

SOUTH AFRICA / JUDGMENT

S v Dlamini (CC9/2020) [2020] ZAGPPHC 684 (4 November 2020)

[2020] ZAGPPHC 684

COURT

North Gauteng High Court, Pretoria

BEFORE

Broodryk

CASE / FILE NUMBER

CC9/2020

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IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA, HELD AT BENONI

(1) REPORTABLE: YES / NO

(2) OF INTEREST TO OTHER JUDGES : YES / NO

(3) REVISED

4/11/20

CASE NO: CC9/2020

DATE: 2010.10.09

In the matter between

THE STATE

and

LUNYU LEWIS DLAMINI

Accused

J U D G M E N T

BROODRYK, AJ: Case number CC 9/2020. According to the indictment the accused Lunyu Lewis Dlamini, a 49-year old male and an South African citizen of [...], is guilty of the crime o murder, read with the provisions of section 51 (1) of Act 105 of 1997, in that upon or about the 10th of February 2019 and at or near Duduza in the district of Duduza, the accused did unlawfully and intentionally kill Mabalenye Naledi

Ngwenya, a female baby.

The accused pleaded not guilty to the charges and his counsel, Mr Mashabela, confirmed those instructions and he provided an explanation of plea in terms of section 115 of the Criminal Procedure Act.

He stated that on the day in question the accused was in a tavern. He was drinking and playing snooker with a friend. Lydia Mokoena, his girlfriend, as well as Mtombeseni Zodwa, the grandmother of the deceased plus a friend were also present. The deceased, was also in the shebeen. At some stage the accused went to Lydia's house, as he was drunk. Upon his arrival he sat on a couch and from there on the accused does not remember what happened further. The accused confirmed this explanation of plea.

Mr Mashabela told the Court that he had explained the provisions of section 51 (1) of Act 105 of 1997, the so-called minimum sentences

regimen. The accused confirmed that it was explained to him.

Mr Jacobs, for the state, then referred to exhibit A, which was the normal admissions which were made in terms of section 220 of Act 51 of 1997. It referred to the normal admissions which were made in respect of the identity of the deceased as well as the cause of death. The post-mortem report was admitted and handed in as exhibit B. The correctness of a photo album and key thereto as compiled by constable M J Khupela was handed in, also by consent, as exhibit C.

In paragraph 7 the accused then formally admitted in terms of section 220 that Dr W H Steyn took a buccal and wound swab on the 12th of February 2019 from the deceased mentioned in the indictment, to wit, Mabalenye Naledi Ngwenya and that this collection kit was

correctly packed and sealed with collection kit seal number PA40027331123 (15D2AV1983) kept and transported to the forensic science laboratory in Pretoria where it was correctly (sealed) received under Duduza CAS 74/02/2019.

In paragraph 8 the accused also admits in terms of section 220 of Act 51 of 1997 that Constable M J Bapela on 10 February 2019 took a swab from the garden hoe that was found on the scene and that this swab (collection kit) was correctly packed and sealed with the collection kit seal number PA4002153039 (14DCAJ1983) kept and transported to the Forensic Science Laboratory in Pretoria where it was correctly (sealed) received under Duduza CAS 74/02/19.

Exhibit A which contains 8 paragraphs was formally admitted by the accused and he confirmed it. At the same time a, what was loosely referred to as DNA report, exhibit D, was also handed up by consent. The effect thereof is simple, that the DNA result from the garden hoe matched that of

a reference sample, that is a buccal swab taken from the deceased and according to paragraph 4.2 of that report exhibit D, which is an affidavit by one warrant officer Zanele Promise Zuma, it stated that the most conservative occurrence for the DNA result from the “Swabbed from hoe” swab (14DCAJ1924) (PA4002153039) is one in 560 thousand trillion people. The effect thereof is simple that the blood on the hoe matched the blood of the deceased.

At the same time and this is also by consent, a psychiatric report, marked exhibit E was handed up. This is a joint psychiatric

report signed by Dr M Joubert, the state psychiatrist, professor J L Roos, a psychiatrist appointed for the Court and Dr N Campher a psychiatrist appointed for the defence. All three psychiatrists signed this document on the 28th of November 2019 after observing the accused at Weskoppies hospital. The report is in terms of section 79 of the Criminal Procedure Act.

I need briefly to refer to three paragraphs in this report. Firstly, the first reference is to paragraph B. It is noted psychiatric diagnosis – alcohol use disorder. This diagnosis however has no bearing on paragraph C and D below.

Paragraph C states the accused is capable of understanding the Court proceedings and he is able to contribute meaningfully to his defence.

Paragraph D and I quote:

“At the time of the alleged offence the accused did not suffer from a mental illness or intellectual disability that affected his ability to distinguish between the rightful and the wrongful nature of his deeds. A mental illness or intellectual disability did not affect his ability to act in accordance with the said appreciation on the rightful or wrongful nature of his deeds.”

This joint psychiatric report was also handed in by consent and is formally admitted. The accused confirmed that the report is admitted and that it be handed in by agreement.

The state called two witnesses, Lydia Mokoena and Adeliën Mtombi Zodwa Molakeng. She is the grandmother of the child, the

deceased in this matter. The accused testified in his own defence and two further witnesses, former state witnesses were called that was one Beauty Mbenye as well as Constable Patosetso Khorombi.

I will now deal with a summary of the evidence of the state witnesses. The first witness which was called by the state was

Lydia Mokoena. She told the Court as they were sitting at the shebeen the accused requested a black label beer. They

continued sitting there with Zodwa. At some stage the child started crying because it was hot. One Busi then took the child and put her on her back and the child then kept quiet. Eventually the child fell asleep. At some stage the child woke up and started crying. Busi then gave the child some water. She said, that is now Lydia, she said to Zodwa let her rather take the child to her

house to prepare some juice for her which she did. As she was preparing the juice at the house, the accused walked in. The accused was standing right at the door inside the house. She told him to move away as she was in a hurry to go to her society meeting. She wanted to take the baby, but the accused said no, they are going to fetch a bottle for the baby. She then left to go and fetch the baby's bottle.

On her way at about the third house away from her house, she saw a child. She called on this child, whose name was Twana, and said she must go and call, I take it, the mother for her, not the mother, to go and call Zodwa for her. Zodwa, as I stated earlier, is the grandmother. She then returned to the house. She found accused in possession of a pick and she found that the child, that is now the deceased, was placed on the floor. The child was already injured. The child was lying in a pool of blood and the child had injuries on its face. She identified the deceased in the photographs exhibit C, photos 24 and 25 as well as up to 30.

She told the Court that as exhibited in photograph 24 and 25 of exhibit C, that that is the position she found the baby lying.

She pointed out in photograph 29 and 30 of exhibit C that there was pool of blood to the left side of the head of the deceased. The deceased was, as she described it, lying on some sort of a plastic carpet, as she referred to it.

The accused had a pick in his hand. She referred to it as a pick and she identified the pick in exhibit C photograph 6. If one looks at it, it is clear that it is what is commonly referred to as a garden hoe, in Afrikaans it would be known as a skoffel-pik.

At that stage she said accused was just standing there staring at the child while he had the pick in his hand. She asked the accused why he had killed someone else's child. The accused said this is not a child. This is Satanism. She then ran crying to the shebeen to call people, this is now the shebeen where they were seated earlier. She stated that she does not think that the child was still alive when she found the child lying on the floor. She was also scared. At the time when she found the accused with the pick in his hand it was around 3 o'clock in the afternoon.

Community members were called and the police also arrived on the scene. She stated that she left the baby because the accused

said so and that he said that she should go and fetch the bottle. She stated that the time she left until she returned it could not have lasted longer than 10 minutes. At the time when she left the house it was only the accused and the child there and at that stage the child was not injured. She stated that the child was eight months old. The child was only wearing a diaper because the grandmother had undressed the child earlier saying that it was very hot. She stated that the shebeen at which she referred to earlier, she arrived there at approximately 2 o'clock and left at about 3 o'clock in the afternoon. She stated that whilst at the shebeen accused only bought one black label beer, referred to as a quart. He shared that quart of beer with her and they both drank from it.

She, on a question by the prosecutor, stated that at her house she spoke to the accused. He was able to speak to her. When she asked him why he killed the deceased he stated that that it is not a baby, that is Satanism. She stated that she could have a conversation with him and that he followed her as she spoke to him. She also stated he “could hear her”. He had also earlier stated that she must not leave with the child and that she was quite at ease to leave the child there with him.

Upon a question from the Court whether the accused drank anything else at the shebeen except the beer earlier referred to, she stated well, when they originally went there accused had half a beer.

Under cross-examination of Mr Mashabela, for the accused, she was asked when she left the house that morning. She stated that it was around 7 in the morning. She was asked whether she knew where the accused and his relative went. She stated no, she did not know. It was then put on behalf of the accused that he would tell the Court that when he left the house at 9 that morning he went to the shebeen with his relative. The witness replied that she did not know. She was adamant that it was 7 o'clock and not 9 o'clock because, as she stated, there was a big watch on the wall which she looked at.

It was put that when accused arrived at the shebeen at 9 he started drinking. Her answer was that she does not know as she was not there. It was asked of her in cross-examination whether she confirms that the pick is that which is contained or which is depicted in photograph 6 which she confirmed. There were some questions put as to the difference between a pick and a garden hoe, but I do not intend to deal with that as it is common cause that it was a garden hoe.

She was asked about what she had been drinking at the shebeen. She told the Court that she only had half a bottle. It was then put that if someone else would come and say that they were all drinking and that she not only drank half a beer, and that she in fact drank more than half a beer, she stated yes, that she drank from the black label beer which she had shared with the accused. She could not say how much time she had spent at the shebeen, but she estimated that she arrived there at about 2 o'clock in the afternoon, 14:00. At 14:30 she was still there and she left with the child just before 15:00. She said that she left first from the shebeen and that she reached the house first. She told the Court that accused arrived soon thereafter probably after about 5 minutes. She was busy preparing the juice at the time he walked in.

It was then put that the accused, upon reaching her house, does not remember laying a hand on the child. She stated well, she found him in possession of the hoe at the house and that she found him next to the child staring at this child. He stated that it was not a child. It was Satanism. He then sat down on a sofa, still having this garden hoe in his hand. She asked him why did he kill the child and he said it is not a child. It is Satanism. She then screamed.

She stated that she was shocked but that there was no one else in the house. It was then put to her that Constable Khoromby, a police officer who was also later called by the defence, stated that when he arrived on the scene she told the police that she actually saw the accused picking up the hoe and hacking the deceased. She however denied that and was adamant that she only found him in possession of the hoe.

She stated that she had a relationship with the accused from 2003. It was a good relationship although about 2 years before the incident he started to do “funny things”. He would go and stay with another girlfriend but then returned and was there for three months before the incident. She was then confronted with her statement but it appeared that she had not read the statement and that it was not read back to her although her signature was affixed to the statement. As the statement was not admitted, Mr Mashabela, on behalf of the accused, then did not pursue that line of cross-examination.

She was asked whether she actually saw the accused killing the child or did she simply just assume it. She stated that she did not find the accused killing the child and she only assumed that. She was asked who first then came to her house after she found accused there. She stated it was one Simon Twabe and a person known as Doctor Malaba, apparently a medical doctor.

In re-examination Mr Jacobs asked the witness about the garden hoe and she stated that when she arrived at her house accused was holding this garden hoe with his right hand, initially she indicated with a bent arm but then she changed that and said that he held it with his arm pointing straight downwards and that he was standing right next to where the baby was lying, probably about a metre away.

The second state witness who was called was Adeliën Ntombi Zodwa Molakeng. That is the grandmother of the deceased. She confirmed that she is the grandmother of the deceased. She told the Court that on Sunday, the 10th of February 2019 she went to a shebeen with the child, the deceased. She stated that Lydia was there as well as the accused and the child. They were sitting there drinking. At some stage the accused took the child and put the child down. The accused then left. After a while Lydia said she is going to make a cold drink for the child. She left with the child. She did not know what happened thereafter. She stated that it is correct so that the deceased was her grandchild and that she allowed Lydia to take the child to go and prepare juice for her as it was very hot. Upon it being put to her that if Lydia was drunk, would she have allowed her to leave with the child and she stated that she would not have allowed that.

She stated that Lydia left with the child just past 2 in the afternoon. She could not say how long Lydia had been at the

shebeen, but when Lydia left, she also left. She stated that Lydia was drinking beer, but she does not know how much. She stated that Lydia is normally not a person who drinks a lot. While she was in her house, a child came to call her and she went to Lydia's house. When she arrived there, she found that the house was cordoned off with tape and that there was a police van on the premises. She went inside the house and Lydia said to her that accused had hacked the deceased with a pick and that she said that accused said the child was possessed with demons. When she

arrived at Lydia's house the accused was not there. She did not see him at all. He had already been taken away at that stage.

Under cross-examination by Mr Mashabela she was asked about the conversation she had with Lydia and whether anybody else was present

when she asked Lydia what had happened. She stated that there was not many people but that the neighbours were some distance away but that she could not say because the complainant was really hysterical at that moment. She stated that originally she found Lydia with the accused at the shebeen and she does not know how long they had been there. She stated that she drank 2 beers. When she was asked about in her presence how many did Lydia drink, she stated well, she found them sitting there and they were having, as she stated, two beers.

According to her the accused left first after the beers were finished and that they had drunk it all. When questioned about the sobriety of the accused she stated that he was, and I quote "okay. He had not drunk too much." It was then put that the accused will say that he arrived at the shebeen about 9 o'clock that the witness Zodwa as well as accused and Lydia were playing snooker and drinking. She denied that and stated that she found them there and that she does not play snooker. The accused was the one who played snooker.

In re-examination it was asked, where was the mother when she took the child to the shebeen. She stated that she is the grandmother. She is used to the child and the mother was not there at the shebeen on that day.

On questions of the Court she stated that she had known the accused for a long time and that when she left the accused at the shebeen he appeared to be normal to her and that he also appeared normal when he left. That concluded the state case.

Mr Mashabela then called the accused to the stand. It was put to him by his counsel, Mr Mashabela, that on the 10th of February 2019 a murder was committed and it is alleged that he had killed the child, Malaleny. He stated emphatically that he did not kill the child. He stated that on that day his brother woke him up. It was around 9 o'clock in the morning and the brother said they must go and relieve themselves from, as he put it, "his babelas" which they had sustained due to drinking the previous day.

The relative he referred to as his brother, was actually his cousin. They then went to Mafokane's place. It is a drinking place. His cousin bought some alcohol and they started drinking. At some stage he went to Lydia's house and she requested him to open for him. When he arrived at the shebeen he bought one beer and he consumed it. He was about to finish when Lydia arrived at the shebeen. It was himself, that is now the accused and Lydia and they drank. Zodwa, that is now the grandmother of the child, and the father of the child also came. He then related the snooker game. The first player was himself and the owner of the shebeen. He lost that game as the owner was the winner, he, that is the owner was then replaced by Zodwa who then played with the owner of the shebeen. At some stage Zodwa took the child and placed the child next to the snooker table on the floor. They then continued playing. He then continued drinking but now

on credit. They drank for a long time. Eventually he went to Lydia's house. He sat on a sofa and he fell asleep. He was surprised when he heard a noise outside and someone said that he had killed the baby. Police then came and took him to the police station. When he left the shebeen, he was with Lydia. He did not notice if she had the baby with her at that stage. Lydia arrived at her home first and she had the house keys. He was then asked that after he sat down whether he saw anyone else in the house, that is now except for Lydia. He stated that he did not see anybody else. It was then put to him by his counsel that Lydia said that he killed the deceased with the garden hoe and that he had the garden hoe in his hand looking down at the child. He stated again that he did not see the child. He sat on the sofa and fell asleep. It was put to him that Lydia and Zodwa both stated that he appeared to be normal when he left the shebeen. He denied that and stated that he had drunk a lot and that he was in fact drunk.

He was asked whether anyone else talked to him at the scene and he stated that he spoke to no one. He was asked whether the police told him why they were taking him away from the scene and he stated that they only informed him at the police station. He told the Court that he had sustained injuries, but he did not ask them why or how he sustained the injuries. He only knows that he was injured at the yard of Lydia's house. He also stated that he did not see anyone assaulting him there at the yard of Lydia.

He was then taken under cross-examination by Mr Jacobs. Mr Jacobs put it to him that in his plea explanation he said that he could not remember anything from the time he sat down on the couch which he confirmed. It was then put that if he could not remember how could he then say that he did not kill the baby. His answer was simply I did not see the child. It was then put to him that it was never disputed when Lydia testified that the child was there and that he initially stated that she should leave the child there and that Lydia had to go and get the bottle. His answer was that he was not told what to dispute but he then stated that Lydia was lying. He stated that he could not dispute that the child was in the house. He could also not dispute that the child was killed. Then he stated that he is disputing that he killed the child and that he does not remember being in possession of the instrument; the instrument referred to as the garden hoe. When that was put to him that that does not mean that he had it in his hand he replied that I did not see myself in possession.

He stated that he did not tell Lydia that he killed the child because it was a demon. He stated that he did not speak to Lydia at all. He was asleep and he said when Lydia asked him why he had killed the baby he stated that she was lying. The Court asked him how is it possible that he could say that she was lying if he could not remember. He simply just stated I was asleep.

Mr Jacobs then put it to him that Lydia has said that he had killed the child because of Satanism and that it was never put to Lydia that he was sleeping. He was however adamant that he was sleeping. It was put by Mr Jacobs, is it his defence that he was sleeping or because he could not remember. He stated that I, that is referring to himself, and I quote "I slept plus I do not remember anything." He also stated that he did not see anything. It was then put to him that he then could not dispute that Lydia saw him standing there to which he conceded and his answer was no.

He however persisted in his evidence that Lydia was lying. It was put to him that he could not dispute that he told her that he killed the child because of Satanism because he could not remember. He however, persisted with his earlier version that he did not anything to Lydia. He told the Court that he could remember the house and sitting down. He also remembered that Lydia was in possession of the keys and that they had walked together from the shebeen. He said that he had left the child at the shebeen. He did not see the child on her back. I take it by that he means on the back of Lydia when he was then questioned about the sudden reference to her back he stated that he did not see it. He did not take notice of the baby.

He stated that he did not see the child after he woke up. He also did not take notice as to who took the child to the house.

He then came with the revelation that he thinks that it was Lydia who killed the child. The Court asked him, but it was never put to Lydia that she was actually the killer and he told the Court that he did not tell that to his counsel. He stated that there was no problem between him and Lydia. It was put to him that he wanted to give an impression that he was very drunk to which he stated yes, that he had consumed alcohol. Mr Jacobs then put it to him, but he could remember a lot of detail. He stated well the things he remembered is things that happened in the morning until he went to sleep. Mr Jacobs then put it to him that he remembered that he played a game of snooker at the shebeen to which he confirmed. He also confirmed that he remembers that he left the shebeen with Lydia and that she had the keys and that she opened the house with the keys. He also stated that he in fact gave her the key. It was then put to him that the only thing he does not remember was whether the child was there or not. He stated that he has no recollection of what happened at the house. When it was put to

him that according to Lydia they had consumed, he the accused, that is consumed half a beer of black label and his answer to that was, that she is lying. It was put to him that that was never disputed when Lydia testified he stated that he did not dispute it but on a question of the Court he told the Court that he also did not tell that to his counsel. It was put to him that Lydia and Zodwa both said nothing was wrong with him and that he was not so drunk. He stated that they are lying. He told the Court that he does not know who assaulted him and he stated that somebody must have injured him while he was sleeping on the couch. It was put to him that only he and Lydia was present there in the house, he told the Court that he was asleep.

In re-examination by his counsel he stated that at the shebeen the child was seated on the floor and he was busy playing snooker.

He was asked whether he knows this person Mbenye. He stated that he does not know the name and the surname. He was asked by the Court whether he knows anything about the injuries sustained by the deceased. He told the Court that he knew nothing of the injuries and he was also never asked about the injuries.

He told the Court that he did know about the garden hoe. It was normally in Lydia's yard. At some stage it was placed in the house and not where it was normally kept. He did not return it to the normal place where it was kept. That happened on the Saturday immediately preceding this incident. That concluded his evidence.

Beauty Mbenye, a former state witness, was then called. She stated that on the day of the incident on the 10th February 2019 while she was in her house Lydia came. She was crying. When they enquired why she responded that Louis, that is now the accused, had killed the child inside the house. They left the house with one Simon and they followed Lydia. They found the deceased child lying inside the house on the floor. The accused was also present and she asked him why did he kill the child. He said that she must ask Lydia. He does not know. She stated that she did not know anything further as only the two of them were there.

Under cross-examination by Mr Jacobs she stated that when she arrived she found the accused sitting on a sofa. She was asked whether he was awake. She stated that he was not sleeping. She also stated that he was not injured. She was asked whether anybody assaulted the accused while she was present and she replied that that did not happen.

The last defence witness which was then called was Constable Phatusetso Khorombi. He stated that he was one of the first

police officers to arrive at the scene. He found plenty people on the scene. He found a lady alone with the accused.

There were some other people present. This lady he referred to was Lydia. He was asked whether Lydia told him anything.

He told the Court that she told him that she was seated with another lady on that day with the child. She left leaving the child behind. The child started crying. She comforted the child by giving the child some Simba chips and juice. She told him that the accused took a hand hoe, he used it to hit and cut the child with it. She then went and started looking for assistance from people. According to Constable Khorombi the witness said that accused was hacking the child in her presence. She narrated it to him as if she was there when it happened. When Mr Mashabela put it to him that Lydia said that she found the accused with hoe in his hand, not actually that she saw the accused hacking the child, he stated well, he could not say, perhaps she was confused when she narrated it to him. He spoke to her in IsiZulu while he is not an ethnic Zulu and he is in fact a Venda. He stated that he saw the accused in front of the house. He was seated surrounded by people. Accused in fact looked as if he was assaulted and he was bleeding on his face. He stated when questioned as to the sobriety of the accused that he looked like someone who had taken some alcohol substances.

Under cross-examination by Mr Jacobs it appeared that he never talked to the accused and he could not say if he was in fact intoxicated or not. As he did not either speak to him or did not see him walking around. He stated that Lydia was crying and that she was upset. She was in fact crying while he was talking to her. He confirmed that there were only two people there at the

scene, that is now the accused and Lydia. He conceded that there is a possibility that he misunderstood Lydia when she stated that she saw the accused hacking the baby. There was no further re-examination.

Both counsel then addressed the Court and I will now deal with my evaluation of evidence. Firstly, I deal with the evidence of Lydia Mokoena. Although she at first blush appeared to be a bit of a dozy witness and not a dynamic outgoing person, she made a favourable impression upon me. Her evidence was presented in a logical manner and she stuck to her version under cross-examination.

Her evidence is also inherently probable. To her credit she testified that she found the accused standing next to the deceased

with the hoe in his hand starring at the deceased. She could very easily have stated that she actually saw him hacking the

deceased to death. She denied that she told the police that she actually saw the accused hacking the deceased. She was very adamant in this regard. It must also be remembered that her statement was not proven.

She is a single witness and the cautionary rule applies. I am however satisfied that her evidence is satisfactory in every material respect. I accept her evidence. The fact that it is common cause that she and accused had a good relationship for 10 years acts as a form of a guarantee. There is no reason to doubt her evidence.

The second witness, Adeliene Ntombi Zodwa Molakeng testified. This witness, the grandmother of the deceased, was not an eyewitness

to the murder. She however, testified to some events preceding the incident. She was also at the shebeen where the accused and Lydia were drinking. She confirms that Lydia left with her child, but she does not know what happened thereafter. She stated that if Lydia was drunk she would not have allowed her to leave with the child. When she arrived at Lydia's house the accused had already been removed. She could not say if anybody else could hear when Lydia told her the accused had hacked the deceased with a pick and said the child is demon possessed. What is important of her testimony is that she corroborates Lydia that the accused appeared normal. This witness was similarly a good witness, made a favourable impression on me and I should add her evidence was not disputed. I accept her evidence.

I then deal with the evidence of the accused. The accused was a spectacular bad witness. He was a disinterested and evasive witness and he contradicted his instructions to counsel on vital aspects. His problem was of course that he tried to sit on two chairs as correctly pointed out by Mr Jacobs. Whilst on the one hand saying that he cannot remember but then at the same time trying to dispute that he killed the deceased. These two defences are mutually destructive. As pointed out by the state he also had a very selective memory. As to events preceding the killing of the deceased he could remember what he drank at the shebeen, that they played snooker with the owner and that Zodwa placed the child on the floor next to the snooker table. As soon as they,

that is now he and Lydia, left the shebeen, his memory miraculously disappeared. He tried to convince the Court that he did not take notice of the child which is highly improbable. Clearly he falsely tries to distance himself from the child due to the inherent incriminating nature thereof. Contrary to his section 115 plea explanation where he merely stated that the upon his arrival he sat on a couch and could not remember what happened after that, in evidence in chief he stated and contradicted himself that he fell asleep on the chair. Of course this was never put to Lydia.

He still maintains that he did not see the child although the child was clearly there. His denial of seeing the child was clearly false and also a lying version. He denied Lydia and Zodwa's evidence that he was normal when he left the shebeen. He maintained that he was drunk yet he did not provide any evidence in support thereof and no detail was given by him in his evidence as to what he had done. His version as to the injuries he sustained while apparently asleep, is similarly so improbable as he states that he did not see anyone assaulting him.

Already in chief his evidence was unsatisfactory and riddled with inconsistencies and improbabilities. Under cross-examination by Mr Jacobs his version disintegrated completely. He could not explain if he could not remember anything once he sat down on the couch how he could then possibly dispute that he did not kill the baby. He simply kept on saying he did not see the child which is of course nonsensical and absurd. When it was put to him that it was never put to Lydia that the child was not there, he, for the first time, stated that she was lying. This explanation is not only improbable (as the child was clearly there) but his further explanation that he was not told what to dispute is similarly unimpressive and improbable.

He disputes that he killed the child and being in possession of the garden hoe, yet that is at odds with his version that he cannot

remember or that he was asleep. This version is not only false but contradictory and falls to be rejected.

When Mr Jacobs put it to him that Lydia said he killed the child because of Satanism and that it was never put that he was sleeping,

he falsely and adamantly stated that he was sleeping. This explanation is so improbably it must be rejected. When it was put to him that he does not remember anything he cannot dispute that Lydia saw him standing there staring at the child, he came up with the absurd explanation that she is lying. He could remember entering the house and sitting down and that Lydia had the keys, yet he could not remember seeing the child all the way from the shebeen to the house. That is not only improbable but in fact false. His selective memory clearly negatively affected his credibility.

When the prosecutor kept on pressing him in cross-examination that how is it possible that he did not see the child, he simply just kept on saying he did not take notice of the child. He was eventually forced to come up with the astounding revelation that he thinks that Lydia was in fact the killer. I pause here to state that this was never his defence ab initio and even at the time when he gave his plea explanation. This was the coup de grace. Not only was this never put to Lydia it

was, as I stated, never his case and there was no mention thereof in his section 115 plea nor in his evidence in chief.

I reject that out of hand as false especially as it appears that accused and Lydia had a good relationship for a long time and as I stated earlier there is no reason for her to lie.

I also reject his version that he was so drunk as he wants the Court to believe. I accept the version of Lydia that they shared a quart of black label. The latter was also never disputed and his lame excuse that he did not tell his counsel to dispute that, is significant. I accept the version of Lydia and Zodwa that nothing was wrong with him at the time he left the shebeen and that he was not so drunk when he left.

His version that both of them were lying in this regard was never put to them and I reject it out of hand. Furthermore, I reject his version that he was assaulted by unknown people while he was sleeping and similarly that no one ever told him why he was being arrested. According to him he was only informed thereof at the police station. It is so improbable that it just cannot reasonably possibly be true. Even more improbable is that on his own version he never even enquired about these injuries which he sustained.

I reject the version of the accused that he was so drunk. I find that while he has clearly been drinking his averment that he was so drunk that he cannot remember is so exaggerated and improbable that it must be rejected as not reasonably possibly true. Of significance in this regard is paragraph B of exhibit E, that is the psychiatric report where it is stated in paragraph B psychiatric

diagnosis. Alcohol use disorder. And I emphasis the following. "This diagnosis however has no bearing on C and D below."

Paragraph C and D deals with the fact that he could understand the Court proceedings to meaningfully partake in his defence and that he did not suffer from a mental illness at the time of the commission of the offence which affected his ability to distinguish between right and wrong and act accordingly. His actions, this paragraph, this finding in paragraph B of the joint psychiatric report, which was handed in by consent, strengthens the finding of the Court in this regard. His actions on the scene is far too goal directed and purposeful as well as his utterances thereafter to conclude that he was so under the influence that he did not know what he was doing. As stated earlier, I reject that. I should add that significantly in this regard is that he referred to the child as this is not a baby, but it is Satanism. His amnesia is clearly contrived.

The evidence of Beauty Mbenye does not take the case any further as she merely stated that she found Lydia crying at the scene and when she enquired Lydia told her that accused has killed the child inside the house. It was never clarified whether Lydia's

utterances meant she actually saw the accused killing the deceased or whether she merely made such an inference. This was left hanging in the air. In fact, her evidence was very terse and cryptic and not detailed at all. I find that it cannot, on that basis, be used to attack the veracity of Lydia's evidence. Interestingly enough she does state that accused was not sleeping as he avers and that he told her when she asked why he had killed the child, he stated that she must ask Lydia. He does not know.

If I accept that it means simply that the accused version that he was sleeping is in fact false. I accept her evidence in this regard.

The last state witness, Constable Khurombi's, evidence can quickly be disposed of. He was one of the first police officers

on the scene. Although he initially stated that Lydia told him that, and that is the way he understood it at least, was that accused was hacking the child in her presence. He later conceded that it is possible that he misunderstood her and that she was not in fact present as she was somewhat confused. That explanation is strengthened when regard is kept that he was Venda speaking and he spoke with her in IsiZulu whilst we know that in evidence in chief she testified in Sesotho.

I am satisfied that there is more than enough scope for miscommunication in these circumstances and it does not mean that the witness Lydia, actually saw the accused hacking the deceased. Constable Khurombi also conceded that he could not really say if the accused was so intoxicated as he did not speak to him and he also did not see him walking around where he could be observed.

I then turn to the findings I make.

Firstly, I therefore find that accused was found with the garden hoe in his hand, standing next to the deceased and staring at her. There was no one else in the house at that stage. It is undisputed that there was blood found on the garden hoe that was the blood of the deceased. See in this regard the biology, also referred to as the DNA report, exhibit D of warrant officer Zanele Promise Zuma. Quite clearly the only reasonable inference to the exclusion of all other inferences to be made from the objective facts is that it was in fact the accused who had killed the deceased with the garden hoe. In this regard I refer to the well-known case of *R v Blom* 1939 AD 188 at 202-3.

I then must deal with the injuries. If one looks at the post-mortem report exhibit B it requires some more elucidation.

In firstly, in exhibit B the post-mortem report, compiled by Dr Wiets Hermanus Steyn, he stated that the cause of death was determined to be a head injury due to blunt trauma. If one simply just pauses here and has regard to the fact that on the photos the garden hoe is visible. It is clearly a substantial instrument and would obviously be reconcilable with the fact that that caused the injuries.

I then go to paragraph (iv), that is on page 2 of the post-mortem report, where several injuries are noted. They are numbered

from 1 to 10. I repeat paragraph iv on the second page of the post-mortem.

Firstly, it is stated in paragraph 1 that there was a contusion, a triangular contusion 7 cm by 5 cm by 7 cm. This means there was a bruise.

Secondly, reference is made to a linear abrasion 2 cm above the right nipple in a horizontal way. A linear abrasion means simply it is a scrape wound.

Paragraph 3 there is a contusion on the right upper arm.

Paragraph 4 a linear abrasion on the left shoulder posterior. As I stated a linear abrasion is a scrape wound.

Paragraph 5 there is a laceration of 7 cm on the coronal plain on the occipital parietal junction. This wound is visible in photograph 31 and 32 of the exhibit C. A laceration of course means that there was deep cut.

In paragraph 6 it is noted that there was also a linear abrasion, so another scrape wound on the right forearm. The doctor then also notes that the baby had a full nappy on. There was faecal matter and it was totally filled with urine.

Paragraph 8 he notes that there was secretion of food stuff from the nose and mouth and lastly in paragraph 9, he states that there was a small contusion on the left nostril. So another small bruise on the left nostril.

He then ends off in paragraph 10 by stating that there was no other injuries noted and that, if I understand this correctly, it means that he has seen worst cases of child abuse.

Of interest is then paragraph 5 where it is noted with reference to the scalp that there is a laceration, in other words a deep cut with sub-aboniorotic bleeding in the occipital area. This means that there is blood between the brain and its exterior covering. This is visible in photograph 31 and 32 of exhibit C. Of more importance is that the doctor then notes that the skull was in fact cracked with a crack from the left ear to the right ear. The only inference being that whatever was used to cause this injury was applied to the skull with some force.

In paragraph X, Roman X in respect of the thoracic cage and the diaphragm the doctor notes that there were fractured ribs on the 6th and the 7th of the right mid clavicle line. In other words, beneath the collar bone, that this is consistent with the injury in point 4 in paragraph 2 which we will recall is the linear abrasion 2 cm above the right nipple. There is also a contusion, that is a bruise on the monogram sternum, that is the breastbone. So, if one has regard to these injuries it is clear that there were several injuries, serious injuries, ribs were cracked, the skull was cracked. It is very clear that whoever inflicted these wounds did so with some force.

Bearing in mind the multitude and serious nature of these injuries, especially if it is seen cumulatively it is consistent with the deceased being assaulted with a formidable weapon such as a garden hoe and that caused the death as described and I quote “Head injury due to blunt trauma.”

In this regard I then want to refer to the following case law. R v Mlambo. I refer to the minority judgment of Malan AJA in R v Mlambo 1957 (4) SA (AD) where he is reported to have said the following about the proof of intent in such circumstances at page 737 next to C-F, and I quote:

“Proof of motive for committing a crime is always highly desirable, more especially so where the question of intention is in issue.

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

Then at paragraph 738 next to the A-D and I quote:

“In my opinion there is no obligation upon the Crown to close every avenue of escape which may be said to be open to an accused. It is sufficient for the Crown to produce evidence by means of which such a high degree of probabilities raised that the ordinary

reasonable man, after mature consideration, comes to the conclusion that there exists no reasonable doubt that an accused committed the crime charged. He must, in other words, be morally certain of the guilt of the accused. An accused claim to the benefit of doubt when he maybe said to exist must not be derived from speculation but must rest upon a reasonable and solid foundation

created either by positive evidence or gathered from reasonable inferences which are not in conflict with, or outweighed by, the

proved facts of the case. Moreover, if an accused deliberately takes the risk of giving false evidence in the hope of being

convicted of less serious crime or even, per chance, escaping conviction altogether and his evidence is declared to be false and

irreconcilable with the proved facts a court will, in suitable cases be fully justified in rejecting and argument that notwithstanding

that accused did not avail himself of the opportunity to mitigate the gravity of the offence, he should nevertheless receive the same benefits as if he had done so.”

This quotation and the position set out is clearly apposite in the facts of this case. I also have regard to the case of *S v Mtsweni*. In this regard *S v Mtsweni* 1985 (1) SACR 590 (A) at 593 next to E. This case simply says that the mere fact that the accused is lying does not mean that he is guilty of a crime of which he is charged but that it is merely a factor to be taken into account when inferences are made as to the guilt of the accused and that one should be cautious to give too much weight thereto.

As I stated bearing in mind the number and the nature of the injuries as described in the post-mortem report, the nature of the weapon, that is now the garden hoe, there can be no other finding as to the form of mens res than that of dolus directus.

The accused, according to the indictment, is charged with murder read with the provisions of section 51 (1) of Act 105 of 1997. The indictment and the summary of substantial facts, however, does not set out on what basis that is alleged. At first blush it appears to be a reference to either planned or premeditated murder, that is contained in part I

of schedule 2. Mr Jacobs, on behalf of the state, however, correctly so conceded that there is no evidence to justify such a finding. Mr Mashabela agreed with this submission. There is one further aspect. Part I of schedule 2 does however refer to the following and I quote, that is read with the provisions of section 51

(1) the last paragraph, paragraph (f) and I quote,

“(f) The death of the victim resulted from, or is directly related to, any offence contemplated in section 1 (a) to (e) of the Witchcraft Suppression Act of 1957 (Act 3 of 1957).”

However, there is no such allegation in the indictment nor did Mr Jacobs argue in that vein. It also does not appear to me to be the state case. The utterances of the accused at the scene, that this is not a baby but that this is Satanism appears to me nothing more than that or an afterthought when the accused was in fact caught red-handed at the scene.

Mr Jacobs then also referred to assault on a child however that reference in fact appears only part III and I quote:

“Assault with intent to do grievous bodily harm on a child under the age of 16 years.”

So that reference is not in terms of section 51 (1). Clearly part III, as I referred to, triggers a minimum sentence of 10 years' imprisonment in terms of section 51 (2) (b). Clearly it is not applicable as the charge here is murder. Clearly what is left can only be murder read with the provisions of section 51 (2) which is referred to in part II of schedule 2 of Act 105 of 1997. In other words, murder in circumstances other than those referred to in part I.

Accused must please stand.

Mr Dlamini, you are convicted of murder read with the provisions of section 51 (2) of Act 105 of 1997, that is the Criminal Law Amendment Act.

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BROODRYK, AJ

ACTING JUDGE OF THE HIGH COURT

DATE: ...4/11/20.....

For the State: Adv K Jacobs instructed by the Director of Public Prosecutions, Pretoria.

For the Defence: Adv Mashabela

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