IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION; JOHANNESBURG

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES / NO.
(2) OF INTEREST TO OTHER JUDGES: YES / NO.
(3) REVISED.
DATE:
SIGNATURE:

BEFORE THE HONOURABLE ACTING JUDGE COERTSE C.J.
COURT

CASE NO: SS 57/2023
Boksburg

STATE

Versus

MAGWAZA BONGIWE PRAISE **The Accused**

JUDGEMENT ON THE MERITS

COERTSE CJ AJ

INTRODUCTION

1. The indictment states that on Friday 2nd December 2022 Kgopotso Ntsana, the deceased, died at or near Boksburg, in the district of Ekurhuleni North as a result

of a gunshot wound to the head. The indictment stated that the accused BONGIWE PRAISE MAGWAZA unlawfully and intentionally killed the deceased. The accused was born on the 11th day of November 2000 in KZN at or near Hammersdale.

2. The indictment further alleges that the accused:

2.1. was in possession of a parabellum calibre model Z288 semi-automatic pistol with serial number Q[…] without holding a licence, permit or authorisation issued in terms of the relevant act.

2.2. was in possession of 15 9mm parabellum calibre cartridges without being the holder of a license in respect of a firearm capable of discharging that ammunition or a permit to possess ammunition.

2.2.1. In connection with this specific count, the state applied for an amendment of this count in that she was in possession of 15x cartridges and not 16x as initially alleged. There was no opposition from the accused's side and the amendment was granted.

2.3. put the said fire-arm between the deceased's legs with the intention to distort the truth as to the circumstances surrounding the death of the deceased and that she threw the scissors she used to stab the deceased, away and is therefor guilty of the crime of defeating the ends of justice.

3. The court warned the accused before pleading to the charge of murder that in the event of her being found guilty of the crime of murder she might be sentenced to a minimum sentence in terms of the Criminal Law Amendment Act 105 of 1997 as amended ["the Act"].

4. In respect of the firearm and ammunition the accused was warned about the maximum sentences.

5. On Monday 16 October 2023 the court read the warnings that might apply in respect of minimum sentences in the event of her being found guilty of murder in open court and in the presence of her legal representative by the Court. And she indicated that she understands it.

6. The accused pleaded not guilty to all the counts and offered her plea explanation. The court will set it out in detail further below.

7. The state's case was based on circumstantial evidence, that is oral testimony and documentation, further informed by her plea explanation, her admissions in terms of Section 220 of the Criminal Procedure Act ["CPA"] and the accused's statement Exhibit G.

8. In connection with the *onus* in criminal trials, Morrison AJ said at paragraph 16 of his well-reasoned judgment[1]:

> "It is trite that the State had to prove its case against the Accused beyond a reasonable doubt, whereas his defence needs only to be reasonable possibly true. Furthermore, in terms of section 35 of the Constitution, the supreme law of the Republic, he has the right to a fair trial." And he goes on to refer to some of our oldest case law on this very topic.[2]

THE STATE CALLED THE FOLLOWING WITNESSES:

9. Mr. Sello Joseph Chalale the security officer at the complex where the incident took place.

10. Mr. Njabula Mxolisi Ndlovu who was accused's ex-boyfriend.

11. Sergeant Ramokone Irene Baloyi.

12. Constable Hangwelani Mulelu in respect of Exhibit C – who took the scene photos.

13. Colonel André Botha in respect of Exhibit D the ballistic report.

14. Constable Humbulani Pleasure Mufamadi in respect of Exhibit E the scene statement.

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[1] *S v Alaba Kakuyu Makunjuola Osabiya* https://www.saflii.org/za/cases/ZAGPPHC/2021/716.html
[2] *R. v M*, 1946 AD 1023; *R. v Difford*, 1937 AD at p. 373.

15. Colonel André Botha in respect of Exhibit F the scene reconstruction.

16. Captain Mashudu Ramaite.

17. Brigadier Makgalangeke Paulina Sekgobela.

18. Colonel Serfontein in respect of Exhibit G.

19. Lt. Colonel MN Matlole in respect of Exhibit G.

THE ACCUSED WAS THE ONLY WITNESS FOR THE DEFENCE:

20. She, Bongiwe Praise Magwaza, was the only witness in her own defence.

THE DOCUMENTARY EVIDENCE SUBMITTED BY THE STATE:

21. The following exhibits were handed into court:
    21.1. Exhibit A: the accused's admissions in terms of section 220 of the Criminal Procedure Act.
    21.2. Exhibit B: the *post mortem* examination by Dr. B. Krysztofiak.
    21.3. Exhibit C: the scene photographs taken by Constable Hangwelani Mulelu on 4 December 2022 at 01:00.
    21.4. Exhibit D: the ballistic report of Colonel André Botha; he carried out the forensic ballistic examination on 23 March 2023.
    21.5. Exhibit E: the scene statement of Constable Humbulani Pleasure Mufamadi executed 4 December 2022.
    21.6. Exhibit F: the forensic report of Colonel André Botha setting out his intention and scope of his forensic examination comprising the following ballistics techniques: crime scene examination, reconstruction and scene photography carried out on 6 December 2022.
    21.7. Exhibit G: the confession/admission of the accused Bongiwe Praise Magwaza dated 6 December 2022. This statement was provisionally allowed

after a trial-within-a-trial. The court will indicate below why it is now allowed without any reservations.

21.8. Exhibit H: Two photographs of the accused depicting where the deceased allegedly cut her artificial hair. This was handed in on behalf of the accused with the agreement of the state.

21.9. Exhibit J: a letter by the Director of Public Prosecutions dated 22 April 2024 to the Superintendent Sterkfontein Hospital: Mental observation: report in terms of section 78 of the Criminal Procedure Act 51 of 1977.

21.10. Exhibit K: a letter from Dr B Armstrong State Psychiatrist dated 17 May 2024: observation matter: Bongiwe Praise Magwaza: Case Number SS 57/2023; Hospital Number F 19959.

21.10.1. Dr Armstrong, in terms of section 79 (1) (b) (i) of the CPA[3], and Dr N Govender, in terms of section 79 (1) (b) (ii)[4] of the CPA formed the panel for the purposes of enquiry and to report under sections 77 and 78 of the Criminal Procedure Act, who independently examined the accused during the period of 22 April 2024 to 17 May 2024.

21.10.2. They filed their report and found that:

21.10.2.1. The diagnosis in respect of section 79 (4) (b)[5] of the CPA there is no mental illness or intellectual disability and cannabis and alcohol use disorders.

21.10.2.2. That, in terms of section 79 (4) (c)[6] read with section 77 (1)[7] of the CPA that the accused is fit to stand trial.

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[3] "79 Panel for purposes of enquiry and report under sections 77 and 78 (1) Where a court issues a direction under section 77 (1) or 78 (2), the relevant enquiry shall be conducted and be reported on- (a) ... (b) where the accused is charged with murder ... or if the court considers it to be necessary in the public interest, or where the court in any particular case so directs- (i) by the medical superintendent of a psychiatric hospital designated by the court, or by a psychiatrist appointed by the medical superintendent at the request of the court."

[4] 79 Panel for purposes of enquiry and report under sections 77 and 78 (1): Where a court issues a direction under section 77 (1) or 78 (2), the relevant enquiry shall be conducted and be reported on- (b) where the accused is charged with murder ... or if the court considers it to be necessary in the public interest, or where the court in any particular case so directs-(ii) by a psychiatrist appointed by the court and who is not in the fulltime service of the State unless the court directs otherwise, upon application of the prosecutor, in accordance with directives issued under subsection (13) by the National Director of Public Prosecutions;

[5] "Section 79 (4) The report shall- (a) ... (b) include a diagnosis of the mental condition of the accused"

[6] "Section 79 (4) (c) The report shall – (a) ... (b) ... (c) if the enquiry is under section 77 (1), include a finding as to whether the accused is capable of understanding the proceedings in question so as to make a proper defence"

[7] Section 77 Capacity of accused to understand proceedings (1) If it appears to the court at any stage of criminal proceedings that the accused is by reason of mental illness or mental defect not capable of

21.10.2.3. That, in terms of section 79 (4) (d)[8] read with section 78 (2)[9] of the CPA, at the time of the alleged offence, she was both able to appreciate the wrongfulness of her actions and able to act in accordance with such appreciation of wrongfulness.

ACCUSED'S PLEA EXPLANATION:

22. The accused offered the following plea explanation: On the night of the incident, 2 December 2022, they were lovers and they had a quarrel when deceased assaulted her with open hands and strangled her. He then took a pair of scissors and started cutting her braids. She managed to get hold of the pair of scissors and defended herself by stabbing deceased multiple times and by so doing freed herself from this attack. Whilst he was strangling her, she could not breath. They were drunk and this altercation took place at round 23:00 that night. After stabbing the deceased, she broke free and fled from the property through the front door. She returned the following day and to her surprise she found him dead. She became very remorseful and alerted the neighbours whereafter the police were called. She did not know what killed the deceased. So far, her plea explanation.

ACCUSED'S ADMISSIONS IN TERMS OF SECTION 220 OF THE CRIMINAL PROCEDURE ACT [Exhibit A] which were signed by the accused on 16 October 2023 at the commencement of the trial and therefor sufficient proof of the following facts:

23. IN RESPECT OF THE *POST MORTEM* [Exhibit B]

23.1. Accused's admissions of the *post mortem* examination are as follows:

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understanding the proceedings so as to make a proper defence, the court shall direct that the matter be enquired into and be reported on in accordance with the provisions of section 79.

[8] Section 79 (4) The report shall- (a) ... (b) ... (c) ... (d) if the enquiry is in terms of section 78 (2), include a finding as to the extent to which the capacity of the accused to appreciate the wrongfulness of the act in question or to act in accordance with an appreciation of the wrongfulness of that act was, at the time of the commission thereof, affected by mental illness or mental defect or by any other cause.

[9] Section 78 (2) If it is alleged at criminal proceedings that the accused is by reason of mental illness or mental defect or for any other reason not criminally responsible for the offence charged, or if it appears to the court at criminal proceedings that the accused might for such a reason not be so responsible, the court shall in the case of an allegation or appearance of mental illness or mental defect, and may, in any other case, direct that the matter be enquired into and be reported on in accordance with the provisions of section 79.

23.1.1. That the deceased is Kgopotso Ntsana a male.

23.1.2. 2 December 2022: Deceased died on 2 December 2022 as a result of a gunshot wound to the head and that the body of the deceased did not sustain any further injuries from the time the wounds occur until the *post mortem* was conducted [ad para's 2 & 3 of the admissions];

23.1.3. On 6 December 2022 Dr B Krysztofiak recorded her findings in the report and these are correct and these facts and findings contained in the *post mortem* are admitted. The court will pay attention to the *post mortem* later in this judgment.

23.2. ADMISSIONS IN RESPECT OF THE SCENE PHOTOS TAKEN ON 4 December 2022

23.2.1. In respect of the scene photographs, Exhibit C, taken on 4 December 2022 by Constable Hangwelani Mulelu and the key provided to the photographs are correct.

23.3. ACCUSED'S ADMISSIONS IN RESPECT OF THE BALLISTIC CHAIN EVIDENCE of the items that were recovered from the scene:

23.3.1. 1x9mm Parabellum Calibre LIW model 288 semi-automatic pistol with serial number Q[…]

23.3.2. 1x magazine;

23.3.3. 15 9mm parabellum calibre cartridges.

23.3.4. packed and sealed the exhibits referred to in the above paragraph into a forensic bag bearing number PAD002516384.

23.3.5. booked the above-mentioned exhibits sealed in forensic bag PAD002516384 in, into the SAP13 624/22 stores.

23.3.6. booked out the exhibits sealed in forensic bag PAD002516384 from the SAP13 624/22.

23.3.7. forwarded the exhibits sealed in forensic bag PAD002516384 it to the Forensic Science Laboratory Ballistic Section for analyses.

23.4. ADMISSIONS IN CONNECTION WITH THE BALLISTIC REPORT EXHIBIT D:

23.4.1. Lieutenant André Botha concluded a forensic examination on the contents of the exhibits sealed in forensic bag PAD002516384 and he recorded his findings in Exhibit D and the correctness of the facts and

findings as recorded in his Ballistic Report contained in Exhibit D are admitted.

POST MORTEM EXAMINATIONS [Exhibit B]:

24. The Death Register no DR 3771/2022 GW 7/15 the *post mortem*[10] dated 20 February 2023:

24.1. On page 2 of the report the pathologist noted under para. "(iv) the chief post mortem findings in this case were: 1. Gunshot wound to the head to the parietal area, associated with multiple skull fractures and brain injury. ***2. Several superficial penetrating wounds to the right sub clavicular region of the chest, right arm, left hip and left forearm. 3. Abrasions to the right hand and bruising of the left palm.***" And at para. (ii) "the cause of death was determined to be: GUNSHOT WOUND TO THE HEAD." [emphasis in the original]. [emphasis by the court]. The accused stated during her plea explanation, and confirmed subsequently during her evidence that she stabbed the deceased with a pair of scissors but she was not sure where exactly she stabbed him as her artificial hair was in the way. Other witnesses for the State during their evidence in chief referred to the stabbing of the deceased.

24.2. On page 7 of the report under the heading 2. "History as per SAPS180: The deceased was found laying on ***prone position;*** Girlfriend alleges that they were fighting and she stabbed him on the right shoulder. Upon observation and exit wound found on top of the head – ***with firearm belonging to the state btw the deceased thighs***, ***pair of scissors was used to stab him***." [emphasis by the court]. The court is of the view that these remarks by the pathologist is clearly hearsay evidence; it should however be analysed/investigated carefully to assess the veracity of it. The photographs of the deceased show him in a prone position with a fire-arm between or near his legs. This is evident in the photographs [Exhibit C] Prone position: one of the witnesses stated under oath that it seemed as if

[10] See footnote 2.

deceased was praying. The other witness stated it was as if the deceased was asking for forgiveness.

25. Botha's observation and notes in respect of photos 3, 4, 5 & 6[11] are graphic in that it states that "The deceased had a stellate wound on top of his head … The muzzle of the firearm was pressed against the head when the shot was fired." And at para. 5.3: "An corresponding exit wound was visible at the back of the head (marked D]. See photo 5. Photo 6 indicate the trajectory through the head." Ad para. 5.4 he writes: "I am of the opinion that the deceased upper body was possibly bend forward when he was shot. His head was at a lower position close to the height of the bed. The bullet perforated his head and struck the wall. A self-inflicted wound can be ruled out." It does have the trappings of a brutal execution – because Lt Col Botha positively ruled out a self-inflicted wound. The shot was not at close range but it was point-blank: the nozzle of the pistol was pressed onto the skull – Botha's examination and professional opinion about this specific fact is based on his experience and his expertise as a ballistic expert and is borne out by the starshaped [stellated] wound. The photo of the open skull depicted the trajectory of the bullet through the skull with the entrance wound and the exit wound clearly visible as is evidenced in Exhibit F photos 3, 4, 5 & 6. Photos 7 & 8 depicted the possible body posture of the deceased moments prior to him being shot.

26. Still on page 7 of the report it is noted that Lt. Col. A Botha Ballistics & Captain M. Ramaite DPCI Germiston were present amongst others.

SCENE PHOTOS: Exhibit C:

27. Photos [40 photos] of the scene taken on 4 December 2022 at 01:00 - it should be noted that the photographs were taken on 4 December 2022 at 01:00 early that morning. Accused stated under oath that she returned on the day after the incident that is on 3 December 2022 and that she had to climb over the balcony to get into the flat – that in turn corroborates her description in her statement Exhibit G that she locked the front door from the inside and she had to go up the stairs, past

[11] Exhibit F.

the deceased's body and jumped down from the balcony to the outside to get out of the flat. It was done deliberately to "create the impression of suicide." When she walked up the stairs to get out of the flat, she had to walk through deceased's blood on the floor which in turn explains why her tekkies [she admitted it is hers] imprints were photographed on 4 December 2022. The takkies on the photograph shows that it is clean with no blood on it and yet the marks are from hers and she admitted during evidence that it belonged to her. The police officer's notes reflects that the shoes were still wet when he photographed it. The inference is irresistible that accused washed it on 3 December 2022 and put it there on the floor where the shoes were photographed.

BALLISTIC REPORT Exhibit D:

28. From the Ballistic report[12] by Lt. Col, Botha it is clear from his *curriculum vitae* that he is well qualified to conduct forensic examination and to reach professional and expert opinions based on the facts, observation and then to reach conclusions. He is equally well qualified to reconstruct crime scene. The attack by Adv Mqushulu on the expertise of Lt. Col. Botha is unwarranted and totally unfounded and is hereby rejected in totality. He testified twice during this trial – once during the trial-within-a-trial and the second time after the court admitted accused statement contained in Exhibit G.

29. He filed two reports: Exhibit D & F. Accused admitted Botha's ballistic report Exh. D. He, however, read his entire report into the court record. Part and parcel of the accused's admissions of this report [Exhibit D] is that she admitted that Botha is an expert in his field and that his forensic examination of the contents of PAD002516384 was done by him and his facts and findings as recorded in his report are correct. This leaves no room for the accused to doubt his expertise or his examination, the facts he listed and his findings. Unfortunately, counsel for the accused attacked the expertise of Col. Botha; the attack by Mqushulu is rejected as a desperate attempt to argue his client's case. It further more unclear why this

[12] See footnote 5.

unwarranted attack was levelled at the expertise of this expert in light of the Section 220 admission which put the facts beyond any further proof.

SCENE STATEMENT: Exhibit E:

30. Statement by Constable Mufumadi dated 4 December 2022 [this is two days after the incident that occurred on 2 December 2022]. The court deals with this later in the judgment.

FORENSIC RECONSTRUCTION etc REPORT Exhibit F:

31. Report by Lt Col Botha of the reconstruction of the scene dated 9 December 2022 [some seven days after the incident that occurred on 2 December 2022]
CONFESSION/ADMISSION CASE NO 38/12/2022: Exhibit G:

32. This statement by the accused dated 6 December 2022 and signed by her on that date at 23:55 was admitted in the trial after a trial-within-a-trial. The court provisionally admitted this statement and it will be dealt with in greater detail hereunder. I hasten to add that I hereby admit it.

33. I have already passed judgement on this Exhibit G and will not dwell on those reasons. At this juncture the court will concentrate on the contents of the statement and the remarkable dovetailing of the contents thereof with the forensic evidence, observations and conclusions. Defence counsel cross-examined Colonel G.J.A. Serfontein and Lt. Col M.H. Matlole extensively and levelled accusations that these two police officers were untruthful and that they inserted information into this statement and that the accused did not give it to them. During the cross-examination of these two officers, accused admitted to giving them certain information but the moment there is reference to the actual shooting of the deceased, that is denied. She started off her statement by saying: “I will tell everything that happened on the night of the incident.” Her statement then gave great detail where the deceased was that night and what happened when he returned home and how the fight started and what was the “trigger” so-called for the fight that got serious and escalated to him being killed. She repeated this almost word for word during her evidence in chief but

she denied having pulled the trigger that fired only one bullet and that bullet killed the deceased. The unwarranted attack by the defence on the expertise of these SAPS officers are hereby rejected in totality.

34. She told Serfontein that she bought beers, returned home and sat drinking those beers. She phoned various of her friends; the deceased arrived later than usual and she did not hear him arriving; he told her that he came on foot. This is not only written down by Serfontein, but she also gave evidence about it.

35. The fight between her and deceased was about the fridge that was broken and she was not present when the handymen who was supposed to fix it, arrived. Deceased got aggressive and started cutting her braids because he paid for it and therefor it belonged to him – according to the accused under oath. During argument Adv Mqushulu argued that it might have been a crime of passion. This is also rejected in its totality as unwarranted and clutching a straws.

36. She tells exactly how she found the fire-arm and how she approached the deceased and then how she shot him through his head. She immediately conceived of the idea to put the gun between his legs to create the idea of suicide; in her own words written in Exhibit G she said: “I wanted people to think that KG killed himself” KG is the deceased. She then went down and locked the front door from within, went back upstairs and left through the balcony door and jumped down from there and left. By her walking up the stairs to get to the balcony, she had to walk thru deceased’s blood and her shoes [“tekkies”] must have been covered by his blood which she later washed. It is evident from images in the court file that the tekkies were spotlessly clean and it was still wet.

37. She was covered with blood. Her ex-boy-friend picked her up the night of the incident and he testified under oath that he saw her full of blood and she told him of the fight. He saw her wiping herself with wet-wipes and then she threw the soiled wet-wipes out of his vehicle. She also threw the scissors, which she used to stab the deceased, from his vehicle’s windows while they were driving. She testified that she threw the scissors away so that the police would not be able to find it.

38. She spent that Friday night at Njabula's place where they had sex. Njabula testified that he and the accused had sex that specific night and he was vehemently attacked during cross-examination and it was strenuously denied that the accused and Njabula had sex that very night. Yet, during her evidence in chief she suddenly and unexpectedly changed her version from denial to an admission: she herself stated under oath that she and Njabula had sex that night. It was put to Njabula during cross-examination that the reason why she did not want sex that night was because of what happened between her and her boy-friend, by now the deceased. She was too stressed out to have sex and yet, she admitted to it while giving evidence in chief.

PHOTOGRAPHS OF THE ACCUSED SHOWING HOW HER ARTIFICIAL HAIR WAS CUT: Exhibit H:

39. Two photos of the accused were tendered during her evidence and Advocate Kau, on behalf of the State had no objection to the tender; in other words, these two images were handed in by consent. These photos are undated, but the court was informed that these images were taken at the Police Service Station shortly after the incident that occurred on 2 December 2022. It should be pointed out that the accused marked certain points on these images to indicate how her artificial hair was cut on her say so by the accused.

GENERAL OBSERVATIONS AND REASONINGS

40. "The drawing of an inference requires properly established objective facts." – this was stated by Southwood BR in his ESSENTIAL JUDICIAL REASONING[13]. The learned author, wrote this "… as a retired judge with vast and varied knowledge of the judicial office on the High Court and, in an acting capacity, on the Supreme Court of Appeal"[14], referred to specific case law such as *S v Mtsweni* 1985 [1] SA 590 [A] at page 593E - G: "Inference must be carefully distinguished from conjecture or speculation. There can be no inference unless there are objective facts from which to

[13] ESSENTIAL JUDICIAL REASONING in Practice and Procedure and the Assessment of Evidence; B.R. Southwood, LexisNexis, 2015, at page 51.
[14] The Foreword to this book was written by Laurie Ackermann, himself an experienced and well respected judge of the Constitutional Court on page vii.

infer the other facts which it is sought to establish. **In some cases, the other facts can be inferred with as much practical certainty as if they had been actually observed**. In other cases, the inference does not go beyond reasonable probability. But if there are no positive proved facts from which the inference can be made, the method of inference fails and what is left is mere speculation or conjecture" [the court's emphasis]. This is a quote from *S v ESSACK AND ANOTHER* 1974 (1) SA 1 (A) on page 16D is obviously with approval. As an aside I would add that the court is of the view that the case against the accused is strong enough to convict her of murder without her statement Exhibit G; the seamless interaction between the facts and opinions expressed by the state's experts and the reconstruction of the crime scene is extremely powerful and above reproach.

41. The learned author Southwood referred to *R v Blom*[15] and I quote directly from the reported case: "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 a doubt whether the inference sought to be drawn is correct." These wise words were penned by none other than Watermeyer JA as he then was who later became the Chief Justice of SA. The matter of *S v Blom* was entirely based on circumstantial evidence[16] as is this case against the accused. The well-known case against Oscar Pistorius was also founded on circumstantial evidence[17]. the Director of Public Prosecutions, Gauteng v Pistorius (96/2015) [2015] ZASCA 204 (3 December 2015). I want to repeat what was said in the *Mtsweni*-case "In some cases, the other facts can be inferred with as much practical certainty as if they had been actually observed." I am of the view that not only in the *Pistorius*-case, but also in this specific case, the facts of this case can be inferred with as much practical clarity as if they had been actually observed.

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[15] 1939 (AD) 188, as it then was, at p.p. 202 - 203
[16] *S v Blom 1939* AD 188 at page 201.
[17] Director of Public Prosecutions, Gauteng v Pistorius (96/2015) [2015] ZASCA 204 (3 December 2015)

42. What is the court's view about *dolus directus*? This type of gunshot is crucial in understanding whether the murderer had ***dolus directus*** or ***indirectus***? The SAP expert on gunshots gave evidence. He is qualified to give evidence of such a nature and there was no evidence led by the Accused of contrary nature. He was adamant that the deceased was shot at point-blank range and the inference is irresistible that it was an execution.

MR. NJABULO MXOLISI NDLOVU – first state witness

43. Mr. Njabulo Mxolisi Ndlovu was the first state witness. He was her ex-boyfriend. He identified her in court as his ex-girlfriend and told the court that she phoned him that night of the incident, and asked him to fetch her and when they met up, he noticed that she was full of blood. She had a pair of scissors, a cell phone and wet-wipes with her. She was covered in blood and even the motorcar seat was covered in blood; he also saw that the scissors were full of blood. He was very explicit in what he saw she was doing in the motorcar whilst he was driving: She wiped her legs, thighs, feet and her tekkies that were full of blood. There were bruises on her neck as well. It was obvious to him that she was involved in a fight with someone – she later told him she was fighting with her boy-friend. She opened the window and threw the wipes out and she threw the scissors out of the car as well. He smelt alcohol. He never threatened her; he just asked her what happened and she voluntarily explained to him. The following day, he took her back to the place where the incident occurred. During cross-examination he told the court that he was happy to have her with him and he had another opportunity to make love to her – and they indeed made love. He was somewhat embarrassed about what happened and it seemed to the court that he was telling the truth albeit it embarrassing to him. Defence counsel immediately tried to rescue the situation and put to the witness that she would deny having sex because she was stressed and confused and she was not "free to do anything." These are the exact words that were put to the witness. The witness told the court that although she was hysterical and terrified, they had sex. He even told the court that he is telling the truth. Later on, during the evidence of the accused, she suddenly admitted that they had sex that night. He withstood the rigorous cross-examination and I find him to be truthful and frank with the court and I accept his evidence.

SELLO JOSEPH CHALALE was the second state witness

44. He was the security officer at the complex where the incident took place. On 3 December 2022 during the morning, he received a report that some-one apparently committed suicide in the complex. He went to Unit 6374 and found a lady standing nearby the door and he identified the accused in court as the particular lady. He asked her where the person was who allegedly shot himself and she informed, him that body is inside and upstairs. They went inside and he followed her; he saw a lot of blood and he got scared. He is scared of blood. He then noticed that the blood was dry and he entered. He followed her to the top floor where he noticed the body "… kneeling as if he was praying …" [The court took careful notes about his say-so and these were his actual description]. He noticed blood on the body. He asked her what happened and she told him. She was emotional; he never threatened her at all. She was crying and she told him voluntarily what happened. She told him that she threw the scissors away. This ties neatly in with what her ex-boyfriend Mr. Njabulo Mxolisi Ndlovu, the first state witness told the court. The court accepts his evidence as being truthful, to the point and in some respects against himself in that he admitted to be scared of blood and he was hesitant to enter the dwelling.

CONSTABLE HUMBULANI PLEASURE MUFUMADI was the next state witness

45. Constable Humbulani Pleasure Mufamadi writes in his statement Exhibit E, that he received a report on Sunday 4 December 2022 at 00:02 of a possible suicide by a police officer and he immediately left and went to the scene where certain pointings out were made to him and he personally observed *inter alia* on the ground floor of the flat there were a lot of blood and two sets of "… shoe-blood-prints mainly two sets." The scene was preserved for forensic investigation. On the top floor he observed the deceased in a prone position with the fire-arm between his legs and there was a lot of blood. The hammer of the fire-arm was still on back. He observed lacerations on the body of the deceased and the exit wound on the head – he could not locate the entrance wound due to excessive blood. The body was stiff and his observation was "… suggesting that the person has been dead for a longer period."

He further observed blood splatter and the spent bullet on top of the bed and the cartridge casing.

46. During his evidence he informed the court that he found that the stairs leading up to the second floor had blood stains and a wet-wipe; there were attempts to have wiped the blood from the stairs. There were two sets of footprints. One pair of sneakers was wet and it belonged to the accused. He decided to call for experts to visit the scene and to examine it forensically because he lacked the necessary skills to do so.

47. It was evident to him that there was struggle. Defence counsel cross-examined him in respect of various of the photographs that were handed in as evidence and he openly admitted certain aspect where he was not qualified to form an opinion. He was factual and stuck to his statement and evidence in chief.

48. This witness gave blood chilling evidence of his observation of how he found the deceased: he was kneeling down in an apologetic position and shot directly from the top of the head.

49. His evidence was in all material aspects wholly in line with his statement Exhibit E. I find that he was objective, truthful and I accept his evidence. The scene suggested further that there was a struggle and multiple bloodied shoe-prints of both the deceased and his girl-friend.

50. The police official photographer arrived and processed the crime-scene and recovered gun-residue, collected the projectile and cartridge casing. And he photographed the scene. The body was removed. Later that same morning a scene reconstruction was done with another photographer and police-officers. And some measurements were done on the balcony where the girl-friend alleged her entry was. Shoe-prints were lifted and measured. Lt.Col. Botha and other officers arrived and conducted a scene inspection. A blood splatter analyst also attended the scene.

SERGEANT RAMOKONE IRENE BALOYI THE NEXT STATE WITNESS

Sergeant Ramokone Irene Baloyi is a South African Police sergeant with 14 years' service who testified that on 3 December 2022 at round 23:30 she received information of a suicide. She immediately went to the scene at Windmill Estate and she found the accused on the scene. Accused opened the door to the dwelling and she, Baloyi noticed blood on the floor and on the couch. Accused went with Baloyi to the bedroom upstairs where she found the deceased in a kneeling position and it was obvious that he was dead. He was in a kneeling position facing downwards with the fire-arm between his legs. There was a cartridge on the bed. The para-medics arrived and declared him dead on their arrival. She saw wounds what looked like stab wounds on the deceased skull. The court noted that when she gave this evidence she pointed with her right finger on the top of her head. Baloyi informed the accuseD of her rights to remain silent and to obtain the services of a legal representative. She is not compelled to say anything but if she says anything it might be used against her. Then she arrested the accused for assault with the intention to do grievous bodily harm. The reason why she arrested the accused for assault with the intention to do grievous bodily harm is because of the stab wounds. The court also accepts her evidence. Adv. Mqushulu only asked this witness one question.

CAPTAIN M RAMAITE the next state witness

51. The State called Captain M Ramaite with 33 years' experience in the South African Police Service – this translates to vast experience in almost all aspects of the policing services. On 6 December 2022, after he attended a *post mortem* examination of the deceased in the matter, he went to Vosloorus Court. He tells the court that he went there to obtain a docket 38/12/2022 in respect of a murder. When he arrived at the court, he was informed of the existence of another docket 33/12/2022 in respect of assault with the intention to do grievous bodily harm. He was not aware of the latter docket. He then ascertained that the accused was implicated in respect of both dockets. He wanted to interview her but was informed that she was released on docket 33/12/2022. He went outside and found her; he enquired where she was going and was told that she is going to a friend of hers who lives in Germiston as she was not going back to her home. In light of the fact that his offices were also in Germiston he offered her a lift and she got into his vehicle.

52. On their way he asked her what does she know of the murder matter to which she replied that there are things that worry her and she wants to speak to somebody about it. He immediately stopped her and warned her of her constitutional rights; it should be pointed out that during his cross examination by accused's advocate, Adv Mqushulu who asked the captain to "tabulate" his warnings. Captain tabulated it as follows:

52.1. Firstly, her right to silence.

52.2. Secondly, her right to legal representation. If she cannot afford to pay her own lawyer, she may employ a lawyer appointed by Legal Aid.

52.3. Thirdly, if she says anything, it will be written down and may be used against her in a court of law.

52.4. Fourthly, she can apply for bail.

53. So far, his evidence in so far it is relevant to the trial within a trial.

54. He did not threaten her – he kept on denying it.

55. He did not see the point of taking her to her friend's place but instead took her straight to his offices in Germiston. He was candid with the court in stating that in light of the fact that she told him there are things that worry her, he thought it best to take her to the Police's offices in Germiston.

56. He further told the court that he thought that because she is a woman it would be better for her to be taken to a lady that would maybe put her more at ease. He did so and took her to Brigadier M.P. Sekgobela at Germiston.

BRIGADIER M.P. SEKGOBELA next state witness

57. The State then called the Brigadier Sekgobela who told the court that after a short interview with the accused, and after the accused informed the Brigadier that she wants to make a statement, the Brigadier warned her of her section 35 constitutional rights as well – in essence the same as the rights the captain warned her. They were speaking Zulu. The Brigadier started phoning around to arrange officers to take the statement and to act as an interpreter. After some time, she was

successful and a further meeting was arranged. She denied that she ever threatened the accused.

58. She found her to be calm and relaxed. No, she does not know whether accused is an introvert or an extrovert and the reason is that she has met her there on 12th floor of the offices for the first time. She warned her a second time of her section 35 rights and asked her whether she still wants to make a statement to which the answer was yes.

59. The Brigadier asked Colonel G.J.A. Serfontein, a male with 32 years' experience in the SAPS, to take the statement and Lt/Col M.H. Matlole to be the interpreter. It was her first time to give evidence in respect of a trial within a trial.

COLONEL G.J.A. SERFONTEIN next state witness

60. Colonel Serfontein meticulously took the court through Exhibit "G" paragraph by paragraph. He never threatened her and she never complained about any threats that was made. He described to the court the entire procedure of asking the questions and how it was interpreted by Lt Col Matlole. And how the accused's answers were interpreted by the Lt Col. And that in the end, about 3 hours later, they all signed the document. Accused told them that she is satisfied that everything was correctly written down.

61. Exhibit G was provisionally allowed after the trial-within-a- trial which was delivered on Wednesday 25 October 2023. The paper that covered the statement throughout the trial-within-a-trial, were then removed and the contents were only then disclosed. I have dealt with this already,

LIEUTENANT COLONEL M.N. MATLOLE next state witness

62. Lt. Col Matlole then gave evidence and told the court the procedure that they followed and how she interpreted what Serfontein asked and the answers given by the accused. And then she told the court that it also happened that the accused at times did not wait for her to interpret, but she would have none of it and interpret

nevertheless. This statement by Lt Col Matlole was never attacked during cross-examination. She also described to the court how the document was signed.

63. Advocate Mqushulu cross examined these witnesses and put the version of the accused to them.

64. This concluded the state's case against the accused.

MAGWAZA BONGIWE PRAISE accused evidence

65. The accused gave evidence under oath and gave her version of the above events. She denies that Captain Ramaite took her in his vehicle to Germiston and avers it was somebody else. She then told the court that the captain did not believe her story she told him. He informed her that he just came from the *post mortem* and that deceased died of a stab wound. Apparently, he never mentioned a gunshot wound to the head. It is inconceivable why an experienced police officer would tell her that especially after he just came from the *post mortem* examination where it was found that he died from a gunshot wound. I find that the accused deliberately told the court a lie about the alleged stab wound.

66. She told the court that she thought that there would be some advantage for her if she made a confession, or for that matter an admission in spite of indications to the contrary from state officials cannot be regarded as undue influence. She was rather vocal about the fact that there were things about the murder that worried her and it cannot be regarded as undue influence as well.

67. The captain allegedly threatened to assault her with a machine that cleans sofas; she does not know what it is called. This was constantly denied by Captain Ramaite.

68. At the end of the cross-examination by the State Advocate, she told the court the following:

68.1. Because nobody believes her, she is at liberty to tell anything because nobody believes her. The court is of the view that her statement contained in

Exhibit G is the closest that we can get to the truth of what actually happened that fateful night when she shot the deceased the way she described in that statement. It is a most spine-chilling document to read: her graphic descriptions of how she went about and how she "escaped" the dwelling and eventually returning to it. The court believe Captain Ramaite unreservedly when he testified that she told him that there were things about the incident that worried her. It was too brutal to ignore. Her new counsel Adv. Musekwa, after him having had the opportunity to read the entire record, and after he informed the court that he is thoroughly acquainted with the contents of the record and that he is in a position to continue the argument, he told the court that he is of the view that the accused's case is full of holes. The court disagreed with him and told him that there is only one hole in her case and that is the one hole thru the head of the deceased.

68.2. She states that she wishes that the court would be lenient on her.

68.3. She was not threatened by the Brigadier, Col Serfontein nor Lt. Col Matlole. She insisted that she wanted to proceed to make a statement and it was then taken down and reduced to writing.

69. She made the statement voluntary and without being threatened by the above-mentioned officers Brigadier, Serfontein and Matlole.

SOME OF THE ARGUMENTS BY THE DEFENCE AS ADVANCED BY ADV MQUSHULU

70. The accused testified under oath, that had she killed the deceased then she would have disappeared into thin air never to come back. The court considered this to be a serious threat to flee justice. Adv Mqushulu's response to this threat is that the accused is young and inexperienced in life and she does not know how to operate a fire-arm.

71. He further advances the argument that the case of *S V EADIE* 2002(3) SA 719 SCA, is directly applicable on his client's case. "He continued his argument by stating in paragraph 15 of his amplified heads of argument: This case dealt with criminal capacity as I am also equating my client's case with this one. The brief

summary of the facts are that during the early hours of the morning of Saturday 12 June 1999 on Ou Kaapseweg near Fish Hoek, the Appellant assaulted Kevin Andrew Duncan (the deceased) and beat him to death in circumstances described in popular language as road rage. The primary issue in this appeal is whether the appellant lacked criminal capacity at the time that he killed the deceased."

72. It was strenuously and at length argued that the *Eadie*-matter and this present matter are "equated" and the court should treat it as such – it boils down to the question whether Magwaza lacks criminal capacity in respect of the killing. The court warned counsel for the accused that it is a dangerous argument, but counsel persisted with it. The court then also referred to the threat that she made while giving evidence under oath that had she killed the deceased then she would have disappeared into thin air never to come. The court cancelled her bail in terms of Section 68 of the CPA and she was put under immediate arrest.

73. Further, in connection with the argument of the applicability of the *Eadie*-matter on this case, it is common cause that neither the court nor the legal representatives for the state and the accused are qualified to pronounce on the criminal capacity of the accused either at the time of the offence or during the criminal proceedings. It was forced upon the court to refer the accused to Sterkfontein Hospital for psychiatric evaluation in terms of either Section 77 of the CPA [the capacity of the accused to understand the proceedings] or Section 78 of the CPA [Mental illness or mental defect and criminal responsibility] hence the detailed discussion above of the outcome of this evaluation.

74. Counsel for the accused referred the court to *Key v Attorney General*[18]. I looked carefully at this judgment and would like to refer to the following at paragraph 12:

> "A criminal trial court will of course always have to be mindful of the fundamental rights entrenched in Chapter 3. It will in particular ensure that the accused enjoys the benefit of the right to a fair trial guaranteed by the general introductory words in section 25(3) of the Constitution. In doing so, due regard

[18] 1996(6) Criminal Law Reports CC1994

will be had to the dictum of Kentridge AJ (speaking on behalf of this Court in its first reported judgment) in S v Zuma and Others: The right to a fair trial conferred by that provision is broader than the list of specific rights set out in paras (a) to (j) of the subsection. It embraces a concept of substantive fairness which is not to be equated with what might have passed muster in our criminal courts before the Constitution came into force." [the footnote is omitted].

75. At of the above case and at para 13 it is said:

"In any democratic criminal justice system there is a tension between, on the one hand, the public interest in bringing criminals to book and, on the other, the equally great public interest in ensuring that justice is manifestly done to all, even those suspected of conduct which would put them beyond the pale [I pause here to interject the following observation: this means The State versus the individual in the person of an accused]. To be sure, a prominent feature of that tension is the universal and unceasing endeavour by international human rights bodies, enlightened legislatures and courts to prevent or curtail excessive zeal by state agencies in the prevention, investigation or prosecution of crime. But none of that means sympathy for crime and its perpetrators. Nor does it mean a predilection for technical niceties and ingenious legal stratagems. What the Constitution demands is that the accused be given a fair trial. Ultimately, as was held in *Ferreira v Levin*, fairness is an issue which has to be decided upon the facts of each case, and the trial judge is the person best placed to take that decision. At times fairness might require that evidence unconstitutionally obtained be excluded. But there will also be times when fairness will require that evidence, albeit obtained unconstitutionally, nevertheless be admitted." [footnote omitted]

76. At para 14 of the above case it is said:

"If the evidence to which the applicant objects is tendered in criminal proceedings against him, he will be entitled at that stage to raise objections to its admissibility. It will then be for the trial judge to decide whether the circumstances are such that fairness requires the evidence to be excluded."

77. I am satisfied that this court gave the accused a fair trial.

78. Unfortunately, Adv. Mqushulu got ill and is apparently no longer practising law and Adv Musekwa was appointed by Legal Aid to represent the accused. Adv Musekwa requested, very fairly I think, that the entire court record be made available to him to study it prior to him getting involved. I ordered that the record be transcribed and be made available to both the defence, the prosecuting authority and the court.

79. Within no time the entire record was transcribed and forwarded to the parties. I thank GAUTENG TRANSCRIBERS Recording and Transcriptions for their exemplary services rendered at a very short notice period. I request the state Advocate to convey my appreciation to Gauteng Transcribers.

80. I wish adv Mqushulu a speedy recovery.

81. The court rejects the version of the accused that the deceased committed suicide and finds that she brutally and with *dolus directus* killed the deceased by shooting him one shot in the head as is evidenced by the state pathologist and as analysed by the expert witnesses for the state. I also accept the evidence by the state witnesses as being truthful, authentic and crisp and to the point. This is underpinned by the accused own statement contained in Exhibit G.

82. Consequently, I find her guilty of:

82.1. Murder as charged.

82.2. being in possession of a parabellum calibre model Z288 semi-automatic pistol with serial number Q[…] without holding a licence, permit or authorisation issued in terms of the relevant act;

82.3. being in possession of 15 9mm parabellum calibre cartridges without being the holder of a license in respect of a firearm capable of discharging that ammunition or a permit to possess ammunition and lastly

82.4. that she put the said fire-arm between the deceased's legs with the intention to distort the truth as to the circumstances surrounding the death of

the deceased and that she threw the scissors she used to stab the deceased, away and therefor is guilty of the crime of defeating the ends of justice.

C. J COERTSE
ACTING JUDGE OF THE HIGH COURT

Legal Representatives:
For the State: Advocate Kau on behalf of the DPP Johannesburg
For the accused: Advocate Charles Mqushulu who was replaced by Adv Musekwa both appointed to the matter by Legal Aid