his testimony that during the process of filling out the pointing-out form the photographs of the accused were also taken to show that the accused did

not have any injuries. According to him the pointing-out form illustrates the entire process he underwent with the accused. He also testified that the accused was calm and he was ready to do the pointing-out. He also confirmed the photographs that were taken during the entire process of the pointing-out.

[113] Sergeant Dean Luke Abrahams, stationed at Local Criminal Records as a photographer. On 29 February 2020, he was called to assist with the pointing-out. They arrived at Hout Bay Police Station around 8:20 A.M. They decided to take photographs instead of video, because they were of the view that the pointing-out was going to be long. The process with the accused included taking photos of blank forms and photos of the accused. He testified that it was unusual for him not to capture the pointing-out process on a video.

[114] It was also his testimony that for the pointing-out they had to go to three locations. He does not think that his camera's battery life would have lasted that long. He cannot recall everything that happened there, but what comes to mind is the suspect, the accused. He testified that he could remember what the accused said to them as they did the pointing-out. He could tell the suspect was well-versed in English. That's a brief summary of his testimony.

#### The evidence pertaining to the confession

[115] Lieutenant Colonel Monakele Nonkula testified that he is a retired police officer. When he was in service, he was stationed at Muizenberg Police Station as a Branch Commander of the detectives. During the period of his service, he did about 25 confessions and pointing outs.

[116] He testified that he received a call from Captain Phillips to assist with the taking of the accused's confession. On the very day, 28 February 2020, he was asked to assist with the confession, he took it from the accused at Claremont Police Station.

[117] On his arrival at Claremont Police Station, he went to the boardroom, where he found the video operator. When he arrived the video operator had already

displayed his equipment and was only waiting for him to tell him where to place everything. After the videographer told him that they could begin the accused was brought in.

[118] They started with the confession process at 8:30 P.M. The accused appeared relaxed and answered questions normally. The accused's confidence was very high. They spoke to each other in isiXhosa. He read to him his rights as indicated in the confession form. He was satisfied that the accused understood his constitutional rights and that he was making the statement freely and voluntarily.

[119] The accused told him that he wanted to speak because he regrets what he did. After they were finished with the document, the accused appended his signature and thumbprint to the documents. Whenever there was a correction or deletion made, the accused and him initialled the particular paragraphs. He thinks the process lasted for two hours. He specifically recalls the accused because of the statement he made. Shortly, that was his testimony.

[120] Sergeant Siyabulela George testified that he is attached to the Cape Town Local Criminal Record Centre as a photographer, videographer and a fingerprint expert. In this matter, he was requested to help with a confession which was going to be taken by Colonel Nonkula. A confession was going to be taken at Claremont Police Station. He arrived there at 8:30 P.M. After he was allocated a room, he set up his equipment. The colonel arrived first and after the arrival of the colonel the suspect was called in. His role during the confession was to capture the confession process on a video.

[121] He is adamant that during the process the accused was advised of his rights. According to him the process starts with explanation of rights. Once a suspect indicates that he/she wants legal representation, the process stops immediately. They would not carry on if the rights are not explained. If the rights were not explained, it would have been unusual and he would have remembered that. He does not believe what the accused is claiming. According to him the accused is lying to his legal representative. He testified that the suspect was willing to proceed, as he wanted to explain himself.

[122] He maintains that from the beginning, until the end the confession process was never interrupted. They completed the process at 11:00 P.M. The duration of the entire process was approximately three hours. The communication between the colonel and the suspect was flowing. He knows what he is testifying about because of his observations. He can recall that the rights of the accused were read to him.

[122] After the recording he went back to his office. The following morning when he was supposed to present his confession recording for inspection, he realised that the SD card, also known as a memory card, did not show any recordings. It turned out that the memory card was corrupted. It was his testimony that before he left for the confession, he checked everything out to make sure that everything was working okay for the recording. During and after the recording of the confession the camera did not give him any indication that there was a problem.

[124] He testified that, though his role during the confession process is to capture the confession on a video, in fact, when he makes the video recordings of the confession proceedings, he also recalls what happened during the process. Briefly, that was his testimony and that concludes the evidence which was led in this particular trial-within-a-trial by the State.

[125] The accused then testified after the State had closed its case in the trial-within-a-trial concerning the admissibility of the confession and pointing- out. The accused started testifying about the confession. According to him the only papers Colonel Nonkula had in his possession were the ones that he, Nonkula, wrote in the statement that he [the accused], gave. He does not recall Nonkula having a portion of papers with constitutional rights on. Nonkula did not ask him many questions. He was the one doing most of the talking. After he related to Nonkula everything, Nonkula read the statement back to him. He then signed that statement at the back. He agrees that all the other signatures appearing on the confession form are his but he does not remember signing any other papers with Nonkula.

[126] According to him his signature was appended on the papers afterwards on a Sunday at Hout Bay Police Station when Captain Phillips and Captain Oosthuizen

gave him a bunch of papers and asked him to sign. He suspects that the signed documents on Sunday pertaining to the confession formed part of the papers that were given to him by Captain Phillips and Captain Oosthuizen.

[127] As far as the pointing-out is concerned, the only thing he remembers doing with Colonel Ngxaki is when he told him to take off his clothes and the photos being taken before they went for the pointing-out. He did not sign any form before the pointing-out. He does not recall being read or answering any questions pertaining to his constitutional rights.

[128] He denies that Sergeant Mpateni gave him an SAP.14 form [Exhibit O]. According to him it is also not true that Mpateni read him his rights.

[129] Similarly, he denies that Captain Phillips explained his rights. According to him, Captain Phillips only explained to him about making a confession and a pointing-out. He did not mention anything about rights. Captain Phillips did tell him that he would be taken to a district surgeon before and after the pointing-out. He never told Captain Phillips that "*Ek is sorry.*" That's a brief synopsis of the accused's testimony.

#### Reasons for the rulings pertaining to the confession and pointing out.

[130] As already intimated, insofar as the admissibility issues raised in this trial-within-a-trial are concerned, this Court has already overruled the accused's objection. The corollary to this is that this Court was satisfied that the constitutional rights of the accused were explained to him before he made the pointing-out and the confessions. The reasons for this finding are as follows.

[131] First and foremost, though the various State witnesses gave independent accounts of what they individually did as far as the accused's statements are concerned, the evidence of the State witnesses is seamlessly connected and made sense. Each witness's testimony tended to throw some light on the testimonies of other witnesses, because their evidence was inter-related. In other words, the evidence of one witness tended to verify the other witnesses' testimony. As such

there was enough confirmatory evidence to give the testimony of these witnesses some weight.

[132] In essence, this Court was convinced that there were smaller chances of fabrication. For instance, Sergeant Mpateni testified that he explained to the accused his constitutional rights. Then Captain Phillips, who came to the picture after the arrest of the accused by Mpateni, testified that when he was about to explain the rights of the accused, the accused told him that it was not necessary, because his rights were already explained to him. The evidence of Captain Phillips in this regard inadvertently supports the evidence of Sergeant Mpateni that he [Mpateni], had read the accused's rights during his arrest.

[133] The accused would like this Court to believe that this part of Captain Phillips's testimony is a mere fabrication. Captain Phillips testified that, albeit the accused told him this [that he was already informed of his rights], he continued and explained the accused's constitutional rights.

[134] In the grand scheme of things, had Captain Phillips testified that he did not continue to explain the accused's rights because the accused told him that his rights were already explained, then his claim that the accused said he was informed of his rights would have been a critical piece of evidence.

[135] However, considering Captain Phillips's testimony, its mention [that the accused informed him that, he had already been informed of his rights], does not appear that it was necessary. In fact, in the present case, its mention is not sufficient to rise to the level of significance. It had peripheral significance. Thus, it was not even necessary for Captain Philip to even refer to it if it was a mere fabrication. This piece of evidence indicates that Captain Phillips's evidence includes a level of detail in it. In my view, this particular fact also demonstrates that Captain Phillips's evidence was not fabricated.

[136] Furthermore, Mpateni's evidence is also supported by Exhibit "O" [the SAP.14(A) form which contains the rights read to the accused]. Much was made of the time as to when Mpateni explained to the accused the rights contained in Exhibit



"O". However, sight cannot be lost of the fact that the accused's signature is appended to Exhibit "O". The signature of the accused in Exhibit "O" is a sufficient corroboration, as it confirms a material point in this case. Of course, the accused wants this Court to believe that Exhibit "O" was amongst the stack of documents he was told to sign on the Sunday. Mpateni's unchallenged evidence is that he did not work on that Sunday.

[137] I am mindful of the fact that dates can be fabricated. I do not believe, however, that Mpateni had a reason to lie in this regard. It does not make sense that Exhibit "O" would be attributed to Mpateni if he did not explain the rights of the accused to him. I thus do not attach any significance to the discrepancies and recollections of the time related to Exhibit "O".

[138] For that matter, what could have led Mpateni to fail to explain the accused's rights when he arrested him, particularly someone who was very cooperative. For that matter, Mpateni was not the investigating officer of this case. The evidence in this matter also shows that Mpateni was not prone to exaggeration. Any suggestion that Mpateni has fabricated evidence in this matter is simply too far-fetched to deserve any level of credence.

[139] More importantly, Mpateni's evidence is full of details, explaining how he got to be the one who arrested and explained the constitutional rights of the accused. There are other pieces of evidence that convinced this Court that Mpateni was being truthful when he told this Court that he read the accused his rights. Additionally, the evidence of the various state witnesses cannot be viewed in isolation of another, as intimated before.

[140] The version of the accused suggests that there was a deliberate act not to explain his rights and to make him sign documents to suggest that his rights were explained. Equally, the accused's version suggests that there was a conspiracy or collusion on the part of the Hout Bay police and the other officers who were involved in taking the statements and photographs not to inform him of his rights. The question that begs is why Captain Phillips would be part of this deception.

[141] Notably, Captain Phillips testified that he arranged different officers for the confession and pointing-out. Surely, if Captain Phillips wanted to cut corners by ignoring the accused's constitutional rights, why would he go to the length of arranging photographers and officers to take statements?

[142] It also makes no sense why Phillips would do everything by the book and follow the procedures with precision in obtaining, for instance taking the accused to the district surgeon and arranging photographers and high-ranking officers from other police stations to take the accused's statement, yet the high-ranking officers he secured would intentionally disregard the most integral part of the process: to explain the accused's rights.

[143] Remarkably, what is lacking in the version of the accused is that there is nothing which informed the police to act in such an underhanded way. Moreso, if it is common cause that the accused cooperated with the police. Even on the accused's version he was willing to make the statements.

[144] The common thread in the testimony of the State witnesses is that the accused is an intelligent person. The accused is clearly not illiterate. He joined the workforce and can also eloquently express himself in three languages. Yet, he would like this Court to believe that at all relevant times he was unaware of his constitutional right to legal representation and against self- incrimination.

[145] Additionally, it makes no sense that the police would elicit a signed document of rights only after they obtained what they termed as a confession and the pointing-out. It is highly improbable that they would do things in such a fragmented nature and piecemeal fashion. Surely, if they did this, they would also be risking a chance of not getting the signed document.

[146] In this case, looking at the evidence presented by the State, it is clear that the evidence of the prosecution was sufficiently corroborated. Sergeant George corroborated Colonel Ngxaki that the rights of the accused was explained before the statement of the accused was taken.

[147] As far as the pointing-out is concerned, Colonel Nonkula is a single witness, but the signed documents lend credence to his testimony. Moreover, the accused does not deny that there are corrections and deletions in the form taken by Colonel Nonkula. He also admitted that he initialed the paragraphs with the deletions and corrections. Why would an intelligent person like the accused do that if he was not aware of what he was doing? Significantly, besides the signatures and initials of the accused on the form used by Colonel Nonkula, the very same form contains a thumbprint. The version of the accused does not cater for the thumbprint. It also does not reveal or explain why an obviously literate and well-spoken accused did not take time to assess the contents of the stack of papers put before him.

[148] Importantly, if his version does not suggest any form of coercion on the part of the police, who placed the supposed stack of papers before him, why then did he sign the papers and also put his thumbprint on them? The version of the accused that he was simply given the document to sign does not make any sense at all.

[149] In the circumstances, the version of the accused that his constitutional rights were never explained is simply too far-fetched to deserve any level of credence. These foregoing reasons are the reasons why I found that the accused knowingly, intelligently and voluntarily waived his right to silence and his right to legal representation. After my ruling the confession and the pointing-out evidence were admitted as evidence. The State then closed its case in the main trial.

[150] The accused then came and testified in his defence. He vehemently denied the allegations levelled by the State against him, particularly the rape allegation. He maintained his version that he parted ways with the child whilst the child was still alive. He testified further that on 27 February 2020 whilst at the training in Silikamva he heard for the first time that the police were looking for S[...]. When he heard this, he was with his colleague, Ronald. After they were done with the training, he parted ways with Ronald. Ronald went to the training at the sport complex and he went to his grandfather's place.

[151] His grandfather also informed him that the police officers are looking for him. He then went to the police station. At the police station he saw a police van with

Constable Mpateni and two ladies in it. One of the ladies was a police officer. The van was on its way out.

[152] The van stopped at the main gate and asked if he was Marvin. They then asked to go with him to his grandfather's house and he left with them. They did not tell him the reason why he should go with them. They just told him that they are going to his house.

[153] The S[...]s father was not part of the trip. He would have remembered if he was there. At some point in the trip, the police searched his house. After the police searched his house, they left, and he left for the basketball field.

[154] The next morning around 8:30 A.M., Mpateni and a lady officer came to his house and took him to the police station for questioning. On their arrival at the police station Mpateni placed him in the holding cells.

[155] Thimba came twice to his holding cell to ask him questions. On the second occasion Thimba asked him about the clothes he wore the previous day. He told Thimba that he was wearing a basketball sweater, shorts and tekkies. Thimba and Mpateni took him to his home. After they took the clothes, he was wearing, Thimba took a picture of his ID with his [Thimba's] phone camera.

[156] On their return to the police station an unknown police officer told him that he was a suspect, because he was the last person to be seen with S[...]. He testified that what is contained in Exhibit "Q" [the confession], is what happened according to him. He stated that he agrees with everything material mentioned in Exhibit "Q". When he was asked about the pathologist's finding that a ligature was used to strangle S[...], he responded that he does not dispute the doctor's professional opinion, but he has already put his version on his statement as to what happened.

[157] During cross-examination when the State asked the accused if he had killed S[...], he responded by saying, "I am not going to comment on that question." The Court then asked him what he meant by that and he responded by saying, "I am going to remain silent and not comment on that." The Court further asked him if he

chooses not to answer the question and he replied, "Yes."

[158] He testified that when he was with S[...] he was wearing his basketball kit. It was a vest, shorts and tekkies. The vest was sleeveless and was blue-and-white in colour. The vest had the number seven in white. It also had a basketball team name on it, Hout Bay Snipers. The vest also had basketball flames on it. On the day of his arrest, he was wearing navy-blue flip flops. Later on, he said the colour of the flip flops he was wearing was black.

[159] On the day S[...] went missing, he [the accused] left his home just before six and arrived at the training at six.

He further testified that on the 26th of February 2020, the day S[...] went missing, he coached the under-12s with Brian. S[...] was also training on the court with the ladies under-12s. According to him he did not coach for long, because he came late and he had to leave early because he had to go to buy an asthma pump. He thinks that he assisted with coaching for about 20 minutes. He thinks he left around 6:15 P.M. 6.20 P.M., but it was close to the time they finished training. He asked Bryn what time it was, and Bryn gave him the time. After he had obtained the time from Bryn, he sat for about two to five minutes.

[160] He then saw Biagi, whom they coached at the international school, coming to the skateboard park. Biagi said he was on his way home. He then got a lift from him. When he was asked by Ms Ajam on behalf of the State whether he was alone, he replied, "Yes, that is correct", and then again said, "I was with S[...]" He testified that S[...], who was in a happy mood, came when he was still busy talking to Biagi. It is his testimony that S[...] asked, "Coach, where are you going?" He told him that he was going to Clicks. S[...] wanted to accompany him and he did not see any problem with that.

[161] He introduced S[...] to Biagi and said he was one of the children that was playing basketball. He also testified that Biagi and S[...] greeted each other. S[...] spoke English. Furthermore, he testified that they arrived at Clicks. When they arrived at Clicks it was a little bit dark. They left Clicks just before seven on foot to

get to Clicks from the sports complex. On foot to get to the Clicks from the sports complex takes about 30 to 45 minutes. The shortest route for him would have been the horse-trail path. According to him the horse-trail path would take 25 to 30 minutes. He also testified that the horse trail is the quickest road he had used from Mandela Park to Main Street. It was also his testimony that when you take the Main Road there is a lot of traffic and there are cars that pass by and a person also passes traffic lights. However, when you take the horse trail, you just go straight. He further testified that while they walked on the horse trail he cannot recall if they took other paths.

[162] He did put his arm around the shoulder of S[...] while they walked on the horse trail. Both he and S[...] exited the horse trail and went to Imizamo Yethu. They walked together until the road separated. S[...] took his street, and he also went to his. He knew the address where S[...] stayed but did not know the actual house on the street. They parted ways at the stop sign, because he knew that S[...] was not far from his home. He denies that he is the person depicted on Exhibit "J" and the video footage walking with S[...] and the first child. He testified that because the picture is not clear he would not say it's him and S[...]. Basically, the accused vehemently denied all the allegations levelled against him by the State.

[163] That's a brief synopsis of the evidence of Mr Minnaar. After his testimony the case of Mr Minnaar was closed without calling any further witnesses. That then concludes the evidence which was led in this trial.

### *Analysis*

[164] At issue in this matter is whether the accused was involved in the commission of the offences as alleged by the State. In any criminal trial, the default position is that the accused person is presumed to be innocent. It must always be borne in mind that an accused person has got a legitimate expectation of being afforded protection by the courts from wrong convictions.

The presumption of innocence is there to *inter alia* protect an accused person from a wrongful conviction. The law is settled that from the beginning and throughout the

stages of every criminal trial the presumption of innocence remains with the accused until his guilt is established beyond reasonable doubt.

[165] Thus, in order for the State to defeat the hurdle of the presumption of innocence it bears the onus to present evidence that would be sufficient to prove guilt of the accused beyond a reasonable doubt. However, it is well established that there is no obligation on the State to close every possible avenue of escape which may be open to an accused. We must also constantly remind ourselves that the burden of proof that rests with the State does not apply to individual parts of the evidence but to the entire body of evidence.

It is also trite that the accused does not have any burden to prove his innocence in order to avoid being convicted. If the accused offers a reasonable possibly true version he should be acquitted. If at the conclusion of the trial, there is doubt, that doubt should be resolved in favour of the accused.

[166] In this instant case there is no eyewitness account to the crimes that were committed on S[...]. Put differently there is no eyewitness testimony that the accused is the person who caused what ultimately happened with S[...]. This is why the State is partly relying on circumstantial evidence to prove the guilt of the accused.

[167] Furthermore, it is settled that the guilt of an accused person cannot be based upon circumstances that raise merely suspicions, assumptions, surmises, guesswork or a probability of guilt or even for that matter out of fear that the accused might have committed the crime.

[168] The State in this matter presented different types of evidence in its endeavours to unmask the killer of S[...].

First and foremost, there is a timeline that was established from the CCTV footage. At this juncture I would like to quote in verbatim what was stated by the defence regarding the footage. The following was submitted by Mr Brand, counsel on behalf of the accused:

"We were placed in possession of copies of the CCTV camera footage of the

cameras that are operating in the wetlands or reeds area that we have come to learn of in this evidence that are operated by the security company as alluded to by my learned colleague and which routinely view the area and these copies of these videos were handed to us. From that analytic of the service of the police zoomed in on certain parts of the footage and made still photographs of certain scenes or images that appear from the CCTV footages and if I understand correctly, it is those images that my colleague seeks to hand in as an exhibit. As such, and I can already state now regarding the actual CCTV footage itself the state seeks to hand that into evidence or refer to it..."

The most important part of the citation is as follows:

"... we do not have any objection to that, either the footage or the still images taken from the footage to be presented as evidence in this court."

The above submissions clearly demonstrate that the defence did not object to the presentation of the CCTV footage.

[169] In addition, the following interaction occurred during the handing in of memory sticks pertaining to the footage of the scene of the crime. I quote again from the record:

"MS AJAM: Yes there are three memory sticks which are referred to and in addition to what is stated there further under paragraph 8 the statement says that the same exhibits, the three memory sticks, were placed in a sealed evidence bag with reference number (...) and handed to the administration of the Forensic Science Laboratory for safe keeping (...) effectively the memory stick refer to footage retrieved from the security cameras at the scene(...)."

Ms Ajam further states:

" ... of the crime.



COURT: Of the scene of the crime?

MS AJAM: Effectively the horse trail and Manchester Road and the surrounds. They span the time of the incident alleged and sometime before and sometime after.

COURT: So the importance is the timeline?

MS AJAM: Yes, it is important for various levels. They are also the footage upon which the still images contained in EXHIBIT J were obtained (...)

MS AJAM: Defence counsel were provided or made their own copies from the original in the presence of the state and are satisfied that the exhibits can be handed up as exhibits in this matter.

COURT: Alright and the contents thereof? MS AJAM: And the contents thereof(...)

MR BRAND: Yes(...) we have no objection from our side if the three memory sticks as reference in paragraphs 3.1, 3.2, 3.3 of EXHIBIT J be handed in as exhibits by consent."

[170] There is no better and meaningful indicator than the above to show that the CCTV footage was admitted into evidence by consent. Thus, it can never be successfully argued that Exhibit "3" and Exhibit "J" were ever placed in dispute.

[171] Having said that, there is also the testimony of Claassen which also created a timeline from the CCTV footage of the movement of the suspect in the wetland. The timeline created by his testimony is as follows:

1. A timestamp 6:03 P.M., the footage from the Manchester CCTV camera, depicts the suspect and an unknown child walking towards Manchester Road.
2. At timestamp 6: 34 P.M. the same individuals are captured by the

camera that faces towards the footpath in the direction of Mandela Park. The camera captures them coming from Princess Road towards Mandela Park and the skateboard park. This is the last image of the two individuals [the suspect and the small child], in the footage.

3. At 7:13 P.M., the suspect with the second child are depicted walking from Princess Road direction towards Mandela Park.

4. 7:14 P.M., the footage depicts the suspect walking on the horse trail towards Mandela Park with the second child.

5. 7:16 P.M., the footage shows the boy running towards Princess Road, and few moments later the suspect also appears in the footage running behind the boy.

6. 7:22 P.M., the footage depicts the boy and the suspect coming back from Princess Road in the direction towards Mandela Park.

7. 7:23 P.M. the footage shows the suspect and the boy entering the footpath towards the crime scene.

8. At timestamp 7:25:19 that was the last sighting of the boy (the second boy) and the suspect on the footage disappearing in the reeds.

[172] The above timeline places the person wearing a blue vest with number 7 on the back on the horse trail. First session between 6:03 P.M. and 6:34 P.M. And the second session between 7:13 P.M. and 7:25 P.M.

[173] The evidence also shows that the person wearing the blue vest with number 7 had access to S[...], due to the fact that it is not really in dispute that the second child seen on the footage is S[...]. The evidence also indicates that the man wearing the blue vest was at the crime scene at the time of the criminal event and this access to S[...]afforded him the opportunity to commit murder or kill S[...]. Essentially the man wearing a blue vest is placed at the scene of the crime by the timeline.

[174] On the other hand, the accused had access to S[...] due to the fact that he went with him to Clicks and walked with S[...] on the horse trail, at the critical time.

[175] Furthermore, in this matter the following issues are common cause:

1. The accused was wearing a blue vest on 26 February 2020 when he was walking with S[...] on the horse trail.
2. The accused was with S[...] just before 7 PM and after 7 PM.
3. The accused was with S[...] at Clicks just before 7.
4. The accused was present in the horse trail for about 25 to 30 minutes.
5. The accused and S[...] were walking together in the horse trail after 7.
6. The accused did place his arm around the shoulder of S[...] whilst they were walking on the horse trail.
7. The accused does have flip flops that are shaped like the ones worn by the man wearing blue vest on the CCTV footage.
8. S[...]’s body was found on the horse trail.

[176] Mbulawa and Nongamashe corroborated each other that on the day S[...] went missing the accused did not coach the children. Though they contradict each other as to which gate the accused stood at, they, however, corroborate one another that they saw the accused standing at the sports complex gate. The contradiction pertaining to whether the accused stood at the small or big gate is not really material as it only affects detail. For that matter such contradictions are expected when a witness is testifying about incidents, they never imagined that they would be expected to recall.

[177] For that matter, I did not get the impression that they wanted to give evidence in this court that would cast the accused in a bad light. After all there is sufficient evidence in this matter to support their testimony that the accused did not coach the children on the day in question and this would be revealed further in this judgment.

[178] The following evidence reveals how unreliable and materially inaccurate the evidence of the accused was.

In the first place, it is significant to note that, the accused testified that on the day he went with S[...] to Clicks, S[...] was part of the children practising on the basketball court. But on the other hand, Mbulawa was adamant in his testimony that he had details of children and parents belonging to their club and that S[...] was unknown to him, and he was not part of their club. This aspect of Mbulawa's evidence was never challenged.

[179] Secondly, Biagi testified that before he gave a lift to the accused, he saw the accused coming from the side of the reeds towards the skateboard park and he greeted him when the accused went past him. On the other hand, the accused gave a contrary version of how he arrived at the sports complex and about his first encounter with Biagi. He testified that he was coming from his home. In this matter it is common cause that the reeds and Imizamo Yethu where the house of the accused is located are on the opposite side of the sports complex. The testimony of Biagi places the accused on a path coming from the horse trail before S[...] got to the car of Biagi.

[180] Similarly, Nogamashe testified that around 3:00 P.M., on Thursday 27 February 2020 when he was on his way with the accused from the High School training going to the sports complex, they met up with S[...]’s family and the family was looking for S[...]. They then went with them to the neighbourhood watch and thereafter to the police station. On the other hand, S[...]’s father, Mpateni testified that on Thursday 27 February the accused arrived at the police station with S[...]’s father and from there they went to his house to go and conduct a search. In this regard Mpateni, S[...]’s father and Nogamashe corroborate each other.

Not surprisingly the accused offered a diametrically opposed version of Thursday

events. According to the accused on Thursday when he heard that the police were looking for S[...] whilst he was at the training with Nogamashe after they were done with the training, they parted ways. He went to his grandfather's house. At home he was told that the police were looking for him and he went to the police station.

[181] Regarding the accused's visit to the house of S[...]’s grandmother on Friday once again the accused gave a different version of the encounter there. According to the accused when they got there, they were received by the grandmother of S[...] who opened for them and he spoke to her outside the house. Yet S[...]’s father maintained that he was the one who received the accused and his stepfather. He even gave a plausible reason as to why this was the case.

He testified that on that particular morning he slept in the dining room as he did not stay there and when there was a knock at the door, he was the first person to open the door. His evidence in this regard is full of details. For instance, he testified that when he opened the door the accused stepfather was the first person to enter. The stepfather told him that the accused asked him to accompany him to his mother's house. He even mentioned why they visited his mother's place. As already stated, the evidence of S[...]’s father is full of details to be a mere fabrication.

[182] Biagi testified that S[...] appeared uncomfortable, did not engage at all, came with the accused to his car, and was introduced to him by the accused as his brother. Contrary to this, the accused testified that S[...] was in a happy mood, spoke with Biagi in English, S[...] was the one who approached him at the car of Biagi whilst he was speaking to Biagi and wanted to leave with him. He introduced S[...] to Biagi as one of the players of the basketball. S[...] greeted Biagi. Regarding these aspects the accused when he testified, he introduced new evidence which was never put to Biagi when he testified.

[183] There is no meaningful reason why this Court should not believe the testimony given by the State witnesses. There are so many apparent features in the evidence of the State witnesses that indicate why this Court should believe them. For instance, the State witnesses corroborate each other. Most of their evidence was never challenged by the accused when they testified.

[184] It is plain that the accused blatantly lied to this Court and tried to mislead the Court by tailoring his evidence to try and contradict the State's version and to fit events described by the State witnesses.

For instance, during the pointing out interview, it is common cause that the accused was wearing flip flops that are similar to the ones the individual on the video footage wore. The accused testified that on Wednesday he was wearing *tekkies* as he went to the training. Clearly, his evidence that he went to the training cannot be true because both Nogamashe and Mbulawa convincingly testified that he was never on the training, he never participated in coaching the children on 26 February 2020.

[185] Additionally, all the State witnesses that testified that the shortest route to Mainstream mall from Imizamo Yethu is the route through the Main Road. Their evidence in this regard was not challenged yet when the accused came and testified, he testified that the route through the horse trail is the shorter route. The State witnesses also testified that the horse trail route is dangerous.

When the accused was cross-examined by counsel on behalf of the State, he wanted to deny that he testified earlier that bad things can happen in the reeds.

[186] When Ms Ajam insisted that he testified that bad things happen there, the accused simply retorted that "I do not remember saying such". Ms Ajam was persistent in putting to him that he said so. The accused ultimately yielded and answered "yes, but I do not recall saying such". It is obvious here that the accused realised that it does not make sense to choose a route which is dangerous with a child at that particular time. He wanted to change his evidence but, in this instance, he could not lie through.

[187] The accused was also caught in a lie when he testified that after he obtained time from Bryn, he sat for about two to five minutes. He then saw Biagi. Biagi said he was on his way home and he got a lift from Biagi. Ms Ajam asked the accused if he was alone. The accused interestingly answered yes that is correct but immediately he changed his evidence and stated that he was with S[...].

[188] Clearly, the accused was a woeful witness. He was even dismal in explaining how S[...] trained with the team on Wednesday or which teams S[...] trained with on Wednesday. He could not really explain what he meant by saying that he sat after he asked Bryn for time. He even testified that at the time he said he sat he was actually coaching. When asked by the counsel on behalf of the state as to what happened after he finished waiting, he testified that he could not remember everything.

[189] His evidence regarding his encounter with Biagi is also not clear. His evidence in most instances than not contained new evidence that was not put to the witnesses. For example, it was not put to Mbulawa that the accused asked for time from him. The evidence of the accused is all over the place.

[190] Additionally, the accused through his testimony would like this Court to believe that it is a matter of mere coincidences that:

1. he has similar flip flops to the ones worn by the individual on the video footage;
2. that he admitted in his testimony that on the horse trail he put his hand around the shoulder of S[...];
3. the suspect on the footage placed his hand on the shoulder of the boy he was with and he admitted in his evidence that he placed his hand around the shoulder of S[...] as they walked in the horse trail;
4. that the suspect on the footage was wearing a basketball vest similar to the one he was wearing on the day S[...] went missing;
5. that the basketball kit on the footage is similar to the one of the Snipers basketball club [ accused's basketball club];
6. that the vest worn by the individual on the CCTV has a number 7 on it,

and the basketball vest he wore on the day S[...] went missing also had a number seven on it; and

7. that the accused on his own version he puts himself on the crime scene in the presence of S[...] at the critical time.

[191] As already alluded, the accused as a witness did not strike this Court as an impressive witness. I got the distinct impression that he was deliberately lying to this Court. I also find it highly improbable to the point of being unbelievable that the accused did not know where S[...] stayed yet on his own version he used to lend S[...] basketballs and S[...] used to train with them. For that matter the evidence in this case establishes that the house of S[...] was not that far from the accused's house. Moreover, the evidence of Nogamashe that the house of the accused and that of S[...] are two streets away from each other and they are in a straight line Nogamashe also testified that a person from either yard can see another from their respective yards. This evidence was not challenged.

[192] The evidence of the accused that he could not tell that the person on the video footage or on the still photos was him and S[...] because the picture was not clear is rather odd because in the context of the video footage or the still images in this case, I would have expected the accused to say 'no that is not me'. This I say because the pictures are not random but they are part of a continuous scene which also includes the scene where the child is being chased by the individual wearing a vest.

[193] I also found it very odd when during cross-examination, the accused was asked if he had killed S[...] he responded by saying "I am not going to comment on that question". Surely there was nothing difficult about that question. It is rather quite odd that the accused who does not want to associate himself with the person depicted on the video footage when afforded an opportunity to deny being the person who killed S[...] who was found dead in the vicinity where he walked with him answers that he chooses to remain silent.



[194] In my mind the answer which was given by the accused was quite telling in the circumstances of this case, particularly if regard is had to the contents of his confession. The contents of the confession of the accused amongst others revealed the following:

"When I arrived at the soccer field kids were already there training basketball. I asked one of the kids who was there who is not a member of the basketball team but he liked to come now and again to play basketball and sometimes he would come with his friends to my place to borrow a ball and they play on my street. He agreed to go with me to buy the asthma pump. On my way out from the soccer field I met someone who used to be a player of the basketball at Hout Bay International School. He was there with two of his friends(...) by the time I was going to buy the(...) I asked him if he could drive us to the shopping centre (...). He dropped us at the shopping centre (...) we purchased the asthma pump and it was almost closing time(...). On our way home we took a road through the bushes. As we were walking we were having a conversation which was about sex and could see that he was not really comfortable with having that conversation. We went for two to three minutes without saying anything. I leaned closer to him and I put my arm around his shoulder. We continued walking and I touched him inappropriately. He asked me if I could remove my hand which was touching him inappropriately with but I still continued touching him. He said if I do not stop touching him inappropriately, he will report me to his parents and the police. That is when I got scared. I could see that he was serious. When I let him go, he turned back to the direction where we came from and started running. I realised that I could end up in trouble and I chased him. Eventually I caught up with him and I grabbed him and we went to the direction which we first used to go home. While we were walking, I saw a passage like sort of a bush. I told him that we should go inside there. As we got in we were both scared. By the time we were inside I tried to calm him down and convince him that would (...) done anything to hurt him. He became more scared and started crying. He insisted that he will tell his parents that I tried to rape him. After some time of back and forth and him crying he started to take off his clothes. That is when I got scared and I was not thinking rationally. My first instinct was that if we leave I

would have been in trouble and be accused of rape I did not do. This is when I put my hand around his neck and pushed him to the floor. We started fighting and he was scratching me with nails. I continued choking him until he stopped moving. By the time I realised that he was not alive anymore I panicked and I started running away(...)."

[195] Different facets and aspects of this case resemble pieces of a jigsaw puzzle. Fitting them together they reveal a perfect pattern, related the identity of the culprit. Importantly, part of the confession made by the accused accords with the video footage. The confession strengthens the State's case. The confession together with other evidence presented by the State, reveal beyond reasonable doubt the identity of the individual wearing the basketball vest on the video footage. The confession also confirms the circumstantial evidence presented by the State, that the person seen running from the footage is indeed S[...] and that the clothes that were found scattered near his body were his.

The confession also indirectly confirms that the underpants found on the crime scene is that of S[...]. The confession further explains why S[...]ran away. The timeline which puts the accused right in the middle of the horse trail at the time when S[...] was chased is also confirmed by the confession.

[196] The evidence of Mbulawa that the accused did not join the training that day is also confirmed by the confession of the accused.

[197] It is so as already alluded earlier on that Biagi testified that whilst he was at the skateboard park, he saw the accused coming from the side of the horse trail. I have already found that the accused has been revealed as the person who is depicted on the CCTV footage. In this Court's mind in the circumstances, it is clear as daylight that Biagi is correct and truthful when he testified that the accused came on the side of the horse trail before he asked him for a lift. The direct corollary of this is that the accused is once again the person who was seen earlier on the video footage with a younger child. This is also confirmed by the placing of his hand around the shoulders of the children when walking with them, which probably qualifies as a signature *modus operandi*.

[198] It is so that the pointing out did not produce any physical evidence but all the same it also confirms that the accused was there with S[...] when he died. The evidence of Ngxaki clearly shows that the accused showed him where he committed the crime.

[199] All the state witnesses who testified in this trial were impressive. There is absolutely nothing negative I can say regarding their credibility. Their evidence as demonstrated is also supported amongst others by objective facts.

[200] When the evidence is viewed holistically, I am satisfied that I can without any reservation rely on the testimonies of the State witnesses. In the face of the overwhelming incriminating evidence presented by the State against the accused, the accused's attempt to poke hole and negate the State's case, failed dismally. He tried to create a false plausible alternative to what happened with S[...]. It is also noteworthy that during cross examination, whenever the accused was trapped in evident irrationalities, he would rely on memory loss.

[201] I am convinced that the accused entirely lied in this trial. The accused is unmitigated liar, who came up with a farfetched theory. I formed the distinct impression that he is someone who is always willing to make up stories whenever it suited his needs. I am even starting to believe that the accused is beginning to believe his own lies. It appears as if the accused cannot draw a line between the truth and the falsehood anymore.

[202] Even in the confession, the accused did not honestly reveal everything that happened between him and S[...]. It is evident that in the confession, the accused did not account straightforward and truthful. The other evidence in this matter, reveals that the accused in the confession disclosed as little information as possible regarding his actions. The contents of the confession evince the accused's attempt to create a mitigated version to an extreme degree. For instance, he states that S[...] fought, cried and tried to run away from him. But in the same breath, even though it is clear from his confession that S[...] was scared, the same confession reveals that S[...] without being urged simply took his clothes off. Who would do that? Particularly, a scared child. The accused in the confession does not say anything

about the rape. When the evidence is viewed wholistically, it is evident that the accused in his confession failed to reveal pertinent information he clearly had.

[203] The version of the accused is not reasonably possibly true. I reject his version as fabrication solely intended to mislead this Court. I am satisfied that the State has succeeded in proving its case beyond reasonable doubt. I am even satisfied in the circumstances of this case that the elements of kidnapping were also satisfied. Clearly, the evidence in this case shows that S[...] was taken by force to the bush and his freedom of movement was restricted.

[204] Evidence further demonstrates that S[...] did not want to go with the accused. He even ran away from him and the accused chased him and came back with him holding him in his arm. This evidence alone proves that S[...] was restrained and was under duress. In other words, he was forcibly confined. I am even satisfied that the State has proven beyond reasonable doubt that the accused raped and killed S[...]. He killed him by strangling him with a ligature on his neck.

[205] I therefore find you GUILTY on all the charges which were preferred against you by the State.

**NZIWENI, J**  
**JUDGE OF THE HIGH COURT**

**Counsel for the State                      Adv N Ajam**

**Instructed by                                  National Prosecuting Authority**

**Counsel for Accused                      Adv B Brand**

**Instructed by                                  Legal Aid**