

SOUTH AFRICA / JUDGMENT

S v Mabunda (CC15/2021) [2022] ZAMPMBHC 50 (24 June 2022)

[2022] ZAMPMBHC 50**COURT**

Mbombela High Court, Mpumalanga

BEFORE

C I Moosa

CASE / FILE NUMBER

CC15/2021

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Source record**IN****THE HIGH COURT OF SOUTH AFRICA****MPUMALANGA****DIVISION, MBOMBELA (MAIN SEAT)****CASE****NO: CC 15/2021****DPP****REF: M1/2021****REPORTABLE:**

YES

OF

INTEREST TO OTHER JUDGES: NO

REVISED:

NO

24

June 2022

In

the matter between:

THE

STATE

V

MUGIYO

ULRICH

MABUNDA

ACCUSED

JUDGMENT**ON MERITS**

MOOSA J:

[A]

INTRODUCTION

[1] MR MUGIYO ULRICH MABUNDA ('accused') is arraigned on the following charge:

[1.1] MURDER READ WITH THE PROVISIONS OF SECTION 51(1) OF THE CRIMINAL LAW AMENDMENT ACT 51(sic) OF 1997

IN THAT upon or about 14 May 2020, and at or near Stonehenge, in the district of Mbombela, the accused did unlawfully and intentionally kill Tebogo Dikeledi Auspicious Mabunda, an adult female person.

In case of conviction, the said Director of Public Prosecutions prays for a sentence in terms of the provisions of section Section 51(1) read with Part 1 of Schedule 2 of the Criminal Law Amendment Act, 1997 (Act 105 of 1997) in that the murder was planned and/or premeditated.

[2] The accused pleaded not guilty to the charge, which he faced in the indictment. Adv De Necker ('Mr De Necker') on behalf of the accused confirmed that the plea of the accused was in accordance with his instructions, and that the accused elected to remain silent. The accused accordingly confirmed the plea explanation made on his behalf.

[3] The accused was duly explained the provisions, application and implications of the Criminal Law Amendment Act No. 105 of 1997 ('Minimum Sentences Act'), as well as the seriousness thereof. The accused confirmed that he accordingly understood the provisions of the aforementioned Act.

[B] ADMISSIONS

[4] The accused did not make any admissions in terms of section 220 of the Criminal Procedure Act, 51 of 1977 ('CPA') at the commencement of the trial on Monday, 04 October 2021.

[C] EVIDENCE

[5] To discharge the onus upon it to prove that the accused committed the crime charged, the prosecution called the following viva voce witnesses:

[5.1] Ntombikayise Jabu Nkosi ('Nkosi'), the accused's domestic helper testified, inter alia, as follows:

[a] She was in the employ of the accused and his family for a period of 3 (three) years up until the time of the incident. The accused and deceased resided in the family home together with their three children, Kenso, Phulani and Katikani.

[b] On Thursday, 14 May 2020 she completed her daily chores and was seated with the children. At approximately 16h55, the accused entered the home and proceeded to the guest room, sat down and a short while later emerged from.

[c] At this stage, she departed from the lounge and proceeded to Katikani's bedroom. She thereafter heard the accused making a telephone call to the deceased. The telephone was on loudspeaker and resultantly she was able to hear the conversation between the parties. The accused inquired regarding the deceased's whereabouts, and whereupon she informed him that she was en route home, and that she would arrive thereat shortly.

[d] The deceased arrived a short while later and proceeded to the guest room, wherein she usually prays on a daily basis. She did not enter that room as the accused was therein, but proceeded to the main bedroom.

[e] The accused thereafter proceeded to the bedroom and requested to speak to the deceased, whereupon she complied and followed him. The children followed them as they were proceeding outside, and the accused then requested them for privacy, as he wanted to speak to the deceased alone.

[f] She entered the bathroom and observed the accused returning from outside, entering the guest room and thereafter proceeding outside again. She began to take a shower and a short while later heard Kenso screaming and saying "What are you doing with my mum".

[g] She came out of the bathroom, and saw Kenso running and he entered Katikani's bedroom. She followed him into the room and saw him looking out. She looked out of the window and saw the accused holding a firearm and he was busy shooting in front of him. When he finished shooting, she saw him bend down to where the deceased was lying. The

accused was approximately 20 (twenty) metres away and the visibility was good, as it was not dark.

[h] She heard the neighbours shouting for Kenso and ran outside. At this stage she heard a gunshot, and discovered that the accused was also injured. He was asking for water to be brought to him. She observed the accused to be lying alongside the deceased, and he was crying.

[i] The neighbours summoned the members of the SAPS and the members of the Armed Response team.

[j] During cross-examination, she denied the proposition that the deceased had arrived home before the accused. She was clear that it was the accused who arrived first in the Jeep, and the deceased thereafter in the Mercedes Benz.

[k] She denied the proposition that the accused did not make any call to the deceased at 17h00. She was adamant that he had made a telephone call to the deceased, and she heard the conversation, as it was on loudspeaker.

[l] She confirmed that she did not hear the conversation between the accused and deceased when they were outside. Further that there was no any heated discussion between the parties.

[m] During cross examination it was put to her that the accused was in possession of his firearm at the time, as he normally carries it with him. She was unable to comment, and stated that she did not know.

[n] During cross-examination, she confirmed that she had made two statements to the police. The first one was made on 14 May 2020, and the second one on 16 November 2020. She further stated that Sergeant Horn ('Sgt Horn') did not read the statement back to her, and accordingly was made to sign the statement without reading the contents thereof. Further, that she was not asked to take an oath, and did not confirm to him as to whether the contents were true.

[o] At this stage of the cross examination, Mr De Necker then applied that a trial within a trial be held in order to determine the admissibility of the statement, as he required to put the contents of the statement to Nkosi. Accordingly, having heard argument from both parties, and having considered the dicta in

Rex v Nyede 1951(3) SA 151 (T) and S v Mcoseli 2012 (2) SACR 82 (ECG), I ruled that a trial within a trial be held.

Accordingly, the evidence of this witness stood down for practical reasons, pending the evidence of Sgt Horn (third witness), who was unavailable at this stage. However, I shall deal with the remainder of her evidence hereunder for ease of reference, having found the statement to be admissible in law.

[p] During her further cross-examination, she was adamant that the statement was not read back to her, despite the contrary evidence of Horn, in this regard. She further stated that she was having difficulty in communicating with Horn in English, and was unable to properly articulate herself. Accordingly, there were various aspects that she had told him which were not written down. During re-examination she stated that as a result thereof it became necessary for her to make a second statement, and at this stage she communicated in Siswati.

[q] During cross-examination she stated that she heard possibly 5 (five) shots being fired, during the shooting.

[r] During clarifying questions by the Court in respect of paragraphs 6 (six), 7 (seven) and 8 (eight) of her statement, she stated that she did not know where Sgt Horn obtained the information in the aforementioned paragraphs.

That in essence concluded the evidence of the witness, Nkosi.

[5.2] Jacobus Johannes Meiring ('Meiring'), a member of the Stonehenge Security Group and the first responder who attended the scene testified, inter alia, as follows:

[a] On Thursday, 14 May 2020 at 17h29 he received a call regarding the shooting incident. He immediately proceeded to 7 Sekretariesvoel Street, Stonehenge and upon his arrival observed the deceased to be lying face down and the accused near her. He noted that the accused had a pistol in his right hand, and he asked him as to who shot the deceased. The accused did not say anything.

[b] He removed the firearm from the accused's hand, and noted that the deceased did not have any pulse. The accused said to him that he should finish him off. He then responded to the accused that justice will have to take its course. He noted that the accused was injured on his left arm and chest. He subsequently handed over the scene to members of the SAPS.

[c] During cross-examination he stated that he could not dispute the proposition that the accused was shot three times in his upper body and once on his left arm. He noted multiple injuries on the upper left torso of the deceased.

[d] He came to the conclusion that the accused was the one who fired the shots as he was holding the firearm in his right hand. It was proposed to him that he could not exclude the conclusion that the deceased fired the shots; and to which he stated that he could not. However, he concluded that it was the accused who fired the shots, as he was still alive and his wife was dead. His conclusion was further fortified by the request of the accused to finish him off.

That in essence concluded the evidence of the witness, Meiring.

[D] TRIAL WITHIN A TRIAL

[5.3] Sergeant Michael Ockert Horn ('Sgt Horn'), a member of the South African Police Services ('SAPS') with 21 (twenty one) years of service and the investigating officer testified, inter alia, in the trial within a trial as follows:

[a] He is no longer in the employ of the SAPS since

31 July 2020. He confirmed that he took down the first statement from Nkosi, shortly after the incident.

[b] He duly interviewed Nkosi in English, and according to him there appeared to be no real challenge in them understanding each other. He wrote down what she explained to him. He did not add anything to the statement, nor leave out any detail therefrom.

[c] He read the statement back to her once it was completed, and she was satisfied and did not want to add anything thereto. She duly signed the statement, and he accordingly had the statement commissioned by the Commissioner of Oaths.

[d] During cross-examination by Mr Molatudi, Sgt Horn conceded that it is not unheard off that a witness may make more than one statement. Further that one cannot come to the conclusion that all subsequent statements are false.

[e] He conceded that he was aware that English was not Nkosi's first language when he interviewed her, and could not dispute the fact that Siswati was Nkosi's home language.

[f] During re-examination by Mr De Necker he stated that if he was told that the witness saw the accused shooting the deceased, he would not have missed it and it would have been included in the statement.

That in essence concluded the evidence of Sgt Horn in the trial within a trial

[6] Accordingly, having heard argument from both parties, I duly ruled that the statement that was made by Nkosi was admissible in law, and accordingly allowed Mr De Necker to continue with his cross examination in respect of the contents of the statement. I have accordingly dealt with this aspect during the evidence of Nkosi.

[E] GUILTY PLEA

[7] I pause to mention that at this stage of the proceedings, Mr De Necker duly informed the Court that both himself and Mr Molatudi have been engaged in certain discussions, and whereupon the accused has decided to change his plea.

[8] Accordingly, on 08 October 2021 the accused pleaded guilty to the charges in terms of section 112 (2)(b) of the CPA, freely and voluntarily, in his sound and sober senses, and without any undue influence being applied upon him, inter alia, as follows:

"[a] I admit that on or about 14 May 2020 and at or near Stonehenge in the district of Mbombela, Mpumalanga, I caused the death of Tebogo Dikeledi Auspicious Mabunda unlawfully and intentionally by shooting her with a firearm. The deceased was an adult female at the time of her death.

[b] I further declare that the implications of these admissions have been explained to me, and I understand that the State does not need

to prove the allegations contained herein and that it stands as prima facie proof thereof.

[c] The provisions of Section 51(2) of the Criminal Law Amendment Act 105 of 1997 (as amended) were explained to me by my legal representative, and I understand that should I be found guilty, in the absence of compelling and substantial circumstances justifying the imposition of a lesser sentence, a minimum sentence of 15 years imprisonment may be imposed on me. I have been advised and accept that this plea stipulates that I plead guilty in terms of Section 51

(2) (a) (i) of the Criminal Law Amendment Act 105 of 1997 (as amended).

[d] The deceased, Tebogo Dikeledi Auspicious Mabunda, is the person mentioned in the murder charge in the indictment. On 14 May 2020, the deceased and I were married and resided together with her 14 year old son (my stepson), our 9 year old son, and our 4 year old daughter at house no 7 Sekretariesvoel Street, Stonehenge in Nelspruit.

[e] The deceased and I were married some 10 years ago. She was employed as a quantity surveyor in the Department of Public Works.

[f] On that day of the incident I called the deceased from my Jeep Wrangler vehicle, as I wanted to discuss the plans for us relating to the coming weekend. I wanted to visit my mother who was ill, and my wife had stated that this was a challenge as she was working on Saturday due to the situation with the Covid pandemic. My wife indicated that she was already at home, and that we would talk when I arrived at home.

[g] Upon arriving at home I found my wife in the house, and indicated that we should go and talk outside, as it was our habit of always

going outside to discuss matters that we did not want the children to be part of. We duly went outside, and we talked for quite a while. Later on we went to sit in my Jeep vehicle to talk further.

[h] Whilst we were talking in my vehicle, my wife received a phone call and it was clearly work related, as she asked the other person

to send her a report, obviously relating to work. It was a quick conversation and I thought nothing of it.

[i] As we were talking another phone call came to my wife while we were seated in my stationary and switched off vehicle. My wife opened

the door and exited the vehicle and I remained seated inside the vehicle. I saw that my wife walked to the back of the vehicle talking on the phone and she was busy on the phone for approximately five to seven minutes. It was obvious to me that I was not meant to listen to the conversation and the whole conversation look very suspicious and in the circumstances.

[j] I was then very surprised as my wife would always and usually speaking in my presence and upon realising that something odd was at

hand, I exited the vehicle and asked her why she left the vehicle and who she was talking to.

[k] My wife quickly ended the call and claimed somewhat lackadaisical and to my utter surprise that it was her boyfriend on the phone. I could also hear the voice of a male person on the other side when I initially approached her before the call was ended.

[l] I pause to say here that my wife and I had a challenging past where she at times would engage in adulterous affairs which then caused me severe emotional hardship, but after every occasion and upon her pleas I resumed our relationship. After her last affair that

I was aware of, and that gave rise to the birth of her eldest son with another man, we reconciled and decided to get married in order to commit fully to our relationship. This happened some 10 years ago. I would want to believe that that was the last affair she had, but now after all, I would never be sure unfortunately.

[m] At the time when my wife told me about yet another new boyfriend on the day of the incident, my sense of rationality left me at that

moment as my wife intimated and said that it was high time that I face the reality of her belonging to another man and must accept that she has come to other pastures and was leaving me. Our whole past came back in one split second, and the emotional despair and pain that I had felt so many times in our past was suddenly back. This time it was actually much much worse feeling this betrayal, as we now had three children, but that did not even prevent the deceased from repeating her past conduct of infidelity.

[n] From the State case I learnt during preparation for this trial that my wife had already been in the process at that time of instituting divorce proceedings with her attorney, Miss Tersia Marshall.

[o] After this great shock and emotional blow that I had just been dealt in a very callous fashion by the deceased, I took out my firearm and started shooting at my wife, not caring at that time whether I hit her or not. I fired several shots at my wife with my firearm, and in the haze I was in I tried to end my own life by shooting myself multiple times in the chest and once in my left upper arm. I always carry my firearm with me, although it is concealed always.

[p] The crime was committed in the heat of the moment, at a time when I was emotionally charged and deeply hurt by a callous rebuff from

the person to whom I was married and in love with since High school and thus more than 20 years.

[q] The adulterous affair of my wife flooded my mind and provoked me to the extent that I momentarily lost control of my inhibitions and shot the deceased. During the firing of my firearm at my wife and myself, I can't recall all the details as I was too angry and for a certain period lost my consciousness, but I remember being admitted in Medi Clinic Hospital in Mbombela. I remember that the medical personnel were taking my information and cutting my T-shirt as I was bleeding profusely and I still recall that I screamed that I wished that I could die. I do not remember having spoken to Mr Meiring at my house as he testified in this matter.

[r] I further remember that there were a lot of doctors and that I was confused as they told me that I shot my wife and also myself. I was informed that I had four bullet wounds in my upper torso and my arm and felt that my left hand was not working at that point in time. I was told that I almost died due to my injuries.

[s] The following day I was informed that my wife had died on the scene and the police also informed me in hospital that I was duly under arrest and subsequent to that appeared in the court at a later date after being fit to attend court.

[t] I have no recollection of exactly how many shots I fired at the deceased, and neither do I have any recollection of how many times I shot myself.

[u] I always carry my firearm with me as I was in the security sector working at Transnet at that point in time but has since been unemployed since the month of November 2020. I was a police officer for eight years prior to my employment at Transnet security division where I have been employed since the year 2010 until November 2020.

[v] My wife and I had known each other since high school but we only started dating at Technicon Pretoria where we were both studying. I have therefore known her since school and we were in love since high school, but married only for the last 10 years. My wife also had another son with another person that she had a relationship with during our relationship, as I described hereinabove. He was two years old when we decided to get married, and although he is my stepson, I have always raised him together with our other two children as one of my own children.

[w] I wish to state unequivocally that I am guilty of a crime of passion, and not one of gratuitous violence. I acted with diminished

responsibility and impaired judgment at the time of this very sad incident that I must carry with me for the rest of my life. Despite

my plea that I acted in a state of diminished responsibility, I admit that my conduct was unlawful and intentional in the sense that I knew that firing shots at the deceased might cause her death, but I still did so regardless of the possible consequences that I had foreseen, because of the reasons mentioned herein above.

[x] I wish to state that despite everything that happened, my worst/ gravest punishment is that I killed the woman whom I still love

dearly, the one and only woman I loved the most in my life and for the most of my adult life. She was also the mother of my children. I have deep remorse over my conduct and actions and will regret this until the day that I die.

[y] It will be submitted, based on all of the above-mentioned admissions that this was an incident which happened on the spur of the moment and as a result of emotions and loss of temper or anger or inhibitions. I did not plan to kill my wife.

[z] I further admit that Dr Sunnyboy James Mabelane

(‘Dr Mabelane’) performed a medico-legal post-mortem examination on the body of the deceased person on 15 May 2020 and recorded his findings on the form GW7/15, with Death Register Number DR 164/2020, which is handed in as Exhibit “C”.

[aa] The originality, authenticity, facts and findings in the post-mortem report are correct, and the cause of death of the deceased is correctly recorded as: “Gunshot wounds to the Body”.

[9] Mr Molatudi duly informed the Court that the plea was not in accordance with the State case, and that it did not conform with the evidence of the State. Advising in the circumstances, that the State did not accept the guilty plea of the accused. Accordingly, stating that the State wished to proceed with leading further evidence in the trial, in accordance with it's case.

[10] Having due regard to the provisions of section 113 of the CPA, and which provides that: “ ...if the court is of the opinion for any other reason that the accused's plea should not stand, the court shall record a plea of not guilty and require the prosecutor to proceed with the prosecution: Provided that any allegation, other than an allegation referred to above, admitted by the accused up to a stage at which the court records a plea of not guilty, stands as proof in any court.” [1] Accordingly, a plea of not guilty was entered on behalf of the accused.

[F] EVIDENCE

[11] The State then proceeded to lead the evidence of a further five witnesses, in support of the charges and in accordance with the State case.

[11.1] Tersia Marshall ('Marshall'), a practicing attorney in Mbombela testified, inter alia, as follows:

[a] The Ward Counsellor referred the deceased to her as a client on Saturday, 02 May 2020. She accordingly met with the deceased on the aforesaid date, and duly received instructions to institute an action against the accused for a decree of divorce.

[b] During her consultation and preparation she considered, inter alia, the finances of the deceased, and noted therefrom that she was responsible for funding the entire marriage, and that she funded

the accused's lifestyle. The deceased informed her during one of their many conversations, that the accused was full well aware of the divorce proceedings, and that he had consulted with his family in this regard.

[c] On Sunday, 10 May 2020 at approximately 19h00 the deceased called her and reported to her that she was feeling scared. She comforted the deceased and informed her that she will duly make an application for an interdict against the accused, on Monday, 11 May 2020.

[d] She duly had a conversation on Monday, 11 May 2020 with the deceased regarding the application for the interdict. The deceased informed her that she was scared to proceed with the application, as it would aggravate the situation at home.

[e] She confirmed that she was in constant communication with the deceased via Whats App, email and voicemail during the period Saturday, 02 May 2020 – Thursday, 14 May 2020. The deceased was unhappy about the divorce action, and felt rather embarrassed as a result thereof. She duly questioned the deceased regarding the reason for the divorce, and more especially if there was any fault on her part. The deceased responded and informed her that there was no fault on her part.

[f] On Thursday, 14 May 2020 at 17h26, she received a telephone call from the deceased. The deceased was crying and informed her that the accused had attempted to assault her once again, and that she was scared. She requested the deceased to take the children with her to her aunt's house, and that they would meet the following morning, in order to obtain an interdict against the accused.

[g] Whilst speaking to the deceased, she heard her screaming and thereafter heard two loud bangs and the call terminated. She immediately called the deceased at 17h28, and her phone just rang and remained unanswered. She thereafter noted on one of the security group chats that there was a shooting. She tried to make contact with the deceased once again, and was unsuccessful in this regard.

[h] She proceeded to the deceased's residence, and upon her arrival thereat observed that the members of the SAPS and the paramedics were on the scene. She was duly informed that her client had passed away, by members of the SAPS.

[i] During cross-examination she confirmed that the deceased did not want to proceed with the application for the interdict, as it would have aggravated the situation at home.

[j] It was put to her that the accused will state that he was never aware of the potential divorce proceedings. She stated that the deceased informed her that the accused knew her every move, and that he was aware of the divorce proceedings, as he had consulted with his family.

[k] It was further put to her that the accused will deny that she was funding his lifestyle, and that he in fact paid for the motor vehicles and school fees. She responded that the deceased was paying for the motor vehicles and that these vehicles were registered in her name. Further, that the deceased paid for everything.

That in essence concluded the evidence of Marshall.

[11.2] Bonani Dolly Hlongwane-Sithole ('Hlongwane'), the deceased's friend testified, inter alia, as follows:

[a] She knew the deceased since 2000, when they met at the Tshwane University of Technology. They continued being friends during their educational career, and even after they qualified. She commenced working at Eskom in Standerton, whilst the deceased was employed at the Department of Public Works, Nelspruit.

[b] Both their first born children were born out of wedlock in 2006, and during this time they continued being friends. The deceased subsequently informed her that she was getting married to the accused. She was surprised that they had reconciled, as they had broken up whilst they were at University, due to them having problems.

[c] She confirmed that the deceased's eldest son, Kenso was born during the time that the deceased and accused were not together after University, and which breakup was for a period of 4 – 5 years.

[d] They kept in touch and continually discussed their relationships with each other. Their discussions continued until two weeks prior to the deceased's death.

[e] The deceased was not a secretive person, and did not hide things. The deceased was a frank person and during their employment they would have to interact with male colleagues, as they worked in a male dominated industry.

[f] The deceased confided in her regarding problems that she experienced from the first year of her marriage to the accused.

[g] During April 2020, they spoke and the deceased informed her that she was no longer happy in her relationship with the accused, and that she was seriously considering divorce. She advised the deceased to rather stay and to take care of her children. The deceased responded to her in a Whatsapp message, and told her that she will continue with the divorce proceedings after the lockdown.

[h] During cross examination she was adamant that the accused and deceased were separated for a period of 4 – 5 years after University, and she was full well aware of this fact as they were communicating with each other regularly.

That in essence concluded the evidence of Hlongwane.

[G] INTERLOCUTORY APPLICATION AND RELATED MATTERS

[12] At this stage of the proceedings on Friday, 08 October 2021 at 13h45, Mr Molatudi informed the Court that he intended to call Khenso Matsani (15 years old) as his next witness, and further advising that this witness be allowed to testify via the closed circuit television system in terms of section 158 of the CPA. Arguing further that this witness was at home on the day in question, and that the witness would suffer undue stress if he testified in open court. Mr De Necker responded by informing the Court that he required time to prepare himself in order to reply to the application. Accordingly, by agreement the matter was postponed to Monday, 11 October 2021 for this purpose.

[13] On Monday, 11 October 2021 at 10h00 Mr De Necker informed this Court in chambers that the accused was ill, and that he is awaiting the medical certificate from the accused's family. At 12h30, the medical certificate was duly received, and which was valid until 15 October 2021 (Exhibit "D"). Mr De Necker advised the Court that he did not have any further

information regarding the accused's condition. After hearing submissions from both parties, I duly handed down a Court Order wherein, inter alia, I authorised a warrant of arrest for the accused, and stayed same until Wednesday, 13

October 2021. The accused was ordered to provide a medical certificate with particularity and specificity setting out the diagnosis and further prognosis of his medical condition. I simply did so on the basis that the medical certificate was thunderously silent regarding the accused's condition and/or ailment.

[14] On Wednesday, 13 October 2021, counsel attended at my chambers and I was informed by Mr De Necker that the accused was present at Court, but was very ill and could not stand or sit upright, and was lying down. Advising that he was unable to take proper instructions from the accused, and would not venture close to the accused, for the sake of his own personal safety. Further advising that the accused attended Court as his treating medical practitioner did not want to divulge any information regarding his medical condition.

It further emerged during the discussions that the integrity of the medical certificate was placed in dispute by the State. Mr Molatudi

informed the Court that he had no other option but to seek an order to have the doctor attend Court, in order to indicate as to the accused's medical condition and the prognosis thereof. I pause to mention that this request was precipitated by the fact that the deceased's family informed him that the treating doctor was a relative of the accused. Further, it was common cause that the accused had failed to produce a further medical certificate, as ordered to, in my court order dated Monday, 11 October 2021.

[15] Having duly heard argument from the parties and having carefully considered the matter, I handed down a Court Order, inter alia, ordering the investigating officer to forthwith take the accused to the Rob Ferreira Hospital, Mbombela together with the court order, in order for the attending medical practitioner to examine the accused, and to report on the fitness of the accused to stand trial on Thursday, 14 and Friday 15 October 2021.

Further ordering that Dr Zelda Mkhonto ('Dr Mkhonto') attend court on Thursday, 14 October 2021 at 10h00, together with her medical records in respect of her examination and diagnosis of the accused, as conducted on Monday, 11 October 2021.

[16] On Thursday, 14 October 2021, Dr Mkhonto duly attended court and testified regarding her examination of the accused, and in respect of the medical certificate. Further, the medical report from the attending doctor at Rob Ferreira hospital was received and considered. However, the accused was not before the Court, at this stage, as he was still at hospital. Mr De Necker stated that he did not have any questions for Dr Mkhonto, as his client was not before the Court, and further that these proceedings were being conducted in the absence of his client.

Having duly considered Dr Mkhonto's evidence, as well as the report from Rob Ferreira Hospital (Exhibit "E") and in the interests of justice and the right of the accused to a fair trial, the trial was postponed in the accused's absence for further hearing to Monday, 02 November 2021 until Wednesday, 04

November 2021.

[17] Upon resumption on Monday, 02 November 2021, the accused launched an application for a special entry of irregularity or illegality in terms of section 317 of the CPA. Alleging that inter alia, that he did not enjoy the right to a fair trial and consequently seeks that the matter be set aside and remitted to start de novo before a new presiding judge. The respondent opposed the application and submitted that such application is not made bona fide and that it is frivolous or absurd, and that the granting of such an application would be an abuse of the process of court.

[18] I do not intend dealing with the merits of the application in this judgment, for the sake of brevity and to avoid unnecessary prolix, as I handed down a detailed judgment in respect of the aforementioned application on Thursday, 11 November 2021.

I pause to mention that I accordingly found, inter alia, as follows:

[a] "[61] I find that the so-called irregularities relied upon did not qualify because they all concerned an attack on a ruling made by the court during the proceedings, and they do not relate to irregularities that affect the trial that do not appear from the record.

[b]

[64] I find that the application for special entry of irregularity or illegality has been introduced as a red herring in this trial".

I concluded, inter alia, "[63] Having considered the application, as well as the nature of the alleged irregularity, and the fact that the application is in respect of an interlocutory matter dealing with the failure of the accused to attend court and his initial undisclosed medical condition, and which is totally unrelated to the evidence led in the main trial, I am impelled to conclude that the application is not made bona fide, is frivolous and absurd and that the grant of the application based on the allegations contained therein would be an abuse of the process of the court".[2]

Accordingly, having taken the view that the applicant failed to satisfy the requirements set out by the Supreme Court of Appeal in *S v Nkabinde* 2017

(2) SACR 431 (SCA), I refused the application for special entry of irregularity in terms of section 317 of the CPA.

[19] Mr De Necker informed the Court that he required time to take further instructions regarding the aforementioned judgment and order of this Court. Further, that he was unable to get hold of his instructing attorney at that stage. Accordingly, it was agreed that this matter be postponed to Friday,

19 November 2021, in order for the defence to advise regarding its position in respect of the judgment of this Court. Upon resumption,

Mr de Necker informed the Court that the accused was not going to note an appeal against the judgment, and accordingly the matter could be set down for further hearing.

[H] EVIDENCE

[20] Upon resumption on Monday, 10 January 2022 the State called the following witness in support of its case:

[20.1] Lieutenant Colonel Dorcas Mbali Mavimbela ('Mavimbela'), a member of the SAPS and the Provincial Co-Ordinator: Social Work testified, inter alia, as follows:

[a] The investigating officer referred Khenso Matsane ('Matsane') for her to provide an expert report as to whether the child would be able to testify in court.

[b] She duly conducted two forensic assessment sessions with Matsane, and obtained a detailed history from him.

[c] Her forensic competency report was duly handed in as

Exhibit "G", and wherein she recommended that Matsane testifies with the assistance of an intermediary in terms of section 170A of the CPA. In support thereof submitting that he will suffer undue mental stress, and it would have a negative impact upon him, if he testified without an intermediary.

That in essence concluded the evidence of Mavimbela. Having carefully considered the report as well as her viva voce testimony, I ruled that the provisions of section 170A apply, and accordingly ordered that an intermediary be appointed for Matsane.

Accordingly, Ms Miranda Mhlanga ('Mhlanga'), a full time intermediary, was appointed and the evidence of Matsane proceeded, after having duly satisfied myself that Mhlanga was properly qualified, and competent to act as an intermediary. I pause to mention that I do not deem it necessary to appraise her evidence, as it simply dealt with her qualifications and competence, and which was not disputed by the parties.

[20.2] Kenso Matsane ('Matsane'), the deceased's 15 (fifteen) year old biological son and accused's stepson testified, inter alia, as follows:

[a] On 14 May 2020 at 15h00, he was in his bedroom. At that stage the accused, his siblings and Nkosi were all present at home. The deceased was still at work and arrived at home between 16h30 – 17h00.

[b] The accused was in the guestroom, and he observed that the deceased did not enter therein, but proceeded to her bedroom in order to pray. The accused then approached the deceased and requested her to join him outside, as he wanted to speak to her. He saw them proceed outside and where they remained speaking for a period of five to ten

minutes. He was able to hear their voices, but could not hear their conversation.

[c] The accused then returned to the house alone, and proceeded to the guestroom where he spent a few minutes therein. The accused had to pass his bedroom in order for him to gain access to the guestroom. The accused emerged a short while later and proceeded to walk past his room, at a hurried pace.

At this stage, he heard the cocking of a firearm. Having heard the cocking of the firearm, he immediately proceeded to follow the

accused to the garage. He did so, because he heard the cocking of the firearm and was suspicious as to what was going on. As he reached the garage door, he observed that the accused had closed it with a remote control, and therefore this prevented him from proceeding further.

[d] He returned to his bedroom and peeped through the window, but was unable to see them. He then busied himself with his mobile phone. A short while later, he heard the deceased screaming out his name – “Aah Kenso”. He asked his brother if he had heard their mother screaming, and to which he said that he did not. He then proceeded to Nkosi, and made the same enquiry, and to which he was told that she did not hear anything. He thought that he was hearing things. Whilst returning to his bedroom, he heard gunshots.

[e] He went out of the kitchen door and heard more gunshots. He proceeded to the main gate and observed the deceased on the floor, gasping for breath. He did not see the accused at this stage. He ran back into the house and immediately contacted the deceased’s younger sister. He thereafter proceeded outside, jumped the wall and awaited

the arrival of the ambulance.

[f] During cross examination he was adamant that he heard the cocking of the firearm whilst the accused walked past his bedroom to the outside of the house, and that it was not a figment of his imagination.

That in essence concluded the evidence of, Matsane.

[20.3] Warrant Officer Francois Viljoen (“Viljoen”), a member of the SAPS, stationed at the Cyber Crime Unit, Mpumalanga with 32 (thirty two) years of service testified, inter alia, as follows:

[a] On 29 January 2021 at 11h25, he received a sealed forensic bag (PAD 500115791), from the investigating officer, and which contained a Huawei VOG-L29 mobile cellphone, in order to conduct a forensic download of data relating to Nelspruit CAS 180/05/2020.

[b] He duly conducted logical and file system downloads of the phone, but was unable to extract any data relating to WhatsApp messages, as a physical extraction of data was not supported by the device. He accordingly used an external USB camera module and captured images of WhatsApp conversation data from the device relating to conversations with the WhatsApp user Tersia Marshall Attorneys with cellular number 0825768889.

[c] The WhatsApp conversation data, inter alia, included the following:

(i). On 10 May 2020 at 19h01, 19h02 and 19h03 – “Good evening Tersia. My life is at risk in this house. Witchcraft is taking part in this house and he will not stop until he gets what he wants. Please advise me. I think we should get an interdict to keep

him away from home. We should I now fear for my life”.

(ii) On 10 May 2020 at 19h08, 19h12 and 19h13 – “Are you available tomorrow to go to court? Okay, We can go at 14h00. It should be quiet then. Okay”.

(ii). On 11 May 2020 at 12h59 and 13h00 – “ Hi, T Received funds. Will proceed now. Copy of Antenup arrived this morning”.

That in essence concluded the evidence of this witness, Viljoen.

[20.4] Suzan Sibongile Sibuyi (‘Sibuyi’), the deceased’s maternal aunt a.k.a Mama Bongi testified, inter alia, as follows:

[a] She was the first one to arrive on the crime scene on Thursday, 14 May 2020. She confirmed that she had earlier spoken to the deceased during the day.

[b] She stated that the deceased had and used two cellphones. She saw the one cellphone in the deceased’s handbag that was lying on top of the bed, in the main bedroom. She later learnt that the deceased’s

other cellphone was found in her possession, and where she was lying after being shot.

[c] She subsequently was allowed by members of the SAPS to enter the house, and proceeded to the main bedroom. She observed a firearm holster on the floor, near the entrance of the door, and observed clothes scattered on the floor.

That in essence concluded the evidence of this witness, Sibuyi and the case for the State was accordingly closed. On Tuesday, 11 January 2022 at 17h30, the matter was further postponed to 28 March 2022 for the defence case.

[21] Upon resumption on Monday, 28 March 2022, Mr De Necker informed the court that the accused would not be testifying in his defence, and his case was accordingly closed.

[I] EVALUATION OF EVIDENCE

[22] It is trite that in order to succeed with the prosecution, the State has to discharge the onus to establish the guilt of the accused beyond reasonable doubt, and on the other hand the accused bears no onus but will be entitled to a discharge if he presents an explanation of innocence which is reasonably possibly true. This trite legal test is more succinctly and elegantly stated by Nugent JA in *S v Mbuli*[3] as follows:

‘It is trite that the State bears the onus of establishing the guilt of the appellant beyond reasonable doubt, and the converse is that he is entitled to be acquitted if there is a reasonable possibility that he might be innocent. In whichever form the test is applied it must be satisfied upon a consideration of all the evidence’.

‘An accused version can only be rejected if the court is satisfied that it is false beyond reasonable doubt. An accused is entitled to an acquittal if there is a reasonable possibility that his or her version may be true. A court is entitled to test an accused’s

version against the improbabilities. However, an accused’s version cannot be rejected merely because it is improbable’.

[4]

[23] In *S v Shackell* 2001(2) SACR 185 SCA it was held that “it is a trite principle that in criminal proceedings the prosecution must prove its case beyond reasonable doubt and that a mere preponderance of probabilities is not enough. Equally enough is the observance that, in view of this standard of proof in a criminal case, a court does not have to be convinced that every detail of the accused’s version is true. If the accused’s version is reasonably possibly true in substance the court must decide the matter on the acceptance of that version. It is indeed permissible to test the accused’s version against the inherent probabilities. It cannot be rejected merely because it is improbable: it can only be rejected on the basis of inherent probabilities if it can be said to be so improbable that it cannot reasonably possibly be true.”

[24] In assessing the evidence, a court must in the ultimate analysis look at the evidence holistically in order to determine whether the guilt of the accused is proved beyond reasonable doubt. This does not mean that the breaking down of the evidence in its component parts is not a useful aid to a proper evaluation and understanding thereof. In *S v Shilakwe*[5] at page 20, para [11], the Supreme Court of Appeal approved of the following dictum :

“But in doing so, (breaking down the evidence in its component parts) one must guard against a tendency to focus too intently upon the separate and individual part of what is, after all, a mosaic of proof. Doubts about one aspect of the evidence led in the trial may arise when that aspect is viewed in isolation. Those doubts may be set at rest when it is evaluated again together with all the other available evidence. That is not to say that a broad and indulgent approach is appropriate when evaluating evidence. Far from it. There is no substitute for a detailed and critical examination of each and every component in a body of evidence. But, once that has been done, it is necessary to step back a pace and consider the mosaic as a whole. If that is not done, one may fail to see the wood from the trees.”

See *S v Hadebe and others*[6] and *S v Mbuli*[7].

[25] It is acceptable in evaluating the evidence in its totality to consider the inherent probabilities. Heher AJA (as he then was) dealt with this aspect as follows:

“The correct approach is to weigh up all the elements which point towards the guilt of the accused against all those which are indicative of his innocence, taking proper account of inherent strengths and weaknesses, probabilities and improbabilities on both sides and,

having done so, to decide whether the balance weighs so heavily in favour of the State as to exclude any reasonable doubt about the accused’s guilt.”

See *S v Chabalala*[8].

[26] I am mindful of the basic principles to be applied when evaluating evidence. In this regard, it is trite that evidence must be weighed in its totality and that probabilities and inferences must be distinguished from speculation and conjecture.

Navsa JA in *S v Trainor*[9] stated as follows: “A conspectus of all the evidence is required. Evidence that is reliable should be weighed alongside such evidence as may be found to be false. Independently verifiable evidence, if any, should be weighed to see if it supports any of the evidence tendered. In considering whether evidence is reliable, the quality of that evidence must of necessity be evaluated, as must corroborative evidence, if any. Evidence, of course, must be evaluated against the onus on any particular issue or in respect of the case in its entirety”

[27] The quote from the judgment of Malan JA in *R v Mlambo*[10] at 738 A and B is apposite:

‘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 probability is raised that the ordinary reasonable man, after mature consideration, comes to the conclusion that there exists no reasonable doubt that an accused has committed the crime charged. He must, in other words, be morally certain of the guilt of the accused. An accused’s claim to the benefit of doubt when it may be said to exist must not be derived from speculation but must rest upon a reasonable inference 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 a less crime or even, perchance, 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 an argument that, notwithstanding that the accused did not avail himself of the opportunity to mitigate the gravity of the offence, he should nevertheless receive the same benefits as if he had done so’.

[28] Having carefully considered the totality of the evidence and the mosaic of proof before me, as well as the plea of the accused in terms of section 112 (2) of the CPA, I do not deem it necessary to individually traverse the evidence of all the witnesses that testified during the trial, for the sake of brevity and to avoid unnecessary prolix.

[29] It is common cause that the accused unlawfully and intentionally caused the death of the deceased on 14 May 2020 by shooting her with a firearm, as set out in his guilty plea. However, in dispute is whether the accused had planned and had acted with premeditation at the time of the shooting of the deceased. It is clear that this is the crisp and narrow question that has to be answered, having due regard to the available evidence before this Court. I pause to mention that there are no eye-witnesses who actually witnessed and overheard the conversation between the parties, and who were outside at the time with the parties, at the time of the shooting.

Hence, the State has relied to a certain extent on circumstantial evidence, the evidence of the various State witnesses in support of the mosaic of proof against the accused, the accused's guilty plea, as well as the objective medico legal and cellphone evidence; in order to prove the allegations against the accused, and in an attempt to prove its case against the accused. I am therefore required to objectively and in an impartial and balanced manner, consider all the evidential material in coming to a decision.[11]

[30] It is trite that once a court is faced with circumstantial evidence it naturally flows that it is duly called upon to draw inferences from the evidence thus presented.

"In reasoning by inference there are two cardinal rules of logic which cannot be ignored:

- (1) The inference sought to be drawn must be consistent with all the proved facts. If it is not, the inference cannot be drawn.
- (2) The proved facts should be such, that they exclude every reasonable inference from them save the one sought to be drawn. If they do not exclude other reasonable inferences, then there must be doubt whether the inference sought to be drawn is correct.”[12]

[31] The value of circumstantial evidence is often found in a whole range of independent circumstances, all giving rise to the same conclusion. It is imperative for the court to consider all these circumstances as a whole and not to assess each in isolation.

"The court must not take each circumstance separately and give the accused the benefit of any reasonable doubt as to the inference to be drawn from each one so taken. It must carefully weigh the cumulative effect of all of them together, and it is only after it has done so that the accused is entitled to the benefit of any reasonable doubt which it may have as to whether the inference of guilt is the only inference which can reasonably be drawn. To put the matter in another way, the Crown must satisfy the court, not that each separate fact is inconsistent with the innocence of the accused, but that the evidence as a whole is beyond reasonable doubt inconsistent with such innocence.”[13]

[32] In *De Villiers supra* at 508 it is said: “...even two particles of circumstantial evidence-though taken by itself weigh but as a feather – join them together, you will find them pressing on the delinquent with the weight of a millstone....”

[33] Circumstantial evidence is indirect proof from which a court is required to draw inferences which, when weighed with all other evidence, may contribute towards proving a fact in issue. The inference must comply with certain rules of logic.[14] The reasonable inference has to be drawn only from proved facts and not from facts based on suspicion.[15]

Circumstantial evidence has on occasion been described as a chain, the links of which consist of pieces of evidence. This is not correct as it implies that the chain will be broken once one piece of evidence is rejected. It is better to compare it with a braided rope: as the strands break, the rope weakens and conversely, as strands are added, the stronger it gets. The gist of the matter is that one piece of circumstantial evidence may be inconclusive, but once other evidence is added, it gains probative force.

[34] The ratio of Hendricks J in *S v Nkuna* 2012 (1) SACR 167 (B) sets out the approach to circumstantial evidence, at paragraph 121 as follows:

“The evaluation of circumstantial evidence must be guided by a test of reasonableness. The onus on the State is not that it must prove its case with absolute certainty or beyond a shadow of a doubt. All that is required is such evidence as to satisfy the court and prove its case beyond a reasonable doubt. It is trite law that the accused is under no legal obligation to prove his innocence. The State must prove the guilt of the accused beyond a reasonable doubt”.

[35] It is noteworthy to mention that from the totality of the available evidence, it is clear that the testimonies of Nkosi, Marshall, Hlongwane and Matsane are of utmost importance, and in my view their testimonies, both direct and circumstantial, require to be distilled in order to ultimately make a determination regarding the circumstances of the shooting, and objective intention of the accused at the time of the shooting. It is clear that an examination of the evidence of the aforementioned would enable this Court to make a proper determination in respect of the vexing question regarding the intention of the accused at the time of the shooting of the deceased. In my view, the simple question is whether the accused had acted in the heat of the moment and with diminished responsibility as set out in his guilty plea, or whether he acted with an element of planning and premeditation. This in the final analysis is what matters, and what is required of this Court to grapple with.

[36] I deem it important that in order to arrive at a conclusion regarding the aforementioned, it is necessary to make a comparative analysis of the accused's guilty plea, and to compare it with the evidence of the aforementioned four witnesses.

[a] The accused stated, inter alia, that he became overwhelmed when he learnt that the deceased had yet another new boyfriend, on the day of the incident. As a result of the shock and emotional blow he drew his firearm and fired several shots at the deceased. He committed the crime in the heat of the moment, when he was emotionally charged, and acted with diminished responsibility and impaired judgment. Denying that he planned to kill the deceased.

[b] Nkosi testified, inter alia, that upon the arrival of the deceased at home, she did not enter the guestroom as the accused was therein. The accused requested the deceased to accompany him outside in order to have a discussion. At this stage, he stopped the children from accompanying them outside. A short while later he returned to the guestroom alone, and thereafter proceeded outside again. A while later she heard Matsane saying “What are you doing with my mum?”, and when she followed him to his room, saw the accused holding a firearm and shooting the deceased.

[c] Marshall testified that on 02 May 2022, the deceased had instructed her to proceed with instituting an action for a decree of divorce. The deceased informed her that the accused was aware of the divorce action, as he had discussed the matter with his family. In addition thereto, the deceased had discussed with her during the interim to obtain an interdict against the accused. Further, sending her a WhatsApp message advising that she was scared for her life. Her evidence is corroborated by the objective and undisputed evidence contained in Exhibit “J”.

Further, what is most telling and decisive is her evidence to the extent that she was speaking to the deceased on the telephone regarding obtaining an interdict against the accused, when she heard the deceased screaming, followed by two loud bangs and the conversation ended. Against this evidence, one notes that the accused in his plea stated that the deceased was speaking to a boyfriend at the time, and as a result thereof lost control and shot the deceased several times.

[d] Hlongwane testified that the deceased informed her, in a WhatsApp message that she was no longer happy in her marital relationship with the accused, and wished to institute divorce proceedings against him.

[e] Matsane testified that he saw the deceased leave her bag in the bedroom upon her arrival from work, and did not enter the guestroom to pray when she saw the accused therein. He heard the accused requesting the deceased to accompany him outside, so that they could speak privately. He observed his parents go outside, and where they remained in conversation for a period of between five to ten minutes.

The accused then returned to the guestroom and spent a few minutes therein. A short while later when the accused emerged, he proceeded

in a hurried manner, and he clearly heard the accused cocking the firearm. He followed the accused as he believed that something was awry, however he was unable to do so, as the accused closed the electric garage door with a remote control. A short while later, he heard his mother scream his name and thereafter heard gunshots, as he was proceeding to his bedroom.

[37] I am mindful of the fact that the witness Marshall is a single witness in respect of the instructions that she received from the deceased. However, it is clear that her evidence does not stand in isolation as it is corroborated by the evidence contained in Exhibit “J”, and that of Hlongwane.

I am also mindful of the fact that the evidence of Matsane stands in isolation as regards the cocking of the firearm, at the time, and after the accused emerged from the guestroom and proceeded to the outside. However, I am reminded of Nkosi's evidence wherein she confirms that the accused had returned to the guestroom alone, and proceeded a short while later, outside. This in my view lends corroboration, supports and underpins Matsane's evidence regarding the firearm that he heard being cocked, at the time when the accused had come into the house from outside, and later returned outside.

[38] Accordingly, I am mindful that the evidence of the witnesses to an extent stand singularly on certain aspects, and are corroborated on others. To this end, the most important evidence in my view is the cocking of the firearm by the accused, whilst inside the house and which only Matsane heard. It therefore follows that his evidence is to be treated with caution, and is governed by the provisions of section 208 of the CPA, and which provides as follows: "an accused may be convicted of any offence on the single evidence of any competent witness".

[39] In *S v Sauls* 1981 (3) SA 172 (A) at 180E-H Diemont JA said: "There is no rule of thumb test or formula to apply when it comes to a consideration of the credibility of the single witness (see the remarks of Rumpff JA in *S v Webber* 1971 (3) SA 754 (A) at 758). The trial Judge will weigh his evidence, will consider its merits and demerits and, having done so, will decide whether it is trustworthy and whether, despite the fact that there are shortcomings or defects or contradictions in the testimony, he is satisfied that the truth has been told. The cautionary rule referred to by De Villiers JP in 1932 may be a guide to a right decision but it does not mean "that the appeal must succeed if any criticism, however slender, of the witnesses' evidence were well founded"(Per Schreiner JA in *R v Nhlapo* (AD 10 November 1952) quoted in *R v Bellingham* 1955 (2) SA 566 (A) at 569). It has been said more than once that the exercise of caution must not be allowed to displace the exercise of common sense.'

See also *AS v S* (349/10) [2011] ZASCA 52 (30 March 2011);

S v Pistorius 2014 (2) SACR 315 (SCA)

[40] In *S v Banana* 2000 (2) SACR 1 (ZSC) at 8b-c the Court held as follows: "Where the evidence of a single witness is corroborated in any way which tends to indicate that the whole story was not concocted, the caution enjoyed may be overcome and acceptance facilitated. But corroboration is not essential. Any other feature which increases the confidence of the court in the reliability of the single witness may also overcome the caution"

[41] Accordingly, I have carefully listened to the evidence of Matsane and taken cognisance of his conduct and behaviour when he testified, and it is clear in my mind that his evidence clearly has a ring of truth. I did not gain the impression at any stage that this witness had come to falsely implicate the accused in the commission of the crime. He gave his evidence in a clear, concise and uncontradicted manner, and in my view was an impressive witness. In addition thereto, I have

duly taken cognisance of the veracity of the evidence of Nkosi, Marshall and Hlongwane, and find in the same terms as I did regarding

Matsane's evidence.

The accused on the other hand did not take the Court into his confidence, and closed his case without testifying. Accordingly, he failed to convince this Court regarding the veracity of his denial in respect of the allegation against him.

[42] In *S v Di Blasi* 1996 (2) SACR 1 (A), the accused was aggrieved and insulted by his wife's decision to divorce him, he shot her three times. On appeal by the State, the Appellate Division found that it was necessary for the accused to lay a factual foundation that non-pathological causes resulted in diminished criminal capacity, and the fact that he did not give evidence reduced the weight of expert evidence given on his behalf. This was so because the expert evidence was based on the assumption that the accused's version was truthful. The objective facts however showed no signs of inability to appreciate the wrongfulness of the killing and the actions of the accused did not lead to an inference of diminished criminal capacity.

See: *S v Calitz* 1990 (1) SACR 119 (A)

S v Mc Donald 2000 (2) 493 (N)

S v Eadie 2002 (1) SACR 663 (SCA)

[43] To this end, it is clear on the available evidence before me that there is a prima facie case, which the accused has had to answer to. However, having duly exercised his legal right to silence, he has failed to answer thereto. Further, it is clear that what counsel put on his behalf during the cross examination of the witnesses, is not evidence. See *S v Bhamjee* 1993 (1) SA 627 (W). Accordingly, the State's case stands unchallenged before this Court, as there is no version before me on behalf of the accused.

[44] In *Osman and Another v Attorney General Transvaal* 1998 (4) SACR 1224 (CC) Madala J stated the following at paragraph 50: "Our legal system is an adversarial one, once the prosecution has produced evidence sufficient to establish a prima facie case, an accused who fails to produce evidence to rebut that case is at risk. The failure to testify does not relieve the prosecution of its duty to prove guilt beyond reasonable doubt. An accused however, always runs the risk that, absent any rebuttal, the prosecution's case may be sufficient to prove the elements of the offence. The fact that an accused has to make such an election is not a breach of the right to silence. If the right to silence were to be so interpreted it would destroy the fundamental nature of our adversarial system of criminal justice"

[45] In *S v Boesak* [2000] ZACC 25; 2001 (1) SA 912 (CC) Langa DP stated the following at paragraphs 293D – F, as follows: "The right to remain silent has application at different stages of a criminal prosecution. The fact that an accused person is under no obligation to testify does not mean that there are no consequences attaching to the decision to remain

silent during the trial. If there is evidence calling for an answer, and an accused person chooses to remain silent in the face of such evidence, a court may well be entitled to conclude that the evidence is sufficient in the absence of an explanation to prove the guilt of the accused. Whether such a conclusion will be justified will depend on the weight of the evidence”.

[46] I pause to mention that upon a conspectus of all the direct and circumstantial evidence before me, and having distilled all the common cause facts, it is clear in my mind that the only aspect to be finally adjudicated upon is whether to accept the version as put forward by the accused in his plea, or to accept that of the State.

To this end, I reiterate that the State witnesses subjected their evidence to scrutiny and cross examination, whilst the accused chose to lay thunderously silent in the face of direct evidence regarding his intention, on the day in question. I am impelled to accept Matsane’s evidence regarding the cocking of the firearm in the house by the accused, and before the shooting of the deceased. I am further impelled to accept Marshall’s evidence regarding the nature of her conversation with the deceased at the time of the shooting

[47] Accordingly, on the available direct and circumstantial evidence before me, the inescapable inference and conclusion to be drawn from all the proved facts, in my view and as I am impelled, is as follows:

[a] The accused and deceased experienced marital strife, which ultimately caused the deceased to duly instructed her attorney, to proceed with divorce action against the accused.

[b] The accused was aware of the deceased’s intention to divorce him, as he had discussed the matter with his family.

[c] The accused was aggrieved by this turn of events, regarding the deceased’s intention to divorce him, and more so due to the dire financial implications accruing to him, which would have been caused as a result of the divorce.

[d] That the accused being aggrieved made the circumstances difficult at home, and which caused the deceased to consider applying for an interdict, and to feel scared for her life.

[e] The accused and deceased proceeded outside their home to speak privately for a period of between five to ten minutes, at the accused’s special instance. At this stage, he was not in possession of his firearm, as per Nkosi.

[f] At a certain stage during the conversation the accused then returned to the guest room, and the only reason being to arm himself with his firearm, as he did not have it in his possession initially. I am impelled to infer and conclude that his planning and premeditation to kill the deceased commenced at the time when he left the deceased,

and returned to the guest room, in order to fetch his firearm.

To this end, I am reminded that a finding of premeditation requires inferential reasoning, and the trier of facts has to interrogate the facts of each case and then deduce from them whether the commission of the offence was premeditated or not. That is partly due to the legislature not having defined ‘planned’ or ‘premeditated’ in the Criminal Law Amendment Act, Act 105 of 1997.

[16]

[g] Upon his exit from the guest room, he was duly armed with his firearm and thereafter cocked it. The only logical inference to be drawn from this conduct is that there was now premeditation on his part to kill the deceased, when he cocked the firearm inside the house, and prior to shooting her several times.

I am of the view that the planning and premeditation were complete at the time when the accused consciously held the firearm and cocked it, inside the house. This action in my view is a clear intention and the culmination on his part of his intention to return to the accused, and to kill her.

[h] I am of the view and am impelled to conclude that the accused’s intention to kill the deceased commenced when he returned to the guest room in order to collect the firearm, and was finalised with the conscious and intentional cocking of the firearm. His resolve was finalised and completed at the time when the first bullet entered the chamber, ready to be discharged and to cause the untimely death of the deceased. Nothing more! Nothing less!

[i] It is clear that at the time when the deceased was fatally shot by the accused, she was engaged in a conversation with her attorney, in respect of an application for an interdict against him; and was not talking to a boyfriend as the accused would like this Court to believe. The inescapable inference to be drawn from this is that this conversation further fortified his resolve to kill the deceased, and to rid him from the insurmountable challenge of the divorce, which he faced.

[j] I further infer that the accused simply wanted to create atmosphere and to evoke sympathy in order to support his narrative of the events, and yarn that he intended spinning, by shooting himself. I say so on the basis that if the accused wanted to end his life he would have shot himself fatally, having due regard to the fact that

he was a police officer, and upon his resignation being involved in the security business.

[48] In *S v Kekana* 2013 (1) SACR 101 (SCA) it was held that

“premeditation does not necessarily entail that the accused should have thought or planned his or her action for a long period of time in advance before carrying out his or her plan. This is because ‘even a few minutes are enough to carry out a premeditated action’.”

Accordingly, it is clear on the available evidence that the accused spoke to the deceased for a short while before returning to the house in order to arm himself, and to return to the deceased with the clear intention to shoot and kill her.

- [49] I now turn to deal with the red herring raised by Mr De Necker during argument to the extent that the accused has been charged with the crime of Murder read with the provisions of section 51(1) of Act 51 of 1997. Submitting further that the accused has not been properly charged in terms of section 51(1) of the Criminal Law Amendment Act 105 of 1997. I have duly applied my mind to the authority cited by the defence in *S v Makatu* 2014 (2) SACR 539 (SCA), as well as his argument that in the circumstances of this anomaly that the accused can only be convicted in terms of section 51(2) of Act 105 of 1997 (per his plea), as he is not properly charged under any other section.
- [50] In *S v Legoa* 2003 (1) SACR 13 SCA, in considering whether the increased sentencing jurisdiction provided for by Act 105 of 1997 could be invoked against an accused, the court dealt with the related question of whether the charge sheet should include reference to the specific form of the offence which triggered the increased sentencing jurisdiction. It noted ‘that under the new constitutional dispensation, the criterion for a just criminal trial is “ a concept of substantive fairness which is not to be equated with what might have passed muster in our criminal courts before the Constitution of the Republic of South Africa, Act 108 of 1996 came into force.”

Cameron JA went on to say that one of the specific rights constituting the right to a fair trial is the right: “to be informed of the charge with sufficient detail to answer it.” What the ability to “answer” a charge encompasses in this case does not require us to determine. But under the constitutional dispensation it can certainly be no less desirable than under the common law that the facts the State intends to prove to increase sentencing jurisdiction under the 1997 statute should be clearly set out in the charge sheet.”

- [51] In *S v Ndlovu* 2003 (1) SACR 331 (SCA) it was held that the relevant sentence provisions of the Act must be brought to the attention of an accused in such a way that the charge can be properly met after conviction. Mpati JA, after referring to *S v Legoa* (supra) said the following: “The enquiry, therefore, is whether, on a vigilant examination of the relevant circumstances, it can be said that an accused had had a fair trial. And I think it is implicit in these observations that where the State intend to rely upon the sentencing regime created by the Act a fair trial will generally demands that its intention pertinently be brought to the attention of the accused at the outset of the trial, if not on the charge sheet then in some other form, so that the accused is placed in a position to appreciate properly in good time the charge that he faces as well as it’s possible consequences. Whether, or in what circumstances, it might suffice if it is brought to the attention of the accused only during the course of the trial is not necessary to decide in the present case. It is sufficient to say that what will at least be required is that the accused be given sufficient notice of the State’s intention to enable him to conduct his defence properly.”
- [52] On a proper reading and interpretation of the indictment, and to which the accused pleaded to on 04 October 2021 at 10h40, it is clear that despite the indictment stating that the “accused is guilty of the crime of: Murder read with the provisions of Section 51(1) of the Criminal Law Amendment Act 51 of 1997..... “ , the following qualification was brought to the

attention of the accused as follows: “ In case of conviction, the said Director of Public Prosecutions prays for a sentence in terms of the provisions of section 51(1) read with Part 1 of Schedule 2 of the Criminal Law Amendment Act, 1997 (Act 105 of 1997) in that the murder of the deceased was planned and/or premeditated”.

In amplification thereof, the entire indictment was read to the accused and interpreted to him, and to which he pleaded not guilty. In addition thereto, at 10h50, this Court carefully explained the provisions, application and implications of the Criminal Law

Amendment Act No. 105 of 1997 (‘Minimum Sentences Act’), as well as the seriousness thereof. The accused confirmed that he accordingly understood the provisions of the aforementioned Act.

[53] Therefore, it is clear in my mind that at all material times, the accused was properly appraised in respect of the sentencing regime applicable, in the event of a conviction; both in the narrative in the indictment, as well as by this Court in a further detailed explanation, and prior to any evidence being led. It is clear in my mind that it was simply a typographical error in respect of the reference to the Criminal Law Amendment Act, which has caused absolutely no prejudice to the accused, and the ultimate conduct of his trial and defence.

[54] The ultimate result of this vexing and baseless argument, is that the accused was full well appraised of this fact from the outset, and that he clearly enjoyed the right to a fair trial. Further, it is clear from the evidence led, and an undisputed fact, that his defence was conducted with the absolute appreciation of the fact that it was alleged that the murder of the deceased was planned and/or premeditated.

[55] This view is further fortified by the fact that during the early stages of this trial, the accused changed his plea to one of guilty in terms of section 51(2) of the Criminal Law Amendment Act 105 of 1997, and which was not accepted by the State. The State refused to accept the plea, as it alleged that the murder of the deceased was

planned and/or premeditated. I pause to mention that at no stage was any cause of complaint raised in this regard by the accused, or his legal representative.

Accordingly, I am of the considered view that there is simply no merit and sound justification in this baseless argument, and as such stands to be summarily dismissed.

[56] I have carefully listened to the evidence of the State witnesses, and taken cognisance of their conduct and behaviour when they testified, and it is clear in my mind that their evidence clearly has a ring of truth. I did not gain the impression at any stage that the witnesses had come to falsely implicate the accused in the commission of the crime. All the State witnesses gave their evidence in a clear, concise and uncontradicted manner, and in my view were impressive witnesses.

[57] I have carefully analysed the evidence before me and applied the necessary caution where required, and accordingly am unable to find any reason to doubt the ipsissima verba of the State witnesses. They gave their evidence in a clear and concise manner without any

material contradictions. On the other hand the accused has not tendered any viva voce evidence, and I have duly taken note of the contents of his guilty plea. His version seemed to be very far fetched on the available evidence, and on any analysis of his evidence it simply cannot be believed, that the murder of the deceased was not planned or premeditated.

[58] After careful consideration of the evidence of all the State witnesses, the totality of the circumstantial evidence in support of the charges, as well as the accused's version of the events, I am satisfied that the evidence of the State is sufficient to prove that the accused planned, and that there was premeditation on his part to murder the deceased.

[59] I have weighed all the elements that point towards the guilt of the accused against those which are indicative of his innocence, taking proper account of the inherent strength and weaknesses, probabilities and improbabilities on both sides, and having done so, I find that the balance weighs so heavily in favour of the State, so as to exclude any reasonable doubt of the accused's guilt,

[60] In conclusion, I find that on a consideration of the totality of the evidence the prosecution has discharged the onus to prove beyond reasonable doubt that the accused has committed the crime as charged. On the other hand the accused has failed to give an explanation of innocence which is reasonably, possibly true and his version is accordingly rejected as beyond false.

[61] It is accordingly clear in my mind that the action of the accused was in accordance with the requisite intention of *dolus directus*, and that he acted with an element and degree of planning and premeditation at the time of the shooting of the deceased.

[62] In the result, the accused is found guilty as follows:

[a] MURDER READ WITH THE PROVISIONS OF SECTION 51(1) OF ACT 105 OF 1997

C I MOOSA

JUDGE OF THE HIGH COURT

MPUMALANGA DIVISION

MBOMBELA

FRIDAY, 24 JUNE 2022

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Dates of hearing 04 October 2021

06 October 2021

07 October 2021

08 October 2021

11 October 2021

13 October 2021

14 October 2021

02 November 2021

11 November 2021

19 November 2021

10 January 2022

11 January 2022

28 March 2022

29 March 2022

06 April 2022

30 May 2022

Heads to be filed on: 29 March 2022

Date of judgment: 24 June 2022

[1] DPP: Gauteng Division, Pretoria v Mbonani [2020] ZASCA 115 (30/09/2020)

- [2] Pages 29 and 30, paragraphs 61, 63 and 64 of the judgment
- [3] 2003
- (1) SACR 97 (SCA); See also *S v Trickett* 1973 (3) SA 526 (T)
- [4] *Susha v S* 2011 JOL 27877 (SCA)
- [5] 2012
- (1) SACR 16 (SCA)
- [6] 1998
- (1) SACR 422 (SCA) at 426 F – H
- [7] 2003
- (1) SACR 97 (SCA) at 110, para [57]
- [8] 2003
- (1) SACR 134 (SCA) paragraph [15]
- [9] 2003
- (1) SACR 35 (SCA) at 9
- [10] 1957
- (4) 727 (AD)
- [11] *S v Ntsele* 1998 (2) SACR 178 (SCA)
- [12] *S v Blom* 1939 AD 188 at 202; See also *S v Mtsweni* 1985 (1) SA 590 (A) at 593
- [13] *S v De Villiers* 1944 AD 493 at 508-509
- [14] *S v Burger* 2010 (2) SACR 1 (SCA)
- [15] *S v Mseleku* 2006 (2) SACR 574 (D)
- [16] *Rasimate Samuel Baloyi v The State* [2022] ZASCA 35 (01 April 2022)

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