IN THE HIGH COURT OF SOUTH AFRICA,

FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	**YES/NO**
Of Interest to other Judges:	**YES/NO**
Circulate to Magistrates:	**YES/NO**

Case number: 10/2018

In the matter between:

THE STATE

And

JOHANNES MOKATI Accused

JUDGMENT BY: MATHEBULA, J

HEARD ON: 10, 11, 12, 13, 14, 17, 18, 20, 26 & 27 SEPTEMBER 2018

DELIVERED ON: 26 & 27 SEPTEMBER 2018

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[1] The accused is appearing before me on three (3) charges viz. rape, robbery with aggravating circumstances and murder. These charges are read with the provisions of section 51 of the Criminal Law Amendment Act 105 of 1997. They all arise out of the same

set of facts. Before me Mr Johan De Nysschen is appearing for the state and Mr Pieter Nel for the accused.

[2] The accused pleaded not guilty to the charges and indicated that the applicability of the legislation on minimum sentences in the event of conviction(s) of one or all charges has been explained to him. His counsel read out a plea explanation which was confirmed by him. These admissions were recorded as such in terms of section 220 of Act 51 of 1977.

[3] **The admissions are as follows:-**

<u>Charge 1 – Rape</u>

- **The accused admits having had consensual sexual intercourse with the deceased once.**

<u>Charge 2 – Robbery with aggravating circumstances</u>

- **The accused admits possession of the laptop and tablet belonging to the deceased.**
- **These items were lawfully handed to him by the deceased and he was supposed to keep them with him until she had liquidated her debt due to him.**
- **These items were voluntarily handed to him by the deceased and no weapon in particular the knife was used.**

<u>Charge 3 – Murder</u>

- **He denies the cause of death as alleged by the State.**
- **He contends that on medical basis, the correct cause of death should be cerebral venous sinus thrombosis.**

- **He maintains that there is no causal link between the sexual intercourse and the correct cause of death.**
- **Further, the correct cause of death is not reasonably foreseeable to a person in his position nor is it foreseeable on medical basis.**

[4] Prior to leading evidence, the state counsel made an application to lead hearsay evidence as provided in section 3 of Act 45 of 1988. This application was granted provisionally and will be discussed fully in the following paragraphs.

[5] Christiaan Johannes Botha is a police officer with the rank of Warrant Officer attached to the Local Criminal Record Centre, Welkom. On 11 February 2017 he attended the alleged scene of crime at 48 Le Roux Street, Theunissen. The property is the offices of a firm of attorneys namely Hewetson Incorporated. He was in the company of among others Warrant Officer Schoeman and the complainant in life A M. I will henceforth refer to her as the deceased not out of disrespect but to avoid confusion. He took several photographs later arranged into a photo album and drew the sketch plan. These were handed in as **Exhibit "A"** and **"B"** respectively.

[6] The deceased pointed out to her different places where the incident took place. The office appeared ransacked and she was fearful to enter the room where it all happened. She only told him that it happened in that room and did not enter it. She was emotional, crying and shivering. At that point she just turned, walked away and swore never to return to that office ever again. Certain DNA material was uplifted and sent to the laboratory for

examination. He observed certain marks on the floor and that the carpet was dirty.

[7] A J M (the deceased's sister) took to the stand. She positively identified the deceased's workplace as dipicted on the photographs handed in as **Exhibit "A".** She testified that the deceased was a receptionist at an attorney's firm. Also at the time of the incident she was betrothed. She described her as a lovely person who was getting along with everyone. She was also a sportswoman who had excelled in a number of sporting codes. However she had stopped partaking in sports a year prior to her demise. She was a fit and healthy person with no known ailments.

[8] On 9 February 2017 she arrived at home and found her motor vehicle already parked. Her dogs were outside and this aspect was strange because they were always with her. She proceeded to her room and found her slumped on the bed with her head hanging on the other end. She was crying.

[9] She tried to engage her in conversation as to what was the problem. She refused to divulge anything to her. Later she told her that someone took her tablet and laptop. At this point she sat straight on the bed and cried hysterically. She enquired from her if that person hurt her but she did not respond. She asked if that person "did it to her" and she nodded positively. She added that the person concerned told her not to tell anyone because he will kill her and the entire family.

[10] She contacted her fiancé, told their parents and reported the matter to the police. The deceased was taken to a local general practitioner Dr. Lukas de Lange for medical examination. Thereafter one Constable Prinsloo came to their residence to obtain the written statement from the deceased.

[11] The deceased was taken to Bongani Hospital, Welkom the next day for medical tests. At the same time the accused was arrested and she was relieved a bit. The entire episode had hurt her deeply and in subsequent days she spent most of the time in her room. The period between the 9 to 20 February 2017 the deceased lost a lot of weight, could not communicate, spent her time sleeping and did not eat. Literally she deteriorated and would throw up all the time when she attempted to eat.

[12] On 20 February 2017 just before 6H00am there was a loud voice emanating from her room. They rushed in there and found her lying on the floor. She was experiencing convulsions commonly known as fits. They rushed her to the consulting rooms of Dr. de Lange. She had also become unresponsive to verbal commands. She was taken to Katlego Hospital, Virginia in an ambulance and attended by medical personnel there. She temporarily became a bit better.

[13] Her condition turned to the worst in the evening and on advice, they took her to Pelonomi Hospital, Bloemfontein. At this stage she was very weak and had to be helped to do menial tasks. She could not even walk. On 22 February she visited her in hospital. The deceased was not awake and even had no idea of their presence. The convulsions were continuing unabated. It was the last time she saw her alive.

[14] She recognized the Acer laptop and Vodafone tablet handed in as **Exhibit 1 and 2** as the property of the deceased. In particular the laptop because she spilled the nail cutex on it.

[15] Under cross-examination, she testified that the deceased was using oral contraceptives although she did not know the name of the specific pill. The deceased did not suffered from any bulimia,

nausea or blood clotting before 9 February 2017. She was aware that anti retro virals (ARV's) were prescribed to her and no one told the deceased to stop using contraceptives. She admitted that the deceased did not tell her the details of the incident that occurred at her workplace with the accused.

[16] Ella Johanna Prinsloo, a police constable stationed at Theunissen testified that on 9 February 2017 while on duty she took the statement of the deceased. During the interviewing process the deceased was afraid and crying incessantly. The statement was handed in and marked **Exhibit "D".** This statement was read verbatim into the record and I do not intend to repeat it. Suffice to mention that the deceased informed her that the accused rape her, took her possessions and threatened to kill her if she divulged the information to any other person.

[17] The deceased had told her that her assailant was known to her and used to work at Bafana Bafana Furnishers. She (Ella) undertook to go and look for him. He approached one Nesto who was running a computer shop in town. The latter showed him the tablet and informed her that it was brought by the accused who wanted the information to be wiped off its memory. She also saw the photos of the deceased on it. Nesto also told her about the laptop and they agreed that he will let her know when the accused returns to his shop.

[18] The accused was arrested by Warrant Officer Rakgosi inside Nesto's shop. He was there with the laptop listening to music through the headphones. She also confirmed knowing of a receipt apparently issued by Nesto to the accused which was handed in as **Exhibit "E".**

[19] She did see the deceased after the aforementioned day of the incident. She informed her that the medication was making her sick. She also assisted the family on the day she was taken to Katlego Hospital, Virginia. She confirmed that she was very weak. She visited her at Pelonomi Hospital and her condition had deteriorated to the point that she had stopped talking

[20] She conceded under cross-examination that she does not know whether the version she was given in the statement was true or false. Further that the description of the accused was not in the statement. In their discussions, she understood her to mean that there was one sexual act of intercourse between them with different positions.

[21] Dr. Lukas de Lange a general practitioner of Theunissen is the house medical doctor of the Maree family. He had known the deceased as a child because she was of the same age as his children. Later she became his patient. According to him she was physically fit and active in sport. She usually came to him for minor ailments. He is the author of the two reports handed in as **Exhibit "F" and "G"**. They are dated 20 February and 29 March 2017 respectively.

[22] On 9 February 2017 while on a private business in Welkom he received a call from the deceased's mother that the deceased was raped. He requested her to take her to his consulting rooms. On arrival the entire family was hysterical and very angry. After calming them down he consulted only with the deceased in private.

[23] The deceased narrated to him that around 16H00pm a man entered her workplace armed with a knife. He had sexual intercourse with her on the table, chair and floor. She requested him not to ejaculate into her for fear of venereal diseases or falling

pregnant. When he was done she saw few drops coming from his manhood falling onto the carpet. She was dead scared.

[24] He prescribed to her pills to prevent infection and referred her to the hospital to be put on Anti-Retroviral medication. These are pills for the prevention and management of HIV-Aids. He prescribed the broad spectrum of medications for prevention of sexual disease. He also prescribed Doxycycline and Flagyl. Later he added Adco-dol, Vomiguard and Alzam. These were effective and not costly.

[25] On 20 February 2017 in the morning he examined the deceased. Her mother had called informing him that she had convulsions/fits. He also witnessed her suffering them as shown on the video clip handed in as **Exhibit "3".** He referred her to Katlego Hospital, Virginia. He administered anti-convulscent injection to keep her calm for some time.

[26] Under cross-examination he testified that when he saw her after her ordeal, she did not complain about the headache or stiff neck. He testified that he was not specifically consulted for that and the information filtered to him at a later stage. The cause of death had nothing to do with her genitals but was confined to her head. He added that oral contraceptives can cause blood clotting. Anti-retrovirals can cause nausea which may lead to dehydration. Also severe nausea/clotting can cause cerebral venous thrombosis.

[27] He was aware that the deceased was using the following medication viz. Yaz, Doxycycline 100 milligrams twice, Fragyl 400 mg three times a day, Alzam, Adco-dol, Vomiguard, Valium injected and ARV's. These medications were not necessarily taken together. Although oral contraceptives can definitely cause blood clotting in high risk patients like those suffering from

hypertension, diabetes etc. the deceased did not have any of those. He acknowledged that this kind of knowledge was not within the grasp of ordinary people.

[28] Sister Mabel Qhatatsi a Clinical Forensic Nurse examined the deceased and completed the J88 report handed in as **Exhibit "H"**. I will deal with the content of this report at a later stage. She noticed traces of anal penetration and concluded that the sexual intercourse was not consensual. She observed that the deceased was crying all the time and this clearly demonstrated that she did not like what had happened to her.

[29] She further testified that she did not observe any blunt injury to her head and that she did not make recording of any anal penetration. She mentioned that the deceased was on her menstrual cycle. She was involved in the prescription of the anti-retrovirals to her as it is the standard issue in the circumstances. These are the Pre Exposure Profalaxis. They are used for 28 days and could be used with oral contraceptives. They are generally considered safe to use. She was aware that they can cause extreme nausea and dehydration. She was also aware that oral contraceptives can cause blood clotting.

[30] Dr. Mariane Kotze a medical practitioner with expertise in Clinical Forensic Medicine testified that she never saw the deceased but only watched the video clip and read the clinical notes provided to her. She commended the accuracy of the J88 completed by her protégé Sister Qhathatsi. She stated that as per experience, she noted that many rape victims did not mention any anal penetration. This is because they are too embarrassed or forgot about it.

[31] She testified that with the anal trauma, constipation and bowel disease should be excluded. In this matter, there were multiple

tears. This was consistent with anal penetration. As far as the injuries observed on the back of the deceased, she confirmed that they were consistent with the movement on the carpet. Importantly, she testified that acute/chronic stress can lower one's immunity to certain diseases.

[32] Under cross-examination she testified that it was always better to give a combination of medication to treat a patient in these circumstances. However, this could also boost chances of blood clotting.

[33] The report handed in as **Exhibit "I"** was prepared by Dr. Pauline Maria van Zyl a Clinical Pharmacologist with expertise in the field of Pharmacology. According to her Ativan was prescribed for acute anxiety. On the effect of Yaz on the deceased, it was her view that because she had been using it for approximately a year, it could not have been expected that it will have any new side effects. Although Doxycycline and Flagyl were used for spectrum of activities, both when used together could have caused severe nausea and vomiting. Avril with a high dose of estogen could increase the severity of nausea and vomiting. This was, primarily used to cleanse the uterus in a chemical way.

[34] She admitted that people reacted differently to medication. This is largely influenced by genetics, nutrition, previous diseases etc. She testified that it was not standard practice to prescribe these medication in this manner. Perhaps the medical practitioner thought that it would stop nausea and vomiting.

[35] In her view she could not have discharged the deceased as it happened at Katleho Hospital, Virginia. On examining the clinical notes it was apparent that pressure was building in her brain as noted in the reports of Dr. Litelu. She wondered as to why they

(treating medical practitioners) did not introduce medication to reduce the intra cranial pressure although it could not have prevented the formation of the blood clot. The shaking as evidenced on the deceased could not be pinned to a specific thing as it could have been convulsions or expression of non-sympathetic nerves.

[36] Under cross-examination, she testified that had the deceased not been sexually violated she could not have been put through all the medications. Accordingly the cause of death is cerebral venous sinus thrombosis. She was alarmed that a urine test was not performed to check the urinary tract infection. In her view anxiety could also have had an effect on blood clotting. The deceased had been anxious since the unfortunate incident on 9 February 2017.

[37] She conceded that her list of possible causes of clotting was not exclusive. Inflammation could also be the cause. It was her evidence that it is not possible to put the time limit for the clot to form. It could lie dormant for some time until triggered by a series of events.

[38] Briefly the evidence of Liberty Nesto Matendere is that he is the owner of Nesto IT Solutions and Network based in Theunissen. The deceased was well known to him. So was the accused. The latter approached him on 9 February 2017 at around 17H00pm in possession of a Vodafone tablet and a Acer laptop. He wanted to sell the latter item for R1 500.00. He informed him that it had a problem with connectivity to other electronic devices via Bluetooth. He (Nesto) explained to him that any tampering with the software may result in the loss of all the data on the device. The accused was less bothered and instructed him to proceed with it to do so.

[39] He switched the tablet on and messages written in Afrikaans trickled in. He scrolled it and eventually sent a message to one of the contacts he could recognize on the phone.

[40] Under cross-examination he vehemently denied any proposition that the accused left the tablet with him for safekeeping. He disputed any suggestion that they were friends with each other. He confirmed that the accused attempted to sell the laptop only not the tablet.

[41] Professor Richard Nichol an Associate Professor of Psychiatry at the University of the Free State and currently the Head of Child Unit at the Free State Psychiatric Complex is the author of the report handed in as **Exhibit "M".** He testified about different levels of stress and explained that before 30 days period a person is suffering from Acute Stress Disorder and if this persist beyond 30 days period it turns into Post Traumatic Stress Disorder. The traumatic exposure may lead to strokes and heart attacks.

[42] In simple terms he testified that acute stress can lead to a clot in the corollary veins. In this matter the clotting system was activated which later led to the venous sinus thrombosis. The panic attacks and anxiety disorder could have fuelled the process. It was his evidence that stress reduces the immune system of the body of an individual. The adrenaline which is released by the hormones if more than enough is released in the body can affect many parts of it leading to strokes, hypertension, stomach ulcers, irritable bowel syndrome and incessant headaches. In essence prolonged secretion after a traumatic event is bad for the body. It was his view that medication did cause venous sinus thrombosis but stress was an important contributing factor.

[43] Under cross-examination, he admitted that engaging in a sexual intercourse with a stranger can cause stress. He was aware that the deceased did receive counselling although not certain to which extent. He very much doubted that given the circumstances, the deceased could have given consent to a sexual intercourse. He stated that it was possible that stress triggered a pre-existing condition. He testified that this wealth of knowledge that he traversed could not be classified as common knowledge to all people. He agreed with the proposition that the accused could not have foreseen the death of the deceased as the ultimate result. He admitted that he did not dwell on the pre 9 February 2017 period in his report though it would have been ideal to do so.

[44] Dr. Ignatius Stephanus Ferreira a Specialist Forensic Pathologist conducted an autopsy on the deceased and was present when photos of her brain were taken. These were handed in as **Exhibit "O"** and **"P"** respectively. Prior to conducting this autopsy on the deceased he had performed almost 3 000 autopsies. He repudiated his colleagues that the cause of death was superior sagittal venous thrombosis with bilateral cerebral bleedings. He found nothing untoward on the genitals of the deceased and no sign of infection was detected.

[45] He perused the history of the deceased and after perusing different records, holding discussions with colleagues he concluded that the course of death was complications secondary to rape. He drew distinction between the course and mechanism of death. He explained that in determining the cause of death, the relevant question is "What led to the death of the person?" For example: If a person is hit on the head with a blunt object. The result will be the skull fracture and brain bleeding. In this case the cause of

death will be the blunt trauma to the head. In that manner there is the causal link between the death and the incident. The mechanism of death is what one gets. In this matter it is a clot. These are incidents where there is a repeated onslaught on the body eg medication, dehydration, temperature etc. The cause starts from elements outside the body.

[46] He testified that an examination of the clot in her brain revealed that it was a relatively fresh clot of about two (2) weeks. According to him it was possible to determine the age of the clot. In his view the most common clots occurred in the legs and in this matter it was lodged in the superior sagittal sinus. There was no drainage for the blood pumped by the heart into the brain. This resulted in swelling of the brain in the finite space leading to the building up of the pressure there. The progressive deterioration resulted in certain parts of the brain not getting the necessary blood supply. The bleeding into the brain substance muzzled oxygen into the brain and she suffered convulsions.

[47] He eloquently explained that the bigger the clot, the more its effects and thus the more the intra cranial pressure. He ruled out the possibility of small clots. In his view the clot will start and simply progress. Accordingly there is no evidence of the dormant clot. It will either grow or dissolves.

[48] He opined that any medication that gives adverse reaction will normally do so in the first phase of the treatment. The longer that medication is used the less the risk. However the risk factor will always be there as opposed to a person not using it at all. He added that acute stress increases the incident of thrombosis. Avril is considered more severe than Yaz. She was given 4. Inevitably it enhanced the chances of clotting. In addition antibiotics and

ARV's were added. These drugs course dehydration and vomiting. There was always a lurking possibility that the effect thereof may be adverse. The resultant dehydration caused her blood to become thicker and sluggish. The inactivity of the deceased during this time preferring to spend time sleeping did not help. The body needs movement to function properly. Given all these possibilities, in his words he said "I cannot say which one broke the camel's back". Certainly it was a combination factors.

[49] He conceded that on examining the body of the deceased he did not find anything signifying assault, rape or indecent assault. He repudiated the cause of death as determined by Dr. van Zyl and categorically stated that out of all the experts he is the only one qualified to determine the cause of death. None of them are experts on the cause of death. Lastly he lamented the fact that the medical system was not perfect in dealing with the deceased.

[50] The unique circumstances of this matter is that the deceased despite laying the charge against the accused, died before the accused had his day in court. Prior to her death she had the divulged certain information to several people namely her sister, Constable Ella Prinsloo, Dr. Lukas de Lange, and Sister Mabel Qhatatsi. It is on this basis that the state counsel moved an application for the admissibility of hearsay evidence.

[51] In terms of section 3 of Act 45 of 1988, hearsay evidence means evidence, whether oral or in writing the probative value of which depends upon the credibility of any person other than the person giving such evidence. The section reads as follows:-

> **"Hearsay evidence.- (1) Subject to the provisions of any law, hearsay evidence shall not be admitted as proceedings, unless-**

(a) each party against whom the evidence is to be adduced agrees to the admission thereof as evidence at such proceedings;

(b) the person upon whose credibility the probative value of such evidence depends, himself testifies at such proceedings; or

(c) the court, having regard to-

(i) the nature of the proceedings;

(ii) the nature of the evidence;

(iii) the purpose for which the evidence is tendered;

(iv) the probative value of the evidence;

(v) the reason why the evidence is not given by the person whose credibility the probative value of such evidence depends;

(vi) any prejudice to a party which the admission of such evidence might entail; and

(vii) any other factor which should in the opinion of the court be taken into account'

is of the opinion that such evidence should be admitted in the interest of justice."

[52] In **S v Ramavhale**[1] the court held that **"a judge should hesitate long in admitting or relying on hearsay evidence which plays a decisive or even significant part in convicting an accused, unless there are compelling justifications for doing so"**.

[53] I now turn to deal with the individual requirements as provided in section 3 of Act 45 of 1988 which must be taken into consideration before evidence of this nature is rendered admissible.

[54] **Nature of the proceedings**

The complainant is deceased in this matter. Undoubtedly the events leading to her demise were triggered by events following

[1] **1996 (1) SACR 639 (A) at 649 D**

the sexual encounter with the accused on 9 February 2017. However, that does not mean that the accused is guilty of any offense. However, it will be in the interest of justice to admit such evidence because this matter is important to the parties involved in it.

[55] **Nature of the evidence**

In this matter, it was recorded as an admission in terms of section 220 of Act 51 of 1977 that the deceased and the accused engaged in a sexual intercourse though it was consensual. In this regard the accused must give his version of the events.

[56] **Purpose for which the evidence was tendered**

This evidence is necessary to prove that the accused did not have the necessary consent to have sexual intercourse with the deceased. In essence that he committed the crime that he is charged of.

[57] In Ramavhale the court said that “the inquiry under his head should proceed under heads namely (a) the reliability and completeness of the deceased’s words, and (b) the reliability and completeness of whatever it was that the deceased did say.”[2]

[58] **The reason why evidence is not given by the person whose credibility the probative value of such evidence depends.**

[2] See footnote 1 para F

It is a fact that the deceased met her untimely death on 24 February 2017 at 10H15am.

[59] **Prejudice**

The accused will suffer no prejudice at all. I take cognizance of the fact that the accused is represented by an experienced counsel. Further that there is no opposition in the main against the admissibility of this evidence.

[60] For these reasons I ruled that hearsay evidence tendered by the state is admissible.

[61] The accused took to the stand in his defence. He testified that on 9 February 2017 at 15H53pm he went to the deceased's workplace. Prior to this visit he had been there on two (2) other occasions, in the morning and at 12H00pm. The deceased kept on postponing him. The purpose of his visits was to collect the debt that was due and payable to him. He had fixed her laptop sometime in September 2016 for R1 500.00 because someone had spilled cutex on its keyboard. Shortly prior to setting off for her workplace, he was smoking outside his workplace when she waved to him that he could come. Indeed he went. On arrival he outstretched his hand to receive his money. The deceased reciprocated by kissing him and he responded positively to this. She proceeded to close the door behind them and the kissing continued in the reception area. They pushed each other to the adjacent room while they continued kissing each other. The deceased removed his stripe T-shirt and his pants. Thereafter she removed her shirt, short jeans and lastly her panties. While this

was happening there was no discussion taking place between them.

[62] He took off his boxer shorts and they engaged in a sexual intercourse on the carpeted floor. It was only one sexual act and according to him the deceased had given her consent through her conduct as well as verbally. After their sexual encounter he left for his workplace. At no stage did he enter her workplace armed with a knife. The Vodafone tablet and the Acer laptop were removed per consent of the deceased. She gave him permission to hold onto these items until the following Monday when she will be in a position to pay him.

[63] The reason why he went to Nesto after the sexual encounter with the deceased was that he wanted to leave the items with him for safekeeping. He was weary to carry so many items with him home. However, he was annoyed by Nesto who wanted him to sell the laptop to him. He decided to leave with it. He left the tablet behind with him.

[64] Under relentless cross-examination he conceded that he did not inform his counsel about the version relating to the cutex. He had taken the laptop with him because he was facing eviction where he was staying. He wanted to show his landlady that he was not lying that some people were owing him money. He was confronted with his warning statement made to the police on the day he was charged which differed markedly with the version he gave orally in court. His only explanation was that there was a miscommunication between himself and the police officer who took down the statement. He denied ever being in a position to foresee that the death of the deceased may follow consequent to his

actions. The defence case was closed without calling further witnesses.

[65] It is trite law that the State bears the onus to prove its case against the accused beyond reasonable doubt. This does not imply that the State must prove its case beyond all doubt. In matters of this nature, it is a norm that the court will be confronted with mutually destructive versions. The correct approach was authoritatively explained in **S v Chabalala** by Heher AJA (as he then was) writing for an undivided bench in the following manner:-

> **"The trial court's approach to the case was, however, holistic and in this it was undoubtedly right: *S v Van Aswegen* 2001 (2) SACR 97 (SCA). 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. The result may prove that one scrap of evidence or one defect in the case for either party (such as the failure to call a material witness concerning an identity parade) was decisive but that can only be an *ex post facto* determination and a trial court (and counsel) should avoid the temptation to latch on to one (apparently) obvious aspect without assessing it in the context of the full picture presented in evidence. Once that approach is applied to the evidence in the present matter the solution becomes clear."[3]**

[3] **2003 (1) SACR 134 (SCA) at para 15**

[66] On the other hand the accused person is under no obligation to prove his/her innocence. These principles were instructively laid in **S v V**[4] as follows:-

> **"It is trite that there is no obligation upon an accused person, where the State bears the *onus*, 'to convince the court'. If his version is reasonably possibly true he is entitled to his acquittal even though his explanation is improbable. A court is not entitled to convict unless it is satisfied not only that the explanation is improbable but that beyond any reasonable doubt it is false. It is permissible to look at the probabilities of the case to determine whether the accused's version is reasonably possibly true but whether one subjectively believes him is not the test. As pointed out in many judgments of this Court and other courts the test is whether there is a reasonable possibility that the accused's evidence may be true".**

This undoubtedly imply that the admitted hearsay evidence may be taken into consideration when evaluating the total evidence.

[67] It is common cause that the accused approached the deceased at her workplace around 16H00pm on 9 February 2017. Sexual intercourse took place between them. Thereafter the accused left in possession of the Vodafone tablet and Acer laptop belonging to the deceased. The question to be answered is whether the complainant gave the consent to sexual intercourse and permission that the accused may remove her possessions from her? I will deal first with the evidence relating to the sexual intercourse. That evening her sister found her slumped forlornly in

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[4] **2000 (1) SACR 453 (SCA) at 455 A-C**

her room. She had to persistently ask her what was wrong. She told her about her property that was taken by some person. Intermittently she burst out in tears. Her response to the question whether “that person did it to her”, was answered positively.

[68] Although she did not use the word rape, but it is clear that they were talking about sexual intercourse that occurred under such circumstances. This is demonstrated by the reaction of the entire family to the news. Her fiancé was notified, the police were contacted for assistance and the family doctor was also jolted into action. Their emotional outpourings simply displayed that of people in distress. Normal people do not report incidents of consensual sexual intercourse to the police. It is a private matter between two (2) consenting adults. Logic dictates that this was a reaction to an unwanted event. I hold a considered view that the absence of the use of the word “sexual intercourse” or “rape” is not fatal to that extent that it can be said that she was not violated. Obviously her nodding to the question “whether he did it to her” triggered the chain reaction that followed thereafter and the conclusion that she was sexually molested.

[69] The deceased informed her medical practitioner that a man armed with a knife had sexual intercourse with her at three (3) different places in the office of her employer. It was repeated to Constable Ella Prinsloo. That he was armed and subdued her resistance with it. She informed her that he had sexual intercourse with her on the chair, table and floor. It was also relayed to Sister Qhatatsi that she was penetrated by a man known to her on 9 February 2017 at 16H00pm who had a knife and he placed it on her neck. There can be no better corroboration in this regard.

[70] The accused's version is that he was surprised by the amorous showing of the deceased towards him. He simply reacted to it and it led to them having sexual intercourse. He was totally taken aback by her.

[71] Perhaps it is opportune to examine the version discussed above.

- The deceased and the accused were known to each other. Although the deceased did not know his name.
- They were not in any platonic/intimate relationship. The deceased was engaged to her fiancé.
- On the day in question she was on her menstrual cycle.
- Her conduct after this ordeal is reminiscent of a person who was put under duress to have sexual intercourse with the accused.
- She had to endure the ordeal of receiving medication, relaying her story to her family and police. If she had done this willingly she could have simply walked away from it and continued with her life. I come to this conclusion because the deceased must have been sexually active because she was taking oral contraceptives.

[72] The accused's version is fraught with weaknesses and improbabilities. The accused was a poor witness with many versions littered with contradictions.

- Prior to 9 February 2017, he had just been released on 6 February 2017 from incarceration. He had this long outstanding debt which only on that day that he decided to collect. If that is the case he needed money more than any commodity. The difficulty with the version of the debt is that it

was only disclosed late in the trial. It is indeed an afterthought.

- The accused gave a version to the police in his warning statement. He told the police that he was surprised by the deceased when she emerged from an adjacent room stark naked. She called him and he went to her and had sexual intercourse. This is in contrast to his version under oath. The version had changed that the deceased started by kissing him and they pushed each other to the adjacent room. There she undressed him and herself. The material contradiction in these 2 versions weakens his case. I have no qualms to reject it as false.
- Throughout it was presented as if the deceased was repaying her debt with sexual favours. This is contrary to the version of the accused that it happened for no reason at all.

[73] Consistent with the proven facts, I am satisfied that the only inference to be drawn is that the accused intentionally and unlawfully had sexual intercourse with the deceased without her permission. These facts in my view are of such a nature that they exclude every reasonable inference save the one that I have drawn.[5]

[74] The next instalment on this matter is whether the accused penetrated the deceased both anally and vaginally. Further whether the accused raped the complainant more than once or not.

[75] I will commence with the issue whether the accused penetrated the complainant anally or not. This aspect was not relayed to her sister and/or Dr. de Lange. It appears that it was only noted as an

[5] **S v Blom 1939 AD 188**

observation by Sister Qhatatsi in completing the J88. However, she did not record it as an aspect conveyed to her by the deceased. The only explanation by Dr. Mariane Kotze a Clinical Forensic Medical Specialist is that the deceased might have forgotten or felt embarrassed about it. Although that might be, no basis was laid to come to that conclusion. It is a mere speculation. Both Dr. de Lange and Constable Prinsloo were well known to her. She told them everything and it is unthinkable that such an aspect would be forgotten or she would be coy about it. This aspect was not recorded by the Forensic Pathologist who conducted the autopsy. In the event of doubt, the accused is given the benefit of such doubt. I conclude that the accused did not penetrate her anally.

[76] The enquiry whether the accused raped the complainant more than once is a factual matter. Each case has to be decided on its own facts. In S v Blaauw, Borchers J set out the approach in the following manner:

> **"Each case must be determined on its own facts. As a general rule the more closely connected the separate acts of penetration are in terms of time (ie the intervals between them) and place, the less likely a court will be to find that a series of separate rapes has occurred. But where the accused has ejaculated and withdrawn his penis from the victim, if he again penetrates her thereafter, it should, in my view, be inferred that he has formed the intent to rape her again, even if the second rape takes place soon after the first and at the same place."[6]**

Applying this approach to the facts of this matter, I conclude outrightly that the accused raped the deceased once not three (3)

[6] **1999 (2) SACR 295 (W) at 300 C-D**

times. It was one continuous act with different positions. The reason for my conclusion are based on the following:-

- Constable Prinsloo took a detailed statement from the deceased about the incident. She testified that she understood it to be one sexual act with different positions.
- An equally detailed account of the events was narrated to Dr. de Lange. He too, testified that he understood the sexual encounter as one act with different positions.
- Counsel for the defense submitted that the three positions were in the same place (room) on the chair, table and the floor. There is no evidence of the duration of the sexual intercourse nor of any significant break between the changing of positions or any other fact to prove that three separate sexual acts took place. In fact as Dr. de Lange testified, the deceased informed him that when the accused was done, she noticed some sperms dripping from his penis and spilling on the carpet. This seems to suggest that one act of sexual encounter took place. It is clear that these three (3) sexual positions were closely connected with each other. Given the circumstances I am unable to infer that the accused formed separate intent to rape her many times when they changed positions.

[77] I now turn to the charge of robbery with aggravating circumstances. It is common cause that the accused was found in possession of the tablet and laptop belonging to the deceased. It is also common cause that he gained such possession from 9 February 2017. He left with them after he had raped her.

[78] The deceased was consistent in her account of the events of 9 February 2017 relating to how the accused gained possession of her tablet and laptop. She told her sister that her assailant left with them. She did not give details. Constable Prinsloo, Dr. de Lange and Sister Qhatatsi corroborates each other regarding the presence of the knife possessed by the accused and that he pressed it against her neck. This account of the events was given to them by the deceased at different times and occasions. It is the very knife that he used to subdue her to succumb to his sexual sadistic attacks. The overwhelming evidence is that he had the monopoly of violence at the scene and could not have left with these items as per her permission.

[79] The evidence of Nesto Matendere impressed me immensely on this aspect. He took possession of the tablet and realized the messages coming in written in Afrikaans and personal photos of the deceased. He did not sit back but acted on his guts that something was amiss. Perhaps it is this single act of benevolence that led to the accused being arrested quicker than he had imagined.

[80] The accused had brought the tablet to him so that the information on it could be deleted. He wanted Bluetooth connectivity with other devices to be fixed. Nesto stuck to his version and never veered off it. He denied the version of the accused as false that the item was brought to him for safekeeping. He testified that even though they knew each other they did not have a platonic relationship.

[81] The accused's version lacked credibility and is a concoction of convenient facts depending on the question posed to him. He testified that the deceased owed him money for having fixed the laptop, because cutex was poured on its keyboard. The

deceased's sister testified that she identified the laptop with the marks of the spilled cutex which were still visible. It begs the explanation what is that he fixed given her testimony.

[82] He continued and testified that he took the items to show to his landlady that there were people owing him money. It is not difficult to know that his landlady will be interested in the settlement of her rental account not laptops. It boggles the mind how possession of these items would have convinced the landlady that she must be patient and that she will soon be paid. It remains unexplainable as to why he so eagerly wanted to take these items on that day. Minutes after taking possession of her property he attempted to erase her information from the tablet and sell the laptop. His conduct materially contradicts his version that he was holding them in lieu of payment. He was doing everything to hide his traces and dispose them. The inescapable conclusion is that the accused exerted force on the deceased armed with a knife and took her Vodafone tablet and Acer laptop. His version stands to be rejected as not reasonably possibly true but false.

[83] The tragedy that involved the deceased on 9 February 2017 ended with her death on 24 February 2017. She never became the same. The pathologist who conducted the autopsy recorded the cause of death as **"complications secondary to rape"** as per **Exhibit "O".** It is on this basis that the accused is charged with her murder.

[84] In our law, murder is described as the unlawful and intentional killing of another person. It therefore stands to reason that in order for an accused to be convicted of this felony, the state must prove beyond reasonable doubt that an accused committed an act, (in this matter rape) that led to the death of the deceased. It must be established that he had the necessary intention to kill.

- The intent (referred to as *dolus*) can take the form of *dolus directus* and *dolus eventualis.* The state case in this matter is premised solely on the intention in the form of *dolus eventualis.* This consists of two (2) parts viz foresight of the possibility of death occurring and reconciliation with that foreseen possibility.[7] It will be sufficient that the perpetrator foresee the possibility of death arising out of his/her actions for the necessary criminal intent to exist.

[85] In its quest to prove its case on this aspect the state relied on the evidence of three (3) expert witnesses. Undoubtedly, they are practitioners of impeccable qualifications, great skill, knowledge and experience in their chosen professions. Their immense contribution geared towards finding the solution of this conundrum is greatly appreciated.

[86] The primary function of an expert is to assist the court to reach a conclusion with regard to matters on which the court itself does not have the necessary knowledge to enable it to decide the issue.[8] The expert must satisfy the court that he/she is qualified to speak with authority on the subject matter.[9] An expert must satisfy the court that because of his/her special skill, training or experience, the reasons for his/her opinion are acceptable. In the event the expert refers to textbooks, articles or other publications of others, he or she must affirm such, by showing that the writer of such is a person of established repute and of approved experience in that field.

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[7] S v Pistorius 2016 (1) All SA 346 (SCA) para 26

[8] Expert Evidence in Clinical Negligence – Patrick van der Heever et Natalie Lawrenson, Juta, 2015 page 16

[9] Menday v Protea Assurance Co Ltd 1976 (1) SA 569 (E) at 569

[87] In conclusion, expert evidence though important is part of the entire evidence to be taken into account. This far Satchwell J cautioned in Holtzhausen v Rood in the following manner:-

> **"Finally, opinion evidence must not usurp the function of the Court. The witness is not permitted to give opinion on the legal or the general merits of the case. The evidence of the opinion of the expert should not be proffered on the ultimate issue. The expert must not be asked or answer questions which the Court has to decide."[10]**

[88] The pertinent question is whether on the facts proved relevant to the conduct of the accused, he foresaw that the deceased will die and he reconciled himself to that event occurring?

[89] It is common cause that the deceased was on the Yaz contraceptive pill for at least a year before 9 February 2017. This pill has been associated with a higher risk for venous thrombosis due to the fact that it promotes blood clotting. However, the risk for abnormal blood clot formation decreases with prolonged use though the specifics of this aspect were not explained to any significant effect.

[90] The deceased was prescribed Doxycycline and Flagyl by Dr. de Lange. Later ARV's prophylaxis and antibiotics were added. After commencing this treatment she experienced severe nausea and was taking fluids with great difficulty. She started vomiting and diarrhoea followed. Alzan, Adco-dol and Vomiguard were added to the list by Dr. de Lange. She was examined by a Dr. Nkabinde on 20 February 2017 at Katlego District Hospital, Virginia. He prescribed Alluvia which is a different regimen to the normal ARV prophylaxis. The only reason proffered by Dr. van Zyl is that

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[10] **1997 (4) SA 766 (W) at 773 B - C**

probably the treating doctor expected that the nausea, vomiting and diarrhoea will be better on another ARV drug regimen. It is clear that her condition worsened until her demise.

[91] In considering the factors that increased the patient's risk for developing cerebral venous sinus thrombosis, Dr. van Zyl concluded as follows:-

> **"The trigger for the thrombo-embolic event is most likely dehydration (as indicated in Dr. de Lange's referral letter to the hospital in Virginia and the doctor at Pelonomi hospital) due to vomiting and diarrhoea, made worse by the lack of taking enough fluids. Dehydration increases the risk for blood clots to form. Nausea, vomiting and diarrhoea are all known side effects of anti-retro viral prophylaxis drugs. Administration of anti-retro viral drugs were essential in this case to prevent transmission of HIV in high-risk scenario. The patient would not have been on these medications if she had not been raped. The antibiotics doxycycline and Flagyl are also known to cause severe nausea and vomiting. Again, these medications were given to prevent infection in a high-risk scenario. The patient would not have been on these drugs had she not been raped".**

[92] The state's case is on the basis that had the accused not raped the deceased then she would not have taken the medications. The deceased was more exposed to suffer venous sinus thrombosis following the stressful events namely rape. This is the incorrect approach.

[93] Given the facts found to have been proved, considering all the evidence relevant to the issue(s) and applying the correct legal test, did the accused act with *dolus eventualis* when he raped the deceased leading to dire consequences. This matter was

authoritatively dealt the in **S v Humphreys** were the following was said:-

> **"For the first component of dolus eventualis it is not enough that the appellant should (objectively) have foreseen the possibility of fatal injuries to his passengers as a consequence of his conduct, because the fictitious reasonable person in his position would have foreseen those consequences. That would constitute negligence and not dolus in any form. One should also avoid the flawed process of deductive reasoning that, because the appellant should have foreseen the consequences, it can be concluded that he did. That would conflate the different tests for dolus and negligence. On the other hand, like any other fact, subjective foresight can be proved by inference. Moreover, common sense dictates that the process of inferential reasoning may start out from the premise that, in accordance with common human experience, the possibility of the consequences that ensued would have been obvious to any person of normal intelligence. The next logical step would then be to ask whether, in the light of all the facts and circumstances of this case, there is any reason to think that the appellant would not have shared this foresight, derived from common human experience, with other members of the general population."**[11]

[94] Both Drs de Lange and Van Zyl as well as Prof Nichol testified that the cause of death was not reasonably foreseeable by a person in the position of the accused. In this regard it does not pass the legal requirement that this should be reasonably foreseeable before a person can be held liable for the death of another person.[12] It also clear from the evidence that the use of different medication could have independently caused the clotting or worked against each other to cause sagittal venous sinus thrombosis. Equally so, according to all the medical practitioners, although those tasked with her care did their best they could in the circumstances, thay did not meet the threshold of proper medical care.

[95] Dr. Van Zyl recorded the case of death as venous sinus thrombosis. Dr. Ferreira as complications secondary to rape. He

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[11] 2015 (1) SA 491 (SCA) para 13

[12] S v Van As 1976 (2) SA 921 (A)

refuted the conclusion of his colleague Dr van Zyl to comment on this aspect. According to him, none of the other experts are experts on the cause of death. He pertinently lamented the fact that the treatment by the medical system was not perfect. Medication like wafrin and heparine which are used to prevent anti-clotting were not administered on the deceased. The important aspect of his evidence is his admission that of all factors, “he cannot say which one broke the camel’s back. This means that he could not nail his mast on the specific cause of her death

[96] Certain contradictions emerged between the evidence of medical experts. Dr. van Zyl testified that clots could form and be dormant until precipitated by a particular event. This aspect is opposed by Dr. Ferreira that clots will form and simply progress. Perhaps this impasse could have been resolved by a Specialist in Internal Medicine because this is a medical condition. I canvassed with Dr. Ferreira whether the cause of death will still be the same in the event it is found that the parties had consensual sexual intercourse. His response was noncommittal.

[97] I have no qualms about the imminence of these experts. I have difficulty with the soundness of the opinion and logic. It appears to me that they are intent on establishing the causal link between the rape and the death of the deceased without logical reasoning and underlying theory to sustain the conclusion. I could not decipher whether their testimony or opinion was based on generally accepted opinion in this speciality order specific clinical references. Prof Nichol based his report on one Ronald von Kanel. I have no idea who is this author and whether he is an authority in his field. He too did not give a clear answer about him despite assistance by counsel for the accused as to who you might be. Importantly whether the

aforementioned author is an authority in the speciality and can comment as such on this subject.

[98] Given this evidence and taking all into consideration it is patently clear that it could not have been foreseeable to the accused that his action will lead to the death of the deceased. Equally so there is no nexus that has been established by the state between his act and the known results. In the case of doubt, he is given the benefit of it.

[99] For these reasons, I conclude as follows:-

99.1 The accused is found guilty on charges one (1) and two (2). He is acquitted on charge three (3).

Sentence

[100] Sentencing is an unenviable task to discharge in a criminal trial. This is so because whatever sentence is meted out to the accused will not necessarily be appeasing to all interested parties. However, it lies within the discretion of this court to impose a sentence which is in accordance with the law and guidelines developed in our courts over a period of time. In doing so the court must exercise its discretion judicially in a manner that is just and equitable.

[101] The personal circumstances of the accused are common cause. The accused is twenty two (22) years old. He had completed grade 10 at school. He is unmarried with one (1) daughter aged two (2) years. The child is in the care and custody of her grandmother. He could not advance at school because of the death of his parents and financial difficulties that followed thereafter. Prior to his incarceration he was gainfully employed at Bafana Bafana Furnishers as a general worker. He was earning R250.00 per week.

[102] His counsel submitted that he has been incarcerated since 10 February 2017. A period of 19 months has elapsed prior to his sentencing. Acting on his instructions, counsel conveyed to the mother of the deceased his sincere condolences and expressed his remorse for what occurred on 9 February 2017.

[103] In aggravation, the state led the evidence of the mother of the deceased. Tearfully, she recounted what a loving, easy-going and God-fearing person the deceased was. She was passionate in her sports and good at it. She was awarded several medals for her excellent performances. She acted as her coach and they spent many hours together while she was honing her skills.

[104] The deceased was not only the baby in the family but the centre of attraction. Her demise had created a void that is still being felt by the family to date. This has adversely affected all of them in particular her father and fiancé. Her father's life has been negatively affected and is deteriorating. It has been an insurmountable struggle for all of them to cope in the circumstances. The devastation caused by the accused's ill-considered actions is a bitter pill to swallow.

[105] On behalf of the state, it was submitted that the accused has been incarcerated for so long because of his own doing. This cannot be considered as a mitigating factor. The accused was also not appearing in this matter as a first offender. He had been sentenced to serve a six (6) months custodial term for assault with intent to do grievous bodily harm. He spurned the window of opportunity afforded to him.

[106] It is a well-established principle of our law that the courts must follow the long developed and followed triad taking into

consideration the personal circumstances of the accused, the crime and the interest of the community. In **S v Banda** it was held that "the triad required the balancing of the equilibrium and that one element should not be accentuated at the expense of and to the exclusion of the other".[13]

[107] It is so that the offenses that the accused has been found guilty attracts minimum sentences of ten (10) and fifteen (15) years respectively. The court can only deviate from imposing the said sentences if there are substantial and compelling circumstances which can justify the departure from the prescribed minimum sentence.

[108] It is aggravating that the accused attacked and violated a defenceless woman. He did so to her where she was supposed to be safe viz her workplace. In **S v Chapman**[14] the court emphasized that women must be free to enjoy their rights like everybody else. The court sternly warned that those who commit these crimes will be dealt with a heavy hand without mercy. Undoubtedly the accused committed heinous crimes targeting the vulnerable in society.

[109] On the accepted evidence, it appears that the accused planned meticulously his offence. He pounced on her when she was less expectant of such an unwanted attention. Having violated her womanhood in the most ghastly manner he continued to humiliate her by taking her property. That was pitiless.

[110] The personal circumstances of the accused are not extraordinary. He is still a young man probably with the future ahead of him. In **S v**

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[13] **1991 (2) SA 343 (BG)**
[14] **1997(3) SACR 341 (SCA)**

Vilakazi[15] the court held that **"in cases of serious crime the personal circumstances of the offender, by themselves, will necessarily recede into the background**".

[111] I find it difficult on the evidence to accept that the accused is genuinely remorseful. In **S v Matyityi**[16] the following was said:-

> **"After all, before a court can find that an accused person is genuinely remorseful, it needs to have a proper appreciation of, inter alia: what motivated the accused to commit the deed; what has since provoked his or her change of heart; and whether he or she does indeed have a true appreciation of the consequences of those actions."**

[112] Taking all into consideration, I am of the view that there are no substantial and compelling circumstances which can justify the departure from the prescribed minimum sentence. I note that the accused had been incarcerated for some lengthy period. However, this is largely due to the fact that he had broken his parole conditions. He has no one to blame but himself. Equally I do not intend to impose sentence on him that will be tantamount to breaking him. The facts of this matter demand the imposition of the minimum sentence as ordained by the Legislature.

[113] In the result, the following order is made:-

113.1 Charge 1 - The accused is sentenced to ten (10) years imprisonment.

113.2 Charge 2 - The accused is sentenced to fifteen (15) years imprisonment.

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[15] **2009 (1) SACR 552 (SCA)**
[16] **2011 (1) SACR 40 (SCA) para 47**

It is further ordered that the five (5) years in charge 1 will run concurrently with the sentence in charge 2. The effective term of imprisonment will be twenty (20) years.

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M. A. MATHEBULA, J

On behalf of the State:	Adv. J. M. De Nysschen
Instructed by:	National Director of Public Prosecution Bloemfontein
On behalf of the Accused:	Adv. P. Nel
Instructed by:	Legal Aid Bloemfontein