

SAFLII Note: Certain personal/private details of parties or witnesses have been redacted from this document in compliance with the law and [SAFLII Policy](#)



**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL LOCAL DIVISION, DURBAN**

CASE NO:

CCD49/19

In the matter between:

THE STATE

and

MOHAMED VAHED EBRAHIM

ACCUSED

J U D G M E N T

Henriques J

Introduction

[1] The 17 July 2018 was the first day of school after the July school vacation. R[....] L[....] , the deceased's mother (R[....]) dressed her son M[....] L[....], (the deceased) for school that morning. He was dressed in his school uniform as well as his school track pants and navy track top as it was winter. After breakfast, she kissed

him goodbye, told him she loved him and watched him and his sister M[....] L[....] , (M[....]) leave for school. M[....] would walk M[....] to R[....] School, wait for him to enter the school gate and proceed to B[....] School which she attended. Little did they both know it would be the last time they ever saw M[....] alive.

[2] By 15h00 that same afternoon M[....] sounded the alarm that M[....] was not home from school. His school bag and books were nowhere to be found. A search around the immediate area that afternoon did not reveal M[....] 's whereabouts. That same evening, M[....] 's parents, R[....] and K[....] L[....] (K[....]), accompanied by his grandmother, visited the Asherville sports grounds where they met T[....] a fellow pupil of M[....] 's. T[....] reported that he had seen a man, whom he thought was M[....] 's father come to the school gate earlier that afternoon asking for M[....] . He was shown a photograph of a man by R[....] on her cell phone, and he confirmed that was the man whom he had seen at the school earlier that day asking for M[....] . The photograph that T[....] was shown was that of Mohamed Vahed Ebrahim (the accused, also known as Vahed).

[3] The picture of the accused was posted on social media. By that evening social media reported that the last person suspected to have been seen with M[....] was the accused. The accused, was a former work colleague of R[....] and had spent time with her, her children and mother over a period of time. In fact, the picture she had shown T[....] on her cell phone was taken by her during the July school vacation when the accused had accompanied her, her children and her mother to Suncoast Casino for the day. This picture of him as well as his address was also posted on social media. M[....] 's father, K[....] went to the accused's home in Longbury Drive, Phoenix on the evening of 17 July 2018 looking for the accused and M[....] . Neither of them were there. The police arrested the accused on charges of kidnapping and theft on 20 July 2018. Bail was granted to the accused in the sum of R2 500 but he elected to remain in custody and not pay bail.

[4] Thus began an extensive search for M[....] which would last approximately two and a half months. The search for M[....] saw members of the community join the multitude of searches for him. Social media was in a frenzy with appeals for his

return. Night vigils were held and several appeals were made by R[....] on social media for the safe return of her son.

[5] Searches saw police, family members', neighbours and community members scouring the Sydenham and Phoenix areas and places of alleged sightings. Search dogs were also brought in on two occasions but to no avail. During several court appearances R[....] appealed to the accused to reveal M[....]'s whereabouts. The accused maintained that he had not taken M[....] and had nothing to do with his disappearance. Her last appeal to the accused was coincidentally on the morning of 3 September 2018 at Westville Correctional Services Centre (also referred to as Westville Prison) when she lied to correctional officials and pretended to be Rehana (the accused's alleged girlfriend) wanting to pay the accused's bail.

[6] All efforts to find M[....] proved fruitless and pleas for his safe return were in vain until the decomposed body of what was estimated to be a ten-year-old boy was found in thick brush near a clearing in Longbury Drive, Phoenix on 3 September 2018. A juice bottle, school books and a school bag were found near the badly decomposed body. The body was clothed in remnants of a school uniform, tracksuit jacket and jersey with the emblem of Rippon Road Primary School emblazoned on it. The area where the body was found was in close proximity, a mere 300 metres from the home of the accused.

[7] Sadly, a mother's worse nightmare came true several days later as DNA tests conducted confirmed that the body was that of M[....]. The exact cause and date of death could not be determined given the state of decomposition of the body, save that Dr Salona Prahladh (Prahladh) who performed the autopsy on M[....] indicated that suffocation could not be ruled out.

[8] The accused made several appearances in the Durban Magistrates' Court initially on charges of theft and kidnapping and several months later, in December 2018, the accused was arrested and charged with the murder of M[....]. His attempt at obtaining bail on the murder charge was unsuccessful and he remained in custody.

The amended indictment

[9] On 4 April 2019 the accused was indicted on the following counts:

(a) **COUNT 1: THEFT**

IN THAT on or about 17 JULY 2018 and at or near [...], in the district of DURBAN, the accused did unlawfully and intentionally steal one green identity document and two birth certificates, being the lawful property or in the lawful possession of R[...] S[...] L[...] and/or M[...] L[...] and/or M[...] L[...].

(b) **COUNT 2: KIDNAPPING**

IN THAT on or about 17 JULY 2018 and at or near [...], in the district of DURBAN, the accused unlawfully and intentionally deprived M[...] Michael L[...] , a minor child of his liberty by forcing and taking him from his school being Rippon Road Primary, Sydenham to Phoenix without consent.

(c) **COUNT 3: MURDER, READ WITH SECTION 258 OF ACT 51 OF 1977 AND**

SECTION 51 (1) AND PART 1 OF SCHEDULE 2 OF ACT 105 OF 1997

IN THAT on or about 17 JULY 2018 and at or near [...] in the district of DURBAN, the accused unlawfully and intentionally killed M[...] Michael L[...] , a minor child, in circumstances where the murder of the deceased was planned or premeditated.'

[10] Given the unprecedented outpouring of support for M[...] and his family and the social media frenzy, questions were being asked as to what would have prompted someone, specifically the accused to kidnap and murder M[...] . Rumours were rife. Was the accused a scorned lover of R[...] as the State alleged? Or as suggested by the defence, were drugs involved, did R[...] 's drug use lead to the kidnapping of M[...] ? Was it Mike, R[...] 's former brother-in-law? The apparent motive according to the State emerged in the summary of substantial facts to the indictment.

The summary of substantial facts

[11] In the summary of substantial facts the State alleged that M[....] , a nine-year-old scholar who resided at [....],¹attended R[....] School which was a mere 190 metres away from his home. The accused at the time resided at [....] in a wendy house on his parents' property.

[12] The accused was known to M[....] and his family and the accused would occasionally reside at M[....] 's family home and would perform odd jobs and maintenance around the home. Prior to the incident, R[....] and the accused had an argument as a consequence of which the State alleges the accused decided to kill M[....] to exact revenge on his mother.

[13] To this end and on the afternoon of Tuesday, 17 July 2018, the accused lured M[....] from his school to a nearby food outlet, the KFC, where he purchased food for him and thereafter left with M[....] . At some stage and in circumstances unknown to the State, the accused is alleged to have killed M[....] and left his body in a bushy area adjacent to [....]. The body of M[....] was found on 3 September 2018 in this bushy area adjacent to [....]. The cause of death was determined as 'unascertained at autopsy due to decomposition and skeletonisation, but suffocation should be considered.'

[14] The State further alleges that on the morning of 17 July 2018, the accused was alone at M[....] 's home, when he stole R[....] 's identity document and the birth certificates of M[....] and M[....] .

The accused's plea

[15] The accused pleaded not guilty to all three counts and confirmed that all three counts had been explained to him as well as the provisions of the minimum sentencing legislation. Mr *Naidoo* who appeared for the accused confirmed that the pleas were in accordance with his instructions and further that the accused elected

¹ At the time of the trial the name of the road had changed to [....] Road.

not to make any statement and denied all of the allegations and put the State to the proof of each and every one of the elements of the respective offences in the indictment. He further confirmed that he had explained the provisions of the minimum sentencing legislation to the accused and that he understood them. The court also confirmed with the accused at the commencement of the trial, that he was aware of and that he understood the provisions of the minimum sentencing legislation.

Exhibits

[16] Various bundles containing exhibits were entered into the record at the commencement of the trial. Additional exhibits were referred to during the course of the trial and formed part of the record. These are a matter of record and only some of these exhibits which are relevant will be referred to during the course of the judgment. I have had regard to **all** of the exhibits and bundles when preparing this judgment.

Section 220 admissions

[17] The accused made written admissions in terms of s 220 of the Criminal Procedure Act² (the CPA) which are recorded in Exhibit 'A'. It is perhaps useful at this stage of the judgment to record these in relation to the evidence presented as much of this became common cause during the course of the trial.

[18] The accused admitted that the deceased, M[....] K[....] L[....] , a minor male, disappeared from the Sydenham area on or about 17 July 2018.

[19] In respect of the post-mortem report, (Exhibit 'A1'):

- (a) that the body of the deceased was found on 3 September 2018 in the bush near [...] by Sergeant Devendran Chetty (Chetty) and Warrant Officer Devandree Ellis (Ellis);

² 51 of 1977.

- (b) the body of the deceased sustained no further injuries from the time of the incident until the post-mortem examination was conducted on 5 September 2018;
- (c) Dr Salona Prahladh conducted a post-mortem examination on the body of the deceased the results of which she recorded on the form GW 7/15 marked as Durban PM 1050/2018. The cause of the death was established as unascertained due to decomposition and skeletonisation, but that suffocation, should be considered; and
- (d) the accused admitted the correctness and accuracy of the facts and findings recorded in Exhibit 'A1'.

[20] In respect of the photograph albums:

- (a) the accused admitted the correctness and accuracy of the facts and findings as recorded on Exhibit 'B' and further admitted that on 2 August 2018, Sergeant Borain Rajgopaul, a member of the SAPS, attached to the Local Criminal Record Centre (LCRC) as an official photographer and draughtsman, attended at [...] and took photographs of exhibits. He compiled an album and key, marked Exhibit 'B';
- (b) on 5 September 2018, Constable S E Ngwabe, a member of the LCRC took photographs of the post-mortem examination under Phoenix Cas 85/09/2018 and LCRC 295/09/2019³, (Exhibit 'C'). The correctness and accuracy of the facts and findings as recorded on Exhibit 'C'; were admitted;
- (c) that on 3 September 2018, Constable Vivian Naidoo attended the crime scene at or near [...], took photographs of the crime scene including the deceased person as depicted in the photograph album marked Phoenix Cas 85/09/2018 and Durban LCRC 295/09/2018 marked as Exhibit 'D'. The photograph album correctly and accurately depicts the scene including the deceased person;
- (d) that on 3 September 2018 Sergeant Devendran Chetty attended the crime scene at [...]. He took photographs of the crime scene including the deceased person as depicted in the photograph album, Phoenix Cas

³ This is a typographical error in "A".

85/09/2018 marked as Exhibit 'E'. The photograph album correctly and accurately depicts the scene including the deceased person;

- (e) that on 3 September 2018, Dr Salona Prahladh (Prahladh) attended the crime scene at [....]. She took photographs of the crime scene including the deceased person as depicted in the photograph album marked Phoenix Cas 85/09/2018 marked as Exhibit 'F'. The photograph album correctly and accurately depicts the scene including the deceased person;
- (f) on 5 September 2018, Captain T E Viljoen, a member of the SAPS, attached to the Victim Identification Centre, Forensic Science Laboratory Pretoria, took photographs and collected all specimens of various insects (including live specimens) during the post-mortem examination of the deceased. Photographs were taken during the collection of these exhibits, attached and marked as Exhibit 'G1' and saved onto a compact disk marked as Exhibit 'G2'. The photograph album correctly and accurately depicts the collection and packaging of the exhibits;
- (g) during September 2018 Warrant Officer A K Hunsraj, a member of the SAPS, attached to the LCRC as an official photographer and draughtsman, took aerial photographs and measurements of various places at S[....], D[....] and P[....]. A photograph album and key was compiled under Phoenix Cas 85/09/2018 and LCRC 355/09/2018, (Exhibit 'H'). Such photograph album correctly and accurately depicts the scene and the measurements reflected thereon; and
- (h) on 23 February 2019 Constable Vincent Mokoqama attended the crime scene at R[....]School, S[....] and L[....], and took further photographs and measurements of the reconstructed crime scene and various points in respect of Phoenix Cas 85/09/2018 and LCRC 1737/02/2019, marked Exhibit 'J'. The photograph album correctly and accurately depicts the scene and measurements reflected thereon.

[21] In respect of the entomological specimens:

- (a) Captain Viljoen also compiled a report into the collection, sealing and packaging of the exhibits he recovered; and
- (b) all of the exhibits were sealed into an original entomology evidence collection kit box with a unique serial number 13VICAA0514 and are correctly and accurately reflected in the report marked Exhibit 'K'.

[22] In respect of the closed circuit television recordings:

- (a) video surveillance footage was obtained from the KFC food outlet on the corner of [...] depicting the movements of the accused and M[...] inside and outside the KFC premises on 17 July 2018;
- (b) such video footage was correctly recorded, saved and downloaded;
- (c) copies were made available to the Investigating Officer Warrant Officer S B Zondo;
- (d) a copy of the aforesaid video footage correctly depicting the events of 17 July 2018 marked Exhibit 'L' are correct and the authenticity and integrity of the video footage is admitted;
- (e) video surveillance footage was also obtained from [...] ([...]) business premises situated at Clare Road, Sydenham for 17 July 2018;
- (f) such video footage was correctly recorded, saved and downloaded and copies were made available to Warrant Officer Nivesh Serpaul, a commander of the Surveillance and Monitoring Unit, a division of the SAPS. Still photograph images of the video footage depicted in Exhibit 'L' was prepared by Serpaul and handed to Warrant Officer R M Govender during the course of his investigations in the matter;
- (g) the authenticity and integrity of the video footage is admitted and Exhibit 'L' is an original and authentic recording of the events which occurred at [...] on 17 July 2018;

- (h) the photographs correctly and accurately depict the images displayed on the video footage of KFC and [...] and have not been altered nor manipulated in any manner whatsoever;
- (i) still photograph images of the video footage, Exhibit 'L' were also prepared by Warrant Officer Jacobus Nicolaas Smit a member of the Cyber Crime and Deep Web Investigations Unit, a division of the SAPS, and handed to Warrant Officer R M Govender in the course of his investigations;
- (j) a copy of the photographs is marked Exhibit 'M1' and a copy of the compact disk containing the photographs marked as Exhibit 'M2'.; and
- (k) the photographs correctly and accurately depict the images displayed on the video footage of both KFC and [...] as depicted in Exhibit 'L' and have not been altered or manipulated in any manner.

[23] In respect of the cell phone evidence:

- (a) the accused was lawfully allocated and possessed cellular phone number 061 186 7412;
- (b) a copy of the cellular phone records and RICA information of the accused are attached, marked Exhibit 'N';
- (c) the accuracy and correctness of Exhibit 'N' is admitted;
- (d) an aerial map of the cellular phone towers in the Phoenix area was prepared and a copy of the charts marked Exhibit 'O1' to 'O7';
- (e) the charts correctly reflect the location and the coverage area of the respective towers and call data of the accused;
- (f) R[...] was lawfully allocated and possessed a cellular phone number 065 515 0293;
- (g) her cellular phone records and RICA information is attached and marked Exhibit 'P';
- (h) the accuracy and correctness of 'P' is admitted;

- (i) during the course of the investigations, a cellular phone belonging to the accused with cellular phone number 061 186 7412 was seized by the police;
- (j) Warrant Officer K Y Mkhize, a member of the SAPS, attached to the Cyber Crime Investigation Unit received the following exhibits comprising of a Vodafone and a sim card in a sealed forensic bag;
- (k) she accessed and downloaded the data on the accused's cellular phone and prepared a report marked Exhibit 'Q' and saved such data on a compact disk;
- (l) the contents of the report are true and correct;
- (m) WhatsApp messages exchanged between the accused and R[...] for the period 10 July 2018 to 20 July 2018 are marked Exhibit 'R';
- (n) similarly WhatsApp messages exchanged between the accused and M[...] for the same period are marked Exhibit 'S'; and
- (o) both Exhibits 'R' and 'S' correctly reflect the information and communication reflected thereon and are true and correct.

[24] The charge sheet and transcribed bail proceedings of the accused in the lower court are true and correct. Such are admitted and are entered as Exhibits 'T1' and 'T2'.

Exhibit 'A1' – The post-mortem report

[25] Dr Prahladh also attended at the scene on 3 September 2018 at [...], at approximately 16h30. The Investigating Officer, Warrant Officer Rajen Govender, informed her that officers were following a robbery suspect when their dog stopped by a body. On further examination at the scene it was discovered to be a decomposed body with school clothing and it was suspected to be the body of M[...] who went missing on 17 July 2018.

[26] Her examination of the scene revealed the body lying on the ground on its back under a large overgrowth of thorny bushes. Both arms of the deceased were

over his head and the knees were bent. A few metres from the body a school bag with school books and a juice bottle were seen.

[27] The clothing present was that of a dark navy coloured jacket with 'Rippon Primary' emblazoned on the left breast and such jacket was over the deceased's head. A white coloured shirt and white coloured vest were also over the deceased's head. The abdomen and chest was exposed and the abdomen had a dark brown parchment-like appearance. Navy coloured track pants and grey coloured shorts were on the legs. Grey coloured socks were on the feet, but shoes were not present on the body.

[28] A preliminary examination of the body of the deceased at the scene revealed a skeletonised head with hair and pupae still present. The eye sockets were empty and the neck was skeletonised until the shoulder area and the right scapula was exposed. The abdomen had skin slippage and a dark brown parchment-like appearance.

[29] Exhibit 'A1' is the post-mortem report of M[....] conducted on 5 September 2018 by Dr Prahladh. The chief post-mortem findings and observations made by her were the following:

- (a) she estimated the age to be between six to ten years with skeletonisation of the head, neck, shoulder region and pelvis. There was autolysis and liquefaction of organs;
- (b) the body was found with the arms above the head with the clothing completely covering the head;
- (c) the clothing found on the body was a navy blue jacket with "Rippon Primary" emblazoned on the left breast, a white shirt, white vest, a navy blue track pants, grey shorts and grey socks;
- (d) the body was in a supine position with the jacket, shirt and vest over the head covering it completely;
- (e) the arms were still in the sleeves;

- (f) the neck was completely skeletonised and chest and abdomen were exposed;
- (g) the skin was discoloured a dark brown colour in areas and had a dry parchment-like texture, especially over the abdomen;
- (h) fly eggs were present over the belt area of the trousers;
- (i) the pelvis had a 50 x 60mm defect with patchy subcutaneous tissue and skin attaching to both legs;
- (j) maggot larvae were present in the pelvic area and genitalia area;
- (k) first instar maggots were present at the scrotum and anus;
- (l) dark brown coloured skin was present;
- (m) the neck was completely separated from the skull;
- (n) the skull showed patchy areas of skin and subcutaneous tissue over the left side of the skull and the mandible and maxilla;
- (o) dark brown curly hair was still present over the scalp. Scattered maggot pupae were present that were dark brown and had a dried up appearance;
- (p) the arms were skeletonised with patchy skin and subcutaneous tissue over the dorsum aspect of the hands. Nails were present but finger pads were not present;
- (q) the shoulders showed skeletonisation with exposure of the joints. The back showed multiple clean punched-out defects, the smallest measuring 10 x 10mm and the largest 15 x 20mm within which maggots were present, in keeping with predation injury;
- (r) beetles were also seen on the body;
- (s) the body also had internal decomposition, where the internal organs were autolysed and liquefied into a mass of decomposed tissue; and
- (t) She estimated the post-mortem interval to be more than four weeks taking into account the decomposition, the insects present on the body and the weather conditions.

Inspection in loco held on 31 October 2019

[30] It is common cause that during the course of the trial the court attended an inspection *in loco* at L[...] Drive and H[...] Drive, Phoenix in the presence of the accused's representative, the State Advocate and the investigating officer. Mr *Naidoo*, stated that it was not necessary for the accused to attend. The purpose of the inspection *in loco* was to ascertain the exact measurements testified to by Chetty, the dog handler, during the course of his evidence and to also clarify certain points witnesses testified to during the course of the proceedings utilising the photographs depicted in the various photo albums.

[31] At the time of the inspection, regard was had to the exhibits specifically Exhibit 'F'. The following was placed on record arising out of the inspection *in loco* which was agreed to by the State and the defence:

- (a) having regard to Exhibit 'F', photo 2 from the police car to the entrance of the pathway was 18,5 metres;
- (b) from the tree in front of the boundary wall to the entrance of the pathway was 35,5 metres, Exhibit 'F', photo 3;
- (c) from the entrance of the pathway to where the body of M[...] was found was 64 metres;
- (d) from the road above, being H[...] Road, to the tree in the dense bush where the body of M[...] was found was estimated to be between 50 to 70 metres; and
- (e) the area which leads to the pathway is an open area and there is a ravine in the immediate vicinity of the open area.

The evidence

[32] In order to prove its case against the accused on the three counts, the State relied on the following evidence:

- (a) forensic medical evidence in this regard the State led the evidence of the post-mortem findings of pathologist Dr Prahladh;
- (b) forensic evidence of Captain Pienaar (Pienaar) an entomologist, based at the Victim Identification Centre of the Forensic Science Laboratory to ascertain the approximate date of death of M[....] ;
- (c) CCTV video footage obtained from the KFC outlet at which the accused and M[....] sat and spoke and where the accused purchased food for M[....] ;
- (d) CCTV video footage from [....] which is directly across the road from the KFC;
- (e) evidence of an eye witness, Ismail Rhyman (Rhyman), an employee of [....] , who observed the accused and M[....] walk from the KFC, cross the road and walk to the taxi/bus stop;
- (f) cell phone records of Cell C and MTN which evidence emanated from Ms Hilda du Plessis (Du Plessis) and Mr Dharmesh Kanti (Kanti), relating to the cell phone records of R[....] , the accused and M[....] and also the cell phone towers indicating the accused's cell phone locations at various times, specifically in the Phoenix area on 17 and 18 July 2018;
- (g) lay witnesses M[....] , R[....] and T[....] Z[....];
- (h) the arresting officer, Irshaad Mohamed (Mohamed), his partner Constable Ngcobo (Ngcobo), the first Investigating Officer Captain⁴ Zondo (Zondo) and the second investigating officer, Warrant Officer Govender (Govender); and
- (i) Sergeant Devendran Chetty (Chetty), a dog handler and member of the canine unit who came across the decomposed body of M[....] on 3 September 2018 whilst in pursuit of a suspect.

⁴ At the time of the investigation Zondo held the rank of Warrant Officer.

[33] In summarising the evidence presented by the State, the judgment does not follow the sequence in which the evidence of the witnesses was presented at trial, but rather focuses on the main categories of evidence presented and the relevant witnesses in respect of those categories. In addition, what follows is a summary of their evidence and a summary of what emerged during cross-examination. I may add that the witnesses were thoroughly cross-examined by Mr *Naidoo*. The last State witness to testify was the Investigating Officer, Warrant Officer Rajen Govender. The accused elected not to testify and pursued an application for his discharge on all three counts in terms of s 174 of the CPA at the close of the State's case.

The lay witnesses

T[....] Z[....]

[34] *T[....] W[....] Z[....] (T[....])*, a grade seven scholar at Rippon Primary School testified that he knew *M[....]* as they attended the same school and resided near his home. He would also play soccer with him at school. The last time he saw *M[....]* was during the school vacation in July 2018. *M[....]*'s best friend at school was *J[....]*, also known as Siphso.

[35] On 17 July 2018 when school finished at approximately 14h00pm, *T[....]* accompanied by his friends *S[....]* and *B[....]*, exited through a little gate at the school. He noticed a man, whom he identified as being the accused, standing near the gate. He knew the accused as he previously saw him at the school with *M[....]*'s mother. While standing on the pavement he heard the man call *S[....]* and ask him if he knew *M[....]*. He asked *S[....]* to call *M[....]* and whilst *S[....]* went into the school premises to call *M[....]* he met *J[....]* coming from the direction of classroom 2BD. He saw *J[....]* go to call *M[....]* at his classroom but he could not find him and reported this to them. They then left the man standing at the gate and went home. He confirmed that when the man asked *S[....]* to call *M[....]* he indicated he would give him R10 for doing so.

[36] He described the man as having a long nose, big eyes, dark in complexion and not that tall. When he saw him on 17 July 2018 the man was wearing a green

shirt, a leather jacket and a cap. He knew M[....] 's mother, R[....] as he used to see her in Howell Road and knew that M[....] stayed close to the school.

[37] Later on that day, he went to the gym at the Asherville sports grounds. Whilst there, M[....] 's mother approached him and asked him if he had seen M[....] . This was after she had asked them which one of them attended R[....] School. When he acknowledged that he did and that he knew M[....] , she asked him if he was present when anyone came to fetch M[....] . He responded saying yes. She asked him if the person was a Coloured or Indian person. He confirmed that the person was an Indian person and she started to cry and then left.

[38] At the time he spoke to M[....] 's mother he confirmed that she was accompanied by M[....] 's grandmother and father, K[....] . Whilst at the Asherville sports grounds M[....] 's mother switched on her cellular phone and showed him a photograph. She asked him if he recognised the person in the photograph. He confirmed that the person whom he recognised and identified was the same man who he had seen outside the school gate earlier on that day asking for M[....] . That man was also wearing the same clothes in the photograph, as he was when he saw him at the school gate earlier that day.

[39] Prior to doing a dock identification of the accused during the course of his evidence, he also identified M[....] and the accused from a photograph. (Exhibit 'M, photograph 19). He confirmed that this was the man who attended at the school in the company of M[....] 's mother on a prior occasion and he also saw him outside the school gate when he spoke to S[....] on the afternoon of 17 July 2018.

[40] On the following day, 18 July 2018 whilst at school he made a statement to the police in relation to what he had seen outside the school gate. This was done in the presence of the principal and his father (Exhibit 'U'). He confirmed that the policeman read the statement back to him before he signed it and that he was satisfied with the contents of the statement.

Cross-examination of T[....]

[41] Exhibit 'U' is a statement which the witness confirmed that he signed in the presence of his father and the principal on 18 July 2018 at approximately 11h40am. He confirmed that he was 13 years old when the statement was taken and that the principal of the school was present when the policeman was talking to him. The policeman was writing down everything he was saying. The statement was read back to him before he signed it.

[42] He confirmed that in the photograph of the accused which he identified on the cellular phone of R[...] he described the accused as wearing a cap, a jacket and a green shirt. The lower part of the man was not depicted in the photo and he could not see what pants he was wearing. In his statement, he indicated that the man was wearing 'a black baseball cap, long sleeve green shirt with brown pants'. The CCTV video footage taken at the KFC on 17 July 2018, indicates that the accused was not wearing a pair of brown pants but rather blue jeans. He confirmed that he did not mention anything about a black jacket in his statement to the policeman. The witness admitted that on the previous day when he testified that he said in a statement that the accused was wearing brown pants that was a lie.

[43] When it was pointed out to him that he did not mention to the police in his statement that the man offered S[...] R10 to call M[...], he just kept quiet.

[44] He confirmed that he testified that it was J[...] who went to look for M[...]. However, in his statement the following is recorded:

'... and just then J[...] s transport arrived and he left and I also left to go home'.

He confirmed that this is different to what he testified to in court the previous day. He stated that the reason why he did not mention to the police that J[...] went to look for M[...] was because they were asking him a number of questions. When asked to elaborate on the nature of the questions he was being asked he indicated that the policeman asked him whether he had spoken to M[...] 's parents. He told the police that he had not done so.

[45] It was suggested to him that this was a lie. He confirmed that he had met M[...] 's parents at the Asherville sports grounds at approximately 18h00 and they had spoken to him. He only met and spoke with the policeman the following day

being 18 July 2018. At the time of his interview with the policeman he had already met M[....] 's father and mother the day before. He confirmed that before the statement had been taken down he already had met with M[....] 's mother on the morning of 18 July 2018 as well and seen the photograph which she had shown to him on her cellular phone.

[46] He confirmed that he had testified in court that the man spoke to S[....] and did not speak to J[....] and offered S[....] R10 to find M[....] . He also testified that it was S[....] who had gone back to the school to find M[....] and could not find him. He confirmed however, that this was not correct and that it was J[....] who had gone to look for M[....] and could not find him. When he had spoken to the policeman he did not tell them that J[....] had gone to look for M[....] . He confirmed that at no stage did he tell the policeman anything about S[....] being present.

[47] During cross-examination he confirmed that this man never spoke to him and he did not speak to the man. He indicated that he did inform the police about S[....] and they did not record it. He confirmed that prior to making the statement to the policeman on 18 July 2018 he had spoken to R[....] .

[48] During cross-examination the witness changed his version and indicated that he had seen the photograph on 18 July 2018 when R[....] attended at the school. At the time R[....] asked him if he was the boy she had seen at the Asherville sports grounds and he answered 'Yes'. She then showed him the photograph and asked him if this was the man. He confirmed that the viewing of the photograph happened on the next morning 18 July 2018 at school before he spoke to the policeman and not on the Asherville sports grounds. He confirmed that he did not see M[....] at school on 17 July 2018. He did not see anyone taking him by the hand at school and did not tell anyone that he had. He confirmed on the morning of 18 July 2018 when he spoke to M[....] 's mother at the school it was him, S[....] and B[....] . He confirmed that when he saw the man at the school he had a cap with NYC on it and that it was the same cap which he saw in the photograph shown to him by R[....] on her cellular phone. He confirmed that he made a statement to the policeman describing the clothes used by the accused after he had spoken to R[....] and after she had shown him the photograph on her cellular phone.

[49] As a result of the cross-examination, the following emerged:

- (a) in his police statement he omitted to describe the black jacket which the accused was wearing;
- (b) he mentioned that the person was wearing a brown pair of pants whereas the accused was wearing a pair of blue jeans;
- (c) that he did not mention to the police that the man offered S[....] R10 to look for M[....] ;
- (d) it also became evident that his evidence in chief differed vastly from that which was contained in his statement;
- (e) when referred to his statement he had mentioned that J[....] 's transport arrived and they all left to go home after school. However, when he testified in chief, he did not mention this aspect;
- (f) his evidence seemed to suggest that he was not present and did not witness the accused coming to the school gate and requesting that M[....] be called;
- (g) most notably as suggested by the defence, the contradiction in relation to the fact that he omitted to tell the policeman that he had spoken to M[....] 's parents. This contradicted his evidence in chief that he spoke to R[....] , K[....] and M[....] 's grandmother at the Asherville sports grounds on the evening of 17 July 2018 and had been shown the photograph of the accused;
- (h) he admitted that he lied about certain aspects of his evidence when he testified and;
- (i) he could not have seen the accused at 14h30 outside the school gate as the KFC CCTV footage placed the accused and M[....] there at 14h06.

M[....] Kirsty L[....]

[50] The next witness was M[....] Kirsty L[....] , M[....] 's sister. Prior to her commencing her evidence, Mr *Singh* made an application to have the witness' evidence heard *in camera* and in addition that none of her evidence be published nor made available until such time as her mother, R[....] had testified. The basis for such application was the following.

[51] M[....] , who was 14 years old at the time, was R[....] 's daughter. Mr *Singh* indicated that from a fair trial perspective, and the interests of the accused and justice the evidence of M[....] had the potential to impact on the evidence of R[....] and overlapped to some extent. As a result, Mr *Singh* entertained concerns that should such evidence be heard in open court and published in the public domain, it could negatively impact on the weight to be attached to her evidence. It could also affect the accused's s 35 constitutional rights to a fair trial.

[52] He re-iterated this was a very sensitive matter and the interests of justice and fairness dictated that he makes such a request for the evidence to be heard *in camera* and for members of the media and public to be excused.

[53] Mr *Naidoo*, indicated that he was ambivalent about agreeing to such application. However, as the evidence was that of a minor child, the court may find that it is in the best interests of M[....] and justice that such evidence be heard in camera. It was for this reason that he elected to abide the court's decision.

[54] After considering the submissions of the parties, specifically that of the prosecutor, Mr *Singh*, the court has a duty to maintain the integrity of the proceedings. This must take into consideration the best interests of M[....] , the principles of open justice, the accused's s 35 fair trial rights and strike a balance between these competing interests. In light of the nature of the issues in this matter and as the evidence was that of a child witness, I ruled that the evidence of M[....] be held *in camera*. I was of the view that it was in the interests of justice to do so and specifically to ensure the accused's rights to a fair trial were not impeded. In addition, it was prudent for M[....] 's evidence to be heard *in camera* until after her mother, R[....] had testified so as not to detract from the probative value of her evidence and the weight to be attached to it.

[55] I pause to mention at this juncture that this trial had attracted considerable public interest in the print and electronic media. In fact, the public interest started on the day M[...] went missing and continued until the end of the trial. The trial was well attended by members of the community.

[56] It was for these reasons that I acceded to the request of Mr *Singh* mindful that Mr *Naidoo* for the accused did not strenuously object to the request.

[57] M[...] , testified *in camera* with the assistance of a court preparation officer. I conducted a competency test and satisfied myself that she understood the nature and import of taking the oath. Both the State and defence agreed that she was a competent witness who understood and appreciated the importance and import of taking the oath to tell the truth.

[58] M[...] described M[...] , who was nine years old when she last saw him, as a very shy, quiet person and who kept to himself and it was only when he was comfortable with a person would you really see his true character. It was routine for her to walk him to school every day in the morning and this would take approximately 15 minutes. She would leave him sometime by the small gate at the entrance to the school or otherwise on the pavement by the road. He would return home from school every day with his friends Amber and Mahomed who resided in Howell Road, close to his home. Amber attended the same school as M[...] and was in the same class as him. M[...] was in grade nine at the time of the incident and she attended Bechet High School in Barnes Road, Sydenham.

[59] She knew the accused as one of her mother's friends and she called him 'Uncle Vahed'. He would often visit at their home and stay over mostly over weekends and slept in the middle room of their home which they called 'the dark room'. The accused was always kind to her and M[...] and would often give them money and take them to KFC and buy them stuff. The KFC he took them to was the one directly next door to their home.

[60] The accused liked M[....] a lot and was always kind to him but on one occasion he did smack M[....] because M[....] and C[....], their cousin were fighting. When the accused smacked M[....], M[....] started crying and M[....] told her what had happened. She suggested to M[....] that they should go and report it to their mother. When she saw the accused approaching they did not go and report this incident to their mother.

[61] Thereafter the accused, she, M[....], C[....], her mother and granny went to Sun Coast in the July vacation. They spent some time there enjoying themselves and at the time she recalled that the accused was wearing a green shirt, leather jacket and cap but she did not know what colour and kind of pants he was wearing. On a number of occasions, she observed arguments between her mother and the accused.

[62] On the one occasion she heard them arguing, her mother and the accused were downstairs and she and M[....] were inside the house. She heard her mother say to the accused, 'Stay away from my children.' This argument continued until the next day and her mother did not let the accused into the house that day. But the following morning, she noticed the accused in the house as their granny had let him in. On this occasion her mother made him sleep outside, she could not recall whether the accused and her mother had made peace after their argument.

[63] The day before school opened after the July vacation, on 16 July 2018, M[....] had just come out of the shower when the accused asked both of them what time they finished school. She informed him that M[....] finished school at 14h00pm and she finished school at 14h20pm. The accused told her that he would be waiting for them after school. She told him that he did not have to wait for them and there was no further conversation which took place between them in this regard.

[64] On 17 July 2018, she took M[....] to school as usual and that was the last time she saw him alive. He was dressed in his uniform, being his tracksuit pants with his grey shorts underneath, his white shirt and navy jersey. M[....] took lunch to school and that morning she left him on the pavement not far from the school gate and watched him go into the school through the school gate before she left to school.

[65] That afternoon, she could not recollect the exact time she reached home but noticed that the bricks were out and she saw the key by the door sticking out near the mat. She took the keys and opened the door and went inside but there was nobody at home. She testified that it was usual that by the time she returned home from school, M[....] was at home.

[66] She went to the room to check if M[....] 's schoolbag was there but nothing of M[....] 's was to be found showing he had returned from school. She contacted her mother via WhatsApp and asked her where she was as she had known that her mother was going to see her father in Wentworth that day. She made a report to her mother that M[....] had not returned from school. Her mother told her to look downstairs. She informed her mother that no one was downstairs. Her mother then told her to contact her granny, as there was a possibility that M[....] would be with their granny.

[67] M[....] was not with their granny and it was getting late. Her granny then told her to go and check at M[....] 's school and the shops in the immediate vicinity of their home. When she went to the school, the school premises were empty, and when she checked at the shops and the garage near to their home she did not find him. Her father and mother returned home when it was getting dark with Uncle Marshall. By that stage a search was being conducted for M[....] . She contacted the accused via WhatsApp to find out if he had seen M[....] and he reported to her that he had not seen M[....] . Although he knew about the search that was taking place the accused did not come and assist the family to look for M[....] .

[68] Using Exhibit 'L' which was the CCTV camera footage taken from [....] she identified M[....] close to the rear tyre of the taxi. She identified him from his body language and from the side view, how he had been dressed that morning and recognised him by the way he stood.

[69] She confirmed that M[....] 's best friend at school was S[....] . She identified the grey school bag and the books by the Christmas covers handed in as exhibits as belonging to M[....] . She also in addition identified his juice bottle. The accused

admitted that these items had been recovered from the scene. Using Exhibit 'B', photo 6 she identified this as the green shirt which the accused was wearing.

Cross-examination of M[....]

[70] During cross-examination M[....] confirmed that she and M[....] had a good relationship with the accused. He always took her and M[....] to KFC and it was also not unusual for the accused to take M[....] to the KFC. She confirmed that the accused had initially worked with her mother. One day he arrived at their home with her mother and was introduced by her mother as a friend, Uncle Vahed. Sometime after that introduction, the accused became a regular visitor and would stay over on weekends. She testified that it was usual for the accused to stay over on weekends and not during the weekdays. There was never an occasion during the weekend when the accused would be alone with her and M[....]. There were occasions when the accused would cook for all of them.

[71] In addition, she testified that it was unusual for the accused to be there on a school day. This was the first and only time, being 17 July 2018, that he was there on a school day. She confirmed that the one occasion she mentioned in her evidence in that the accused had slapped M[....], was the only occasion. On the morning of Tuesday, 17 July 2018, when she walked M[....] to school, he was wearing grey shorts, a white Rippon shirt, navy tracksuit pants and a navy jersey.

[72] On 17 July 2018, in the afternoon when she whatsappped the accused, she did so to find out where M[....] was and if the accused knew where M[....] was. The first message she sent was on Exhibit 'S', page 11 at 15:09:30 and the accused responded 'elo'. Subsequently, she advised the accused in relation to an enquiry he made about M[....]'s whereabouts 'no his missing' (Exhibit 'S', page 13). The accused's response was 'Oh my god.' (Exhibit 'S', page 14). She gained the impression from his response that the accused was shocked.

[73] At 16:00 (Exhibit 'S', page 15) the accused messaged her to ask if M[....] had returned home. A WhatsApp exchange occurred after her mother had returned (Exhibit 'S', page 14). When her mother and father arrived home, her granny informed them to report the matter to the SAPS. This was at approximately

21h30pm after they had seen T[...] at the Asherville sports grounds. She testified that her aunty had told her M[...] is okay and he is with the accused in reaction to her parents' conversation earlier that evening with T[....] .

[74] She thereafter exchanged a number of WhatsApp messages with the accused in relation to M[...] . This was based on possibly what she was told to say. However, she could not recollect whether she was told what to say by either her mother or her aunt.

[75] On page 22 of Exhibit 'S' is a message between her and the accused in which the accused says 'I neva take him'. Her response to him is 'but one of the teachers said you did'. M[...] could not recall who told her why she should say that but she was adamant that it was not her mother and must have been one of her aunts. In such WhatsApp exchange, she advises the accused as follows 'The teacher has the pic' (Exhibit 'S', page 25). She was also advising him that five school children had seen him with M[...] (Exhibit 'S', page 25). She could not recall exactly who was providing her with such information, but indicated that it was everyone who was at home at the time including her mother.

[76] On 18 July 2018, at 10h12, a further exchange takes place between her and the accused. By that stage she had already messaged the accused and informed him that he is the one who is suspected of having kidnapped M[...] . The accused's response is to message her and say 'I dnt kW we're he is' (Exhibit 'S', page 28)'. She confirmed that all the while the accused was communicating with her via WhatsApp and answering her messages. She confirmed that some of the WhatsApp messages emanated from herself and some she was told to send although she could not recall who specifically told her to send them.

[77] She confirmed that on the weekend preceding the Tuesday 17 July 2018, her mother and the accused had an argument. At the time of the argument, she was upstairs with M[...] and did not know what the argument was about. She could not recollect whether her mother was at home on the Saturday prior to the 17 July 2018. She also did not hear anyone around the house talk to her mother about having

taken drugs. On the morning of 17 July 2018, both her mother, granny and the accused were still at home when they left for school. Everyone was okay.

R[....] S[....] L[....]

[78] *R[....] S[....] L[....]* the mother of *M[....]* testified that in July of 2018 she resided at 15 Dr Naidu Drive with her mother and her two children. *M[....]* was born on 20 November 2008 to herself and Michael *K[....] L[....]*, *M[....]*'s father, who is now late.

[79] She met the accused when they both worked at *E[....]* in Alpine Road, although she could not recall the exact date she commenced her employment there. The accused was a block man and she was a butchery assistant. Whilst working there they became friends and the accused received a promotion and became a manager. She knew the accused resided in Phoenix as he had told her this but she did not know his address. She worked at *E[....]* for a period of two and a half months before she was dismissed. The accused, who she remained in contact with after she was fired, indicated that he was going to take her to the CCMA as she was fired for no reason. She accompanied the accused to the CCMA and took along her identity document.

[80] She testified she always kept her identity document in her underwear draw in a black book. When she left for the CCMA with the accused she removed it from the black book. When she returned from the CCMA her identity document was in in the black, beige and white handbag which she kept in the draw in her bedroom wardrobe cupboard.

[81] At the time she and the accused attended at the CCMA he had also been dismissed hence the reason why both of them went to the CCMA.

[82] Whilst they were both employed at *E[....]*, the accused would visit her at home. She described the nature of their relationship as friends and co-workers. On the first occasion that he came home she introduced him to her mum and her two

children as a co-worker and friend. Whilst employed at E[....] he slept over once or twice in the spare bedroom of their home.

[83] Even after they had both been fired he would continue to visit her at home and he would often stay over. At the time he was doing maintenance work around the house for her mother. She was not aware as to whether or not he was being paid for performing such maintenance work.

[84] During his visits at her home he would often talk to the children as they got along very well. He would often purchase sweets and chocolates for them and take them to the KFC. On the two occasions that he took the children to KFC he asked her for permission before taking them. She would watch them from the kitchen window. This was as they walked to the KFC and returned home as the KFC is right next door to their home.

[85] She described M[....] as a quiet, humble and innocent little boy who kept to himself. His best friend at school was S[....] and he had other friends whose names she did not know. Every morning M[....] 's sister M[....] would walk him to school and leave him at the school gate. In the afternoon he would walk home with Amber and her brother. Amber was in M[....] 's class and she and her brother resided in Howell Road. She confirmed that at the time of losing her employment, when M[....] arrived home she would be at home. On the last morning that she saw M[....] being, Tuesday 17 July, she got him dressed for school, made him his lunch, kissed him goodbye and told him she loved him.

[86] During the July holidays before the school reopened on 17 July 2018 she, the accused, her mother, M[....] , M[....] and her nephew C[....] went to Suncoast Casino. On the day the accused was wearing a green shirt with a black jacket and a cap. It was on this occasion that she had taken a photograph of the accused on her cell phone. It was this photograph she testified she showed to T[....] .

[87] She characterised her relationship with the accused as being 'just friends'. She recalled having two arguments with him during the course of their friendship. The first argument occurred in the backyard. They were sitting with the tenants in the

yard and the accused got angry with her as she was talking to one of the tenants. At that point he chased her around her mother's home. It was on that occasion that she told him to stay away from her and her kids. She messaged M[....] who was in the upstairs bedroom and told her not to open the door for the accused. When she told him to stay away from her and her kids that is when he said to her he was going to 'show her'.

[88] The accused went to one of the bedroom windows and tried to knock on the windows to get someone to open up the house for him. She asked one of the tenants to walk her to the front door of the house as she knew the accused was waiting at the corner of the front door for her. She asked M[....] to open the front door and the accused was sitting on the step of the front door of the house. She told him to stay away from her and her children and went in the house. This was in the early evening. On the morning after the argument she saw the accused in the house and assumed that her mother had let him in. She did not know how he got into the house.

[89] After the first argument she did not talk to him and he kept on sending her messages saying that he was sorry. Despite this argument he continued to stay at their home and would do maintenance work for her mum around the house and in the garden.

[90] The second argument occurred on the Sunday just prior to the Tuesday on which M[....] went missing. She was in the kitchen of her mother's home with Mike her ex-boyfriend. The accused was sitting in the lounge watching television. The accused came barging into the kitchen starting to attack her and raise his voice. She and Mike were sitting and having a drink at the time the accused barged into the kitchen.

[91] The accused started chasing her around the kitchen table and shouted at her again saying to her 'I will show you'. Mike was in the kitchen. Her mother Ms Omaidien told the accused that he was being disrespectful and that he needed to leave. The accused left the kitchen, went back into the lounge and sat down. At the time Mario the boarder was in the lounge with the accused.

[92] At the time that the accused barged into the kitchen, he told her that she was 'making him a fool' and that he loved her. She responded by saying that he is mad and that they are just friends. On the same Sunday she did not speak to the accused again and noticed him inside the house although she could not recall what he was doing. She went to her bedroom to sleep with the two children. After this Sunday she and the accused chatted to each other via WhatsApp. The accused was apologising to her. At the time of the second argument she told the children not to go near the accused and not to talk to him.

[93] On Monday afternoon, after the second argument on the Sunday she had gone to the clinic. On the morning of 17 July 2018 she made M[....] and M[....] 's lunches and packed it in their school bags. She dressed M[....] for school in his underpants, white vest, white school shirt, grey school shorts and because it was cold that morning she let him wear his navy blue school jersey and his navy blue school tracksuit. Thereafter M[....] left for school with M[....] .

[94] She then went to Wentworth to see K[....] , M[....] 's father and her ex-husband. When she left home she saw the accused outside in the garden busy setting the bricks. At about 15h00 that afternoon M[....] sent her a WhatsApp message saying that she was back home but M[....] was not back from school. She told M[....] to check in the room if his school bag was there and downstairs in their yard by the puppies.

[95] M[....] sent her a message saying that M[....] was not in the yard and that he was nowhere to be seen. She told M[....] to check at M[....] 's school, at the shop next door and in Howell Road at his friend's home.

[96] Whilst chatting to M[....] via WhatsApp, she and K[....] travelled from Wentworth to Sydenham. She went straight to her mother's house with K[....] and his cousin and they proceeded to the Sydenham Police Station. K[....] 's sister Fay Vetter was also present at the police station, and the police station was changing shifts. She could not recall the exact time but it was late afternoon. Because the police were taking so long to assist them they decided to go and look for M[....] .

[97] They first went looking for M[....] at Sydenham Heights. She had a picture of him on her phone and she showed the people around Sydenham Heights to see if they had seen M[....] and they said no. One of the ladies she spoke to told her to go and look at Asherville sports grounds. She went down to the sports grounds and showed the children on the grounds a picture of M[....] and asked them if they had seen him, but they had not.

[98] Whilst there she saw a van with boys at the back so she walked up to the van with K[....] . She testified that 'One of the boys recognised me and said hello M[....] 's mother'. She said 'I am looking for M[....] have you seen him?' The boy said 'yes his father came to fetch him from school'. On hearing this she pointed to M[....] 's father K[....] . The boy said no his other father. That is when the schoolboy started describing the person that had come to fetch M[....] from school.

[98] The description which the boy gave her was the following: the person was dark, tall and had a sharp long nose and looked like an Indian. It was at that stage that she took out her cell phone which had a photograph of the accused on it. She showed the boy the photograph of the accused and the boy said yes that is the same man. The photograph of the accused showed him dressed in a green shirt, a jacket and cap on his head.

[99] At that point they travelled to E[....] in Alpine Road so that she could get the accused's address in Phoenix. When she got the accused's home address in Phoenix she went to Phoenix with K[....] , Mrs Vetter and his cousin. It was dark when they arrived in Phoenix. They went out to the door of the accused's home and knocked on it. There was a lot of chatting and movement going on inside. The people took long to open the door so K[....] kicked the door in and when he opened the front door there was a lot of movement and people racing out the back door.

[100] She proceeded into the house and the accused's mother was sitting in the lounge. She asked the accused's mother if she had seen the accused. She also told the accused's mother that he was last seen with her son M[....] . The accused's father, two young boys and his sister entered the house from the back door. She asked them if they had seen the accused as she was looking for her son. They could

not find the accused at home, and they then proceeded to the Phoenix Police Station. She opened up a missing person's report at the Phoenix Police Station. After doing so, she then returned to the Sydenham Police Station and gave them the Cas number from the Phoenix Police Station. She then returned home.

[101] She could not recall the description of the child whom she had spoken to at the Asherville sports grounds but saw him the following morning on 18 July 2018 at Rippon Road School. She visited him at the school to show him the picture again and make sure that the little boy could repeat the same story that he told her the previous evening about the accused coming to the school.

[102] At the time that she spoke to the little boy K[....] 's sister, Mrs Vetter was there and another teacher whose name she could not recall. During that conversation she showed the little boy the photograph again and made sure that the little boy could tell her the same story that he told her the night before namely that the man who came to school and took M[....] by the hand the afternoon before, was the accused.

[103] They continued their search for M[....] on 18 July 2018 and went to the KFC and asked the manager if they could look at the CCTV camera footage. At the time she viewed the CCTV footage from the KFC she was accompanied by the police although she could not recall their names. In addition, she and K[....] also proceeded to [....] which is across the road from the KFC to ask if they had any footage. They viewed the footage. This footage was subsequently handed in during the trial.

[104] She confirmed that when they went to Phoenix to the accused's home on 17 July 2018, K[....] was with her. When M[....] 's body was found on 3 September 2018 in Phoenix, she was at home with K[....] . She, K[....] and her sister Tasneem went to Phoenix to the place where the body was discovered. Prior to 17 July 2018 she had never been to the accused's home nor did she have any relatives in the Phoenix area.

[105] When testifying, R[....] identified the grey backpack which was the schoolbag that M[....] used. In addition, she was shown the [....] CCTV camera footage and indicated that she recognised two people in the footage. This segment of the footage

relates to an adult male and a young boy at the rear of a taxi in line with the other vehicle. She recognised M[....] and the accused in such footage.

[106] She testified that whilst looking for M[....] she was in constant communication with the accused. She telephoned him and also communicated with him via WhatsApp messages. Her first phone call to the accused was on Tuesday 17 July 2018. She called the accused to ask him if he had seen M[....] and the accused responded that he had not seen M[....] at all that day, being 17 July 2018.

[107] In relation to a series of WhatsApp messages exchanged between her and the accused, she confirmed that the accused had previously sent WhatsApp messages which indicated that he was in love with her but she constantly responded to him to say that they were 'just friends'. The messages that were sent by the accused were exchanged from 17 July 2018 at a time when she was not speaking to him and he was apologising to her asking for forgiveness.

[108] R[....] then testified about a series of messages which she exchanged with the accused on 17 July 2018 in the afternoon (Exhibit 'R', page 29). At approximately 15:16:05 she sent a message to the accused asking him where M[....] was. The accused responded by 15:16:13 saying he did not know. Thereafter at 15:19:31 she sent a message to the accused saying 'Whers my son'. At approximately 15:19:45 the accused responded and said he did not know. At 15:20:24 the accused sent her a message saying 'U sed I must not be with him' She responded and indicated that she had told him to stay away from her children.

[109] At 15:25:05 the accused responded and said to her that he had left the house after she had left which was between 10h00 am and 11h00 on 17 July 2018. She confirmed that during the WhatsApp exchange she communicated to him that they were only friends and that he 'needed to get a life'. The message which the accused sent her back at approximately 10:17:16 said 'heartbroken and sad'. Her responses were sent between 09:03:31 and 09:05:19.

[110] She confirmed that on 17 July 2018, she was not speaking to the accused and he was sending her WhatsApp messages apologising and asking for

forgiveness. She confirmed that part of the WhatsApp exchange between herself and the accused related to her informing him that he must not be with her children and that he ought to stay away from them. She confirmed that on 18 July 2018 at 08:20:00 and 08:22:17 (exhibit 'R', page 33) the accused sent the messages to her. These related to M[....] having disappeared. The accused said to her that he did not take her son and he would not be 'so stupid to take him'. The accused also mentions that he left the house at approximately 1:15 pm. She also confirmed that at 08:24:38 she sent the accused a message asking him to come and help look for M[....] .

[111] She testified that after M[....] had disappeared she had arranged to meet the accused outside [...] in town. The reason for the meeting was to ask him where M[....] was. Despite them making arrangements to meet, the accused did not show up for the meeting and in his WhatsApp message communications to her on the day said to her that the 'cops were looking for him'.

[112] At 13:52:58 in Exhibit 'R', page 58 the accused sent her a message saying 'I ducking'. Subsequently on page 59 of Exhibit 'R' she explained the conversation between her and the accused. The accused told her that he was ducking and there were a lot of police vans when he came into town. She was upset with him and told him that he was making her a fool and had made her come to town for nothing. When he responded to her saying that there were a lot of police vans she told him not to worry. She told him that there was a bomb scare at Woolworths and that is why there were police vans. The accused told her that he had seen her but she informed him that she had not seen him. At 19:51:13 the accused sent her a message saying that he was on his way to meet her but he saw policemen everywhere (Exhibit'R', page 72).

[113] She confirmed that her identity document and the birth certificates of M[....] and M[....] were kept in her underwear draw in a black large hardcover book. It was kept in a cupboard in her bedroom. No other person knew the location of these documents. She at no stage handed her identity document and the birth certificates of M[....] and M[....] to the accused. *Mr Singh* confirmed that the originals of these documents went missing whilst in the custody of the police.

[114] She also confirmed that at no stage did the accused ever escort M[....] home from school in the afternoon nor did she give him permission to escort M[....] home from school, specifically on 17 July 2018. She testified that they had asked Amber and her brother if they had seen M[....] on 17 July 2018 outside the school and they had not seen him.

[115] She confirmed that on one occasion she and the accused went to Rippon Road Primary as on that day she was on her way out the door on her way to the school and the accused arrived at her house. She told him that she was on her way to pay for a function at the school for M[....] and the accused accompanied her. That was the only time that she attended at the school with him.

Cross-examination of R[....]

[116] She confirmed that the accused had a very good relationship with her two children and that from May to July 2018 he doted on them and spoilt them. She also confirmed that the altercations between herself and the accused had nothing to do with the children. The altercations involved her when he became violent towards her but he did not display any violence towards the children.

[117] On 17 July 2018 when she left home for Wentworth, the accused was still at her mother's house. She did not speak to him that day and the accused was doing maintenance on the outside of the property and it did not alarm her that he was there. She had sent him a message to inform him that he must leave the premises when he was done working in the yard. She did not expect anything bad to happen when she left for Wentworth that morning, nor did she fear for anyone's safety.

[118] She testified that the children did not spend a lot of time with the accused. They chatted and got along. She could not ask the accused to leave after the first altercation as that was her mother's home and her mother was not aware of the first altercation that she had had with the accused. It was only after the second altercation that she had brought this to her mother's attention. She could also not recall how much time had passed between the first altercation with the accused and the second altercation.

[119] She confirmed that family members and a private investigator by the name of Dominique King assisted in co-ordinating the search for M[....] . Within hours of M[....] going missing it had been posted on social media. She indicated that she removed herself from social media and was not aware of a social media campaign to try and find M[....] . She heard that stories were circulating on social media and Facebook but she herself had removed herself from it. Her family however kept her informed about what was going on social media.

[120] She confirmed that the accused was a suspect from the time she interviewed T[....] at the Asherville sports ground at approximately 18h00 to 19h00 of 17 July 2018. She could not recall when a family member first informed her that the issue related to M[....] being missing was on social media. Her family members were also making postings on social media and her family members kept her informed of their activity on social media whilst the search for M[....] continued.

[121] During the course of cross-examination from the nature of the questions put by Mr *Naidoo* it became evident that R[....] 's recollection of what transpired in the days prior to M[....] going missing was not very clear. She had no recollection of what she did on the weekend prior to M[....] going missing and could only recall that she went to the clinic on Monday. It was suggested to her, which she did not dispute, that on the Saturday she went out with Mike and left M[....] and M[....] in the care of the accused.

[122] It was suggested to her that this in fact did happen and her mother had gone to a school reunion on the Saturday as her mother had filed a statement confirming this which the state had provided to the defence to this effect. She indicated that she could not recall the day she went out with Mike but that when she did go out her mother was sleeping. She confirmed that on Sunday when the argument with the accused took place, her mother and Mike were present. She and Mike had drinks in the kitchen and at the time Mike was her ex-boyfriend. R[....] could not recall when her relationship with Mike started or when it ended, but the relationship lasted for about a year.

[123] She could also not recall when she and K[....] were married and divorced and only recalled that they were separated for a period of five years. She confirmed that Mike and K[....] are brothers. She also confirmed that although she did not have a problem with narcotics and liquor she had taken drugs being cocaine. She disputed that K[....] was concerned about her use of drugs and alcohol.

[124] She could not recall whether she had gone out with Mike on the Friday but confirmed that she could have gone out on the Saturday. She confirmed that on the Sunday she and Mike were having drinks in the kitchen. On the Sunday when K[....] came to visit M[....] and M[....] she was not at home. She further disputed that the argument which ensued in the kitchen when the accused barged in was between Mike and the accused and not between her and the accused. She disputed that her mother had asked both Mike and the accused to go outside and that is when she and Mike left.

[125] She had gone to the shop earlier on in the day but could not recall whether she went to buy drinks. This was prior to the argument with the accused. The first incident between her and the accused occurred on a day when all five single male tenants were in the yard with her. They were sitting having a drink. She disputed that they were smoking mandrax and taking drugs at the time which is when the accused confronted her.

[126] She indicated that they were sitting downstairs in her mother's yard with the five male tenants and she was talking with one of the male tenants when the accused became jealous and attacked her. She disputed that the argument occurred because of her association with another man and because alcohol played a role. She indicated that she was having an argument with one of the guys in the yard although she could not remember what the argument was about. She was having a drink with two of the tenants on the Sunday being Nigel and Castello.

[127] She confirmed that she and Mike had ended their relationship at the time of M[....] going missing, but they remained friends. He was also fond of M[....] and M[....] and was their uncle. She confirmed that when M[....] went missing Mike came to find out about it although not on the same day. She disputed that she had

telephonic contact with Mike on the day that M[...] went missing. Although she could not recall she did not dispute that in Exhibit 'R' there were messages between her and the accused in which she referred to Mike as her boyfriend. She said she could not recall this and she had another boyfriend whom she was communicating with via WhatsApp. She had met him once and they had exchanged numbers and she used to chat with him on WhatsApp. She could not remember his name and could not say how long she kept company with him nor how long she was communicating with him via WhatsApp.

[128] It was suggested to her that at the time of M[...] 's going missing she was keeping company with the accused, Michael, K[...] , Castello who was in the yard and a WhatsApp friend. She had four males in her life at the time. She indicated that she would not describe them as 'being in her life' but would call them acquaintances. She disputed that each one of them would have a reason to be jealous of the other. She disputed the suggestion that she had asked one of these boyfriends to contact the accused and to bluff him and tell him that he was a boyfriend so that the accused would stop harassing her. She confirmed that she sent a WhatsApp message to the accused to tell him to remove her picture from his profile because her boyfriend was not happy with this.

[129] When she was asked to indicate which one of her boyfriends this was at the time, she indicated that she did not have a boyfriend. She also confirmed lying to the accused that she had a boyfriend in order that he remove her picture from his profile. It was pointed out to her that she lied to the accused and also prior to the lunch adjournment she lied about her presence on social media. It was pointed out to her that she did not say that she did not remember but rather that she was 'refraining from social media and was not on social media'. She indicated that at the time her main focus was looking for her son, her head was not focused and she could not remember everything. It became evident that R[...] had not been truthful with the court as she did have access to social media and was on social media at the time of M[...] 's disappearance.

[130] She confirmed that she went to see K[...] on Tuesday as he wanted to speak to her and she wanted to speak to him. The reason was that he wanted to reconcile.

She disputed the accused's version that she wanted to speak to K[...] as she wanted to get out of her mother's home as she and her mother were having problems because of her drug and alcohol habits.

[131] She did not know why she was fired and she did not ask her boss Ikram. She merely took her belongings and left. She disputed that one of the reasons that she was having problems at work was due to her absenteeism. She indicated that she could not recall. She was referred to the various social media postings that she made and confirmed that having regard to her Facebook profile she set the wheels in motion to have the accused arrested as early as 17 July 2018. She disputed that she was involved in the arrest of the accused.

[132] She confirmed attending all the court appearances which the accused made in the lower court and was also present when he applied for bail. She confirmed that her aim was to ensure that the accused remained incarcerated and was not released on bail. When it was suggested to her that M[...] had returned home between 14h00 and 15h00 that afternoon and that nobody saw him, she disputed this. She indicated that she had spoken to a tenant Abdul who lives in the basement and he confirmed that between 14h00 and 15h00pm that afternoon he was at home and he did not see anyone.

[133] She confirmed that the photograph of the accused which was on her cellular phone she did not make available to the police. She had spoken to T[...] the night before at the Asherville sports grounds but did not tell the police of her conversation with him. She only informed the police of her meeting with T[...] after she had been to the school on the morning of 18 July 2018. On the morning of 18 July 2018, she went back to the school and interviewed T[...] again. This was after she met him the previous evening. She showed him the picture the night before as well as on the morning of 18 July 2018, before advising the police that she had interviewed him. She confirmed that she showed T[...] the picture on the morning that she interviewed him at school in the presence of a teacher, being her ex-sister-in-law Mrs Vetter. It was only after this that the police became involved.

[134] It was suggested to her that her ex-boyfriend Mike's name is Michael L[...] and that M[...] 's middle name is Michael. When she was asked whether this carried

any particular significance she indicated that K[....] wanted to name M[....] Michael. She also indicated that it was coincidence that Michael whom she had a relationship with after she divorced his brother, had the same middle name as M[....] .

[135] She confirmed that M[....] went to Howell Road to Mike's house to see if M[....] was there. When it was put to her that M[....] did not testify about this she indicated that they were unable to contact Mike as despite efforts to contact him he works away and often has private jobs. She was reluctant to confirm that for several days after M[....] went missing Mike could not be contacted and that he did not come and assist in the search for M[....] . She could not recall whether she telephoned Mike for several days after M[....] went missing and could not contact him nor could she recall if she had informed somebody that she had been to Mike's home in Howell Road but could not find him.

[136] During cross-examination it was suggested to her that she informed people who were part of the search, that she could not recall Mike being around and that he was not around to assist in the search for M[....] . She confirmed that she could not identify each and every person that assisted but family members, members of the community and search groups participated in the search for M[....] and they posted flyers and banners. She recollected that at some stage Mike did come and join the search for M[....] although she could not remember exactly when.

[137] She confirmed that on Monday evening K[....] telephoned her wanting to speak to her. He informed her that he wanted to speak to her about the children and she suggested that he come over to her mum's house in Sydenham. K[....] declined this offer and indicated that she should rather come to Wentworth. K[....] wanted to find out how the children were doing and also wanted to reconcile for the children's sake. She confirmed that whenever K[....] was in the area he would come by to see the children and that he had done so on the Sunday. She was not present on the Sunday when K[....] came by to see the children and M[....] informed her of his visit. At the time she and Mike had gone to the shop.

[138] It was suggested to R[....] during the course of cross-examination on more than one occasion, that her lapses in memory was due to her being under the

influence of alcohol and drugs. She denied that this was the reason. She indicated that she had drinks but she was not drunk and spent the day in the kitchen cooking. She confirmed that even though she and Mike had ended their relationship they would still sit together and have drinks together and were friends. She confirmed that she was still talking to Mike and still seeing him whilst K[....] was attempting a reconciliation.

The eye witness: Ismail Rhyman

[139] The next State witness Ismail Rhyman (Rhyman) testified relating to his observations on the afternoon on 17 July 2018 after 14h00pm, in the vicinity of the KFC and the taxi/bus stop on Dr R Naidu Road. He is employed at [....] on Randles Road, Sydenham as a salesman.

[140] At lunch time on 17 July 2018, he was on his way to KFC which is situated directly opposite [....] on Dr R Naidu Road. He was at the bus stop across the road from the KFC on the side of [....] on his way to KFC, when he observed a man and a child coming from the KFC toward his direction. At the time the man held the child by his hand and they were crossing the road with the child on the left hand side and the man holding the child's right hand.

[141] He crossed the road from the bus stop to the KFC and as it was a busy road he turned back and saw the man with the child walking toward the taxi which was now stationary just in front of the bus stop. The last time he observed the man with the child on 17 July 2018 was when he observed them walking toward the taxi. At the time the child was dressed in a school uniform and a blue tracksuit. He could not recall how the man was dressed. Once he had crossed the road he went to the KFC and placed his order.

[142] He described the man and the child and he crossing the road almost simultaneously with each other and he was a few metres away from them, not very far from them and he estimated this distance to be approximately six metres.

[143] He testified that he had seen this child on numerous occasions before as the child walked around outside his place of employment. As he worked at the counter at [...] he could see whatever was happening outside. When asked to describe the young child he described him as a 'young coloured boy.' He had never spoken to the young boy before and had seen the man before, approximately a week prior to 17 July 2018 in the presence of the same child and a girl. The young girl he described as 'a tallish coloured girl' and he had seen them together at night at the KFC. Apart from the two occasions which he saw the man he had seen him on numerous times just walking around the area.

[144] The week prior to 17 July 2018, when he had seen the man with the little boy and girl they were in the KFC waiting for their order. Using Exhibit 'M19', he identified the little boy and the man as the persons he saw on 17 July 2018. He subsequently identified the accused by means of a dock identification.

[145] He also confirmed having provided Exhibit 'L', the CCTV footage from [...] to the police. From such CCTV footage he pointed out himself at (14:06:04 – 28 seconds) walking past the camera, at (14:06:14) crossing the road going toward the bus stop, at (14:06:21) looking at the robot in order to cross the road to the other side, and (14:06:41) pointing out the man and the child proceeding toward the taxi.⁵

[146] He confirmed that there is no footage showing him crossing the road and turning around. In this regard he relied on his evidence that whilst he crossed the road he turned back and observed the man and child walking towards the taxi. He testified that at the time he was at the centre of the road when he turned back toward the shop at the bus stop, hence the reason why he saw the man and the child run towards the taxi.

[147] The witness using the KFC footage pointed out himself walking into KFC to place his order at 14:09:54,⁶ at 14:15:44 he places his order and at 14:16:26 he leaves KFC after collecting his order.

⁵ Channel 16- 20180717140540

⁶ Channel 3 – 20180717140928.

[148] He also confirmed that persons take the taxi from the bus stop on Randles Road proceeding towards the CBD. He was able to point out the place where this occurs on the CCTV footage.

[149] During cross-examination, he confirmed that prior to testifying he watched the video footage and the photographs made available by the State. He had no recollection of what he wore the Thursday prior to testifying. He confirmed during cross-examination that without the video footage he would have no idea what he was wearing on 17 July 2018. In addition, the evidence relating to the colour of the clothing on 17 July 2018 is gleaned from watching the video.

[150] In addition, he confirmed that the KFC outlet was a busy outlet in the evenings between 16h00pm and the early evening. In addition, the intersection is a very busy intersection with lots of vehicles and pedestrian traffic. He confirmed that the Sydenham area has a very large coloured population and that there are a large number of coloured boys that attend the Rippon Road Primary School. In addition, during opening and closing time of the school there were a number of coloured boys in the area.

[151] He testified that he first became aware of the child going missing a couple of days after the alleged incident as the child's parents came in and asked about the availability of any CCTV footage. He viewed the footage together with the parents.

[152] He testified that there was nothing significant about having seen this man around but he had seen him on a number of occasions around the area although he could not give the exact number of occasions he had seen him. He also notices the people in the area as he goes for lunch every day at the same time and purchases lunch either from the KFC across the road or Siraj that is further down the road.

[153] He conceded during cross-examination that:

- (a) but for having watched the video footage he would not have been able to testify as to what transpired;

- (b) the footage assisted him in testifying as to the events of 17 July 2018 and what he saw that afternoon;
- (c) there is nothing significant about the man and the child in the footage which would have caused him to pay particular attention to this man or this child;
- (d) it is only when he saw the footage that he recalled that this is what he had seen;
- (e) when he made his statement to the police the person accused of this crime, had already been arrested;
- (f) the accused was arrested on 20 July 2018 and he made his statement to the police on 18 August 2018;
- (g) he confirmed that the parents and police had come before that and had taken the footage and it was only after a while that they took his statement; and
- (h) there is no record of him having said anything before the video footage becomes available and is viewed.

Medical and Forensic evidence

Exhibit' A1' – The post-mortem report

[154] Exhibit 'A1' being the post-mortem report of M[...] conducted on 5 September 2018 by Dr Prahladh estimated his age as ten years old. The chief post-mortem findings made by her were the following:

- (a) she estimated the age to be between 6 to 10 years with skeletisation of the head, neck, shoulder region and pelvis. There was autolysis and liquefaction of organs;
- (b) the body was found with the arms above the head with the clothing completely covering the head. The post-mortem interval she estimated to be more than four weeks;

- (c) the clothing found on the body was a navy blue jacket with “Rippon Primary” emblazoned on the left breast, a white shirt, white vest, a navy blue track pants, grey shorts and grey socks;
- (d) the body was in a supine position with the jacket, shirt and vest over the head covering it completely;
- (e) the arms were still in the sleeves;
- (f) the neck was completely skeletonised and chest and abdomen were exposed;
- (g) the skin was discoloured a dark brown colour in areas and had a dry parchment-like texture especially over the abdomen;
- (h) fly eggs were present over the belt area of the trousers;
- (i) the pelvis had a 50 x 60mm defect with patchy subcutaneous tissue and skin attaching to both legs;
- (j) maggot larvae were present in the pelvic area and genitalia area;
- (k) first instar maggots were present at the scrotum and anus;
- (l) dark brown coloured skin was present;
- (m) the neck was completely separated from the skull;
- (n) the skull showed patchy areas of skin and subcutaneous tissue over the left side of the skull and the mandible and maxilla;
- (o) dark brown curly hair was still present over the scalp. Scattered maggot pupae were present that were dark brown and had a dried up appearance;
- (p) the arms were skeletonised with patchy skin and subcutaneous tissue over the dorsum aspect of the hands. Nails were present but finger pads were not present;
- (q) the shoulders showed skeletisation with exposure of the joints. The back showed multiple clean punched-out defects the smallest measuring 10 x 10mm and the largest 15 x 20mm within which maggots were present, in keeping with predation injury;

- (r) beetles were also seen on the body;
- (s) the body also had internal decomposition, where the internal organs were autolysed and liquefied into a mass of decomposed tissue; and
- (t) she estimated the post-mortem interval to be more than four weeks taking into account the decomposition, the insects present on the body and the weather conditions.

Dr Salona Prahladh

[155] I have already dealt with the evidence of Dr Prahladh when she attended at the scene on 3 September 2018 at Longbury Drive, Phoenix, earlier on in this judgment at paragraphs 25 to 28.

[156] Paragraph 5 of her chief post-mortem findings were that the post mortem interval was estimated to be more than four weeks, in other words the deceased died more than four weeks prior to the discovery of his body on 3 September 2018. She testified that a number of factors influenced this finding, namely, the state of the body of M[...] , the decomposition changes as well as the temperature, climate, insect activity and predation injuries.

[157] The estimation of the time of death was made by her by considering all those factors as well as the varying weather conditions at the time, literature and her own experience. She checked the weather patterns of the Weather Bureau on the internet for the months of July, August and September 2018 in arriving at that finding. The weather conditions which prevailed at the time were cold and dry and the temperature was below 20 degrees which would be winter conditions. She indicated that the weather would decelerate the rate of decomposition on the body so that it would slow down.

[158] She confirmed that her estimate of 'more than four weeks' was the minimum time period of decomposition taking all the factors into consideration. There was skeletonization present in the body and this would have commenced when the body

was in a more advanced state of decay. She attended the crime scene and confirmed that one could not detect the smell of a decomposing body from far away but as she got nearer to the body that is when the smell of decay was strongest at approximately four metres away from the body.

[159] In relation to the estimated cause of death she indicated that this was influenced by the abnormal positioning of the body, namely that the arms were above the head, clothing was present and pulled up over the head but still on the arms and shoulders. This is why she indicated that suffocation could not be ruled out. She confirmed that if one looked at the clothing of the deceased the clothes were stained with putrefactive fluids. The surface of the chest and abdomen had very dry skin. This usually occurs in cold dry weather conditions. In addition, the body had predation injuries which were consistent with maggots and insects feeding on the flesh. She indicated that under these conditions decay would have commenced more than four weeks prior to the discovery of the body.

[160] During cross-examination, she confirmed that this estimate of more than four weeks was merely a rough estimate as due to the decomposition of the body it was difficult to give an exact time period with any kind of accuracy. The predation injuries were caused by the insects eating into the flesh of the deceased and not by any injuries which the body sustained. In addition, she confirmed that she could not provide a definitive cause of death due to the decomposition and the skeletonisation of the body. She indicated that this was conjecture on her part based on several factors however, this was not a definitive cause of death. The positioning of the body was not specific; hence she could not say as a matter of certainty what the exact cause of death was.

[161] In response to questions from the court she confirmed that:

- (a) the positioning of the clothing over the head would have assisted in the decomposition process as it would have been warmer under the clothing and insects would have been attracted to the warmer environment; and

- (b) the abnormal positioning of the clothing also assisted her in concluding that suffocation was a likely cause of death and should not be ruled out.

Captain Melanie Pienaar

[162] Captain Melanie Pienaar (Pienaar), a senior forensic analyst, employed by the Victim Identification Unit, sub-section Specialised Identification Services, confirmed that her main responsibility is to deal with the evidence from death scenes, related to insect activity collected at the scenes. Her qualifications and expertise in relation to entomology which is the study of insects, were accepted by the defence and were not challenged in any way.

[163] Her evidence was presented to establish the approximate date of death based on the insect evidence collected from the body of M[....] at the mortuary two days after it was discovered. She confirmed that she compiled two reports, the first report, exhibit "V1", dated 2 October 2018 and the second one, exhibit "V2", dated 27 August 2019.

[164] She received various samples of insects from Captain Viljoen retrieved from M[....] 's body in order to assist her in determining the post mortem interval (PMI). Post mortem interval can be sub-divided in two intervals, namely a post mortem minimum interval (PMI min), which refers to the shortest period of time since death until primary infestation by insects commences. The post mortem maximum (PMI max) refers to the time period from which the victim was last seen alive until the victim's body is discovered.

[165] She testified that the standard technique used to estimate the rate of development of insects over a period of time, with temperature compensation, is termed "accumulated degree hours" (ADH) or accumulated degree days (ADD). This is a summation of temperature degrees celsius, above the lower development thresholds (LDT) multiplied by the time in hours or days. The ADH/ADDs required for certain species of insects to reach specific developmental stages have been determined by experimentation.

[166] Forensic entomology is based on the phenomenon that death-eating insects are attracted to carrion (decaying organic matter) in a predictable order. From the time of death from an entomological point of view, each phase of decomposition attracts specific species of insects. The order of the insects is called “waves of insects as they arrive”. Eight waves of insect arrivals have been identified and these eight waves of insect arrivals can be sub-divided into early arrival and late arrival insects. The early arrival species are the calliphorids and the late arrival insects are the piophilids.

[167] Early arrival insects will appear on the body within seconds and start infesting the body within 24 to 48 hours. Late arrival insects are attracted to the advanced stages of decomposition and consist of smaller fly species and beetles. Death attracts specific species of insects at specific times during the decomposition process. Decomposition is divided into phases starting with the fresh phase, followed by the bloating phase, followed by active decay, advanced decay and dry remains.

[168] Active decay, with regard to insect evidence follows the bloating phase, where the body deflates, there is a strong odour and the flesh will be creamy with any exposed parts turning black. This is usually estimated to be at 12 to 20 days depending on the temperature and other variables. Usually in insect cases, the PMI min is calculated using the early arrival insects. Late arrival insects are attracted to the advanced stage of decomposition and consist of smaller fly species and beetles.

[169] Once a body attracts insects what occurs is that the female flies will feed on any protein rich source usually from the body itself in order to develop her ovaries and to prepare for egg laying. Egg laying will happen within 24 to 48 hours after the discovery of the body. The eggs will hatch and the time it takes for the eggs to hatch depends on the temperature and the type of species of insect.

[170] The eggs hatch into a first instar maggot which is about the size of the egg. The first instar maggot lasts for a very short time and the first moult appears. The first moult means the shedding of skin into the larger instar maggot. The second egg sheds its skin into the larger third instar maggot. The biological clock of these organisms programs them to stop feeding during which they move away from the body, the skin hardens and a pupa is formed. A pupa is basically a maggot inside a casing which is its hardened skin in which metamorphosis takes place where it

develops from a pupa to a new adult fly which hatches. That is the life cycle and complete metamorphosis of all flies.

[171] How one determines the rate at which maggots develop scientifically has been done by scientific research at various temperatures and conditions. The development of forensically significant flies have been determined and established by scientific research at various temperatures and conditions and published as such. The order in which the insects appear has been established for many years and there has been no difference in their biological behaviour.

[172] The early arrival insects are from the family group called calliphorids commonly known as the blow flies. There are also beetle species which are early arrivals but the calliphorids will always be the first wave insects, the early arrival insects. The late arrival insects are normally more flies, the smaller species of flies and more beetles. The late arrival insects are attracted to a body which is in active or advanced decay.

[173] The accumulated degree hours (ADH) refers to the temperature dependant rate of development of cold blooded insects and is dependent on the relation between the rate of development and temperature taking into account the upper and lower thresholds of the species involved. Accumulated degree days (ADD) is the same thing as ADH except that in ADH you work in hours and in ADD you work with a 24-hour time period. Using the method, which is called ADD ADH, one calculates the age of the insect.

[174] Given the published data one knows how long it takes specific species to get to the development phase and at what specific temperature. Using the amount, one then calculates backwards to the time of eviposition or egg laying which will be close to the time of death.

[175] In order to calculate the estimated time of death Captain Pienaar confirmed that she received live specimens being pupae and maggots. On receipt of these live specimens they were placed on a food source for feeding phases and were reared to adulthood. This is to determine a timeline of their completed life cycle and for accurate identification. Once she had reared the maggots to adulthood the time

periods she established are indicated on Exhibit 'V2' paragraph 6 on page 5. Two time periods were identified during which infestation occurred.

[176] The stage of development of the insects along with the environmental and circumstantial influences provide a biological clock for estimates of time of death. The calculations are preferably based on species which arrive and infest a corpse shortly after death (first wave species). The accuracy of a PMI calculation relies substantially on the proper collection of samples as well as the environmental and circumstantial aspects.

[177] She confirmed that because forensic entomology is a temperate-driven science, the samples that were collected from M[....] were only collected at the mortuary, which is two days after removal of M[....] 's body from the scene. This to some extent complicated the precise calculations due to the lack of information regarding the environmental influences on the development and infestation behaviour of the insects. In the absence of the much required scene data, the estimation is calculated based only on the data as received by the South African Weather Services for the area and time in question.

[178] In the absence of specimens collected from the body and surroundings at the scene with a much required scene data measured at the scene during collection the estimation was calculated based only on the data received from the South African Weather Services and the insect evidence collected at the mortuary.

[179] Based on her first report, exhibit "V1", Captain Pienaar received samples which contained the calliphorids (early arrival) as well as the piophilids (later arrival). From the information she was able to gather, the samples received, which were analysed by her, she considered that they were sufficient to determine a time period during which insect infestation most likely commenced.

[180] The species which she identified were the banded blowfly, the green tailed blowfly and the common green bottle, as well as the chrysomya putoria, which is also a calliphorid. Using the standard technique to estimate the rate of development , the ADH ADD method, these species identified indicated that infestation most likely occurred during 27 to 30 August 2018. This does not indicate the time of death of the

victim in this case, but is only an estimate of a time period during which he was exposed to insect infestation.

[181] In exhibit "V2", which was the second report she completed, she was able to identify two time periods during which infestation occurred. The specimen of first and second wave species, the calliphorids, she mentions in paragraphs 4.1 to 4.4 of her report, being the banded blow fly, green tailed blowfly, the common green bottle blowfly and the afrotropical latrine blowfly, which indicated that infestation by those insects most probably occurred during 27 to 30 August 2018, being the PMI minimum. The identified specimens mentioned in paragraphs 4.5, the skipper fly, a piophilid and 4.6 the piophila megastigmata and the carrion beetle suggested that infestation most likely commenced during 25 to 27 July 2018, being the PMI maximum.

[182] What was significant for her was that the infestation of the earlier arrival calliphorids occurred very late. Based on this, she concluded that the time of death would be closer to the PMI maximum, 25 to 27 July 2018, taking into consideration that infestation by piophilids will commence during active decay. Usually in insect cases the PMI minimum is calculated using the early arrival insect. In M[...] 's case these early arrival insects started with their infestation at a much later stage of decomposition.

[183] From the samples that she received and reared in her laboratory the early arrival insects were the calliphorids and the late arrivals were the piophilids. By reference to the photographs in Exhibit 'G', pages 10, 41 and 48 she identified the calliphorid eggs, necrobia ruffie pest a beetle, and pupae of both the calliphorids and the piophilids. She was also able to mark off the decomposition fluids from the body as it decays (exhibit G, page 75) and on the surface of the ground (exhibit G, page 85).

[184] Captain Pienaar was then asked to comment on the skeletonisation of the head of M[...] (exhibit G, page 62). She identified pupae of both the calliphorids and piophilids. She confirmed that insects are normally attracted to that part of the body where there are natural orifices or natural openings. Like for example the mouth, nose, eyes, ears, rectum and vaginal opening. These areas are moist and allow for easy access to the soft tissue inside. If there is an injury site or a traumatic site on

the body the female insect will regard this as a natural orifice and she will lay her eggs in that site. The skeletonisation depicted in exhibit G, page 65 and page 99 is the torso and abdomen. The abdomen is deflated which is a sign of advanced decay and the skin is starting to dry out (Exhibit G, page 74).

[185] In so far as the clothing on the body is concerned, (Exhibit G, page 33) from an entomological point of view she confirmed that the exposed parts of the body are dried out and there is very little insect activity which she did not find strange at all, with the jacket pulled over the head there is clear evidence of insect activity as this would have created optimal conditions for insect development whereas that part of the body which was exposed to the elements did not create optimal conditions for development (Exhibit G, page 62). The body was in the semi-sun and semi-shade, (Exhibit E, photo 13). There were adult flies present and also fly eggs.

[186] In relation to the PMI minimum indicator and the PMI maximum indicator and its relationship to the estimated time of death, she testified that the PMI maximum is a clear indication that M[....] died very soon after the time that he disappeared probably around the time that he disappeared. The PMI minimum clearly indicates that the first wave insects or primary infestors did not have access to M[....] 's body up until about a week before his body was discovered.

[187] Her evidence in this regard was based on the development of the piophilid species that were identified. The piophilids that were collected, at the temperatures that were measured, it would take them between 35 to 44 days to complete their life cycle. Keeping in mind that they are late arrivals, she testified that some time needed to pass for the body to reach advanced decay before some infestation starts.

[188] She confirmed that the disturbance of the crime scene by Chetty and his dog, would only effect the adult species as they are more mobile and they can fly or run away.

Cross-examination of Pienaar

[189] During cross-examination, Pienaar was asked to explain her conclusion that it was significant that infestation of the calliphorids occurred very late and the time of death was close to the PMI maximum. She indicated that piophilids are later arrival insects and their arrival depends on the stage of decomposition. Sometime would

have had to pass before they started infestation of the body. In addition, the significance of the late arrival of the calliphorids as well which are first wave insects, is indicative that they did not have access to M[....] 's body when it was still fresh.

[190] During cross-examination she was asked whether the late arrival of the calliphorids raised the possibility that the body was placed in that location some time after death. She indicated that there were many possibilities and she preferred not to stray away from the science. The science was telling her that the first wave insects did not have access to M[....] for primary infestation. She confirmed that certain conditions promote active decay and certain conditions delay active decay. For example, a body that is placed in a casket takes longer to decay than a body that is placed in an open veld. Active decay was accelerated by temperature, water and natural elements and insects.

[191] If the body was in some place or location from which it was protected from the elements and insect activity, that could be an explanation for the late arrival of the calliphorids. She confirmed that this was possible. She also agreed with the proposition that given that possibility it was not possible to say at exactly what time or date the body arrived at the place it was found. She indicated that it was also possible that the late arrival of the calliphorids and the exposure to the elements might suggest that the body was placed where it was found some time after death.

[192] She confirmed that the infestation by the first primary infestors started about a week before discovery of the body. The occurrence of the calliphorids at such a late stage indicates that there was an event, which could be any event such as the remoisturising of the body, which would make the carrion attractive to insects. This was speculation on her part and in doing so one was moving away from the science.

[193] She testified that she could not agree that the possibility existed that the late arrival of the calliphorids was because the body was not exposed, but rather that they did not have access to the body. She confirmed that she was not able to say what this event was.

The police witnesses

Sergeant Devendran Chetty

[194] In respect of the recovery of the body of M[...] , the State led the evidence of Devendran Chetty (Chetty), a Sergeant and dog handler in the SAPS, K9 Unit, Search and Rescue. He confirmed that on 3 September 2018, he was performing search and rescue duties in the company of his canine dog as well as his crew, Warrant Officer Ellis (Ellis), a narcotics dog handler, in the Phoenix area.

[195] They were assisting SAPS Phoenix with a narcotics search. On their arrival, they were briefed that the search had been cancelled and consequently, they did crime prevention duties in the Phoenix area. Whilst patrolling along Longbury Drive and Hopecroft intersection, they noticed an Indian male on the right hand side of the road with what looked like blood on his shirt. He pulled over and after speaking to him, found out that he had been stabbed. Two males who were across the road informed him that the Indian male had been attacked and the suspects had run into the bush along Longbury Drive.

[196] Warrant Officer Ellis attempted to get a patrol dog to the area. However, this was not possible. He explained that the search and rescue dog is there to locate deceased and living persons hence the attempts to obtain a patrol dog. Because they were unsuccessful in obtaining a patrol dog, he took out his search and rescue dog and proceeded in the direction of the bush. As they got into the bush, his dog was in front of him and they followed the footpath. At approximately 50-70 metres into the bush, he detected a strong rotting smell that came with the wind toward him.

[197] He stopped and watched his dog's tail go up and walk into the wind. The dog veered left off the path and turned into the bush and stopped. He ran towards his dog and when he came near to his dog, opened the bush up with his hands and noticed the remnants of a human body and a white piece of cloth. At this point in time, he was approximately two to three metres away from the body. He immediately removed his dog from the bush and put on a pair of surgical gloves and went to look at the body.

[198] He observed that the body was dressed in what looked like a grey school pants and a tracksuit pants over it. The clothes were pulled up from the waist over the head, resulting in the white shirt being exposed. He bent towards the shirt, lifted

up the tracksuit jacket and saw the insignia of Rippon Road Primary School on it. In relation to the position of the body, he observed that the head was closest to the foot path with the remainder of the body, being the feet, placed inwards towards to the bush.

[199] He returned to his vehicle, contacted radio control for the necessary assistance to arrive on scene and cordoned off the scene. He waited for the detectives, LCRC and Mortuary Services to arrive. He waited at the scene for the crime scene investigation to be completed and he was then given the go ahead to remove the body from the crime scene. He did this by utilising a stokes basket, lifted the body off the ground, placed the body into a body bag and then took the body out of the bush and handed it over to Mortuary Services on the scene. He confirmed the following during the course of his evidence:

- (a) he estimated that from the road to where he parked his vehicle was approximately 100 metres;
- (b) the vegetation was extremely high and thick as one walked into the footpath;
- (c) the dog turned left off the footpath into the bush to where the body was located;
- (d) he was approximately 10-15 metres away from the body when he first got the rotting smell;
- (e) he opened up the bush and noticed the body and white clothes; and
- (e) the body was not visible from the pathway without the use of the search and rescue dog.

[200] During cross-examination, he confirmed that off Longbury Drive, there is a clearing which he entered and parked his car. This is evident from Exhibit 'F', photo 2. The entrance to the pathway is a few metres and is approximately 100 metres away from his car before one gets access into the bush where the pathway starts.

[201] He assumed that the pathway comes out on Eastbury Drive. He confirmed that there was a lot of dirt on the pathway which seems to suggest that the pathway is used. Using Exhibit 'F', photo 3, the boundary wall of a residence he estimated ten metres from the entrance to the pathway. He confirmed that the beginning of the pathway, as depicted on Exhibit 'F', photo 12, shows overgrowth which creates an archway, which is indicative of the fact that the pathway was used. There are a number of beverage bottles, litter, dirt, sticks, blocks, stone and rubble and this was indicative that the area was also used as a dumping site.

[202] He confirmed that the school bag and books were found approximately 30-40 metres before one reached the body of the deceased, somewhere in the vicinity of the clearing but to the right hand side of the path. He confirmed that within a 70-100 metre radius of the body on Hopecroft Drive which is above the area where M[...] 's body was found, there are houses and dogs.

[203] It was suggested to Chetty that he was attracted by the rotting smell of the body whilst he was already into the bush. It was suggested to him that people and dogs using the pathway would be able to get the rotting smell. He agreed with this. However, he pointed out that if one were along the pathway close to where the body was found, it was not visible from the pathway and the only reason why he came upon the body was due to him having his search and rescue dog with him.

Captain Sibusiso Bernard Zondo

[204] Captain Sibusiso Bernard Zondo, confirmed that he was the first Investigating Officer in this matter and appointed to investigate the charge of kidnapping of M[...] under Sydenham Cas 237/7/2018. He confirmed that he first met the accused on 21 July 2018 at the Sydenham Police Station.

[205] At the time he introduced himself to the accused as a Warrant Officer (which was his rank at the time) and the Investigating Officer in respect of the kidnapping charge. He informed the accused of the matter he was investigating and also informed the accused of his rights. He also advised the accused that he wanted to ask him questions relating to the disappearance of M[....] . To this end he took the accused out of the police cells on 21 July 2018 and they travelled to E[....] in Alpine Road where he worked. Thereafter they returned to the Sydenham Police Station where he booked the accused back into the cells.

[206] He confirmed that when he explained his rights to him, the accused was co-operative and after he had booked him into the cells that was the end of his interaction with him on 21 July 2018.

[207] He informed the accused of his right to remain silent, the right to have legal representation of his own choice and that if he could not afford one, one would be appointed for him by the State. He also informed the accused that after he answered each question and whatever his response was he would write it down and this may be used as evidence in court. He indicated that in response to him explaining the accused's rights to him they had come to an agreement. The accused did not want to keep quiet and he did not want to have a lawyer of his own and wanted one to be appointed by the State. He confirmed that from his observation of the accused, the accused understood these rights as the accused nodded his head and from his responses it indicated that he understood his rights.

[208] He confirmed that on 22 July 2018 he recorded a warning statement from the accused which is Exhibit 'DD'. He completed it in his own handwriting in the presence of the accused and certain of the information contained therein emanates from the accused and his response to questions to him when going through the form.

[209] The accused appended his signature above the word suspect after he Zondo, completed the document and the interview relating thereto. Paragraphs 3 and 4 of the warning statement contained the accused's constitutional rights which rights he read to him and were explained to him. The accused accepted the explanation and understood the rights as they were read to him as he signed it. In relation to the

legal rights that were explained to the accused he elected to make a statement and paragraph 6 specifically records his responses and his consent to questions being put to him.

[210] In relation to paragraph 4, the explanation of legal rights relating to a legal representative being provided to him, the accused was informed that he would be provided with legal representation during his first appearance at court and the accused agreed to this. The accused also elected to make a statement. Zondo posed the following questions to the accused and the accused provided the following answers. The accused in response to whether he knew the child answered yes, and when asked how he knew the deceased his response was 'We were close bond'. In relation to how it was that he came to know the deceased, the accused responded that he knew him at his house.

[211] In addition, on page 6 he recorded the accused's statement which read as follows:

'I deny allegations against me. I admit that I took the child from school gate and we went to KFC near his house. From KFC I left the child across the road and I went home Phoenix. My mother Sogra Sah saw me on 2018-07-17 about 15:30-15:45 and I slept there.'

[212] The accused signed the document after they had finished the interview and he had taken down the warning statement.

[213] Subsequent to this he continued with his investigations, obtaining statements from witnesses and the CCTV footage from KFC and handed this to the war room. In addition, he applied for a s 205 subpoena in respect of the cell phone records. He confirmed that he also dealt with the bail application of the accused in respect of the kidnapping and theft count. Bail was granted on new facts on 28 August 2018, however, the accused did not pay his bail and remained in custody.

[214] He confirmed that having regard to serial number 884 on Exhibit 'Y', which relates to the SAP13 entry, paragraph 5 refers to him as he received the exhibits on 21 July 2018. These were the birth certificates of M[....] and M[....] and the identity document of R[....] together with the accused's cell phone.

[215] During the course of his investigations he confirmed that he personally made copies of the birth certificates as well as the identity document. In addition, during the course of his investigations he placed the copies of the documents which he had made in the 'B' clip of the investigation docket. He confirmed that he certified the copies of the documents on 14 September 2018. The certified copies were placed in the investigation diary of the docket and the original identity document and birth certificates were locked in the steel cabinet of his office during the course of his investigations.

[216] In October 2018, the unit he was employed at changed offices from Ntuzuma to Umlazi. As a consequence, all his documents were then moved to the Umlazi office. It was during the course of this that he suspects the original of the documents went missing. He searched at the Ntuzuma offices with the assistance of his colleagues as well as at his home and in his vehicle with the assistance of his family. He could not find the originals of these documents and thus the certified copies thereof were used.

[217] During the course of cross-examination he confirmed that the original docket was handed to him on 18 July 2018 and he immediately went about doing his investigations on receipt of the docket by contacting R[...] and questioning her about the circumstances surrounding the disappearance of M[...]. He also commenced looking for M[...]. He confirmed that when he interviewed R[...] she informed him who the suspect was. The Sydenham police officers were the ones who commenced with the investigation on the same day as the minor child disappeared being 17 July 2018. From 18 July-21 July 2018, although he was involved in the investigation of the docket and allocated it, he did not conduct any investigations.

[218] He received a telephone call from his superior on 21 July 2018 relating to the arrest of the suspect. He did not receive any information from Constable Mohamed from the Sydenham SAPS in relation to the arrest of the suspect. He did not meet with Mohamed, as the arresting officer and neither did he record a statement from him. The statement had already been made and was placed in the 'C' clip of the docket. He did not feel the need to subsequently interview Mohamed as the arresting

officer and obtain any further information from him apart from what was contained in his statement.

[219] Although Constable Mohamed made notes in the 'C' clip of the docket relating to his interview with the suspect, he did not discuss this with him. Regarding Exhibit 'HH', the extract from the investigation diary, the following entries were made by Constable Mohamed:

- (a) 18 July 2018 witness statement filed as 'A2' at 11h50;
- (b) 18 July 2018 at 11h55, other students were interviewed and were reluctant to submit statements as per parents.
- (c) 19 July 2018 at 18h15, attended at 418 Longbury Drive, suspect's address as per the complainant. Interviewed suspect's father, Mr Ebrahim who stated that he last saw the suspect a week ago. Whereabouts of suspect unknown. IO details given to Mr Ebrahim to contact the IO should suspect be seen;
- (d) 19 July 2018 at 416 Longbury Drive, IO details left should suspect be seen;
- (e) 19 July 2018 at 18h40, interview with Mr Hoosen, a work colleague of the suspect. He states that the suspect left work and his whereabouts unknown. IO details given should suspect be seen;
- (f) 19 July 2018 at 21h20, the informer is tasked to assist in the tracing of the suspect;
- (g) 19 July 2018 at 23h30, local security companies seen and are assisting in the matter;
- (h) 20 July 2018 at 01h05, enquiries conducted at Durban CBD, negative results; and
- (i) 20 July 2018 02h25, enquiries conducted at Sydenham and surrounds, negative results.

[220] Thereafter the entries in the docket show that the docket was transferred permanently to him on 21 July 2018. He confirmed that Constable Mohamed

through the Sydenham SAPS was doing the initial enquiry and the docket was returned to Sydenham. There is nothing apart from an entry by Mohamed lodging the accused in the cells relating to Mohamed's arrest of the suspect. He confirmed that the diary would require the arresting officer to file an entry in relation to his interview with the suspect.

[221] When he was permanently assigned the investigation he did not make any efforts to fill in the gaps and have the details of the arrest recorded. The statement had been left in the Charge Office and was filed in the docket and made available. All he did was record the exhibits from the Charge Office and the statement which Constable Mohamed deposed to relating to his arrest. He confirmed during cross-examination that he accepted the statement which Mohamed deposed to as being sufficient. He did not see the need to interview Mohamed.

[222] He indicated that the reason for this was that his focus between 20 July 2018 and 3 September 2018 was to locate the child. In addition, Constable Mohamed had never contacted him. He collected the video footage from KFC as the accused had informed him that he went to buy a meal from KFC together with the deceased. He confirmed that the video footage was obtained as a direct result of what the accused informed him.

[223] He confirmed that he was not responsible for obtaining the CCTV video footage from [...] . It was however obtained whilst he was still the Investigating Officer. When the accused informed him that he had bought KFC for M[...] , the accused mentioned that he was seen on the other side of the road. It was as a consequence of this that the video footage was obtained from [...] by a policeman whose name he could not recall and was taken to the war room.

[224] After he interviewed the accused he booked out the accused and took him to the Phoenix area. He had also gone to the accused's home. There was no information received that M[...] was somewhere near the industrial area, but the information was that they had to follow the cell phone towers around the area. A search was never conducted in the immediate vicinity of the accused's home. He did not receive any information that the accused and the deceased were seen near

the accused's home and it was as a consequence of this that there was no search conducted in the immediate vicinity of the accused's home.

[225] At the time he and the accused went to Phoenix they were not accompanied by the dog unit. He was not certain if whether after the arrest of the accused, the dog unit conducted a search in that area. All the police officers were scattered around the area doing searches for M[....] . He confirmed that at some stage during the course of the investigation he sought the assistance of the dog unit, but such search was not conducted near the accused's home.

[226] When he interviewed the accused as the Investigating Officer, he informed the accused that they had information that he, the accused was the last person to be seen with M[....] . The accused confirmed this. He indicated that the accused confirmed that he had gone to the school and bought a meal at KFC for M[....] . He confirmed that although he was more comfortable conversing in IsiZulu he conducted the interview with the accused in English without an interpreter.

[227] In respect of Exhibit 'DD' the warning statement from the accused, he confirmed that he filled in the information in the presence of the accused as well as Sergeant Chiliza although he did not record the presence of Sergeant Chiliza as in his view one was not required to have the names of all persons present. He agreed when it was suggested to him during the course of cross-examination that it was mandatory for all persons' present names to be recorded and that he did not do so.

[228] He confirmed that after he was informed of the arrest of the accused on 21 July 2018, he met with the accused at the Sydenham Police Station. He booked him out of the cells, informed him that he was the Investigating Officer and of his constitutional rights. He informed the accused that he wanted to ask him questions about the whereabouts and the disappearance of M[....] . The accused answered his questions after being informed of his legal rights.

[229] During the course of the interview he confirmed that the accused informed him that he wanted a legal representative to be provided by the State. He informed the accused that he would be allocated a legal practitioner at court and the accused

was satisfied with this. It was suggested to him by Mr *Naidoo* during the course of cross-examination that when the accused asked for a legal representative to be appointed at State's expense he ought to have stopped the interview and obtained the contact numbers of a legal practitioner who was on standby to advise the accused.

[230] He confirmed that he did not record this on the statement. His explanation for this was that the form did not make provision for it and that is the reason why he did not record it. However, the accused indicated that despite wanting an attorney to represent him at court, he could proceed and take the statement down. The accused did not require a legal representative at the interview. He agreed with Mr *Naidoo* that this is not reflected anywhere on the form.

[231] During the course of cross-examination, he confirmed that the accused informed him that he had met M[...] after school and fetched him from the gate of his school. He took him to KFC and then left M[...] at his home and proceeded to his home in Phoenix. He thus disputed the suggestion by Mr *Naidoo* that all he did was see the little boy in Sydenham and leave him there.

[232] Mr *Naidoo* suggested to him that the accused had a speech impediment and did not speak very clearly. He testified that at the time he spoke to the accused, the accused was speaking fluently and was not showing signs of a speech impediment.

Constable Irshaad Mohamed

[233] Constable Irshaad Mohamed (Mohamed) employed at the SAPS stationed at Sydenham SAPS in the Detective Unit confirmed that on 17 July 2018, he was on duty attached to the Crime Office at the station. He was tasked with a kidnapping matter which was initially a missing person's enquiry. He initially contacted the reporting person, being R[...], telephonically. After speaking to her, he made telephone calls to her acquaintances and work colleagues whom she mentioned namely, the accused.

[234] On 18 July 2018, the day after the missing person's report had been made, he contacted the accused during the early part of the morning telephonically. At the

time, he informed the accused that he was a Detective Constable and was investigating a missing person's report. He also informed him that M[...] was missing. He asked the accused if he would come into the police station, alternatively, if he had any information that would assist. The accused informed him that he was in the Pinetown area and that he would report to the police station via public transport.

[235] He informed the accused that he could wait where he was and he would make an effort to fetch him. The accused responded and said that it was okay and he was already en route to the police station. A few hours elapsed and the accused did not arrive at the police station. He made further telephone calls to the accused which were not answered. Most of them were made from the police station and he was aware that other members at the police station also attempted to contact the accused.

[236] Thereafter, he visited the R[...] School trying to gather information from the school. He then followed up on the information from the school as well as information received from members of the public. On 18 July 2018 he confirmed that the accused did not arrive at the police station.

[237] Subsequently he received information from an informant which led to the location of the accused. On the Friday night, being 20 July 2018, he and his colleague, Detective Sergeant Ngcobo went to the Durban Central area, to the corner of Grey and Victoria Street. He noticed an Indian male whom he approached who was standing on the corner of the roads as if he was waiting for someone. At the time he and Ngcobo were dressed in civilian clothing.

[238] He approached the accused, introduced himself as a policeman and showed the accused his appointment card. He thereafter requested the accused's identification. The accused informed him that he was Mohamed Vahed Ebrahim and paused for a brief period. He immediately placed the accused under arrest and informed him of his constitutional rights in terms of s 35(3) of the Constitution. He asked the accused if he understood the rights and the accused said he understood.

[239] Before placing the accused under arrest for kidnapping and informing him of his constitutional rights, he placed his arm on the accused's shoulder, informed him that he was placing him under arrest and informed him of the allegations of kidnapping against him and further that it was a serious charge. The accused responded by saying yes. Whilst on the road, he then questioned the accused regarding the whereabouts of M[....] after he had placed him under arrest for kidnapping.

[240] At no stage did the accused object to any of the questions being put to him. The accused appeared to be a bit shocked and he gained this impression from the expression on the face of the accused as he stood with wide eyes. The accused was attentive and to his knowledge and understanding understood what was being explained to him. The accused was not handcuffed or restrained in any particular manner.

[241] He confirmed that he had received a description of the accused from R[....] and she had also shown him a photograph of the accused. He had used this to follow up on leads and finally found the accused at the corner of Grey and Victoria Street between 20h00pm and 21h00pm. He confirmed that all of this occurred in the presence of his partner, Sergeant Ngcobo.

[242] During his evidence he confirmed that after warning the accused of his constitutional rights and placing him under arrest he questioned him concerning the kidnapping allegations and the missing person's enquiry. Thereafter, the accused was transported to the SAPS in Sydenham where at approximately 22h40pm that night the accused signed the SAP14A being the Notice of Rights. He confirmed that he did not take the warning statement from the accused and this was done by Captain Zondo on 22 July 2018.

[243] He confirmed that on the night of his arrest whilst at the corner of Grey and Victoria Streets, he explained to the accused his constitutional rights and in answer to the question whether he understood them, the accused answered yes. He then questioned him about the whereabouts of M[....] . The accused responded and said he did not know his whereabouts. When he then asked him if he had seen M[....] , the accused responded that he had not seen him.

[244] Thereafter, he asked permission to search the accused and permission was granted by the accused. When he searched the accused in his back pants pocket he found a green identity book belonging to R[....] and two birth certificates being that of M[....] and M[....]. He asked the accused how he came to be in possession of the documents and again warned him of his constitutional rights. He reminded him of the right to remain silent and the accused opted to answer him and informed him that the documents were given to him by R[....].

[245] The accused was then transported to the Sydenham SAPS by himself and his colleague, Sergeant Ngcobo. He then questioned the accused further in the Crime Office at the Sydenham Police Station informing him of his constitutional rights as well as his right to legal representation and asked him once again about the whereabouts of M[....]. The accused responded by saying that he did not know the whereabouts of M[....]. He informed the accused that he had a sworn statement from someone at M[....]'s school that he, the accused, had been to the school looking for M[....].

[246] The accused responded and informed him that he had been to the school to give M[....] money and he left. He informed the accused that he had information that the accused was seen at the KFC opposite the Rippon Road Primary School with M[....]. He once again informed the accused that he had the right to remain silent and did not have to answer any questions. The accused responded that he had taken M[....] to KFC to purchase food for him and had then left M[....] at the driveway of his home and he, being the accused then left.

[247] He informed the accused that he was being dishonest as he had information that he had boarded a taxi with M[....]. He once again warned the accused of his constitutional rights to remain silent and his right to legal representation. The accused responded by keeping quiet for a while and then stated that he, being Constable Mohamed was 'fishing'.

[248] He did not recall putting any further questions regarding M[....] to the accused but what he did raise with him was when he had contacted him telephonically the accused had promised to come to the police station from Pinetown and he had not

done so. In response to this the accused remained silent. The exhibits being the identity document and two birth certificates were then entered into the SAP13 register by Sergeant Ngcobo. At the time he issued the SAP14A to the accused but he was not certain whether he did it or Ngcobo. He also entered the accused's cell phone into the SAP13 and searched the accused before lodging him in the cells. That concluded his involvement with the accused.

[249] The witness was shown the SAP14A, exhibit 'Y' which was the Notice of Rights document which he issued to the accused. He indicated that the accused acknowledged the document by responding in the affirmative saying that he understood it and placed his signature on the document. He completed the details on the document, this was at 22h40pm. The entry recording him placing the accused in the holding cells is entry 1756 by the CSC commander in Exhibit 'AA'.

[250] The witness was also shown Exhibit 'N' specifically page 4 which were the telephone records of the Sydenham Police Station for 18 July 2018. The purpose of this was to record and confirm his evidence in relation to the times that he made the telephone calls to the accused on 18 July 2018, which he did directing the court to the entries on 'N' which reflected the Sydenham police station telephone number.

[251] He confirmed that he made two statements in the matter. The first was made and penned in his handwriting on 21 July 2018 at 03h30am (Exhibit 'BB') wherein he sets out the steps he took in relation to the investigation which led to the arrest of the accused on 20 July 2018 at approximately 20h30pm. The information he had received relating to the accused's whereabouts emanated from a source. He observed the accused at the corner of the intersection of Grey Street and Victoria Street in the Durban CBD. This description matched the description given to him by the complainant, R[...]. At the time the accused was dressed in a brown check shirt, black jacket, blue jeans and black takkies.

[252] After placing the accused under arrest and searching him and informing him of the allegations against him he found the birth certificates of M[....] and M[....] as well as the green identity document of R[....].

[253] When he questioned the accused regarding M[....] , the accused informed him that he did not know his whereabouts. He further informed him that on 17 July 2018 at about 13h45pm he had taken M[....] from school to the KFC at Rippon / Stanley Copley Drive and bought him food before leaving him there and going his own way.

[254] In addition, he confirmed that he had made a second statement on 3 July 2019 at 18h30pm (Exhibit 'CC'). In such statement he elaborates further on the manner in which he had placed the accused under arrest on 20 July 2018.

[255] This statement appears to elaborate more and corroborate his evidence in court in relation to the exact manner in which he effected the arrest of the accused but also informed the accused of his constitutional rights every step of the way whilst questioning him in relation to the missing child. It corroborates his evidence that he had informed the accused that he had a sworn statement from M[....] 's school, stating that the accused was seen at the school and fetched M[....] and the accused informed him that he did go to the school but went there to give M[....] money and left.

[256] In addition, it also corroborates his evidence that after further questioning him and advising the accused that he was seen at the KFC with M[....] , the accused informed him that he had taken M[....] to the KFC to purchase food for M[....] and afterwards left M[....] at the driveway to his home on Stanley Copley Drive and left.

[257] The statement further indicates that after informing the accused that he was being untruthful and that he had additional information that he boarded a taxi with M[....] , the accused paused for a while and then said to him 'You are fishing me'. Thereafter the accused said 'You are lying'.

[258] The statement also deals with the fact that on 18 July 2018 he had telephoned the accused from the Sydenham Police Station and asked him to attend at the police station as he was investigating a missing person's enquiry. This is the time the accused informed him he was in Pinetown and would make his way to the police station.

Sergeant Senzosihle Arthur Ngcobo

[259] Sergeant Senzosihle Arthur Ngcobo (Ngcobo), stationed at the Detective Crime Office of the SAPS Sydenham, confirmed that on 20 July 2018 he was on duty with Constable Mohamed at the time they effected the arrest of the accused at approximately 20h00 to 21h00. He confirmed that Mohamed found the exhibits on the accused and he was present at the time, standing very close to them. They were approximately one and a half metres away from each other.

[260] He confirmed that he entered these exhibits into the SAP13 register. At the time Constable Mohamed and him were performing duties together. Mohamed was busy doing the interview with the accused and he assisted him by making the entries for the exhibits. He confirmed that entry 884 on Exhibit 'Y1' is in his handwriting. This records the SAP13 register number, the date and the OB number for the relevant entry. These exhibits were booked in under Sydenham Cas 237/07/2018 which related to a charge of kidnapping.

[261] It further recorded that the exhibits were recovered from the accused who he identified whilst seated in the dock. He confirmed that the entry in column 4 was made by him and signed off by him. Thereafter, he handed the exhibits to the CSC Commander. In addition, he identified Exhibits 'EE', 'FF' and 'GG' being the copies of the original documents which he had placed in the SAP13 register.

Warrant Officer Rajen Matthews Govender

[262] Warrant Officer Rajen Matthews Govender (Govender) employed by the SAPS and attached to the Provincial Task Team, confirmed that he was subsequently appointed as the Investigating Officer in this matter. M[....] had gone missing on 17 July 2018 and it was approximately two weeks after the missing person's report had been filed that he took over the investigation from Warrant Officer Zondo. Initially he was tasked to assist the Investigating Officer in the compilation of the docket, and to use all relevant resources to search for M[....]. He was responsible for interviewing M[....]'s family members and assessing the accused's cell phone records.

[263] On 3 September 2018, he attended at the crime scene and as it was now regarded as a murder investigation, he was tasked to take over the investigation. Having regard to Exhibit 'F', photo 3 this was the entrance to the bush in which the deceased was found. He corroborated Chetty's version that the area where the deceased was found was dense bush and it had been pushed back to allow entry. He entered the bushes and walked to where the deceased was found. He described the bush as being very dense and thick and quite high, the brush extending to way above his head.

[264] The dog handler, Chetty, had created some sort of a pathway for them to use as he had broken a few branches and cleared the path so they could get in and out of the thick brush. He spent approximately five and a half hours at the scene and was present until the body of what was presumed to be M[....] , was removed. Although he made attempts with the Head of the Entomology Unit to secure the attendance of an entomologist at the crime scene, he was unsuccessful. He was advised, however, that someone from the Entomology Unit would attend at the post-mortem. He learnt that Captain Viljoen subsequently attended the post-mortem examination.

[265] Approximately a week later, he returned to the crime scene to establish if any other exhibits could be located as M[....] 's shoes were still missing. They were never found. When he returned a week later, the bush had been cleared and the grass was cut and one had a clear view to the spot where M[....] was found. He identified the school bag and books found in close proximity to M[....] 's body from Exhibit 'F', photo 27.

[266] He confirmed that after he took over the murder investigation the kidnapping and theft docket were handed to him. DNA was taken from M[....] 's parents and compared with that taken from the body recovered and it was confirmed that the body was that of M[....] . The kidnapping docket and the missing person's enquiry filed in relation to those charges under Sydenham Cas 237/7/2018 were combined with that of the murder docket under Phoenix Cas 85/9/2018.

[267] In respect of his investigations which he conducted in the murder docket, he obtained the post-mortem report, the DNA reports, all the relevant photo albums were compiled and obtained, the entomologist's report was obtained as well as various witness statements.

[268] He confirmed that initially the accused had been arrested on the theft and kidnapping charges. After his investigations in the murder docket had been completed as referred to above, he arrested the accused on the murder charge at the Durban Magistrate's Court on 5 December 2018. At the time, the accused was legally represented by attorney Chris Gounden. He confirmed that at the time he arrested the accused and explained his constitutional rights to him, his attorney was present.

[269] He also informed the accused at the time of his arrest, that he needed to seize the cell phone he was in possession of and the accused informed him that his cell phone was at home. They then proceeded with the accused to his residence in Phoenix to retrieve the cell phone. On their arrival at the accused's residence, although the accused pointed out where he had left his cell phone, it was not there. The accused reported to him that the cell phone had been left in the main house near a set of cupboards against a wall. The accused was given an opportunity to locate the cell phone from where he said he had left it, but he could not find it. After obtaining permission from him he thereafter conducted a search of the entire area as well as the cupboard and in the vicinity of where he had reported he had left the phone but it could not be retrieved. Warrant Officer Govender then dialled the cell phone number of the accused and the accused's father answered.

[270] After completing the necessary documentation at the Phoenix Police Station, they then proceeded with the accused to the Durban Magistrates' Court. He approached the accused's father who initially denied he was in possession of the cell phone. When he dialled the number in the presence of the accused and his father, it rang and he established it was in the accused's father's pocket. He then seized the accused's cellular phone from the accused's father.

[271] He confirmed that in respect of the murder count the accused's bail application was finalised on 21 December 2018 and he was denied bail. In respect of the theft and kidnapping charges, he testified the accused was granted bail but remained in custody and was only released on bail in respect of these two counts sometime at the end of September 2018 when he paid bail.

[272] He further confirmed that during the course of his investigations he visited the Rippon Road Primary School with the intention of interviewing the school children who had been mentioned by the witness, T[...] when he was interviewed. He had spoken to the principal to facilitate these interviews being conducted. The principal thereafter contacted the parents of those children who subsequently indicated that their children would not be making any statements.

[273] In addition as part of his investigations he also obtained the video footage at the KFC on the corner of Rippon Road and Dr R Naidoo Road. This was handed in as Exhibit 'L' during the course of the trial. Despite making various further attempts to obtain additional video footage no further footage could be obtained from the CCTV cameras at the KFC.

[274] He confirmed that during the course of the trial he was present at an inspection-*in loco* conducted by the court in the presence of the legal representatives. He confirmed that if one proceeded to Hopecroft Road (which runs adjacent to the bush) and looked down to the area where the body of M[...] was found, the bush was so dense and thick one would have to scream for people in the dense bush to hear you. He confirmed that this exercise was also conducted on the day that M[...] 's body was recovered on 3 September 2018.

[275] Having regard to Exhibit 'F' photo 44, if one stood at the bottom in the area of the bush in which M[...] 's body was recovered, and looked up, one could only see the roofs of the various dwellings in Hopecroft Road. Having regard to Exhibit 'D', photo 10 he confirmed this was a photograph of himself at the area where M[...] 's body was found looking upward toward Hopecroft Road. On 3 September 2018 other police officers were standing in Hopecroft Drive and he stood at the bottom where M[...] 's body was but he could not see them given the density of the bush.

[276] He confirmed that during the course of his investigations he made numerous attempts to contact and locate M[....] 's uncle Mike. He also sought the assistance of a family friend, an attorney, to no avail. He had not seen Mike and did not know what he looked like but was advised that at one stage he attended at the court proceedings.

[277] He confirmed that having regard to the cell phone records of R[....] he was only able to obtain those records up to and including 20 August 2018. He testified that one could also not establish for a fact from the accused's cell phone records that he was at his home at 418 Longbury Drive on the night in question. However, the cell phone records confirmed that he was in the immediate vicinity of his home. In addition, from his investigations he was able to establish that the accused had changed his clothing during the day of 17 July 2018 and the course of the evening. This is apparent from what was put to him during the course of the bail proceedings. The green shirt which the accused was wearing, was recovered by the police in the wendy house which he occupied.

[278] He also established from his investigations, that the key for the deceased's house had been placed underneath the mat by the deceased's granny after she had locked the house and left on 17 July 2018.

Cross-examination of Warrant Officer Govender

[279] During cross-examination, Govender confirmed that M[....] 's uncle Mike, could not be found. He confirmed that he commenced looking for him in September / October 2018 after he was appointed as the Investigating Officer in the murder docket. In order to trace him, he went to Sydenham and made enquiries and visited his home but did not find him there. His enquiries did not reveal any information indicating his whereabouts but everyone promised to assist should they obtain information in relation to his whereabouts.

[280] He had also established that R[...] had been in a relationship with Mike, which ended but was pursuing a reconciliation with her ex-husband K[...] , Mike's brother.

[281] He confirmed that on 20 July 2018 at the time of his initial arrest the accused's identity as well as his address was public knowledge. He confirmed media reports that the accused's home was searched to establish the whereabouts of M[...] at the time. Having regard to the real evidence, namely the video footage, this linked the accused and M[...] to each other at KFC in Sydenham from 14h06 to 14h16. The footage reveals a congenial relationship and conversation between the accused and M[...] . Such congenial atmosphere continues in KFC and once they leave KFC. The footage does not show M[...] being restrained in any way.

[282] From the inspection *in loco* and his observations at the crime scene on the day M[...] 's body was found, he confirmed that once the pathway had been cleared there was easy access to M[...] 's body where it was found approximately 74 metres into the clearing. In addition, the photos did show a distinct beaten path through the undergrowth. He agreed with the proposition of Mr *Naidoo* that only someone who used the path or knew of the path would have easy access. He confirmed however that to the left of the pathway in the bush is where M[...] 's body was found.

[283] He confirmed that the accused was in custody from the date of his initial arrest on the kidnapping and theft counts from 20 July 2018 up to and including 25 September 2018. M[...] 's body was recovered on 3 September 2018. The subsequent arrest of the accused on the murder count was only effected on 5 December 2018. The reason for this was due to the fact that he was constantly receiving information from persons and this required further investigation. He confirmed that there was a search of the road behind Longbury Drive as well as Eastbury Drive to the far end of both. There was also a search by the dog unit in the latter part of August but this search did not include the area where M[...] 's body was found.

[284] Govender confirmed that a week after M[...] 's body was discovered, on 3 September 2018, the dense bush had been cleared and one could see clearly to

where the body of M[...] was found. However, the photos taken on 3 September 2018, as depicted in the photograph albums clearly indicate the density of the bush as it appeared on that day.

[285] Two cell phones were seized from the accused, one on 20 July 2018 and the second one from the accused's father on 5 December 2018. The records for the cell phone seized on 20 July 2018, were extracted. However, the records in respect of the second cell phone could not be extracted as something went wrong with the extraction of the records. A call was made from the second phone to R[...] after 20 September 2018, and this arose during the course of the bail proceedings. He confirmed that from the cell phone records of the accused, it showed that he was in the Phoenix area on the afternoon and evening of 17 July 2018 until the early morning of 18 July 2018.

[286] He interviewed the accused's father but could not establish, for a fact, that the accused was at home at 418 Longbury Drive, Phoenix, on the evening of 17 July 2018. In addition, from the cell phone records it is evident that the accused would have been in the immediate vicinity of the house and the surroundings. In addition, his investigations established that the accused had changed his clothing at some stage on 17 July 2018. This emanated during the course of cross-examination in the bail proceedings and the green shirt was recovered by the police, in the Wendy house, a few days after 17 July 2018.

[287] During the course of the bail proceedings as well, an issue arose in relation to the keys for M[...] 's family's home. He followed up on this during the course of his investigations and established that the house was locked by M[...] 's granny, Ms Omaidien, when she left on the morning of 17 July 2018 and the key was placed under the mat. In addition, he confirmed that the search dogs were used to search the area, in Phoenix, on two occasions but the search did not encompass the area of the bush in which the body of M[...] was found.

The CCTV footage

[288] The first portion of the video footage relates to that extrapolated from [...] CCTV cameras situated on Dr R Naidu Road for 17 July 2018. The first video⁷ commenced at 14:05:35. At 14:06:04 an Indian male now known to be Ismail Rhyman, wearing a blue top is walking to the bus stop. Rhyman appears at the bottom left of the picture. Rhyman disappears from view at 14:06:05 and then reappears at 14:06:10 walking toward the bus stop. Rhyman is then observed standing at the taxi stop at 14:06:23. The taxi arrives at the taxi stop and stops at 14:06:26. Rhyman is then observed crossing the road at 14:06:33.

[289] The accused and M[...] become visible on the CCTV footage from 14:06:40 until 14:06:45. They are observed at the passenger side of the taxi at the rear toward the taxi door. Two children, a boy wearing an orange bag on his shoulder and a girl, wearing a blue bag on her chest appear at the bottom left of the video at 14:06:54. The same taxi is visible. Other cars are stopping at the robot. This is the robot controlled intersection of Dr R Naidu Road and Randles Road. This video footage ends at 14:07:05. The next video⁸ commences at 14:07:07.

[290] At 14:07:11 a taxi drives off at the top left corner of the video and at 14:08:36 the footage ends. There is no other taxi that stops at the taxi stop during this time as is evident from the CCTV footage. The next video clip of the CCTV footage⁹ commences at 14:08:46 and finishes at 14:09:03. From the video footage there is no taxi that stops at the taxi stop.

[291] A further video¹⁰ commences at 14:09:04. When the video commences the cars on Dr Naidu Road are stationary. At 14:10:00 an Indian male with a beard wearing a [...] jacket walks on the bottom left of the video. The footage ends at 14:10:11. During this period there is no taxi observed that stops at the taxi stop.

⁷ Channel 16 – 20180717140540.

⁸ Channel 16 – 20180717140713.

⁹ Channel 16 – 20180717140851.

¹⁰ Channel 16 – 20180717140910.

[292] The next piece of CCTV footage¹¹ commences at 14:10:11. A silver Corsa bakkie drives in the foreground at 14:10:15. This video clip ends at 14:10:28. From the video clip there is no taxi that is seen stopping at the taxi stop during this time.

[293] Similarly, a further video clip¹² commences at 14:10:37. It ends at 14:11:17. There is no taxi seen stopping at the taxi stop. The next video¹³ commences at 14:11:17. It ends at 14:12:01. There is no taxi that stops at the taxi stop during this period.

[294] Further extracts of video footage were extracted from channel 4 and channel 3. On channel 4¹⁴ the video commences at 14:04:00. At 14:06:25 to 14:06:27 there is a shadow of a stationary motor vehicle at the entrance to the parking on the top centre of the video. This parking is the entrance to Aslam Heights and the further shops in that area. At 14:06:41 there is an Indian male, Rhyman wearing a [...] jacket walking towards the direction of the stationary motor vehicle shadow.

[295] At 14:06:52 there are two children who walk down the entrance driveway towards the camera. The shadow of the stationary motor vehicle mentioned in the paragraph above is adjacent to the two children. The little boy is carrying an orange bag and the little girl is carrying a blue bag. The robots change colour and the traffic on Dr Naidu Road starts to drive off at 14:07:09.

[296] The taxi becomes visible at 14:07:16 as it turns onto Randles Road. The taxi appears to have been the shadow of the stationary motor vehicle which was seen at 14:06:27. The video ends at 14:12:01.

[297] The video extracted from channel 3¹⁵ commences at 14:04:00. The little boy with the orange bag and the little girl with the blue bag, appear at the bottom right of the video at 14:07:07. At 14:07:09 the traffic on Dr Naidu Road moves after the robots have changed colour. At 14:07:16 the taxi travels on Dr Naidu Road and comes to a stop at the bend facing Randles Road. The video ends at 14:12:01.

¹¹ Channel 16 – 20180717141013.

¹² Channel 16 – 20180717141043.

¹³ Channel 16 – 20180717141119.

¹⁴ 20180717140400.

¹⁵ 20180717140928.

[298] From the video footage, the following is clear. The little boy with the orange bag and the little girl with the blue bag are first visible at 14:06:54 on channel 16 (20180717140540). The taxi at which the accused and M[....] are seen at is visible in the video. Thereafter the same little boy and same little girl was seen in channel 4 walking.¹⁶ The shadow seen at 14:06:27 in channel 4 is the same taxi which the two children passed while walking.

[299] The taxi becomes visible again at 14:07:16 on channel 4 mentioned above as it turns onto Randles Road. On channel 3 at 14:07:09 the traffic on Dr Naidu Road moves after the robots have changed.

Cell phone evidence

Hilda Du Plessis

[300] Hilda Du Plessis, of Cell C based at Midrand, Johannesburg compiled Exhibits 'N' and 'O' for the court. Exhibit 'N' are the cell phone records of the accused for cell phone number 061 186 7412. It contains an extract of cell phone calls and sms's sent and received from such mobile device. Exhibits 'O' and 'O1' to 'O7' details the various cell phone towers on the Cell C network and the base stations.

[301] A call is generated automatically through the base stations on the Cell C network. A base station is also colloquially known as a cell phone tower. It then goes through the billing gateway for the costs of the call to be generated. Exhibit 'N' details the call transactions and base stations relate to the Phoenix suburb. The range of the base stations in a densely populated area is between one to five kilometres depending on the area and the settings of the azimuths. There are three panels on a base station in three different directions in order to give the best coverage in that area. There can be different additions to the panel showing in the same direction as the three sectors and there can be six different frequencies or panels on one base station.

¹⁶ 20180717140400.

[302] Having regard to Exhibit 'N', the first page contains the RICA details of the accused for mobile device 061 186 7412.

[303] On 17 July 2018, at 15:37:45 an incoming call was made from cell phone number 062 365 5309 to 061 186 7412 (the accused's phone). This was an unsuccessful call that went into the voicemail service of the accused's cell phone and picked up from the Sea Point Towers. On the same day at 15:55:39, an incoming sms was received by the accused's cell phone and picked up off the Eastbury cell phone tower on sector 2 of the tower.

[304] One identifies the sector of the tower as the records provide a cell identification number of the base station that is being used, the last five digits of the cell identification code is the cell phone tower's identification number and the last digit is the digit showing the sector used on that panel of the tower during the call that was made or received.¹⁷

[305] If one then correlates this with Exhibit 'O1' which relates to the Eastbury cell phone tower, the Eastbury sector 2 tower which is depicted in blue on the diagram picked up this call at 15:55:39 and the coverage area of that base station is reflected in blue on Exhibit 'O1'. The base station number is Eastbury 300039 and the blue colour area is sector 2 which was used during that specific call. The area depicted in red reflects the two pins relating to the residence of the accused and the area where the body of M[....] was found.

[306] At 16:09:40 an incoming call was made from cell number 065 515 0293 (R[....]'s cell number) to the accused's cell phone number and the phone at that stage was at Gem City. This is reflected on Exhibit 'O2' and sector 2 of the Gem City base station which is depicted in pink on Exhibit 'O2' picked up the call. Exhibit 'O2' is a map of the base station for the Gem City base station and the pink area shows the direction of the panel used and that is sector 2.

[307] At 16:11:48 an incoming call from 065 515 0293 (R[....]'s cell number) is made to the accused's cell phone and the phone at that stage was using sector 1 of

¹⁷ KT0300039AY2 Eastbury.

the Longcroft base station. If one correlates this with Exhibit 'O3', this relates to the Longcroft tower's coverage area. The green colour represents sector 1 which was used during that specific call.

[308] Exhibit 'N', the last two pages thereof contain the GPRS records of the accused's cell phone number. The entry at 16:14:37 on 17 July 2018, is an internet connection made from the cell phone number of the accused and the phone at that stage was at the Grove End Tower.

[309] If one considers Exhibit 'N' page 3, the call at 16:22:18 is an unsuccessful call that went to the voicemail service of the accused's phone which was then in sector 3 of the Eastbury Tower, if one correlates this with Exhibit 'O4' the yellow area reflects the Eastbury Tower sector 3.

[310] If one, then goes to the GPRS contact made at 16:27:06 this is an internet connection made using the Longcroft Tower using panel 2. If one then correlates this with Exhibit 'O3' this relates to the Longcroft Tower. The purple area depicted thereon is the coverage for this transaction. There are three yellow pins depicted on Exhibit 'O3'. Longcroft the first pin which reflects 336 Longcroft on the green portion is to show where the tower is located. The pin on the top of the purple area is the residence of the accused and the third pin in the middle of the purple area are the co-ordinates showing where M[...] 's body was found. Longcroft panel 2's coverage area marks the point where M[...] 's body was found as well as the home of the accused.

[311] Turning now to the GPRS connections a call transaction on 17 July 2018, at 16:41:19 is an internet transaction which occurred when the phone was at the Clayfield VC tower using sector 1. If one, then correlates this with Exhibit 'O5' which relates to the coverage area of the Clayfield cell phone tower the greenish / brownish colour in the middle of the page is the Clayfield Tower. At 17:21:00, there is a GPRS internet connection and the phone was at that stage picking up from sector 1 of the Mount Edgecombe Tower. At 17:32:36, this similarly was an internet connection and the accused's phone was at that stage using sector 2 of the Prospect Hall Tower. Similarly, at 19:02:36 this was an internet connection and at the time the accused's

cell phone was in Stamford Hill South using sector 1 of the tower. This is situated close to the Moses Mabhida Stadium. At 19:06:04 an internet connection picked up off the Butterworth Hotel tower using sector 3. This is a roof top tower situated in Joe Slovo Street in the Durban CBD.

[312] On 17 July 2018 at 19:49:24 this was an unsuccessful incoming call that went into the voicemail service of the accused's phone. At this point in time the accused's phone was using sector 2 of the Longcroft Tower.

[313] If one then has regard to the call records from 20:01:52 on 17 July 2018 up to and including 20:26:51 the cell phone was picking up off the Longcroft Tower 2. Although the references are Y2 and W2 it is the same cell phone tower except that the different frequencies are being used from the same tower. The Longcroft Tower covers the residence of the accused as well as the area where M[...] 's body was found.

Dharmesh Kanti

[314] Dharmesh Kanti employed by MTN in the Law Enforcement Agency liaison division, testified pursuant to a s 205 subpoena issued by Warrant Officer Zondo under Sydenham Cas 171/08/2018. This was to obtain the cell phone data in respect of the period 1 July 2018 to 20 August 2018 in respect of mobile devices with cellular telephone numbers 065 515 0293 (R[...] 's cell number) and 073 843 2461. He testified in relation to Exhibit 'P' which were the cell phone records for the accused and R[...].

[315] He confirmed that on 'P, page 5', an entry dated 17 July 2018 refers to an outgoing call at 16:11:48 from 065 515 0293 (R[...] 's cell number) to 061 186 7412 (the accused's cell number). The call lasted for a duration of 53 seconds and connected to the base station at the OMO Tower in Jacobs and terminated at the same base station.

[316] The next call was for 17 July 2018 at 19:17:32, which related to an incoming call from 072 611 0558 to 065 515 0293 (R[...] 's cell number). This call lasted for a

duration of eight seconds and connected to the base station at Clayfield VC and terminated at the base station of Eastbury VC.

[317] The next call record similarly is on 17 July 2018 at 19:48:00, a GPRS session for cell phone number 065 515 0293 (R[....] 's cell number) which lasted for a duration of 1125 seconds and connected to the base station at 35 Longcroft Drive, Phoenix.

[318] The next entry was on 17 July 2018 at 20:08:35, a GPRS session linked to cell phone number 065 515 0293 which lasted for a duration of 26 seconds and also connected to the base station at 35 Longcroft Drive, Phoenix. None of the evidence which Kanti testified to was challenged by the accused, in fact there was no cross-examination emanating from his evidence.

The Whatsapp exchanges between the Accused and R[....] and between the Accused and M[....]

[319] The state led the evidence of whatsapp message exchanges between the accused and R[....] from 10 July 2018 to 3 August 2018. That these were downloaded and extracted from the accused's cell phone was not placed in issue. In addition, the affidavit of Kholeka Yvonne Mkhize, a warrant officer in the SAPS, stationed at Cyber Crime Investigation, confirmed that the XRY software, used to download data from the device, sets the time back to zero and therefore the times are behind the universal time clock which is +2 in South Africa. This means that one needs to add two hours to the times reflected in Exhibit "R".

[320] These whatsapp exchanges commenced from 10 July 2018. On 12 July 2018, the exchange of whatsapp indicates that the accused and R[....] got into an argument over him having her picture on his whatsapp profile. At one point during such exchange, she informs him that, '*she is not his girlfriend*'. (20:02:55 R page 6). During the exchange, he also informs her that his girlfriend, Rehana, is fighting with him as he has her picture on his profile pic. On the same day at 22:03:31 (R, page 9), he mentions to her via whatsapp, '*I kill u*'. She exchanges further messages with him via whatsapp that she is going to block him as he causes problems for her at

work, home and with her boyfriend (R, page 11). She says to the accused *'thought u understood that we were just friends'*.

[321] On 13 July 2018, whatsapp messages are exchanged between the accused and R[....] . Reference is made to the accused seeing R[....] 's brother and sister in law and whether R[....] 's mom had asked the accused if he knew her whereabouts. This presumably is after the accused had informed her that he was going to do painting the next day at their home. On 14 and 15 July 2018, it appears that the accused is at R[....] 's home with the children and he requests R[....] to return home.

[322] Whatsapp messages are exchanged between the two of them, her asking about her children and whether her mother had returned home. In the early hours of the morning on 15 July 2018, the accused messages R[....] to call him when she arrives home. Three minutes later she messages the accused asking him to *'open please'*. Presumably this is a reference to him opening up the house to let her in. (R, page 16 and page 17).

[323] On 16 July 2018, the first whatsapp exchange is from the accused and he is apologising to R[....] (R, page 17). This is followed up with the message containing broken heart emoji's (R, page 18). From the whatsapp exchange, she is extremely angry with him and informs him that he needs to hurry up and finish the painting work at the property and leave as she does not want to see him. She informs him that she is going to stay in her room as she does not want to see him and will do so until he leaves. She does not want him there and he needs to leave. She informs him to stay away from her family as she, *'I Dont want mad ppl near my family'*. (R, page 21).

[324] During the same whatsapp exchange, she informs him that he must stay away from her children as they know he is crazy and they are scared of him. Further whatsapp exchanges take place in which she informs him to return to Phoenix and that he must, *'Go to your grave or I will put you there'* (R, page 23). Further whatsapp exchanges take place and the accused informs her that he will see her after two days. She informs him that he will not see her again as she is moving out of her mother's home. The accused then offers to help her and she declines the offer. (R, page 24).

[325] On the morning of M[....] 's disappearance, the accused first starts whatsapp messaging R[....] , indicating how sorry he is and informing her that *'Plse it kills me to see u making mistakes dats y I do dat'*. She asks him to leave their home and he asks for forgiveness. At approximately 17:12:09, R[....] exchanges whatsapp messages with the accused in relation to M[....] . By this stage M[....] has been reported as missing.

[326] *'Is my son wit u'* (15:12:09)

'hey' (15:12:13)

'maybe he took M[....] for a walk' (15:14:37)

'hey' (15:15:10)

'where's my son u' (15:15:20)

At 15:15:47, the accused responds; *'Huh'*.

At 15:15:51 R[....] responds; *'hey'*.

At 15:16:05 *'Whers M[....]'*.

At 15:16:05 the accused responds, *'Wt u mean'*.

'I dnt kw'(15:16:13)

At 15:16:24 R[....] asks *'Where u'*.

At 15:16:35 the accused responds *'U TLD I must go'*.

At 15:16:38 R[....] asks him *'Where's my ma'*.

At 15:16:46 the accused responds *'Phnx'*.

At 15:17:04 *'Wen hosp'*.

At 15:17:20 *'We're u?'*

At 15:17:37 *'Elo'*

At 15:18:05 R[...] responds *'My son not at home'*.

At 15:18:43 the accused says *'Wer u?'*

Thereafter, at 15:19:06 R[...] sends a message *'Hey where u'*.

15:19:19 *'My son is not here'*.

15:19:23 *'I'm at home'*.

15:19:31 *'Whers my son?'*

15:19:45 the accused responds *'I dnt ke'*.

15:19:49 *'Kw'*

15:20:24 he says *'U sed I must not be with them'*.

15:21:21 he sends a message *'Elo'*.

She responds at 15:21:46 and says *'Look at the tym his not back from school'*.

At 15:21:59 the accused responds *'Oh god'*.

At 15:22:29 he says *'U Neva tel anything'*.

[327] There are further whatsapp exchanges:

At 15:23:13 she says, *'I want my son'*.

At 15:23:37 she says, *'Bring my son back'*.

And at 15:23:44 she says *'Now'*.

At 15:23:54 the accused says. *'I dnt kw'*.

[328] She then informs him that she intends phoning the police. The accused responds that he does not know where M[...] is.

At 15:24:45 R[...] asks the accused *'Did he go wit my mum'*.

At 15:25:05 the accused responds *'Aft u left I left'*.

At 15:25:48 the accused says to R[...] *'Go look, for him'* with emojis.

At 15:27:19 he says *'I'm worried nw'* and sends an emoji.

At 15:27:30 R[...] asks the accused to phone her mother as she does not have airtime. The accused responds:

At 15:28:11 *'Wait I go airtime'*.

At 15:28:48 he says *'Honestly I'm very worid'*.

R[...] responds and says *'me too'*.

At 15:29:34 the accused sends a whatsapp message saying *'My boy is missin'*.

She responds at 15:29:49 to say *'Don't play games wit me'*.

He responds and says that he is not.

[329] Later on at 15:33:42 he sends a whatsapp message to R[...] saying *'Mike came earlier n TLD was cum bk 2 home'*. She responds by saying what his response is *'He came'* and R[...] then says *'No'*. At 15:57:41 the accused sends a message to R[...] saying *'Oh god I am really worid nw'*. She responds at 16:03:45 to say *'My child is not wit u'*. He responds by saying that he is not lying and he is worried. He also mentions to her at 16:07:17 that M[...] won't come with him. Later on at 18:07:41 in response to a whatsapp message from the accused as to whether or not M[...] had arrived, she responds and says *'My child is missing. I'm by the police station'*. His response at 18:09:39 is *'Find him pls. I'm very worid'*.

[330] At 18:10:29 R[...] sends a whatsapp message to the accused asking him where he is. He indicates that he is at home. Subsequently at 19:46:04 in response to a whatsapp message from the accused to R[...] that she speaks to him, she responds *'Where u. Can we meet'*. At 20:05:31 when she does not receive an answer to this whatsapp message, she sent the accused a message saying *'Hi. Hey. Where u'*. This is followed by a series of messages commencing at 22:28:06 and ending at 23:00:11 with the following exchange, *'Hi. Where u. Cum to the house. I*

need a beer I'm so stressed. Don't know where's he. Just leave my son somewhere safe please and I won't charge u. Please just want my son back k. Please'.

[331] The following day on 18 July 2018, at 08:20:00, the accused responds and indicates that he did not take M[....] . That he is not stupid to take him and further that because R[....] told him to leave, he left at 1:15 pm. She responds at 08:23:30 to ask him where he is and he responds by saying that he is looking for a job. She then asks him to come and help in the search for M[....] . His response is to send to R[....] a series of messages which she had sent to him the day before telling him to leave the house and not come back and leave her alone.

[332] At 08:28:36, R[....] sends a message to the accused asking him where he is and he responds indicating that he is in Westmead, Pinetown. She asks to meet and tells him that she is very worried and says *'My child his still missing vyed'* with an emoji. He responds at 08:31:22 to say *'Honestly I Neva take him'*. She responds and says *'So please need your help to look. For him'*. The accused responds that he does not know Sydenham. Subsequently, at 08:37:11, the accused exchanges a series of whatsapp messages with R[....] asking her where should he go looking for M[....] . R[....] responds and asks him where he is and if he is coming to their home. In response he says, no, he is going home.

[333] R[....] then at 11:39:45 asks him where he is and he responds that he is in Phoenix. She responds and says, *'My ma irritating me can we meet. I'm tired of her nw'*. She further says, *'Need to move out here nw'* and *'Can I come there wit M[....] '*. The accused responds at 11:42:58 to say the following *'But u Neva like o love me u TLD me that'* and emojis. R[....] 's response is that *'I'm sorry I made mistake. Fighting wit you for nothing when u always take my part'*.

[334] The accused's response seems to indicate that he does not believe what she is saying. She then responds at 11:48:34 and asks him *'U Don't love me anymore. Where u want to see u'*. He responds and says at 11:49:09 *'Always. Highway'*. She responds and says *'So cum for me I'm thrown out'*. He responds at 11:50:25 to say that he is in Phoenix. She questions him as to where he is and says she wants to go there and asks as to whether he has money so they can book in. He responds and says, *'I dnt he muney nw'* and she responds and says, *'I got R100 only'*. He then responds at 11:55:28 to say *'Nw'*. Her response is *'Yes'. Do u want to meet in town*

then. I said I was sorry just want to fuck off from this place'. He then says 'He I gonna come'.

[335] She then asks him what are they going to do and asks whose house the accused was at as she wants to come and sleep there. She informs him that her phone is going to die and she is locked out of the house as her mother does not want him there. She says to him *'Please. Say something quickly'*. She goes on at 15:10:09 to ask him, *'So what's the story nw?'* His response is, *'I dnt kn. Me phnx'*.

[336] At 15:39:19, R[...] sends a message to him saying, *'Just leave him somewhere safe pleeeeeeeez. No one has to know. Please vyed. Don't do this to me Im so deeply sorry for hurting your feelings. If u love me then u wouldnt want me to be sad. Please I beg of u. I won't tell. Nobody will know. Pleeeeeeeez. I want to see my bb. And I know u love him to and will Neva hurt him vyed. U always protect us Don't do this to me its is too painful I can't take this anymore I'm so so sorry vyed. Please give my bb bac I promise u will be okay. We will be okay'*.

[337] At 16:11:36, the accused sends a whatsapp message to R[...] saying, *'Need to see you'*. She responds at 16:14: to say, *'Okay. Where. When. Tell me'*. The accused responds as to say to her that only she is allowed to meet with him and she responds by saying, *'Okay. Promise'*. She then asks him; will he bring M[...] as she wants to see him. He responds at 16:18:22, *'Jus no1 else'*. She responds and says okay, she will come alone and asks where is M[...] and is he okay. He responds and says, *'I never take him'*. She responds and says, *'Please vyed I promise u it will be okay just give him back to me. Please I will cum see u. Take me instead please. Let him go. Nobody will know. U can have me. Just let him go'*.

[338] He responds by saying, *'Oho'*. For almost 45 minutes there is no response from the accused and then at 16:57:02, R[...] sends him a message to which he responds saying, *'Bk'*. She asks him what the plan is and he says he will tell her. When she asks him where he had gone he said he was outside the house. When she asks him where and whose house he says Phoenix. She asks him where he wants to see her and if he is okay and he responds, *'Nope'*. She asks him why and what is wrong and he says to her at 17:08:53, *'Gt da a feeling I won't see u'*.

[339] She responds and says, *'What u mean now?'* He then informs her, *'It on social media nw'*. She then says, *'Its okay. Trust me. I always trusted u. Remember. We can make a plan togetha. Just tell me M[....] our boy is okay. And safe'*. The accused responds at 17:12:48 to tell her that, *'Some 1 fone me on pvt. Sed his EB from grey st.'* When R[....] asks him who this is, he says he does not know. He informs her that the person wants to kill him. He is Eb from Grey Street Mosque. When she asks him what he wants to do, he asks her if Eb is one of her contacts. She responds and says that she does not know Eb and is this not the accused's friend from work. He responds and says that it is not their EB from E[....] where they used to work.

[340] At 17:18:35, R[....] sends the accused a message saying, *'U said u want to meet its getting late'*. He responds and says, *'Nt 2day. Going to plaza to charge fone nw'*. He responds at 17:20:31 to ask her who phoned him on a private number. R[....] responds and says that she does not know and that this person must have got his number from Facebook or the media.

[341] She then sends a series of whatsapp messages to the accused from 17:21:22 to 17:22:48 as follows:

'Where's M[....] . Vyed? I want him now. Did u hear me, I want my bb'. The accused responds at 17:23:11 to say, *'His nt with me'*. She then asks him, *'Then where u left him. Tell me I will go for him. Tell me now. Tell me. Tell'*. He then responds, *'Yes'* and she asks if he tried calling and he responds, *'Nope'*.

[342] At 19:45:37 R[....] sends a message to the accused asking him what's the story as her mother is fighting with her and blaming her for M[....] being missing. She asks the accused what she must do. He responds at 20:02:47 to say he will see her tomorrow. She responds *'K'*. He responds by saying *'Be ready early, I Kw u take long'*. She asks him *'What time?'* and he says *'By 11'*. When she asks him *'Reach where'*, he says *'2 meet u'*. She says *'No problem'*. Thereafter, a series of messages are exchanged between R[....] and the accused in which she asks him where he is and that she really needs his help. She asks him to come to her. He does not respond.

[343] She then sends him a message at 01:29:30 am to ask him if he is at his house. He responds and says *'Will see you later. Outside. Getn lot of people inviting me'*. When she responds and says *'Outside where'*, he responds and says *'Hse'*. She then asks if they can't come and stay with him tonight. She asks whose house and where he is as they need a place to stay. She says to him *'U dont care that we out in the cold'*. He responds and says *'N me 2'*.

[344] On 19 July 2018, at 08:20:23 he sends messages to her asking her what she is doing. She responds and says she is stressed *'My bb is gone'*. He responds and says *'Me 2'*. She asks him where he is and he says he is going to charge his phone. He asks her if she is awake and she responds by saying *'I Neva sleep. Crying whole nyt. I want my bb vahed. M[....] too'*. He responds by saying *'Me 2'*. Her response is *'She wants her brother'*. At 08:25:39 R[....] questions him and asks him as to why he did not come to Sydenham to help and look for M[....]. The accused responds and says *'U was fighting n dnt wana see me'*. She responds and says *'But I said I sorry an this is serious u know M[....]. He must be so scared my bb'*.

[345] The accused responds and says *'I love him'*. She says *'I know. But u not helping me to find him. We need to find him vahed'*. The accused responds and says *'I dnt slp n I thnk of him every min'*. She responds by saying *'Please. Help me'*. He says *'I am. But we find him'*. R[....] responds and says *'Where we going to find him? I don't know where's he. And if his okay'*. The accused responds and says *'I Neva take him wit me he nt in phnx'*.

[346] The accused responds and says he is leaving now. When she asks why he does not come for her he says he does not have enough money. A series of messages is then exchanged in terms of which the accused seems to suggest to R[....] that she must meet him at [...] in town by 10:30. The accused informs her that he is in town for a long time and he checked at Addington Hospital but nothing was forthcoming. R[....] indicates that she is going to leave and meet him in town and he should wait for her. He then says he would be walking around in the meanwhile.

[347] As series of messages are exchanged from which it seems that R[....] is at the meeting point but the accused is nowhere to be found. She messages him, asking him where he is and mentions the fact that he made her wait for a long time.

He responds and indicates that he went to the hospital in Lorne Street to check. He informs her that on every corner there are vans and that he is ducking.

[348] He mentions to her that she called them. She indicates that she never called anyone. She came alone and asked him why he ran away. He responds and says *'Every corner was vans. I saw u. Wearing brown'*. She says *'Yeah there was a bomb scare at woolworths. That's why there was police vans'*. The accused says to her that he received a call from a guy saying that M[...] was in South Coast from Tuesday evening. This is at 17:39:53. The message reads *'He kws u very well n u hurted him n days y hurting u me.'* He asks her where she is.

[349] He then exchanges messages with R[...] asking her to meet him by Charlies friend. He mentions to her that he is in a car. When she goes, he tells her that he is in the car wearing his green shirt. A series of whatsapp messages is being exchanged between R[...] and the accused in which he advises her that a customer phoned him and wanted to help him sort out this mess. When she asks him *'What mess'*. He responds by saying *'Hear my side of this story out wat I kw'*. He responds and says *'Customer who cares 4 me n wan me cleared'*. She responds by asking him what he did and he says *'Honest 2 god I Nevrr take bb I love him u all KW datt'*.

[350] She responds by asking him then why he was not coming to her. He also advises her that he saw cops everywhere and that he does not know where M[...] is. She responds by saying to him *'Vahed if u say you Neva do it then just cum forward. Someone phoned me too and asked if I want my bb back. Wish they can phone me back. My baby no please vahed save my boy please. Please. Want my bb. Help me don't know what to do. Do u know anything. Or suspect anything'*. He responds and says to her *'I CNT do anything wen the cops on my tail'*.

[351] Exhibit "S", consists of the whatsapp exchanges between M[...] and the accused. On 16 July 2018, the accused wishes her a good night and sends her a message. On 17 July 2018, at 15:15:10 the accused sends a whatsapp message to M[...] saying *'Nope'*. On the same day at 15:18:33 M[...] sends a message to him advising him that M[...] was not home and then M[...] asks the accused whether he was at home and whether he saw when Ma left. He responds and asks her *'Wat?'*

and she asks him where he is. He responds and says that he is in Phoenix. This is on 17 July 2018 at 15:19:14.

[352] When she sends a message saying *'Ha?'*. He responds saying *'Mummt TLD I'm go away'*. He sends M[...] a message at 15:26:27 saying *'Go look 4 him pls my baby'*. At 15:26:44 he sends a message to M[...] saying he is worried. At 15:29:13, M[...] sends a message to the accused saying *'Ma asked where u'*. He responds at 15:30:57 saying *'Gone phnx'*. At 17:09:30 the accused sends a further whatsapp message to M[...] asking her whether M[...] had come home. She responds at 17:12:03 to say *'No his missing'* and again at 17:12:11 *'We can't find him'*. He responds at 17:12:43 to say *'Oh my god'*.

[353] At 18:00:43 he once again messages M[...] to ask her if M[...] had arrived. At 21:27:40 pm Michaela sends a message to Vahed saying *'Hello'*. At 21:34:33 pm she says *'Please tell us where M[...] is we want him'*. At 21:34:54 pm she says *'I am crying we all are'*. She then pleads with him *'Plz'*. At 21:35:52 pm she sends the accused a message saying *'I beg you we want my brother plz'*.

[354] On 18 July 2018 at 10:22:39 am she says *'Please give my brother back that's all uncle vyed'*. She then follows it up with a series of whatsapp exchanges saying *'Please, please we just want M[...]'*. On 18 July 2018 at 10:54:25 Vahed responds and says *'I Neva take him'*.

[355] M[...] then responds on the same day at 10:04:38 to say *'But one of the teachers took a picture with u taking M[...] how come we got that picture?'* At 10:05:21 M[...] sends the accused a message saying *'Please we know u got him even the kids saw take M[...] we just want him please'*. At 10:06:48 she says *'Please please we want M[...] . Uncle Viend please'*. At 10:08:21 M[...] sent him a message saying *'But the children saw you take him'. The teacher has the pic. And the 5 kids saw u. They said 5 children saw u'*. At 10:10:49 she says to him *'Please why u doing this? We want M[...] please'*. At 10:12:18 she says *'Then why u dont come here to see us cause everyone is looking for M[...]'*. The accused sends her a message at 01:19:20 pm. *'I dnt kW we're he is'*.

[356] During the course of the trial, the State sought to lead the expert evidence of Monique Sutcliffe, a sign language practitioner. The competence of this witness to testify as an expert was challenged by the defence. Ms Sutcliffe then testified to place on record her experience and expertise and was cross-examined by the defence. I allowed the parties time to prepare argument and heard oral submissions of the State and defence. After hearing such submissions and considering the authorities in relation to expert evidence, I ruled that she was not competent to testify as an expert. Her evidence and my reasons are dealt with in this judgment in the section hereinafter relating to interlocutory applications.

Interlocutory applications

The admissibility of the evidence of Ms Sutcliffe as a lip reading expert

Ms Monique Sutcliffe

[357] Mr *Singh* sought to lead the evidence of Ms Sutcliffe as an expert witness, her area of expertise being that of lip reading. It was placed on record by Mr *Singh* that Ms Sutcliffe was born deaf and therefore when someone is speaking to her requires the person to look directly at her face, speak slowly to enable her to read their lips.

[358] Ms Sutcliffe confirmed that she was born deaf. She attended the Fulton School in Hillcrest, a specialised school for deaf people and completed the highest grade at the school being standard nine. She completed her schooling in 1984 and did some further studying and also further courses.

[359] Her curriculum vitae (Exhibit "W") sets out her various experience as a sign language facilitator. I do not propose to repeat this for purposes of the judgment. Her expertise in the area of lip reading, emanated from her being deaf for most of her life. She is able to hear sounds and as a consequence thereof is able to decipher conversations and respond accordingly purely from reading the lips of a person who is speaking directly to her.

[360] She does not have a formal qualification in lip reading, but was trained in sign language. Sign language is the language that is produced by deaf people to communicate with hearing people. She was born and was taught by teachers that by looking at a person's lips over and over for a word after a while the pattern of the word gets in your head and that is how you are able to recognise it. She testified that she watches a person's lips and that is how she knows what they are saying and is able to decipher what they are saying.

[361] From her attending a school for the deaf, from the age of two years until Grade 11, the training she received from the teachers was to recognise mouth patterns of words. This was throughout her entire schooling career and in addition apart from lip reading at school she also learnt at home from her family.

[362] She also wears a hearing aid which assists her in hearing things like voices and music but she does not hear words. With a hearing aid she is able to hear the voice of a person and together with looking at their lips she is able to understand what they are saying and communicate.

[363] By looking at someone's lips she is able to identify the words that they are speaking as long as they are looking directly at her and do not cover their mouths. Apart from receiving training at school during the day, from 08h00 to 14h00, she also received training at night as she was a school boarder and the house mothers taught them. She is presently 53 years old and has thus learnt lip reading and sign language for approximately 51 years.

[364] She has never testified in court before, nor has she been called upon to give expert opinions or expert testimony. She does not have a formal qualification in lip reading but only a formal qualification in sign language.

[365] In this particular matter she was asked to do a lip reading exercise from the CCTV footage particularly that of the KFC outlet. The purpose of her evidence was to read the lips of M[...] and the accused in such CCTV footage and place on record what they were saying. Her statement which she made regarding the viewing of the video indicates that she viewed the video 50 times before she recorded what was being said.

[366] It was at this juncture of the evidence of this witness that Mr *Naidoo* raised objections to her evidence. The first of the objections was that she was not an expert, the second objection being that even if the court were to allow her evidence by virtue of her experience, it constituted hearsay and there was no way to verify her interpretation of what was on the CCTV footage.

Summary of the submissions of the parties

[367] Mr *Singh* submits that by virtue of her 51 years of experience she qualifies as an expert. In addition, he submits that the reliability of her interpretation and the

probative value thereof must be determined at the end of the State's case. The requirements of s 3 of the Law of Evidence Amendment Act¹⁸ have been met.

[368] Mr *Naidoo* submits:

- (a) her evidence constitutes hearsay. She was not there at the time and therefore at best all she can do and tender to court is her interpretation of what is being said on the CCTV footage;
- (b) there is no way to assess her lip reading skills;
- (c) there is no way to verify the reliability of her interpretation of what is being said; and
- (d) the interests of justice must be weighed in favour of the protection of the accused's s 35(3) constitutional rights.

Analysis

[369] In the course of my research in relation to the acceptability and admissibility of the evidence of experts in lip reading, there is a dearth of authority. In *S v Mdlongwa*¹⁹ the court accepted the evidence of an expert who had found 13 points of similarities between the facial features of a person in the video footage and a photograph of the appellant.

[370] In *R v Luttrell*²⁰ an expert in lip reading provided expert assistance to the court as to what a person had said on a closed circuit television recording received as real evidence. In essence, the nature of the evidence which Mr *Singh* wishes to have admitted presumably relates to Ms Sutcliffe firstly qualifying as an expert in lip reading and then providing expert assistance to the court as to the conversation between the accused and the deceased at the KFC as captured on CCTV footage.

¹⁸ 45 of 1988.

¹⁹ *S v Mdlongwa* 2010 (2) SACR 419 (SCA) paras 20-21.

²⁰ *R v Luttrell* [2004] EWCA Crim 1344.

[371] An article²¹ by Helen Dagut and Ruth Morgan discusses the violation of rights of disabled persons in the South African justice system and the barriers to communication in police stations and courts. The research involved participant observation in courts, interviews with magistrates and eight case studies involving deaf people in the magistrates' courts in and around Gauteng.

[372] The following observations were made:

- (a) that any deaf person who provided a police statement was not made aware by the police officer with whom they interacted of their right to the assistance of a trained and skilled interpreter. This resulted in none of the deaf people requesting the services of a trained interpreter who used sign language and consequently none was made available. In these instances, statements were made on their behalf by hearing relatives or a friend or by a policeman. Consequently, a deaf person made a statement with the assistance of an untrained and often unskilled family member, teacher or social worker; and
- (b) there was a failure in communication in the court room specifically as a consequence of interpretation involving court appointed sign language interpreters; this was as court officials assumed that the appointment of a sign language interpreter was sufficient to ensure that communication problems with deaf people would be counted. The problem with this was the following, there are approximately 500 users of South African Sign Language (SASL) in South Africa. Natural sign languages are acquired by the deaf through exposure to other signers, and not inevitably through schools. As a consequence, natural sign languages have their own linguistic structure which is independent of that used in spoken or written language. Each sign language has a different variety and dialect in the same way that spoken languages vary according to the factors such as age, geographic region or ethnicity.

[373] In the same article at footnote 19 the following is noted:

²¹ Helen Dagut and Ruth Morgan 'Barriers to justice: Violations of the rights of deaf and hard-hearing people in the South African justice system' 2003 *SAJHR* 27.

'It is also a misconception that most deaf people can 'lip-read'. A study discussed by Smith found that the best lip readers could fully understand only twenty six per cent of what was said to them. Lip reading is difficult for a number of reasons, including that many spoken sounds are not shown on the lips and speaking loudly or softly tends to distort lip movements.'

[374] Mary Luckham in an article 'Forensic lip-reading',²² refers to Professor Ruth Campbell who specialises in communication disorders in adults and children claiming that the intrinsic unreliability of lip reading meant that it should never be used evidentially. She was of the view that what was seen by lip readers was always less than what was said. Even a very good lip reader could not overcome that limitation, hence its unreliability. In addition, the association of teachers of lip reading for adults strongly recommended that members should not undertake forensic work because lip reading is unreliable.

[375] In *R v Luttrell*, the England and Wales Court of Appeal (Criminal Division) had cause to consider the evidence in relation to lip reading presented to the court in respect of the accused and a co-accused recorded on the CCTV footage. A witness was called to give evidence for the Crown as to what was said on the CCTV footage during the meeting between the accused and co-accused.

[376] The witness was a skilled lip reader and relied totally on lip reading in her daily life and did not use sign language. She had been doing lip reading semi-professionally for 10 to 12 years and professionally for five to six years. The skills had been tested by a Professor. She spent 12 and a half hours viewing the tape and prepared a report on what was said. There were certain pauses and dots during the course of her interpretation where she could not see the speaker's face or was not sufficiently sure of the words. She also disagreed with Professor Campbell that lip reading was intrinsically unreliable and indicated that having been deaf at an early age, at four years old she gained her qualification through lip reading.

[377] The Court of Appeal was of the view that:²³

²² Mary Luckham 'Forensic lip-reading' first published in *CrimeLine* Issue 117, week ending 19 December 2004 at 1-2.

²³ Paragraph 13.

‘Although lip reading evidence is potentially unreliable, if a person is careful and adopts safeguards and it is done properly it can be regarded as reliable. It should not stand alone because a case would not be very strong if there is only one piece of evidence.’

The court ruled the lip reading evidence of the witness was admissible in principal, as it was supported by other evidence implicating the accused. The fact that an expert was wrong was no reason to deprive the jury of the assistance of a lip reader.

[378] The court further opined that lip reading evidence from a video, like facial mapping is, a species of real evidence.²⁴ Further the court held the following:

‘The preferred view, and in our judgment the proper view, is “that so long as a field is sufficiently well-established to pass the ordinary test of relevance and reliability, then no enhanced tests of its admissibility should be applied, but the weight of the evidence should be established by the same adversarial forensic techniques applicable elsewhere”’.

[379] In relation to the evidence of the witness, the court held the following:²⁵

‘When these principles are applied in the present cases, we are entirely satisfied that lip-reading evidence as to the contents of a videoed conversation is capable of passing the ordinary tests of relevance and reliability and therefore being potentially admissible in evidence. Lip-reading is a well-recognised skill and lip-reading from video footage is no more than an application of that skill. It may increase the difficulty of the task, as may the speaker’s facial features and the angle of the observation, but the nature of the skill remains the same. . . . It does not of course follow that, in every case where lip-reading evidence is tendered, it will be admissible. The decision in each case is likely to be highly fact sensitive. For example, a video may be of such poor quality or the view of the speaker’s face so poor that no reliable interpretation is possible. There may also be cases where the interpreting witness is not sufficiently skilled. A judge may properly take into account: whether consistency with extrinsic facts confirms or inconsistency casts doubt on the reliability of an interpretation; whether information provided to the lip-reader might have coloured the reading; and whether the probative effect of the evidence depends on the interpretation of a single word or phrase or on the whole thrust of the conversation.’

Expert evidence

²⁴ Paragraph 37.

²⁵ Paragraph 38.

[380] There are certain matters in which expert opinion evidence is received on issues which are outside the expertise of the court. In *Gentiruco AG v Firestone SA (Pty) Ltd*²⁶ the court said the following:

‘...the true and practical test of the admissibility of the opinion of a skilled witness is whether or not the Court can receive “appreciable help” from that witness on the particular issue.’

And in *Ruto Flour Mills Ltd v Adelson (1)*²⁷ the court made the following point, namely:

‘An expert's opinion is received because and whenever his skill is greater than the Court's.

Salie-Hlophe J in *S v Rohde* commented:²⁸

‘Experts are there to assist the court. They must remain unbiased and true to their disciplines and expertise. The Court remains the trier of fact. Adjudication of the dispute before it is the expertise of the Court, not the expertise of any witness.

[381] In *S v Gouws*²⁹ it was stated thus:

‘The prime function of an expert seems to me to be to guide the court to a correct decision on questions falling within his specialised field. His own decision should not, however, displace that of the tribunal which has to determine the issue to be tried.’

In *Principles of Evidence* the following is stated:³⁰

‘The party seeking to adduce the opinion of a witness as an expert opinion must satisfy the court that the opinion is not supererogatory — that is, not irrelevant. For this purpose the court must be satisfied: (a) that the witness not only has specialist knowledge, training, skill or experience but can furthermore, on account of these attributes or qualities, assist the court in deciding the issues; (b) that the witness is indeed an expert for the purpose for which he is called upon to express an opinion; and (c) that the witness does not or will not express an opinion on hypothetical facts, that is, facts which have no bearing on the case or which cannot be reconciled with all the other evidence in the case.’ (References omitted.)

[382] One of the aspects relevant to the acceptance of an expert's evidence is whether the court is able to verify it. It is common cause that in this particular matter, Ms Sutcliffe would be testifying from CCTV footage taken at KFC. There is no sound

²⁶ *Gentiruco AG v Firestone SA (Pty) Ltd* 1972 (1) SA 589 (A) at 616G-H.

²⁷ *Ruto Flour Mills Ltd v Adelson (1)* 1958 (4) SA 235 (T) at 237B.

²⁸ *S v Rohde* [2019] 1 All SA 740 (WCC) at 803.

²⁹ *S v Gouws* 1967 (4) SA 527 (E) at 528D-E.

³⁰ P J Schwikkard and S E Van der Merwe *Principles of Evidence* 4 ed (2016) at 102.

and she would be reading the lips of the individuals on the CCTV footage. There is no way in which the court can verify what is being said and whatever she testifies to will be hearsay.

[383] Hearsay evidence is impermissible unless it falls within the prescripts of s 3(1) of the Law of Evidence Amendment Act.³¹ In *S v Mpofu*³² Alexander J took the view that evidence that is otherwise relevant should be admitted if it carries ‘the hallmark of truthfulness and reliability’. In *S v Ramavhale*,³³ Schutz JA said:

‘...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.’

[384] The admission of hearsay evidence by the court must also pass constitutional muster in relation to the fairness of a trial. In *S v Ndhlovu & others*,³⁴ the court considered the constitutionality of s 3 and the Supreme Court of Appeal found that the section was consonant with the Constitution in that one considered the nature of the proceedings, and the importance of a fair trial in determining whether it was in the interests of justice to receive hearsay evidence against an accused person in a criminal trial. The court opined that the admission of the hearsay evidence did not violate the accused’s right to challenge the evidence by cross-examination. As was considered in *S v Mokoena & others*³⁵ hearsay evidence will always be prejudicial to a party against whom it is allowed as the original declarant cannot be cross-examined.

[385] Witnesses generally are not allowed to inform the court of the inferences they draw from facts perceived by them. Their evidence ought to be limited to an account of such facts. However, in *Coopers (South Africa) (Pty) Ltd v Deutsche Gesellschaft Für Schädlingbekämpfung MbH*³⁶ the court said the following:

‘In the ultimate result, it is the court’s duty to construe the specification and on the merits to draw inferences from the facts established by the evidence. See *Gentiruco’s* case, *supra* at

³¹ 45 of 1998.

³² *S v Mpofu* 1993 (2) SACR 109 (N) at 116I.

³³ *S v Ramavhale* 1996 (1) SACR 639 (A) at 649C-D.

³⁴ *S v Ndhlovu & others* 2002 (2) SACR 325 (SCA).

³⁵ *S v Mokoena & others* 2006 (1) SACR 29 (W) at 48G-H.

³⁶ *Coopers (South Africa) (Pty) Ltd v Deutsche Gesellschaft Für Schädlingbekämpfung MbH* 1976 (3) SA 352 (A) at 370E-G.

pp. 616D -618G. There are, however, cases where the court is, by reason of a lack of special knowledge and skill, not sufficiently informed to enable it to undertake the task of drawing properly reasoned inferences from the facts established by the evidence. In such cases, subject to the observations in *Gentiruco's* case, the evidence of expert witnesses may be received because, by reason of the special knowledge and skill, they are better qualified to draw inferences than the trier of fact. There are some subjects upon which the court is usually quite incapable of forming an opinion unassisted, and others upon which it could come to some sort of independent conclusion, but the help of an expert would be useful.'

[386] Satchwell J in *Holtzhauzen v Roodt*³⁷ summarised the principles in relation to the reception of expert evidence as follows:

- (a) the witness must be called to give evidence on matters calling for specialised skill or knowledge. The court must thus determine whether the subject of the enquiry raises issues calling for specialised skill or knowledge. Evidence of opinion on matters which do not call for expertise is excluded as it does not help the court. See in this regard *R v Turner* [1975] Queens Bench QB 834 (CA) at 841;
- (b) the court should not elevate the expertise of the witness to such heights that it loses sight of its own capabilities and responsibilities;
- (c) the witness must be a qualified expert. A Judge must determine whether the witness has undergone a course of special study or has experience or skill that will render him or her an expert in a particular subject. It is not necessary for the expertise to have been acquired professionally;
- (d) the facts upon which the expert opinion is based must be proved by admissible evidence. These facts are either within the personal knowledge of the expert or on the basis of facts proved by others. If an expert has observed them then the expert must testify as to their existence.
- (f) the guidance offered by the expert must be sufficiently relevant to the matter in issue which is to be determined by the Court; and

³⁷ *Holtzhauzen v Roodt* 1997 (4) SA 476 (W) at 772C-773C.

(g) opinion evidence must not usurp the function of the Court.

[387] The court³⁸ relied on the decision in *Davey v Edinburgh Magistrates*³⁹ where the court said the following:

‘The duty of the expert is to furnish the Judge with the necessary scientific criteria for testing the accuracy of the expert’s conclusions so as to enable the Judge or jury to form their own independent judgment by the application of these criteria to the facts proved in existence.’

[388] In this regard the expert must provide criteria to test the accuracy and objectivity of his or her conclusion. The court must be told of the premises upon which the opinion is based. The guidance offered by the expert must be sufficiently relevant to the matter in issue. At 773 Satchwell J, said the following:

‘...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.’

[389] In *Twine & another v Naidoo & another*⁴⁰ Vally J, set out a useful summary of the principles applicable to expert evidence. I do not propose to repeat this summary but only wish to refer to an extract therefrom relating to the importance of a court being able to verify and test the expert’s evidence. In this regard reliance was placed on the decision in *R v Jacobs*⁴¹ where the court held the following:

‘In cases of this sort (where the issue was whether the accused was drunk while driving) it is of great importance that the value of the opinion should be capable of being tested; and unless the expert witness states the grounds upon which he bases his opinion it is not possible to test its correctness, so as to form a proper judgment upon it.’

[390] Ms Sutcliffe, has no form of qualification in respect of lip reading. Her ‘expertise’ is based on her experience it being common cause that she has been deaf from the age of two and spent the last 51 years communicating with a hearing aid, sign language and by lip reading.

³⁸ Ibid at 772I-773A.

³⁹ *Davey v Edinburgh Magistrates* 1953 SC 34 at 40.

⁴⁰ *Twine & another v Naidoo & another* [2018] 1 All SA 297 (GJ) at 303-308.

⁴¹ *R v Jacobs* 1940 TPD 142 at 146-147.

[391] She has never testified in court before and there is no basis to verify her interpretation of what she says she sees being said on the CCTV footage between the accused and the deceased as they are seated in the KFC. It was for these reasons that I took the view she did not qualify as an expert. Secondly, the court would not be in a position to verify her evidence and thus the reliability thereof questionable. The accused's right to a fair trial as guaranteed by s 35 of the constitution outweighed the State's right call her as a witness.

Interlocutory application relating to the admissibility of extra-curial admissions made by the accused to Constable Irshaad Mohamed

[392] During the course of the evidence of Constable Irshaad Mohamed, the arresting officer, an objection was raised by Mr *Naidoo* to the evidence of Mohamed in relation to responses provided by the accused to questions he asked him during the course of the arrest and subsequent interview of the accused. Mr *Naidoo* indicated that the accused's s 35(3) fair trial rights were violated and that he did not provide informed consent in subjecting himself to questioning by Mohamed. In addition, he indicated that the objection also related to the location where the questioning occurred.

[393] The objection proceeded on the basis that any answers provided by the accused would be tantamount to admissions and consequently the provisions of s 219A of the CPA would be applicable. Mr *Singh* then proceeded to lay the foundation for the admission of such evidence in terms of s 219A of the CPA and Mr *Naidoo* had the benefit of cross-examining the witness.

[394] The record will reflect the various submissions made by Mr *Singh* as well as Mr *Naidoo* in relation to the basis upon which Mr *Naidoo* alleged this line of evidence was inadmissible as there had been non-compliance with the provisions of s 219A. After hearing argument, I ruled the evidence admissible and indicated my reasons would follow in the judgment. These are my reasons.

[395] Section 219A of the CPA reads as follows:

‘Admissibility of admission by accused

(1) Evidence of any admission made extra-judicially by any person in relation to the commission of an offence shall, if such admission does not constitute a confession of that offence and is proved to have been voluntarily made by that person, be admissible in evidence against him at criminal proceedings relating to that offence: Provided that where the admission is made to a magistrate and reduced to writing by him or is confirmed and reduced to writing in the presence of a magistrate, the admission shall, upon the mere production at the proceedings in question of the document in which the admission is contained-

- (a) be admissible in evidence against such person if it appears from such document that the admission was made by a person whose name corresponds to that of such person and, in the case of an admission made to a magistrate or confirmed in the presence of a magistrate through an interpreter, if a certificate by the interpreter appears on such document to the effect that he interpreted truly and correctly and to the best of his ability with regard to the contents of the admission and any question put to such person by the magistrate; and
- (b) be presumed, unless the contrary is proved, to have been voluntarily made by such person if it appears from the document in which the admission is contained that the admission was made voluntarily by such person.

(2) The prosecution may lead evidence in rebuttal of evidence adduced by an accused in rebuttal of the presumption under subsection (1).’

[396] Section 35(3) of the Constitution requires that any admissions made by an accused are admissible in terms of s 219A provided they are freely and voluntarily made and that the accused at the time is apprised of his s 35(3) fair trial rights and provides informed consent.

[397] It is evident from the submissions of the parties that these were exculpatory extra-curial statements and not admissions on the part of the accused. Mr *Naidoo* as well as Mr *Singh* agreed that they were extra-curial statements prior to the ruling being made. As a consequence of these being extra-curial exculpatory statements the provisions of s 219A did not apply and consequently I ruled that Constable Mohamed could testify in relation to what the accused said to him during his questioning of the accused.

The application in terms of s 174 of the CPA

[398] At the close of the case for the prosecution, Mr *Naidoo* brought an application for the discharge of the accused in terms of s 174 of the CPA. Having regard to the summary of substantial facts and the various counts in the indictment it is clear that the State relies on circumstantial evidence when seeking a conviction.

The legal position

[399] Section 174 of the CPA reads as follows:

‘If, at the close of the case for the prosecution at any trial, the court is of the opinion that there is no evidence that the accused committed the offence referred to in the charge or any offence of which he may be convicted on the charge, it may return a verdict of not guilty.’

[400] It is a well-established principle in our law that ‘no evidence’ in the section does not mean no evidence at all but rather means no evidence on which a reasonable court, acting carefully, might convict the accused.⁴²

[401] The question as to whether a court should grant a discharge at this stage is one which entails the exercise of a discretion by the trial court which must be exercised judicially. There have been various judicial pronouncements on the manner in which the trial court must exercise such discretion, some of which have been contentious.

[402] Prior to the enactment of the Constitution, specifically s 35(3) of the Constitution, Hiemstra CJ held in *S v Shuping* that the test was as follows:⁴³

‘At the close of the State case, when discharge is considered, the first question is: (i) Is there evidence on which a reasonable man might convict; if not (ii) is there a reasonable possibility that the defence evidence might supplement the State case? If the answer to either question is yes, there should be no discharge and the accused should be placed on his defence’.

⁴² *S v Mpetha & others* 1983 (4) SA 262 (C); *S v Shuping & others* 1983 (2) SA 119 (B); *S v Lubaxa* 2001 (2) SACR 703 (SCA).

⁴³ *S v Shuping & others* 1983 (2) SA 119 (B) at 120H-121A.

[403] Given the conflicting views since the inception of the Constitution the Supreme Court of Appeal finally decided the issue in *S v Lubaxa* as follows:⁴⁴

[18] I have no doubt that an accused person (whether or not he is represented) is entitled to be discharged at the close of the case for the prosecution if there is no possibility of a conviction other than if he enters the witness box and incriminates himself. The failure to discharge an accused in those circumstances, if necessary *mero motu*, is in my view a breach of the rights that are guaranteed by the Constitution and will ordinarily vitiate a conviction based exclusively upon his self-incriminatory evidence

[19] The right to be discharged at that stage of the trial does not necessarily arise, in my view, from considerations relating to the burden of proof (or its concomitant, the presumption of innocence) or the right of silence or the right not to testify, but arguably from a consideration that is of more general application. Clearly a person ought not to be prosecuted in the absence of a minimum of evidence upon which he might be convicted, merely in the expectation that at some stage he might incriminate himself. That is recognised by the common law principle that there should be 'reasonable and probable' cause to believe that the accused is guilty of an offence before a prosecution is initiated (*Beckenstrater v Rottcher and Theunissen* 1955 (1) SA 129 (A) at 135C - E), and the constitutional protection afforded to dignity and personal freedom (s 10 and s 12) seems to reinforce it. It ought to follow that if a prosecution is not to be commenced without that minimum of evidence, so too should it cease when the evidence finally falls below that threshold. That will pre-eminently be so where the prosecution has exhausted the evidence and a conviction is no longer possible except by self-incrimination. A fair trial, in my view, would at that stage be stopped, for it threatens thereafter to infringe other constitutional rights protected by s 10 and s 12'.

Does the credibility of the State witnesses at this stage of the proceedings play a role?

[404] Having regard to various decisions on this subject it appears that the credibility of State witnesses at this stage of the proceedings only play a very limited role. In *S v Mpetha*,⁴⁵ Williamson J held that relevant evidence can only be ignored if 'it is of such poor quality that no reasonable person could possibly accept it.' Similarly, this view was echoed and expanded on by Kgomo J in *S v Agliotti*.⁴⁶

⁴⁴ *S v Lubaxa* 2001 (2) SACR 703 (SCA).

⁴⁵ *S v Mpetha & others* 1983 (4) SA 262 (C) at 265E.

⁴⁶ *S v Agliotti* 2011 (2) SACR 437 (GSJ).

[272] In *S v Lavhengwa* 1996 (2) SACR 453 (W) the view was expressed that the processes under s 174 translate into a statutorily granted capacity to depart discretionally, in certain specific and limited circumstances, from the usual course, to cut off the tail of a superfluous process. Such a capacity does not detract from either the right to silence or the protection against self-incrimination. If an acquittal flows at the end of the State case the opportunity or need to present evidence by the defence falls away. If discharge is refused, the accused still has the choice whether to testify or not. There is no obligation on him to testify. Once this court rules that there is no prima facie case against the accused, there also cannot be any negative consequences as a result of the accused's silence in this context.

[273] I agree with the view that it is an exercise in futility to lay down rigid rules in advance for an infinite variety of factual situations which may or may not arise. It is thus, in my view, also “unwise to attempt to banish issues of credibility” in the assessment of issues in terms of s 174 or to “confine judicial discretion” to “musts” or “must nots”.

[405] Traverso DJP in *S v Dewani*⁴⁷ summarised the legal position regarding applications in terms of s 174 as follows:

- (a) an accused person is entitled to be discharged at the close of the case for the prosecution if there is no possibility of a conviction other than if he enters the witness box and incriminates himself;
- (b) In deciding whether an accused person is entitled to be discharged at the close of the State's case, the court may take into account the credibility of the State witnesses, even if only to a limited extent;
- (c) Where the evidence of the State witnesses implicating the accused is of such poor quality that it cannot safely be relied upon, and there is accordingly no credible evidence on record upon which a court, acting carefully, may convict, an application for discharge should be granted.'

[406] I respectfully align myself with that summary.

Submissions

⁴⁷ *S v Dewani* (CC15/2014) [2014] ZAWCHC 188 (8 December 2014) para 15.

[407] The State and the defence presented written and oral submissions which were of great assistance and for which I record my appreciation. These submissions can be conveniently summarised as follows.

[408] Mr *Naidoo* submitted the following, namely:

- (a) that much of the evidence led by the State was made common cause by the accused through formal admissions made in terms of s 220 of the CPA. He submitted it was common cause that on 17 July 2018, at or about 14h05, the accused was in the company of M[....] and they were last seen exiting the KFC outlet on the corner of Randles and Dr R Naidu Road in Sydenham;
- (b) the accused left the Sydenham area on the afternoon of 17 July 2018 and proceeded to Phoenix. The decomposing body of M[....] was found on 3 September 2018 in a bushy area on Longbury Drive, Phoenix, approximately 300 metres away from the accused's home; and
- (c) the cause of death was undetermined due to the advanced state of decomposition of the body, but strangulation could not be excluded.

[409] Mr *Naidoo*, levelled criticism in considering the evidence of certain of the State witnesses, namely T[....], R[....] and Constable Mohammed.

[410] In relation to T[....], he submitted that given the nature of the discrepancies between his evidence in chief and that contained in the statement which he deposed to, before the police on 18 July 2018, his evidence was unreliable and differed in sharp contrast to the evidence of R[....]. T[....] is a single witness and a child witness and consequently, the cautionary rule must apply to his evidence. He submitted that given the social media hype and public interest surrounding the disappearance of M[....], one could not rule out the possibility that T[....] was influenced by the suggestions and proddings of adults to embellish his account of what he thinks happened. In addition, he submitted that T[....] was coaxed into making the report by R[....].

[411] He further submitted that the objective facts are at odds with his evidence in two important respects, namely:

- (a) that T[...] 's evidence that the accused was at the school at 14h30 is at odds with the objective real evidence, being the KFC CCTV footage showing the accused and M[...] at the KFC at 14h06; and
- (b) the glaring difference between his evidence and that of R[...] that T[...] reported to her that he saw the accused and the deceased leave the school hand in hand.

[412] Mr *Naidoo* submitted that T[...] 's evidence must be rejected as it is unreliable, specifically insofar as it relates to the State's submission that the accused harboured a premeditated intention to kidnap and kill M[...] and also that it was unreliable in relation to the accused having been at the school.

[413] In relation to R[...] , she was not a good witness, was evasive and had a habit of claiming a loss of memory when she was faced with difficult questions under cross-examination. Within hours of M[...] 's disappearance, she had pointed out and blamed the accused as the person responsible for M[...] 's disappearance.

[414] In addition, she embarked on a social media campaign implicating the accused, both in her telephonic and multimedia communications and identified the accused as the perpetrator. This resulted in a campaign directed solely at the accused, specifically the police investigation by Constable Mohammed.

[415] He further submitted that given the nature of her answers, which emanated during cross-examination, she was a wholly unreliable witness and did not provide any direct evidence in relation to the accused's involvement in the three counts, except that she deliberately set out to paint the accused as an obsessive lover who could not accept that she had rejected his advances.

[416] In relation to Constable Mohammed, who effected the arrest on the accused, Mr *Naidoo* submitted that he was an overzealous witness who embellished his evidence to support his personal belief that the accused was the perpetrator. In addition, he submitted that he conducted an interview and questioned the accused without giving proper consideration to his constitutional rights. He persisted with this submission despite the interlocutory ruling issued by the court.

[417] With regard to M[....] , he submitted that she was the only witness, which in his view, testified in an honest and forthright manner.

[418] As regards the evidence of the forensic entomologist, he submitted that she estimated the time of death to be between 25-27 July 2018. In relation to the putrefactive fluids found on the ground and coupled with the fact that the early arrival insects only started the infestation at a much later stage of decomposition of the body, it was indicative that the body was not exposed to the elements and insect infestation for some time. This was highly suggestive that the body was not at the location it was found and secondly that the body probably only arrived at the location where it was found around 27-30 August 2018, based on her entomological observations and studies.

[419] He submitted that the significance of these findings were that the accused was in custody from 20 July 2018 up to and including 21 September 2018. More importantly, it is indicative of the fact that the body was not in this location from 25 July-27 August 2018. It raises the possibility that someone else disposed of the body at the location at which it was found.

[420] In relation to the real evidence, Mr *Naidoo* submitted that:

- (a) the CCTV video footage from the KFC outlet shows the accused and M[....] sitting congenially in the KFC ordering food and thereafter leaving together;
- (b) there is no indication from the footage that M[....] was accosted or forced or under any distress at the time, nor was there any indication from the CCTV footage that M[....] was being held against his will;
- (c) in relation to the CCTV footage from [....] , this clearly shows the accused and M[....] enter the KFC outlet and leave. It does not show any evidence that the accused and M[....] boarded a taxi or any other vehicle in the afternoon in question;
- (d) there was no positive identification of the persons in the CCTV footage as being M[....] and the accused;

- (e) he submitted that at best for the State, all the video footage reveals is that the accused was in the company of M[....] from 14h06 to 14h16; and
- (f) in addition, there is a period of 44 minutes from the time the video footage ends at 14h16 until approximately 15h00, when M[....] raises the alarm regarding M[....] not having returned home from school.

[421] There was no evidence to show or suggest that M[....] was in the company of the accused after 14h16 on 17 July 2018 or at any time between 17 July 2018 and 20 July 2018. In addition, given that the entomologist places the estimated time of death between 25 and 27 July 2018, this is a week after the accused's arrest. Consequently, he submitted that there is no evidence, *prima facie* or otherwise, to place the accused on his defence.

[422] In relation to the three counts, although it is evident that the accused was the last person to see M[....], there is nothing that the court can infer from that, that the accused kidnapped him and subsequently killed him. The proven facts fall short of proving that the only inference to be drawn is that it was the accused who kidnapped and killed the deceased, given the fact that the accused was in custody at the estimated time of M[....]'s death.

[423] In relation to the individual counts, Mr *Naidoo* submits the following:

- (a) on the count of kidnapping, the State has not adduced any evidence to show that the accused unlawfully and intentionally took M[....] into his custody;
- (b) that in so doing, he deprived M[....] of his freedom of movement and deprived M[....]'s mother and father of their control over M[....];
- (c) in addition, there is nothing to indicate that the kidnapping of M[....] was planned and consequently that the murder of M[....] was planned or premeditated; and
- (d) the State had failed to prove the elements of the crime of kidnapping and in the absence of any evidence directly linking the accused to the death of M[....], a conviction on the count of murder and kidnapping cannot be justified.

[424] In relation to the count of theft, Mr *Naidoo* submitted that the accused had access to the home and indicated that he found the documents outside whilst working in the yard. There is nothing to gainsay this version as proffered by the accused and consequently, no conviction on the count of theft can be sustained.

[425] In relation to the murder count, Mr *Naidoo* submits that an enigma in this matter is Michael L[....] , M[....] 's uncle. He submits that on the accused's version, Michael was at the home earlier on that day and also disappeared almost simultaneously in the time that M[....] disappeared. He did not come and assist the family to locate M[....] and could not be found subsequent to M[....] 's disappearance.

[426] As the State attributed the motive of the accused to being a vengeful, scorned lover, the same motive can also be attributed to Mike. He submitted that it was extremely suspicious that as M[....] 's uncle, Mike would not get involved in the search for M[....] or keep in contact with R[....] in relation to the progress of the search for M[....] . He submitted that the proven facts do not exclude an inference that Mike may have had a hand in the disappearance and death of M[....] , given his suspicious conduct.

[427] All the court must bear in mind is that the accused is not required to prove his innocence and any alternative hypothesis which creates reasonable doubt, is sufficient to warrant his acquittal.

[428] He further submits that in respect of the murder count, if the count of kidnapping is unsustainable, then the only evidence that remotely relates to the accused is the location of where M[....] 's body was found, being approximately 300 metres away from the accused's home. He submits that there is evidence which created doubt and render other inferences more probable, namely:

- (a) Captain Pienaar's finding that the approximate time of death was between 25 and 27 July 2018, a time in which the accused was in custody;
- (b) the entomologist's evidence which supports the proposition that the body was placed in the location around 27 August 2018, when the accused was in custody;

- (c) the area around the location where M[....] 's body was found was easily accessible to a motor vehicle, up to the entrance of the bush and one cannot rule out the possibility of someone else having placed the body there, at the end of August 2018, whilst the accused was in custody;
- (d) in addition, as suspicion had already been cast on the accused, the placing of the body of M[....] close to his home would draw attention to the accused and away from the real perpetrator; and
- (e) the coincidence of R[....] making a surreptitious visit to the Westville Prison on the morning the body is found, with an intention to pay the accused's bail and have him released is highly suspicious when one considers the fact that M[....] 's grandmother and his father, K[....] , visited the home of the accused a few hours before M[....] 's body was located.

[429] Given all these factors, Mr *Naidoo* submits that there is no prima facie evidence in respect of all three counts and there is not a shred of direct evidence pointing to the accused's intention to kill or the actual act of bringing about the death of M[....] . The only evidence remotely linking the accused to M[....] 's death is the fact that he was in his company from 14h06 to 14h16, coupled with the fact that M[....] 's body was found in the vicinity of his home.

[430] All in all, Mr *Naidoo* submits that as the State relies solely on circumstantial evidence to prove the guilt of the accused beyond a reasonable doubt, and as the law requires that the inferences sought to be drawn must be based on the proven facts and must be the only reasonable inference to be drawn, the evidence falls wholly short of this. There are other reasonable inferences which can be drawn from these facts.

[431] Consequently, he submits that there is no "evidence" within the meaning of s 174, on which a reasonable person might convict the accused. In addition, the State's evidence falls short of proving any elements of either of the three counts, even on a prima facie level. To put the accused on his defence, in these

circumstances, would violate his constitutional right to a fair trial and will fall foul of the very harm which the court spoke about and referred to in *S v Lubaxa*.⁴⁸

[432] In the current matter, the question that the court must ask, at this juncture, is the following: what exactly does the accused have to answer to? There is no direct allegation or evidence pointing to him having killed M[....] , there is no evidence that M[....] was seen in or around the Phoenix area alive, there is no direct evidence or otherwise as to precisely when M[....] met with his death, there is no direct evidence or otherwise of how M[....] 's body was placed in the bushes and when it was placed there and there is no direct evidence of where he was killed or how he was killed.

[433] Given these, to place the accused on his defence, and refuse the application for a discharge, would be do so in circumstances where he may incriminate himself or supplement the State's case in violation of his constitutional right to silence and in violation of the principles as set out in *S v Lubaxa* and *S v Boesak*.⁴⁹

[434] Although there is a strong suspicion around the accused's alleged involvement in the crimes, this is not sufficient to put the accused on his defence.

[435] Mr *Singh*, on the other hand, submits that there is a prima facie case against the accused:

- (a) despite the submissions of Mr *Naidoo*, the credibility of the State witnesses plays a very limited role at this stage of the proceedings. The evidence of these witnesses against whom criticism was levelled was not 'of such poor quality that no reasonable person could possibly accept it';⁵⁰
- (b) the real evidence being the CCTV video footage of M[....] and the accused at the KFC as well as the CCTV footage of [....] of M[....] and the accused close to the rear of the taxi;

⁴⁸ *S v Lubaxa* 2001 (2) SACR 703 (SCA).

⁴⁹ *S v Boesak* 2001 (1) SACR 1 (CC).

⁵⁰ *S v Mpetha & others* 1983 (4) SA 262 (C) at 265E; *S v Agliotti* 2011 (2) SACR 437 (GSJ) para 282; *S v Masondo: In Re S v Mthembu & others* 2011 (2) SACR 286 (GSJ) para 32; and *S v Dewani* (CC15/2014) [2014] ZAWCHC 188 (8 December 2014) para 13.

- (c) the medical evidence being the evidence of the pathologist Dr Prahladh estimating the time of death to be in excess of four weeks, coupled with the evidence of Captain Pienaar, which recorded the PMI minimum interval as being between 27 to 30 August 2018 and the PMI maximum interval to be between 25 to 27 July 2018;
- (d) the WhatsApp message exchanges between the accused, R[....] and M[....] on 17 and 18 July 2018;
- (e) the cell phone evidence, specifically that in relation to the evidence emanating from the cell phone towers and the fact that it details the accused's movements in and around the surrounds of Phoenix. His path of travel from the cellular records, shows that at the estimated time M[....] passed away, the deceased's cell phone was in the aforesaid coverage area;
- (f) R[....] 's identity document and birth certificates were found on the accused at the time of his arrest. R[....] 's evidence was that they were kept in a safe place and not given to the accused.

[436] These factors combined, demonstrated that the State had established a prima facie case against the accused. Consequently, Mr *Singh* submitted that the court should refuse the application for a discharge in terms of s 174.

[437] After considering the oral and written submissions of the parties and the evidence presented at that stage of the proceedings, I refused the application for a discharge of the accused on all three counts. In doing so I was mindful of the case authorities.

[438] These are my reasons. At the end of the State's case, the following evidence had been presented:

- (a) the CCTV footage from the KFC outlet, as well as [....] , placed M[....] with the accused, after school;
- (b) Rhyman identified the accused as well as M[....] as leaving the KFC outlet in the opposite direction of his home and crossing the road close to his path of travel;

- (c) at the time the accused is holding M[....] 's hand;
- (d) M[....] identified the accused and M[....] at the rear of the taxi, on the side of the road opposite the KFC outlet and M[....] 's home. At the time, M[....] has his school bag on his shoulders;
- (e) the path of travel which that taxi normally takes to go to the CBD, is to turn left at the intersection and proceed along Randles Road towards the CBD;
- (f) the accused was the last person in the company of M[....] ;
- (g) he did not have permission from R[....] to fetch M[....] from school or take him to the KFC outlet;
- (h) the cell phone evidence, specifically the WhatsApp exchanges, indicate that although the accused was the last person in M[....] 's company when questioned about this and when he was informed that M[....] had not arrived home from school, did not disclose this to the family, nor did he disclose that he had taken M[....] for a meal to the KFC;
- (i) on the evening of 17 July 2018, the accused's movements, as supported by the cell phone evidence (Exhibits 'N', 'O' and 'P') placed the accused in the vicinity of the area where M[....] 's body was subsequently located, but more specifically in the Phoenix area;
- (j) the medical evidence places the approximate time of death of M[....] to be in excess of four weeks, as is evident from the report of the pathologist, Dr Prahladh;
- (k) the evidence of Captain Pienaar also places the PMI minimum and PMI maximum intervals as between July and August 2018;
- (l) the body of M[....] was found on 3 September 2018, in close proximity to the home of the accused, but more importantly, the body is in close proximity to Longcroft Tower 2, which is the area where the accused's cell phone pinged on the evening of 17 July 2018; and

- (m) Constable Mohammed confirmed that at the time he arrested the accused on 20 July 2018, he found the identity document of R[...] , as well as the two birth certificates of M[...] and M[...] in the accused's back pants pocket.

[439] If one then considers count 1, being the theft count, at this stage of the proceedings, the State has led the following evidence against the accused:

- (a) R[...] testified that the identity document and birth certificates were placed in a black hard cover book in her underwear drawer in her bedroom. When she returned from the CCMA her identity document was put in her black, beige and white handbag which she kept in the drawer in her bedroom wardrobe cupboard;
- (b) the KFC CCTV footage depicts the accused standing in the KFC speaking to M[...] and removing an item from his back pants pocket;
- (c) at the time of his arrest, Constable Mohammed found the identity document and two birth certificates in the accused's back pants pocket;
- (d) he informed Mohamed that R[...] had given these to him; and
- (e) in his interactions with R[...] and M[...] on 17 July 2018 he did not inform them that he had found these documents and had them in his possession.

[440] Warrant Officer Govender testified that during the course of his investigations, he discovered that Mrs Omardien, M[...] 's grandmother, had locked the house in the morning and that she had left and placed the key under the mat. The accused would have observed this and there is no reason or plausible explanation as to why, on his version, he did not take those documents and place them in the house, if he indeed found them in the yard where he was working. In addition, his evidence of finding the documents outside in the yard whilst he was working, is in stark contrast to the evidence of R[...] , that the documents were in a safe place.

[441] In respect of count 2, the kidnapping count, there is R[...] 's evidence to the effect that she did not give the accused permission to fetch M[...] from school. In fact, the accused acknowledged that he had never fetched M[...] from school before. In addition, one had the evidence of Rhyman, placing M[...] in the accused's company, the accused holding M[...] 's hand and taking him across the road towards

the taxi. This, once again, is in stark contrast to the accused's exculpatory statements that he did not take M[....] with him to the taxi, that M[....] followed him and he told him to leave, contrasted with his initial statement to Warrant Officer Zondo, that he left him at the driveway of his home and boarded the taxi. Although the CCTV footage does not indicate any coercion or fear on M[....] 's part, R[....] 's evidence is clear that the accused did not have permission to fetch M[....] from school and we know, as a proven fact, M[....] did not return home after school.

[442] In respect of count 3, the murder count, the State alleges that the accused had made up his mind to exact revenge on R[....] and planned to kidnap and kill M[....] . This was after the two arguments which took place, the last one on the weekend prior to 17 July 2018, the day on which M[....] went missing. It is not in dispute that the accused and R[....] argued and on the morning of 17 July 2018, were not speaking to each other. In addition, it is also clear from R[....] 's evidence that she and the accused had argued on the Sunday over his jealousy and that he had told her that he will 'show her'. This was the second occasion that this was said to her.

[443] On the evening of 16 July 2018, the accused questioned M[....] regarding what time she and M[....] finished school. He was aware that he did not have permission to fetch M[....] from school. The KFC CCTV footage shows him in M[....] 's company, in the KFC and also leaving the KFC holding M[....] 's hand. He was the last person to see M[....] on the afternoon of his disappearance.

[444] At no stage when he was contacted concerning M[....] 's whereabouts did he inform R[....] or M[....] that he was with M[....] that afternoon and had taken him for a meal to the KFC.

[445] M[....] 's body was found in close proximity to the accused's home, more importantly, the coverage of the cell phone towers in the Longcroft area and in the Phoenix area and surrounds clearly place him within the vicinity of where M[....] 's body was located. In addition, the medical evidence being the evidence of Dr Prahladh and Captain Pienaar in relation to the approximate time of death is suggestive that M[....] was in Phoenix, in the custody of the accused at the time he was murdered.

[446] From the above, it must follow that there was a prima facie case against the accused and that there was evidence upon which a reasonable court may convict the accused. In addition, I agreed with the submission of Mr *Singh* that although criticism can be levelled against the evidence of the state witnesses their evidence was not of “such a poor quality” which constituted grounds for the granting of the s 174 application.

[447] The evidence of T[...] , although it differed with that contained in his statement, can be accounted for by the fact that he is Zulu-speaking and his statement was taken down by an English-speaking person. Given the circumstances under which he provided his statement, this too likewise could account for the discrepancies. In addition, having regard to the decision of *S v Mafaladiso*⁵¹, *S v Bruiners*⁵² and *S v Govender*,⁵³ our courts have held that such contradictions and omissions in statements are likely to occur as statements are not intended to be a word for word account of what a witness would testify to in court, but rather a summary of what had transpired for the purposes of and in anticipation of a prosecution and / or police investigation.

[448] In relation to the scientific evidence presented, there was no issue taken that the scientific measure of proof being the time period of the death of M[...] , required for the court to consider, had not been placed in dispute. In addition, the courts must, when considering scientific evidence and inferential reasoning, draw a distinction between the scientific measure of proof as opposed to the judicial measure of proof. The judicial measure of proof refers to the probabilities which is what a court must have regard to.⁵⁴

Conclusion

[449] In light of the foregoing and the test to be applied, as well as the use of the word ‘may’ in s 174 of the CPA, having carefully considered the arguments by both the State and the defence, the application for the discharge of the accused at the

⁵¹ *S v Mafaladiso en andere* 2003 (1) SACR 583 (SCA).

⁵² *S v Bruiners en Ander* 1998 (2) SACR 432 (SE)

⁵³ *S v Govender* 2006 (1) SACR 322 (E).

⁵⁴ *S v Maqubela* 2017 (2) SACR 690 (SCA).

end of the State's case was accordingly refused. At the close of the State's case there was a compelling prima facie case against the accused.

[450] Mr *Naidoo* then advised the court that the accused had elected not to testify or call any witnesses. I confirmed with the accused that those were his instructions and that he appreciated the possible consequences of electing to remain silent which is his constitutional right. The accused confirmed this and Mr *Naidoo* closed his case.

[451] The State and defence presented written and oral submissions in relation to the merits of a conviction and acquittal the matter for which I again record my appreciation. As these are a matter of record, I do not propose to repeat them for purposes of the judgment.

[452] Given the duration of the trial, and the nature of the legal issues and evidence, it is a mammoth task trying to draft a judgment which not only has a logical sequence, but is also short. In light of the industry, well researched and extensive written and oral submissions I was provided with, the task has been made somewhat easier and I will refer extensively to and borrow freely from these documents provided by counsel. This must in no way be seen to detract from the industry displayed by the legal representatives in the matter, but it does not serve any purpose to reinvent the wheel, so to speak.

Discussion of the relevant legal principles

Test in a criminal matter

[453] At this juncture it is perhaps necessary to remind oneself of the onus in a criminal trial and the legal principles involved. It is trite that the State bears the onus of proving the guilt of the accused beyond a reasonable doubt.

[454] It has often been argued that what is meant by proof beyond a reasonable doubt is proof beyond all reasonable doubt. The State, so the argument goes, is required to eliminate every avenue which is inconsistent with the accused's guilt or which is consistent with his innocence. However, our courts have indicated that this is not the true test and have rejected this approach time and time again as this would, inter alia, place the onus too high and would lead to defeating the purposes of the criminal justice system.

[455] This was referred to in *S v Glegg*⁵⁵ in the headnote as follows:

'The phrase "reasonable doubt" in the phrase "proof beyond reasonable doubt" cannot be precisely defined, but it can well be said that it is a doubt which exists because of probabilities or possibilities which can be regarded as reasonable on the ground of generally accepted human knowledge and experience. Proof beyond reasonable doubt cannot be put on the same level as proof beyond the slightest doubt, because the *onus* of adducing proof as high as that would in practice lead to defeating the ends of criminal justice.'

[456] The test was formulated by Malan JA in the decision of *R v Mlambo* as follows:⁵⁶

'In my opinion, there is no obligation upon the Crown to close every avenue of escape which may be said to be open to an accused. It is sufficient for the Crown to produce evidence by means of which such a high degree of probability is raised that the ordinary reasonable man, after mature consideration, comes to the conclusion that there exists no reasonable doubt that an accused has committed the crime charged. He must, in other words, be morally certain of the guilt of the accused. An accused's claim to the benefit of a doubt when it may be said to exist must not be derived from speculation but must rest upon a reasonable and solid foundation created either by positive evidence or gathered from reasonable inferences which are not in conflict with, or outweighed by, the proved facts of the case.'

[457] This approach, as decided in *R v Mlambo* has held to be consistent with the approach of the English courts as pronounced by Denning J in the decision of *Miller v Minister of Pensions*⁵⁷ where the following is said:

'...the evidence must reach the same degree of cogency as is required in a criminal case before an accused person is found guilty. That degree is well settled. It need not reach certainty but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence "of course it is possible, but not in the least probable," the case is proved beyond reasonable doubt, but nothing short of that will suffice.'

[458] Consequently, our courts have acknowledged that there is no obligation on the State to close every avenue of escape open to an accused. See *S v Phallo & others*.⁵⁸

⁵⁵ *S v Glegg* 1973 (1) SA 34 (A) at 34.

⁵⁶ *R v Mlambo* 1957 (4) SA 727 (A) at 738A-C.

⁵⁷ *Miller v Minister of Pensions* [1947] 2 All ER 372 at 373H.

[459] There is no onus on the accused. An accused is entitled to be acquitted if it is reasonably possible that he may be innocent. See *S v Van der Meyden*;⁵⁹ *S v Shackell*.⁶⁰

[460] When considering the evidence to determine whether the State has discharged the onus of proof, it is trite that the evidence must be considered in totality and not in a piece-meal fashion. In *S v Chabalala*⁶¹ Heher AJA referring to *S v Van Aswegen*⁶² held the following:

‘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.’

[461] As the State relies on circumstantial evidence to obtain a conviction against the accused, I propose to briefly deal with the legal principles which have emanated from the various decisions when dealing with circumstantial evidence.

Circumstantial evidence

[462] In respect of circumstantial evidence the *locus classicus* is the decision of *R v Blom*.⁶³ Watermeyer JA held the following at 202-203:

- ‘(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 to be drawn. If they did not exclude other reasonable inferences, then there must be a doubt whether the inference sought to be drawn is correct.’

⁵⁸ See *S v Phallo & others* 1999 (2) SACR 558 (SCA) paras 10-11.

⁵⁹ *S v Van der Meyden* 1999 (1) SACR 447 (W) at 449B-D.

⁶⁰ *S v Shackell* 2001 (2) SACR 185 (SCA) para 30 Brand AJA said the following:

‘...It is a trite principle that in criminal proceedings the prosecution must prove its case beyond reasonable doubt and that a mere preponderance of the probabilities is not enough. Equally trite is the observation that, in view of this standard of proof in a criminal case, a court does not have to be convinced that every detail of an accused’s version is true. If the accused’s version is reasonably possibly true in substance the court must decide the matter on the acceptance of that version. Of course it is permissible to test the accused’s version against the inherent probabilities. But it cannot be rejected merely because it is improbable; it can only be rejected on the basis of inherent improbabilities if it can be said to be so improbable that it cannot reasonably possibly be true.’

⁶¹ *S v Chabalala* 2003 (1) SACR 134 (SCA) para 15.

⁶² *S v Van Aswegen* 2001 (2) SACR 97 (SCA).

⁶³ *R v Blom* 1939 AD 188.

[463] As the burden of proof rests on the State, a fact in issue can be proved by circumstantial evidence alone, provided that the inference which the State pleaded is consistent with all the proved facts and no other reasonable inference can be drawn from those facts.

[464] Circumstantial evidence, can also however, sometimes be more compelling than direct evidence.⁶⁴ The court in *S v Musingadi & others*⁶⁵ quoted its approval of a passage from the authors Zeffertt, Paizes and Skeen *The South African Law of Evidence* at 94 which stated the following:

‘. . .circumstantial evidence may be the more convincing form of evidence. Circumstantial identification by a fingerprint will, for instance, tend to be more reliable than the direct evidence of the witness who identifies the accused as the person he or she saw. But obviously there are cases in which the inference will be less compelling and direct evidence more trustworthy. It is therefore impossible to lay down any general rule in this regard. All one can do is to keep in mind the different sources of potential error that are presented by the two forms of evidence and attempt, as far as this is possible, to evaluate and guard the dangers they raise.’

[465] In coming to a decision as to whether proof beyond a reasonable doubt has been established by circumstantial evidence, a court is enjoined to consider the cumulative effect of all the evidence – it must not look at evidence implicating the accused in isolation to determine whether there is proof beyond reasonable doubt, nor should it look at exculpatory evidence in isolation to determine whether an accused’s version is reasonably possibly true. The correct approach is to consider all the evidence in the light of the totality of the evidence in the case.⁶⁶ In doing so, the test is not whether each proved fact must exclude other inferences but the facts as a whole.

[466] The authors, Schwikkard and Van der Merwe⁶⁷ in *Principles of Evidence* say the following in this regard:

‘In *Rex v Blom* it was said that in reasoning by inference in a criminal case there are two cardinal rules of logic which cannot be ignored. The *first* rule is that the inference sought to

⁶⁴ *S v Musingadi & others* 2005 (1) SACR 395 (SCA) para 20.

⁶⁵ *Ibid.*

⁶⁶ *R v Hlongwane* 1959 (3) SA 337 (A) at 341A-B.

⁶⁷ P J Schwikkard and S E Van der Merwe *Principles of Evidence* 4 ed (2016) at 578 and 579.

be drawn must be consistent with all the proved facts: if it is not, the inference cannot be drawn. The *second* rule is that the proved facts should be such that they exclude every reasonable inference from them save the one sought to be drawn: if these proved facts do not exclude all other reasonable inferences, then there must be a doubt whether the inference sought to be drawn is correct. This second rule takes account of the fact that in a criminal case the state should furnish proof beyond a reasonable doubt.’ (Footnotes omitted.)

[467] In *R v De Villiers*,⁶⁸ Davis AJA pointed out that the test was not whether each proved fact excluded all other inferences, but whether the facts as a whole did so. At 508 to 509 the court held the following:

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

[468] In assessing the cogency of the circumstantial evidence, Zulman AJA in *S v Reddy & others*⁶⁹ said the following:

‘In assessing circumstantial evidence one needs to be careful not to approach such evidence upon a piece-meal basis and to subject each individual piece of evidence to a consideration of whether it excludes the reasonable possibility that the explanation given by an accused is true. The evidence needs to be considered in its totality. It is only then that one can apply the oft-quoted *dictum* in *R v Blom* 1939 AD 188 at 202- 3, where reference is made to two cardinal rules of logic which cannot be ignored. These are, firstly, that the inference sought to be drawn must be consistent with all the proved facts and, secondly, the proved facts should be such “that they exclude every reasonable inference from them save the one sought to be drawn”.’

[469] In *S v Reddy*⁷⁰ the court quotes *Best on Evidence*, 10 ed 297 at 261 where it puts the matter as follows:

⁶⁸ *R v De Villiers* 1944 AD 493.

⁶⁹ *S v Reddy & others* 1996 (2) SACR 1 (A) at 8C-E.

“The elements, or links, which compose a chain of presumptive proof, are certain moral and physical coincidences, which individually indicate the principal fact; and the probative force of the whole depends on the *number, weight, independence, and consistency* of those elementary circumstances.

A number of circumstances, each individually very slight, may so tally with and confirm each other as to leave no room for doubt of the fact which they tend to establish . . . Not to speak of greater numbers, even two articles of circumstantial evidence, though each taken by itself weigh but as a feather, join them together, you will find them pressing on a delinquent with the weight of a mill-stone. . . Thus, on an indictment for uttering a bank-note, knowing it to be counterfeit, proof that the accused uttered a counterfeit note amounts to nothing or next to nothing; any person might innocently have a counterfeit note in his possession, and offer it in payment. But suppose further proof to be adduced that, shortly before the transaction in question, he had in another place, and to another person, offered in payment another counterfeit note of the same manufacture, the presumption of guilty knowledge becomes strong. . .”

[470] The court⁷¹ quoted further from Lord Coleridge in *R v Dickman* - referred to in *Wills on Circumstantial Evidence* 7 ed at 46 and 452-60, where the following observations concerning the proper approach to circumstantial evidence was made:

“It is perfectly true that this is a case of circumstantial evidence and circumstantial evidence alone. Now circumstantial evidence varies infinitely in its strength in proportion to the character, the variety, the cogency, the independence, one of another, of the circumstances. I think one might describe it as a network of facts cast around the accused man. That network may be a mere gossamer thread, as light and as unsubstantial as the air itself. It may vanish at a touch. It may be that, strong as it is in part, it leaves great gaps and rents through which the accused is entitled to pass in safety. It may be so close, so stringent, so coherent in its texture, that no efforts on the part of the accused can break through. It may come to nothing – on the other hand it may be absolutely convincing. . . The law does not demand that you should act upon certainties alone. . . In our lives, in our acts, in our thoughts we do not deal with certainties; we ought to act upon just and reasonable convictions founded upon just and reasonable grounds. . . The law asks for no more and the law demands no less.”

⁷⁰ Ibid at 8G-9A.

⁷¹ *S v Reddy* at 9B-E.

[471] In *Shange & others v S*⁷² the full court of this division echoed these sentiments and referred to the extract from *S v Musingadi* with approval. At para 10 of the judgment the court held further:

‘...A court is always enjoined to examine all the evidence; it must neither look at evidence implicating the accused in isolation to determine whether there is a proof beyond reasonable doubt, nor should it look at exculpatory evidence in isolation to determine whether an accused’s version is reasonably possibly true. The correct approach is to consider all the evidence “in the light of the totality of the evidence of the case”.’

[472] In *S v Shaw*⁷³ the court had regard to circumstantial evidence and at para 106 of the judgment held the following:

‘Circumstantial evidence is any fact from which a fact in dispute may be inferred. Such facts have to be proved by direct evidence. Conclusions drawn from evidence not proven or admitted are speculation not inference. The challenge is to draw the most reasonable inferences from the proven facts to establish the guilt of the appellant beyond reasonable doubt, without overlooking the possibility of other equally probable or reasonably possible inferences.’ (Footnotes omitted.)

[473] Further at para 109 the court held the following:

‘...In a murder case in which the state has not established the cause of death and the guilt of the appellant rested on circumstantial evidence, the majority in the erstwhile Appellate Division held that other indications of an intent to kill had to be very strong if they are to make up for serious deficiency and leave no reasonable doubt. Inferences cannot be drawn from conjecture or speculation’. (Footnote omitted.)

[474] Further in para 110 in referring to *R v De Villiers*⁷⁴ the court held the following:

‘... a court should not consider each circumstance in isolation and draw inferences from each single circumstance. The onus on the state is not to prove that each separate item of evidence is inconsistent with the innocence of the accused, but that taken as a whole, the evidence is beyond reasonable doubt inconsistent with such innocence’. (Footnote omitted.)

[475] In *Kubayi v S*⁷⁵ a judgment of Pretorius J delivered on 15/12/2015 in the Gauteng Division, Pretoria the court was seized with an appeal against the

⁷² *Shange & others v S* [2017] 3 All SA 289 (KZP).

⁷³ *S v Shaw* [2011] ZAKZPHC 32; AR342/10 (1 August 2011).

⁷⁴ *R v De Villiers* 1944 AD 493 at 508-9.

conviction of murder and kidnapping by the appellant. The evidence in relation to the kidnapping count was that of a relative of the deceased who observed that the appellant 'dragged the deceased to go with him'. The appellant was convicted of kidnapping as a consequence of the fact that he took the deceased away against her will. That evidence in itself did not prove that the appellant murdered the deceased.

[476] The post-mortem findings on the body of the deceased were 'undetermined due to decomposition'. This is a similar position that prevails in this particular matter. Apart from circumstantial evidence the State relied on evidence of a pointing out and a confession by the appellant. The evidence was entirely circumstantial as the deceased had been taken away from her home in May of 2009 and her decomposed body was found in a veld in July 2009. The court considered the circumstantial evidence but also the evidence of the State presented at the trial within a trial and convicted the appellant based on circumstantial evidence and the pointing out which he had made.

[477] In considering the circumstantial evidence the state relied on the decision in *R v Mthembu*.⁷⁶

'Circumstantial evidence, of course, rests ultimately on direct evidence and there must be a foundation of proved or probable fact from which to work. But the border-line between proof and probability is largely a matter of degree, as the line between proof by a balance of probabilities and proof beyond reasonable doubt. Just as a number of lines of interference, none of them in itself decisive, nor in their total effect lead to a moral certainty (*Rex v De Villiers* (1944 AD 493 at p. 508) so, it may fairly be reasoned, a number of probabilities as to the existence of facts from which inferences are to be drawn may suffice, provided in the result there is no reasonable doubt as to the accused's guilt.'

[478] In *R v Sibanda & others*⁷⁷ Beadle CJ dealt with circumstantial evidence as follows:

'...The degree of certainty with which the individual facts must be proved in criminal cases must always depend on the probative value of the individual facts themselves. Generally speaking, when a large number of facts, taken together, point to the guilt of an accused, it is

⁷⁵ *Kubayi v S* (A829/2014) [2015] ZAGPPHC 985 (15 December 2015).

⁷⁶ *R v Mthembu* 1950 (1) SA 670 (A) at 680.

⁷⁷ *R v Sibanda & others* 1965 (4) SA 241 (SRA) at 246A-C.

not necessary that each fact should be taken in isolation and its existence proved beyond a reasonable doubt; it is sufficient if there are reasonable grounds for taking these facts into consideration and all the facts, taken together, prove the guilt of an accused beyond reasonable doubt.'

[479] In *S v Cooper & others*⁷⁸ the court considered the circumstantial evidence and the inferences to be drawn. The headnote reads as follows:

'When triers of fact come to deal with circumstantial evidence and inferences to be drawn therefrom, they must be careful to distinguish between inference or speculation. There can be no inference unless there are objective facts from which to infer the other facts for which it is sought to establish. The rules of logic referred to in *R v Blom*, 1939 AD188, are to be applied by the triers of fact in respect of *proved facts* at the end of the trial, in order to see whether the guilt has been proved beyond a reasonable doubt and there is generally speaking no scope for the application by the Judge at the close of the case for the prosecution. At that stage the facts are not yet proved and he only has to determine whether a reasonable man might convict, not should convict. Indeed if there is more than one inference possible from the facts that are seen to be uncontradicted at the close of the case of the prosecution, then it is just the sort of evidence that should be referred to the triers of fact for decision.

[480] In the judgment Boshoff J⁷⁹ held the following:

'...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. [references omitted] The dividing line between conjecture and inference is often a very difficult one to draw, but is just the same as the line between some evidence and no evidence. One often gets cases where the facts proved in evidence – the primary facts - are such that the tribunal of fact can legitimately draw from them an inference one way or the other, or, equally legitimately refuse to draw any inference at all. But that does not mean that when it does draw an inference it is making a guess. It is only making a guess if it draws an inference which cannot legitimately be drawn; that is to say, if it is an inference which no reasonable man could draw.'

⁷⁸ *S v Cooper & others* 1976 (2) SA 875 (T) at 876G-H.

⁷⁹ *Ibid* at 889A-C.

The issues for determination

[481] The issues for determination then are whether or not the State had discharged the onus based on the circumstantial evidence beyond a reasonable doubt to show:

- (a) In respect of count 1, that the accused had taken R[....] 's identity document and the birth certificates of M[....] and M[....] with the intention to permanently deprive her of same;
- (b) In respect of count 2, that the accused had unlawfully and intentionally deprived M[....] of his freedom of movement so as to permanently deprive R[....] and K[....] of their custody of him;
- (c) In respect of count 3, that the accused unlawfully and intentionally killed M[....] and that such murder was planned and or premeditated.

[482] The State's case is based on circumstantial evidence and circumstantial evidence alone. In fact, at the commencement of the trial Mr *Singh* for the State indicated that this case was unique in that there was no direct evidence in relation to the commission of any of the offences specifically that in respect of the murder count and neither was there a murder weapon.

[483] I now turn to analyse the evidence of the witnesses in the light of the applicable legal principles to determine whether the State has discharged the onus, taking into account the submissions of the State and the defence.

[484] In respect of all the counts in the indictment it is important to view the entire mosaic of the evidence and not to view the evidence in respect of each count in isolation.

Analysis of the evidence of the State witnesses

[485] It is perhaps appropriate at this stage to deal with my assessment of the State witnesses who testified.

[486] T[...] was a single, child witness to the events which allegedly occurred at the school gate on the afternoon of 17 July 2018. His evidence must thus be approached with the necessary caution. There is no requirement that the evidence of children must be corroborated but it is trite law that the evidence of a child witness must be approached with caution.⁸⁰

[487] The manner in which the evidence of young children must be approached has been thoroughly analysed in *Woji v Santam Insurance Company Ltd*.⁸¹ The court held that the reliability of the evidence must be assessed according to the child's powers of observation, ability to remember and ability to relate events. This applies to the assessment of all witnesses and not only children. The danger of believing a child when the child's evidence stands alone, must not be underestimated. There is no scientific formula which is applied. One is dealing with young people *albeit* immature people who are susceptible to suggestion and flights of fancy or who have short memories and attention spans and are perhaps still unaware or uncertain of the line separating fantasy and reality, but are people nonetheless.

[488] In *S v S*,⁸² Ebrahim AJ mentions six objections which are often raised against the evidence of children, namely that children's memories are unreliable, children are egocentric, highly suggestible, have difficulty distinguishing fact from fantasy, make false allegations particularly of sexual assault and do not understand the duty to tell the truth. Mindful of these warnings sounded in the various decisions, I have treated the evidence of T[...] with the utmost caution. However, I am of the view that on the proven facts, there is corroboration for his evidence.

[489] It is clear that shortly before his interview with the police on 18 July 2018 to provide his statement he had met with R[...] who showed him a photograph of the accused on her cell phone and he identified the accused to her as the person he had seen with M[...] on the afternoon of 17 July 2018.

⁸⁰ See in this regard *R v Manda* 1951 (3) SA 158 (A) at 163.

⁸¹ *Woji v Santam Insurance Company Ltd* 1981 (3) SA 102 (A) at 1028.

⁸² *S v S* 1995 (1) SACR 50 (ZS) at 54H-I.

[490] Under cross-examination he admitted that he was untruthful and that certain important aspects were left out of his statement when compared with his evidence in court. One such example was that he did not mention in his statement that the accused had offered R10 to S[....] if he called M[....] . More importantly when he testified he said that J[....] went to call M[....] from the classroom, yet his statement does not mention that at all and states that in fact when the 'man asked J[....] to call M[....] J[....] 's transport arrived' creating the impression that J[....] had left.

[491] The contradictions could not be adequately explained by him and cannot be regarded as minor or immaterial and goes to his credibility as a witness. Regrettably, I did not find T[....] to be an impressive witness and consequently I have to approach his evidence with caution and consider his evidence in relation to the evidence of other witnesses for corroboration, given the warnings of suggestibility as sounded in *S v S* and *Woji*.

[492] Of the lay witnesses, M[....] was by far the most impressive witnesses. In fact, *Mr Naidoo* described her as being the only credible witness for the State. She was objective, unbiased and gave a clear and precise account of what transpired in the days preceding M[....] 's disappearance and on the day of his disappearance. In her evidence with regard to the barrage of WhatsApp communications between herself and the accused, she admitted she sent these messages herself with information being relayed to her by others, including her mother R[....] .

[493] This evidence had a ring of truth to it and demonstrated a family in a state of panic and desperation in relation to the unexpected disappearance of M[....] and the efforts to find him. She did not try to paint the accused in a negative light and testified that he had been kind and good to them and was very fond of M[....] .

[494] R[....] did not impress me as a witness. She was determined to paint the accused in a bad light and I gained the impression she had at an early stage, in fact on the 17 July 2018 pinned the offences on the accused and would not consider any other possibilities. In addition, her interaction with T[....] possibly influenced the truthfulness of his evidence and I cannot exclude the possibility that both she and Mrs Vetter, her ex-sister-in-law influenced him and possibly coached him on what to say to the police.

[495] Although she was a mother in grief, her lapses in memory and her inability to recall the simplest of things like when she was married and when she divorced, and details of her relationship with Mike, did not impress me. I also gained the impression that she was not being entirely truthful in relation to her excessive use of alcohol and her use of drugs. In addition she is a single witness in relation to the theft count.

[496] An element of caution must apply to the evidence of a single witness. This follows on the provisions of s 208 of the CPA, which provide that an accused may be convicted of an offence on the single evidence of any competent witness. In *R v Mokoena*⁸³ the court indicated that in interpreting the provisions of the word 'competent' in the predecessor of s 208, that the section would only apply if the evidence of the single witness is clear and satisfactory in every material respect.

[497] In *R v Mokoena*⁸⁴ Fagan JA indicated that it was incorrect to assume that in interpreting the provisions of s 208, the evidence of a single credible witness is on the same level in terms of evidentiary value, as the evidence of more than one witness. Where there are more than two witnesses, each version must be corroborated against those of others. Corroborating elements can be found in the circumstances, in order to find that the evidence of such witness is credible.

[498] When considering the requirements, as determined in both the *Mokoena* cases, the Appellate Division, in *S v Webber*,⁸⁵ pointed out that the requirements in the 1932 decision should not automatically be applied as a formula. Although the 1932 *Mokoena* decision referred to 'an interest or bias adverse to the accused' or the fact that an accused contradicts himself, a trial court must nevertheless determine the severity of the prejudice and assess this in the light of all the evidence presented. R[...] clearly displayed bias against the accused, but as referred to in the authorities, the presence of such interest or bias does not necessarily cause the evidence of a single witness to be insufficient.

[499] The manner in which the evidence of a single witness must be assessed, was dealt with in *S v Sauls*,⁸⁶ as follows:

⁸³ *R v Mokoena* 1932 OPD 79.

⁸⁴ *R v Mokoena* 1956 (3) SA 81 (A).

⁸⁵ *S v Webber* 1971 (3) SA 745 (A).

⁸⁶ *S v Sauls* 1981 (3) SA 172 A at 180E-F.

'There is no rule of thumb test or formula to apply when it comes to a consideration of the credibility of the single witness... The trial Judge will weigh his evidence, will consider its merits and demerits and, having done so, will decide whether it is trustworthy and whether, despite the fact that there are shortcomings or defects or contradictions in the testimony, he is satisfied that the truth has been told.'

[500] Rhyman in my view was an honest witness. He acknowledged that the CCTV footage of the KFC and [...] assisted him in recalling the events of the afternoon of 17 July 2018 and jogged his memory and he had no independent recollection of the afternoon's events. In any event this did not detract from the veracity or probative value of his evidence as M[...] corroborated him that the persons depicted in the CCTV footage are the accused and M[...] . Despite the best efforts of Mr *Naidoo* to suggest that he was not there and did not observe the accused and M[...] , in my view he withstood vigorous cross-examination and emerged with his credibility intact.

[501] The arresting officer Constable Mohamed and his partner Constable Ngcobo, were also highly impressive witnesses and displayed excellent qualities as police officers determined to assist in locating the whereabouts of M[...] . I disagree with Mr *Naidoo*'s submission, that Mohamed took a personal interest in locating the accused. In my view he was merely trying to locate a missing child and realised that time was of the essence.

[502] I accept that he made two statements in the matter specifically in relation to his arrest of the accused. In my view no criticism can be levelled against him for this given the first Investigating Officer Captain Zondo having testified that he did not interview him nor did he see the need to do so. This was at the time when the charges being investigated related to the missing person's enquiry/kidnapping and theft.

[503] It was only once M[...] 's body had been recovered and the second Investigating Officer, Warrant officer Govender took over the investigation and it was now a murder investigation, that he deemed it prudent to obtain a second more detailed statement from Constable Mohamed in relation to his arrest and questioning of the accused. In any event nothing significant turns on this since the State and the defence were *ad idem* that at the time of the accused's arrest and questioning by

Mohamed whatever the accused said were extra-curial exculpatory statements and therefore admissible.

[504] Captain Zondo unfortunately was not an impressive witness and appeared to show very little or no interest in locating M[....] and locating the accused. One would have expected him to have conducted an extensive search in the vicinity of where the accused lived since the finger of guilt pointed in the direction of the accused on the very day M[....] went missing. He conducted no search for M[....] and had he done so the possibility cannot be excluded that M[....] 's body could have been found earlier. The handling of the case by Captain Zondo was very disappointing.

[505] On the other hand Warrant Officer Govender when he took over the investigations dealt with the matter with a high level of professionalism. He conducted a proper search and investigation to the extent that a week after M[....] 's body was found he went to look for M[....] 's shoes. He tried his best to find additional supporting witnesses especially at the primary school, but it appears people were reluctant to come forward and assist.

[506] Sergeant Chetty's evidence also cannot be criticised as his evidence related to the discovery of M[....] 's body. His evidence was corroborated by Warrant Officer Govender in relation to where M[....] 's body was found, being away from the already existing beaten path. In addition, that the body was not immediately visible and it was only with the assistance of his dog that he was able to locate the body.

[507] Dr Prahladh and Captain Pienaar were exemplary witnesses who impressed me favourably with their knowledge and expertise. In fact, the defence did not attempt to challenge or question their qualifications or experience. I have no hesitation in accepting their evidence which I found to be very compelling and persuasive. They were truthful, honest and objective witnesses and did not stray from their areas of expertise.

[508] Likewise the evidence of the cell phone experts was also compelling and persuasive. These were highly qualified professionals who presented the court with charts and diagrams in support of their findings relating to the text messages and movement of the accused's cell phone in the Phoenix and surrounding area. This

evidence was of great assistance to the court. Most notably their evidence was not challenged in any way by the defence and was not subjected to cross-examination, and accordingly I accept their evidence and findings.

The accused

[509] The accused elected to exercise his constitutional right not to testify nor call any witnesses in his defence. His election to remain silent and not testify is not without consequences, however. The consequences of a failure, by an accused to testify, and the constitutionally entrenched right to remain silent was dealt with in *S v Boesak*⁸⁷ where the court held the following:

‘The fact that an accused person is under no obligation to testify does not mean that there are no consequences attaching to a decision to remain silent during the trial. If there is evidence calling for an answer, and an accused person chooses to remain silent in the face of such evidence, a court may well be entitled to conclude that the evidence is sufficient in the absence of an explanation to prove the guilt of the accused. Whether such a conclusion is justified, will depend on the weight of the evidence. What is stated above is consistent with the remarks of Madlala J, writing for the court in *Osman and Another v Attorney-General Transvaal* when he said the following:

“Our legal system is an adversarial one. Once the prosecution has produced evidence sufficient to establish a *prima facie* case, an accused who fails to produce evidence to rebut that case is at risk. The failure to testify does not relieve the prosecution of its duty to prove guilt beyond reasonable doubt. An accused, however, always runs the risk that, absent any rebuttal, the prosecution’s case may be sufficient to prove the elements of the offence. The fact that an accused has to make such an election is not a breach of the right to silence. If the right to silence were to be so interpreted, it would destroy the fundamental nature of our adversarial system of criminal justice.”
(References omitted.)

[510] In the recent Supreme Court of Appeal decision of *Tiry & others v The State*⁸⁸ the court held the following:

‘... Furthermore, those appellants elected not to testify, which is their constitutional right. But it is not without consequences. As is trite, the fact that an accused person is under no

⁸⁷ *S v Boesak* 2001 (1) SACR 1 (CC) para 24.

⁸⁸ *Tiry & others v The State* (52/2018 and 149/2019) [2020] ZASCA 137 (29 October 2020) para 40.

obligation to testify does not mean that there are no consequences attaching to a decision to remain silent during the trial. If there is evidence calling for an answer, and an accused person chooses to remain silent in the face of such evidence, a court may well be entitled to conclude that the evidence is sufficient in the absence of an explanation to prove the guilt of the accused. Whether such a conclusion is justified will depend on the weight of the evidence. ...'

[511] Nevertheless, the following emerges from the evidence of the arresting officer Mohamed, the warning statement to Zondo (Exhibit 'DD') and the record of the bail proceedings (Exhibits 'T1' and 'T2').

[512] In response to the questions posed by Mohamed in the presence of Constable Ngcobo on the night of his arrest the accused's response was the following:

- (a) when asked if he knew M[....] 's whereabouts he said he did not know M[....] 's whereabouts;
- (b) when asked if he had seen M[....] , he responded and said he had not;
- (c) when questioned as to how he came to be in possession of R[....] 's identity document and the children's birth certificates, he said R[....] had given them to him;
- (d) the accused informed Mohamed that he had been to the school to give M[....] money but had left;
- (e) on further questioning he said that he had taken M[....] to the KFC and left him in the driveway of his home.

[513] In his warning statement (Exhibit 'DD') which he made on 23 July 2018 at 11:15 to Warrant Officer Zondo he indicates he knows the child in question being M[....] and that they had a close bond and he knew him from his home. His response to the allegations against him are recorded as follows:

'I deny allegations against me. I admit that I took the child from school gate and we went to KFC near his house. From KFC I left the child across the road and I went home Phoenix. My mother Sodra Sah saw me on 2018-07-17 about 15:30 to 15:45 and I slept there.'

[514] In the affidavit deposed to by the accused, Exhibit 'C1' in the bail proceedings emanating from the addition of the murder count, he indicated the following:

'The allegation of murder of murder arises from the allegations of a kidnapping charge that I have been charged with, it is my submission that this is an unlawful splitting of charges. In terms of S83 of the Criminal Procedure Act, 51/1977, the State is entitled to charge an accused with the commission of all offences ... and **tried at once** However the Court is warned not to duplicate convictions, therefore since the offence is alleged to have arisen out of the initial charge it would result in a duplication of charges being levelled against me. The State is not entitled to be doubtful and try the offences at separate times.'

[515] Further on in the affidavit, he indicates that he had demonstrated that his family ties are strong and will not give them up to evade trial or breach any conditions of bail imposed on him. In respect of the specific offence, he indicates the following:

'I have not been provided with the evidence against me in this case. I, however, deny the charge and believe that the State has very little against me as the State will not be able to present objective facts to prove the charges against me.'

[516] At paragraph 28 of the affidavit he indicates the following:

'As noted above, I have not been provided with the evidence which the State intends using against me. I do deny that there are any objective facts present to prove the charge against me and I submit that the State has an exceptionally weak case against me.'

The transcript of the bail proceedings

[517] The accused was initially arrested on 20 July 2018 and made his first appearance in the Durban Magistrates Court on 23 July 2018. At that point in time, he faced charges of kidnapping and theft. The matter was remanded for seven days for further investigation and he was detained in the Durban North police cells. The matter was remanded on two subsequent occasions, being 30 July 2018 and 7 August 2018 for a formal bail application. Such formal bail application occurred on 29 August 2018. Bail was opposed on affidavit by the then Investigating Officer, Warrant Officer Zondo, who filed an opposing affidavit. The accused was admitted to bail in the amount of R2 500, subject to certain conditions. The matter was then adjourned to 17 October 2018 for outstanding statements.

[518] On 17 October 2018, the matter was then adjourned to 5 December 2018 for the accused's first appearance in S Regional Court. It was on that day that he was then arrested by warrant officer Govender for the count of murder. By that stage the

body of M[....] had been recovered and positively identified through DNA. The matter was then adjourned to 12 December 2018 for a bail hearing. The bail application proceeded on 19 and 20 December 2018. Bail was opposed and on 21 December 2018, bail was refused. Warrant Officer Govender filed the affidavit opposing the grant of bail. The matter was then remanded to 31 January 2019 and on 31 January 2019, was further adjourned to 4 April 2019 to W Regional Court for the accused to be served with the indictment.

[519] On 4 April 2019 the indictment was served on the accused and his defence counsel and he indicated he required pro deo counsel for the trial, which was enrolled for hearing from 21 October 2019 up to and including 8 November 2019 at the High Court.

The bail application in December 2018 in respect of the murder count

[520] It is common cause that this bail application was in respect of a schedule 6 offence that of premeditated murder. The accused had prepared an affidavit in support of his application to be admitted to bail and indicated that such affidavit would be supplemented by him testifying.

[521] The accused's application to be admitted to bail in December 2018 was opposed by Govender, the new Investigating Officer assigned to the matter after the body of M[....] was found and identified. The affidavit is a matter of record and is annexure "C4" to the bail proceedings.

[522] The accused took to the stand in his formal bail application and was warned by the court that whatever evidence he would provide in the bail application would be used in his trial. At page 9, line 22 of the record, the court asks the following question of the accused:

'COURT: Mr. Ebrahim, the evidence that you are going to give in your bail application may be used in your trial, are you aware of that?

Yes.'

[523] The accused testified that he knew R[....] as she used to work with him at the E[....] butchery in Alpine Road. On the weekend before 17 July 2018, he was in

Sydenham at M[....] 's home. He testified that he previously used to stay at the premises every week, sometimes two days, sometimes three days or sometimes four days of the week. On 17 July 2018 he was at the deceased's home taking the weeds out of the brick paving. He testified that he was helping out doing some odd maintenance work at the residence.

[524] In the morning, R[....] left and after a while, her mother also left to go to the hospital. He was alone at home and M[....] had gone to school. Whilst he was weeding the paving Mike, R[....] 's ex brother-in-law, came to the house to drop off R[....] 's jacket. He was outside when Mike went into the house to leave the jacket and left the premises. He was still in the yard weeding and was taking the dirt to the back of the yard when he noticed identity documents on the ground. He opened it and it was R[....] 's identity document document with the two (children's birth certificates and a certified copy of Mike's identity document. He put these documents in his pocket for safe keeping and carried on working.

[525] He had mentioned to the family that he was going home on Tuesday and consequently he left their house around 14h00. As he was walking, he saw school children coming out of school and he waited at the robot. M[....] approached him and he spoke to him and told him that he was going home. He also asked M[....] if he wanted something to eat as there was nothing at home for him to eat. M[....] responded and indicated that he wanted KFC. Because he knew that M[....] liked KFC, he took him to the KFC as M[....] said he did not want to sit and eat and he ordered a take away. After he had purchased the KFC, he left, he crossed the road and said goodbye to M[....] . Both he and M[....] crossed the road and he told M[....] where the keys for the house were. He told M[....] to go home and when the taxi arrived he boarded the taxi to travel from Sydenham into town. M[....] did not board the taxi with him and when the taxi took off M[....] was standing outside. Once he arrived in town, he went to the Alice Street taxi rank and took a taxi home to Phoenix.

[526] He did not see M[....] after that day and R[....] contacted him on the same day to ask him whether he had seen M[....] . He told her that he was in Phoenix and that M[....] must be at home. When R[....] phoned him back, he told her to go to the police station and check up on M[....] .

[527] In answer to a question as to whether or not he exchanged messages with R[....] regarding M[....], the accused testified that he was not certain as he did not have his phone with him as it had been seized by the police on 20 July. He confirmed that if he and R[....] had exchanged messages, it would reflect on the phone. In answer to the allegations that he had kidnapped M[....] and murdered him, he responded that he did not do that and did not have any reason to do so.

[528] During cross-examination, the accused confirmed the following:

- (a) that he resided in a wendy house at 418 Longbury Drive, Phoenix, which is the home of his parents Ebrahim and Soogra Shah. Initially, however, the accused indicated that he had a room inside the main house but lived in the wendy house as he had issues with his sister;
- (b) he confirmed that due to an argument between him and his father, he had left the main residence of his own accord and went to reside in the wendy house. He had also left the home in July 2017 for a period of approximately two months and resided in Unit 13. He boarded with a friend, Rehana, as she had a spare room. He did not stay there for long as he had a small accident and broke both his arms and returned home for his mother to look after him;
- (c) he was aware of an incident which had occurred at his parents' home in Longbury Drive, involving the theft, alternatively missing jewellery of his sister. This is what started the fight as they suspected that because he was not working at the time, he had taken the jewellery to sell it or steal it. He confirmed that his sister was the one who accused him of the theft of her jewellery; and
- (d) he confirmed that from January of 2018 he was employed at E[....] in Alpine Road for a period of approximately two and a half years. He confirmed that he had attended at the CCMA for R[....].

[529] He confirmed that there were times during this period where he also stayed over at M[....]'s family residence. He used to spend time with them on weekends and the days he was off. Sometimes, from Friday until Tuesday. He testified that 'because you see I saw my girlfriend I was getting to know the family', and that is why he stayed there. He testified that R[....] was his girlfriend. This was for a period from May to July. He did not pay board and lodging, so what he did was offer to do

maintenance work around the house, like painting and neatening the house.

[530] He confirmed that he had registered a VodaFone sim card on his name, beginning with the number 062. He also confirmed that he was using a second phone, a Samsung Galaxy. He confirmed that he did not have R[....] as a contact on his new phone and was not sending her messages after he had paid his bail regarding wanting to speak to her about M[....]. He confirmed that his sim card was in his father's Samsung Galaxy phone. The second sim card is also registered in his name.

[531] He confirmed that as at 17 July 2018, R[....] was his girlfriend. He disputed that she was not his girlfriend and indicated that everyone at work knew. He also disputed that because they worked together and they worked late, it was on those occasions that he was allowed to come to her home and stay over because it was too late for him to travel home. He disputed this and indicated that when they finished work late, the company had transport for them to take them home. E[....] provided fare-free transport.

[532] He confirmed that on the morning of 17 July 2018 he did not speak to R[....]. He was outside in the garden and saw her open the gate and leave. He did not question her and did not ask her anything. He estimated that she left the house at approximately 11h00, that was because he had woken up at about 10h00. He confirmed that after R[....] had left the house at 11h00 am, R[....]'s mother was there, also getting dressed to go to the hospital. He knew this as R[....]'s mother told him this. He was not sure which hospital it was but guessed that it may have been King George Hospital near their home. He indicated that he did not tell R[....]'s mother that he was leaving her house that morning as she was aware that he comes and goes, neither did he tell R[....] that he was going home. This is because they knew that he needed to go home.

[533] The reason why he did not leave earlier was because he was supposed to paint the house. But as there was no paint, R[....]'s mother had told him that there were weeds in the paving and he needed to weed the paving. He told her he would do so.

[534] During cross-examination he confirmed that the only personal items which he

left at the house was his morning gown, his pants and shirts, no toiletries. He testified that when R[...] 's mother left that morning, she did not lock up the house, the house was open for him to use. He testified that he found the identity document and birth certificates at the front entrance steps of the house. He indicated that although he had access to the house he had locked the door of the house and he was outside hence the reason why he did not take the birth certificates and identity document into the house. He eventually forgot about doing that after he had finished weeding before he was to leave.

[535] He left the premises at approximately 14h00, he was checking his cell phone but was not certain. He testified that when he left the house, he went straight to the robot to take the taxi and then he saw M[...] coming out of school. M[...] was at the robots by KFC, coming up the road. He confirmed that he never picked M[...] up from school but did go to the school once with R[...] to pay school fees. He waited at the robot and because he did not know he was coming from school at the time, he told him that he was going home to Phoenix. He asked him what he wanted to eat as there was nothing prepared at home and offered M[...] chips.

[536] After much cross-examination on whether or not he knew there was food in the house, he confirmed that in the morning he did not check to see if there was food in the house and neither did he know at the time he met M[...] , at the robot, whether or not there was food in the house. He denied T[...] 's evidence as put to him, concerning the statements T[...] had made that he had gone to the school and asked for M[...] . He disputed the description of the clothing he was wearing in the statement, being a black baseball cap, a long sleeved green shirt and brown pants. He disputed that he was wearing brown pants but indicated he used black pants. He confirmed that he was wearing a black baseball cap, a long sleeve green shirt with a grey leather jacket and black jeans.

[537] He confirmed that he offered M[...] KFC and as M[...] wanted KFC, he purchased him a streetwise 2 from KFC but did not buy anything for himself to eat. He was not certain how much time they spent, he just placed the order and waited for the order. Whilst there, they were speaking and he was telling M[...] that he was going across the road to get a taxi to go home. He told M[...] that no one was at

home and told him where the key was. Whilst talking to him, he told M[....] that the last time he took him to Suncoast and if he did well in school this time he would take him to Gateway. They exited KFC and crossed the road together. He testified that he only held M[....] 's hand from the KFC up the steps. He corrected this when asked again and testified that he held M[....] 's hand as he was a young boy and always holds his hand.

[538] After they reached the top of the stairs at the KFC he let go of M[....] 's hand and said goodbye to him there and started to cross the road but M[....] followed him across the road. He confirmed that the road was a very busy road. He signalled for the taxi to stop and did not realise that the taxi would stop. He was still on the KFC side of the road when he signalled for the taxi to stop. When the taxi stopped, he had already said goodbye to M[....] .

[539] Before he jumped into the taxi he had handed the KFC streetwise 2 to M[....] . This was when the taxi stopped and he gave the KFC to M[....] and climbed into the taxi. The reason for holding onto the KFC was because M[....] told him to hold it. He confirmed that he took M[....] across the road but was not holding his hand. When questioned about this, he indicated that he did not think about holding his hand. During cross-examination he indicated that he did not think to take M[....] back home and catch the next taxi. He indicated 'I didn't know he never go home; I didn't know'. They were talking and M[....] came across the road but he did not hold his hand.

[540] When pressed further during cross-examination, he said that the reason why he did not walk M[....] home and see him home safely was M[....] said he will go home himself and M[....] also walks home from school himself and crosses the road himself. He confirmed that he did not observe M[....] cross the road as he was in the taxi and the taxi had already left.

[541] He testified that he first realised M[....] was missing when R[....] called him sometime after 16h00 and 17h00. He did not check the time. She had asked him where M[....] was and he said M[....] may be at home. She did not tell him that M[....] was missing and only came to learn that M[....] was missing in the evening. He realised this on his cell phone. It came up on his phone and his sister told him. He was shocked to learn this. This was around 19h00.

[542] R[....] had phoned him at around 16h00 and he told her he was home in Phoenix. She asked if M[....] was with him and he said no. He also got a message late in the evening from R[....] . He, however, was shocked when his sister showed him the message on her cell phone from CrimeStop to say that he had kidnapped M[....] and mentioned his name. He confirmed that he did not think that the police were looking for him, he thought it was a joke and did not think it was serious. He thought that maybe his sister was playing a trick on him. He indicated that the only time he realised it was not a joke was when he got arrested three days later, on the Friday.

[543] During the course of cross-examination he was evasive as to when he first learnt that the police were looking for him. He confirmed that that evening he was not aware the police were looking for him but the voice note which his sister had played for him mentioned the kidnapping of a boy, M[....] L[....]. At that time, it was approximately 19h00 in the evening and he was still at home in Phoenix. He did not hear his name, he just heard about the M[....] L[....] kidnapping. He confirmed that at 19h00 on Tuesday, 17 July 2018, when M[....] went missing, he did not know that the police were looking for him. He was at home and he was worried, he did not do anything, he was shocked. After he recovered from the shock, he went to town. However, from 19h00 in the evening on 17 July, he was at home the whole night but his phone was off. It was a second hand phone so it goes on and off even though he charged it. He confirmed that R[....] did come looking for M[....] at his residence that evening but he was not there, he had taken a walk to the tuckshop up the road to buy cigarettes.

[544] The accused testified that on the evening of 17 July 2018 he was not at his parents' home when R[....] and K[....] came to his home. At the time, he had gone to a tuckshop up the road and spent some time there. He only returned home at approximately 20h00. On his return home, his sister and father informed him that M[....] 's parents came to their home looking for M[....] . He was shocked and did not think to phone M[....] 's parents at that time. He indicated, during cross-examination, that although he was sending her Whatsapp messages, he could not recall what exactly it was that he was saying to her. When it was suggested to him that he took M[....] , he disputed it and said the following:

'He never come with me he never come with me'.⁸⁹

[545] He indicated that he also told R[....] , in the Whatsapp messages, to look for M[....] and to go to the police station. He did not assist in looking for M[....] as his boss, Raymond, told him not to go near the family. He received information that he must not go near their home and that is why he stayed far away from them. The information was not that he should not help, but rather that he should not go near the family as the family wanted to assault him.

[546] Although he was concerned, he exchanged Whatsapp messages with R[....] and he confirmed that she did ask him if he knew the whereabouts of M[....] and he informed her that he had left him at home on the day and had returned home to Phoenix.

[547] He confirmed that although R[....] contacted him and asked him if he knew where M[....] was, he did not inform her that he had met up with M[....] and had taken him to the KFC. His explanation for this was that R[....] did not ask him if he took M[....] anywhere. This was on the Tuesday evening. However, he indicated that he assumed she knew that he had taken M[....] to KFC, as on the Friday when he was arrested on 20 July 2018, he was informed that they have footage of KFC and his response was *'I said, yes, I know, I admit I got KFC'.⁹⁰*

[548] He confirmed that between 16h00 and 19h00, on 17 July 2018, when he and R[....] were exchanging Whatsapp messages regarding M[....] 's whereabouts, he did not inform her that:

- (a) he saw M[....] ;
- (b) he saw him walk up to the robot and he was waiting there;
- (c) he had a conversation with M[....] ; and
- (d) took him to KFC and bought him a meal.

[549] During the course of his exchange with R[....] , they were having a normal conversation and she did not accuse him of kidnapping M[....] . It was only after

⁸⁹ Page 74, transcript of bail proceedings, Exhibit 'T2'.

⁹⁰ Page 79, transcript of bail proceedings, Exhibit 'T2'.

19h00 that evening of 17 July 2018 that he learnt that he was suspected of having kidnapped M[....] . This was as his parents and sister informed him that the purpose of R[....] and K[....] 's visit to their home was that they were looking for M[....] and accused him of having kidnapped M[....] . He testified that after he had returned from the tuckshop, he went into the wendy house and slept there. He disputed what was suggested to him by the prosecutor that his father had indicated that he was not at home that evening and his mother also testified that he arrived at 16h00 and she did not see him thereafter. The basis upon which he disputed it was as he indicated he did not sleep in the main house and slept in the wendy house and that is why they did not see him.

[550] In order to dispute his version that he was at home at around 20h00 and did not leave until 04h00 the following morning on 18 July 2018, he was confronted with the cell phone records which places him at his home, at Longbury Drive, and then places him moving around the Phoenix area, namely in Longcroft, Sunford, Eastbury, Grove End and not at home. His explanation for this was that he was walking around thinking of M[....] and wondering where he could be. He was not certain as to when he went back home as his cell phone had died. He confirmed that he subsequently, when confronted with the cell phone evidence, confirmed that after 20h00, he was not at home but was rather walking around in the Phoenix area. He confirmed that as per the cell phone evidence, on the morning of 18 July 2018, at approximately 04h00, he went left Phoenix and went to the Durban CBD.

[551] He confirmed that on the morning of 18 July 2018, he contacted R[....] to tell her that he was going to come to Sydenham to help and look for M[....] . However, whilst he was still walking around in the Durban CBD, he received a telephone call informing him that he should not go to Sydenham as people wanted to assault him. He disputed that he was evading the police and disputed that the police contacted him.

[552] He indicated that on 19 July, when he had made an arrangement to meet R[....] so that they could look for M[....] , he received a telephone call about a job offer. He went to the place where the alleged job offer was but he found out that this was a hoax. He did not meet R[....] and subsequently had sent a message to his

boss to tell him where he was and asked him to pick him up. Because he had told his boss where he was, he was arrested.

[553] He confirmed that at the time of his arrest, the clothes that he was wearing on the day M[...] went missing, being 17 July 2018, being his green shirt and pants, were in the wendy house. He had his baseball cap which he always wears. He indicated that R[...] was his girlfriend and denied the suggestion by the prosecutor that his advances to R[...] were rejected and that they had an argument which is why he wanted to punish her and kidnapped M[...].

[554] During the course of cross-examination of the investigating officer, Warrant Officer Govender, the following became evident, namely:

- (a) the accused was arrested on 20 July 2018;
- (b) from 17 to 20 July 2018, he was being contacted by SAPS;
- (c) he interviewed the accused's parents who informed him that the accused did not live in the main house but resided in a wendy house on their property, due to his alleged bad behaviour, arrogance and violent nature towards his family members, specifically his sister. These arguments, in relation to his sister, arose from the accused's sister accusing him of the theft of her jewellery;
- (d) the accused did not always reside at the wendy house in Longbury Drive and would come and go as he pleased and often resided with a friend, Rehana and her husband;
- (e) the accused, in all probability, only resided at the house for two or three days and for two or three days resided at the L[...] 's residence;
- (f) the accused knew R[...] for approximately two and a half months;
- (g) in those two and half months, the accused would reside at their home;
- (h) he established, during the course of his investigations, that during the two and a half months that the accused and R[...] worked together, the accused made advances to R[...] which were rejected and she informed him that they could only be friends and nothing more;

- (i) that in the two and a half months that the accused resided at their home, it was more R[....] 's mother asking him to stay over and that was because the accused was visiting R[....] 's mother late in the afternoon and he was invited to stay over by R[....] 's mother as there was a spare room, given the lateness of the hour;
- (j) the accused disputed that the only reason why he stayed over at R[....] 's home was because he finished work late and there was no transport. The accused in fact indicated that his employer provided transport for him when he worked late and the reason why he stayed over was because he was in a relationship with R[....] ;
- (k) he disputed the accused's evidence that when he stayed over at R[....] 's home, it was with prior arrangement with her and that he had arrived with a bag of his clothing;
- (l) the argument between the accused and R[....] occurred on the weekend prior to M[....] 's disappearance, being Tuesday 17 July 2018. Despite that argument, M[....] 's granny informed the accused on the weekend, that he should leave the premises soon and also reiterated this on the Monday;
- (m) that after the body was recovered, on 3 September 2018, a preliminary DNA sample was done on 12 September 2018 and the body released a week later. The identity of M[....] was confirmed by means of DNA analysis and the investigations in the murder case continued;
- (n) the identity of the deceased as being M[....] was established on or about 19/20 September 2018. At that point in time, the accused was still in custody; and
- (o) he was not in a position to dispute that the accused learnt, through social media, whilst in prison, that the body found in the bush was that of M[....] .

[555] During the course of cross-examination of the investigating officer, Mr Gounden, who appeared for the accused, put the following:

'My instructions further is that the last time the applicant saw the deceased was when he left him at the KFC and he boarded a taxi alone and left the Sydenham area. Any comment? '

Yes, your Worship, it is true that the applicant was last seen with the deceased on 17 July 2018.'

[556] It was further put to the Investigating Officer that footage aired by Carte Blanche, on DSTV, showed that the accused exited the KFC with the deceased around about 14h06 and another part of the footage showed where the accused had jumped into the taxi and M[...] was standing outside the taxi. The investigating officer indicated that he had no knowledge concerning this footage.

[557] During the course of cross-examination Mr Gounden abandoned this line of questioning in light of the fact that there was nothing to indicate that such video footage existed and was authentic. It was suggested to Warrant Officer Govender that the arresting officer had recorded a statement by the accused concerning the arrest of the accused and his questioning of the accused. Govender confirmed this and indicated that the arresting officer had made a statement about how the accused was arrested and also indicated that the accused denied all knowledge about M[...] and when the arresting officer showed him the footage, the accused changed his version to say that he did take M[...] to KFC. He confirmed that, at no stage during the Whatsapp and telephonic exchange with R[...], from 17-20 July 2018, did he ever inform her that he took M[...] to KFC and bought him KFC and left him there.

What is the evidential value if any of the transcript of the bail proceedings?

[558] In the decision of *S v Machaba & another*,⁹¹ the court considered a failure by the accused to testify specifically in light of the countervailing evidence of the State. The court also considered the import of the record of bail proceedings which were handed in by consent. The record of the bail proceedings, exhibits T1 and T2 were handed in by consent. The accused in the s 220 admissions admitted the correctness and accuracy thereof. It is also evident from the transcript, that the Magistrate as well as the accused's legal representative at the time, Mr Gounden, would have warned the accused that in terms of s 60(11B)(c) of the CPA, if he testified, his evidence could be used against him in the trial.

⁹¹ *S v Machaba & another* 2016 (1) SACR 1 (SCA).

What then is the importance of the evidence of the accused, during his bail application and what weight must be attached to it?

[559] In *Director of Public Prosecutions, Transvaal v Viljoen*⁹² Streicher JA held the following:

‘It does not follow from the fact that the record of the bail proceedings forms part of the record of the trial that evidence adduced during the bail proceedings must be treated as if that evidence had been adduced and received at the trial. The record of the bail proceedings remains what it is, namely a record of what transpired during the bail application.’

[560] The purpose of handing in the bail application in terms of s 60(11B)(c) is a shortcut to achieving the same object as provided in s 235 of the CPA.⁹³ Section 60(11B)(c) reads as follows:

‘The record of the bail proceedings, excluding the information in paragraph (a), shall form part of the record of the trial of the accused following upon such bail proceedings: Provided that if the accused elects to testify during the course of the bail proceedings the court must inform him or her of the fact that anything he or she says, may be used against him or her at his or her trial and such evidence becomes admissible in any subsequent proceedings.’

Can what the accused said in the bail proceedings be applied and considered in light of the evidence of the State, specifically where the State proves that he made an admission in such statement.

[561] In *R v Valachia & another*⁹⁴ the following was held:

‘... when one party to a suit proves against the other party a statement made by the latter then the Court must not disregard any portion of such statement, even though it be in favour of the party who has made the statement; it is its duty to weigh the credibility of such portion and to give such weight to it as in its opinion it deserves...’

And further at 837, the court held the following:

‘Naturally, the fact that the statement is not made under oath, and is not subject to cross-examination, detracts very much from the weight to be given to those portions of the statement favourable to its author as compared with the weight which would be given to

⁹² *Director of Public Prosecutions, Transvaal v Viljoen* 2005 (1) SACR 505 (SCA) para 33.

⁹³ *S v Dlamini; S v Dladla & others; S v Joubert; S v Schietekat* 1992 (2) SACR 51 (CC) para 87.

⁹⁴ *R v Valachia & another* 1945 AD 826 at 835.

them if he had made them under oath, but he is entitled to have them taken into consideration, to be accepted or rejected according to the Court's view of their cogency.'

[562] The court in *Machaba*⁹⁵ had an opportunity to consider whether the principle enunciated in *Valachia* ought to apply to the record of bail proceedings. The court considered the decision of *S v Cloete*⁹⁶ which considered whether such principle would apply to a plea explanation. At 428A-G, E M Grosskopf JA held the following: 'It is clear that the evidential value of informal admissions in s115 statements derives from the ordinary common law of evidence. That being so, there would appear to be no reason of principle why the rule enunciated in *R v Valachia (supra)* should not be applicable also to such statements... And I can think of no other reason why a court should be entitled to have regard think of no other reason why a court should be entitled to have regard to the incriminating parts of such a statement, while ignoring the exculpatory ones.'

[563] At paragraph 31 of the judgment in *Machaba*, the court took the view that s 60(11B)(c) was in the same vein as s 115 of the CPA and was introduced as part of the record of the trial subject to the qualification that at the time of testifying in the bail application, the accused was warned of the consequences. This must be clear before the record of the bail proceedings form part of the record.

[564] The court took the view that the legislature, as found by the court in *Cloete* had provided a procedure whereby material could be placed before the court. The court per Schoeman AJA took the view that the *Valachia* principle applied in the context of the record of bail proceedings.

[565] I align myself with the sentiments expressed in the judgment of Schoeman AJ that the evidence of the appellant in the bail application cannot be equated to evidence given during trial, which would have been subject to rigorous cross-examination, to determine whether his version was reasonably possibly true.

[566] The court, in *Machaba* however, took the view that there was a prima facie case against the accused which, as a consequence of him not testifying during the trial, resulted in the fact that the state had established a prima facie case which the accused failed to rebut. Such must also apply in this matter.

⁹⁵ *Machaba* para 30.

⁹⁶ *S v Cloete* 1994 (1) SACR 420 (A) 428A-G.

Analysis of the evidence of the state witnesses

[567] The evidence established the following:

- (a) the accused and R[....] had a second argument on Sunday 15 July 2018, before M[....] went missing;
- (b) during such argument the accused said to R[....] 'I will show you';
- (c) on the Sunday following such argument, R[....] 's mother had told the accused that he needed to finish up the maintenance work he was doing and needed to leave. This was reiterated on the Monday morning;
- (d) on Monday afternoon, 16 July 2018, the accused asked M[....] what time she and M[....] finished school. She told the accused that M[....] finished at 14h00 and she finished at 14h20. The accused said he would wait for them. She responded and indicated that there was no need for him to wait for them;
- (e) the accused had never before fetched M[....] and M[....] from school nor had he sought permission to do so.

[568] At this juncture I pause to mention that the various WhatsApp conversations between the accused and R[....] were indicative of a one sided relationship. The accused considered R[....] to be his girlfriend but she considered him to be no more than a friend. In fact, the impression I gained was that the accused was jealous and possessive over R[....] and seemed to have taken umbrage with her flirtatiousness with the male tenants and her relationship with Mike.

- (f) on the morning of 17 July 2018, the accused is at the house working outside in the yard clearing weeds. R[....] leaves for Wentworth to see K[....] and does not speak to the accused. M[....] 's grandmother leaves for the clinic, locks up the house and leaves the key for the house under the mat;
- (g) on 17 July 2018, the accused fetched M[....] from school (this emerged from the questioning of the accused by Constable Mohamed) and this was without the consent, permission or knowledge of R[....] ;

- (h) from the KFC CCTV footage, the accused took M[....] to the KFC outlet next to his home and purchased a takeaway meal for him. In such footage, M[....] is seen with his school backpack on his shoulders;
- (i) whilst seated in the KFC outlet waiting for the order, the accused can be seen conversing with M[....] and during such conversation pulls something out of his back pants pocket shows it to M[....] and then puts it back in his back pants pocket; **+14h09**. This is in all probability was, as alleged by the State, the identity book of R[....] and the two birth certificates of M[....] and M[....] , which Constable Mohamed found in the back pants pocket of the accused on his arrest on 20 July 2018; and
- (j) on receipt of their meal, the accused and M[....] leave the KFC outlet at the time the accused is seen holding M[....] 's hand. The CCTV footage places M[....] and the accused at the KFC outlet for a period of approximately ten minutes. The accused and M[....] are observed crossing the road by Rhyman with the accused still holding M[....] 's hand.

[570] Having regard to the CCTV footage from the KFC outlet and [....] the following emerges:

- (a) Exhibit 'L' 14:06:41 - The accused and M[....] are observed walking past the bus stop. The accused is seen running still holding M[....] 's hand toward the taxi;
- (b) Exhibit 'L' 14:06:44 - The accused and M[....] are then observed at the left rear of the taxi;
- (c) both R[....] and M[....] , identify M[....] in the CCTV video footage;
- (d) **neither M[....] nor the accused are seen boarding the taxi on any of the CCTV footage;**
- (e) the taxi is then out of view and is observed again on Randles Road travelling in the direction taxis normally use when travelling to the CBD;
- (f) at **14:05:35** the video commences;

- (g) at 14:06:04 an Indian male now known to be Rhyman, wearing a blue top is walking to the bus stop. Rhyman appears at the bottom left of the picture. Rhyman disappears from view at 14:06:05 and then re-appears at 14:06:10 walking toward the bus stop. Rhyman is then observed standing at the taxi stop at 14:06:23. The taxi arrives at the taxi stop and stops at 14:06:26. Rhyman is then observed crossing the road at 14:06:33;
- (h) the accused and M[....] become visible on the CCTV footage from 14:06:40 until 14:06:45. They are observed at the passenger side of the taxi at the rear toward the taxi door. Two children, a boy wearing an orange bag on his shoulder and a girl, wearing a blue bag on her chest appear at the bottom left of the video at 14:06:54. The same taxi is visible. Other cars are stopping at the robot. This is the robot controlled intersection of Dr R Naidu Road and Randles Road. This video footage ends at 14:07:05. The next video⁹⁷ commences at 14:07:07.
- (i) at 14:07:11 a taxi drives off at the top left corner of the video and 14:08:36 the footage ends. There is no other taxi that stops at the taxi stop during this time as is evident from the CCTV footage;
- (j) the next video clip of the CCTV footage⁹⁸ commences at 14:08:46 and finishes at 14:09:03. From the video footage there is no taxi that stops at the taxi stop;
- (k) a further video⁹⁹ commences at 14:09:04. When the video commences the cars on Dr Naidu Road are stationary. At 14:10:00 an Indian male with a beard wearing a [...] jacket walks on the bottom left of the video. The footage ends at 14:10:11. During this period there is no taxi observed that stops at the taxi stop.;
- (l) the next piece of CCTV footage¹⁰⁰ commences at 14:10:11. A silver Corsa bakkie drives in the foreground at 14:10:15. This video clip ends at 14:10:28.

⁹⁷ Channel 16 - 20180717140713

⁹⁸ Channel 16 - 20180717140851

⁹⁹ Channel 16 – 20180717140910.

¹⁰⁰ Channel 16 – 20180717141013.

From the video clip there is no taxi that is seen stopping at the taxi stop during this time; and

- (m) similarly, a further video clip¹⁰¹ commences at 14:10:37. It ends at 14:11:17. There is no taxi seen stopping at the taxi stop. The next video¹⁰² commences at 14:11:17. It ends at 14:12:01. There is no taxi that stops at the taxi stop during this period;

[571] There is an overlap in the CCTV footage from the KFC and [...] and from the [...] footage no other taxi or bus can be seen in the vicinity for at least ten minutes after M[...] and the accused are observed at the rear of the taxi.

[572] Just before 15h00, M[...] raises the alarm that M[...] is not at home, nor is his schoolbag or books at home either. Thus began the frantic search for M[...] . It is therefore safe to conclude that M[...] after having left the KFC in the company of the accused did not go home and remained with the accused. He is not seen in the CCTV footage on the side of the road near where the taxi stops, when the taxi leaves.

[573] Interestingly, M[...] 's home is on the same side as the KFC outlet and he would have had to walk a short distance to reach his home. Instead M[...] is seen crossing the road, his hand being held by the accused walking away from the KFC outlet and his home in the opposite direction, which emerges from both the CCTV footage and by Rhyman.

[574] From the WhatsApp exchanges with M[...] when she contacts the accused regarding M[...] 's whereabouts, the accused's cell phone records indicate his locations at the time of such exchanges to be in the Phoenix area as follows:

- (a) at 15:55:39 the accused is in the vicinity of the Eastbury Tower 2 for a cellular phone call;

¹⁰¹ Channel 16 – 20180717141043.

¹⁰² Channel 16 – 20180717141119.

- (b) at 16:09:40 the accused is in vicinity of the Gem City Tower 2 also receiving a call.;
- (c) at 16:11:46 the accused is in vicinity of the Longcroft Tower 1 receiving a call;
- (d) at 16:11:48 R[....] telephones the accused. She asks him if he has seen M[....] and the accused responds saying he did not see M[....] the whole day;
- (e) at 16:22:18 the accused is in vicinity of the Eastbury Tower 3 to receive a call; and
- (f) at 16:27:06 the accused's phone picks up in the vicinity of the Longcroft Tower sector 2 - GPRS

[575] In the evening there are WhatsApp exchanges between the accused and M[....] relating to M[....] and his whereabouts. At no stage during such cell phone exchange does the accused advise M[....] 's family that he had been with M[....] earlier on that day nor does he advise them that he has R[....] 's identity document and the birth certificates of M[....] and M[....]

[576] At approximately 18h30pm T[....] has a discussion with R[....] , the deceased's granny and K[....] at the Asherville grounds. R[....] shows T[....] a picture of the accused on her cell phone wearing a green shirt, similar to the one the accused allegedly wore on 17 July 2018 and is wearing in the KFC CCTV footage. It is the same shirt which he wore when the picture was taken at the outing they took to Suncoast. Warrant Officer Govender testified, and this is also borne out by the photographs taken (Exhibit 'B', photos 3, 4 and 6) that after the arrest of the accused, a similar green shirt was found in the wendy house occupied by the accused indicating that he had changed and had been at home sometime on 17 July 2018.

[577] R[....] , K[....] and a family member went to the accused's house at Longbury Drive Phoenix. Neither the accused nor M[....] are found there. This is between 19h00 and 20h00. The accused indicated that he was not at home and had taken a walk to the tuckshop close to his home. They then proceed to the Phoenix police

station to lay a charge. A missing person's report is made by M[....] 's parents at Sydenham SAPS.

[578] On the evening of 17 July 2018 already the family of M[....] have posted on social media that the accused was the last known person seen with M[....] and is the main suspect in the disappearance of M[....] .

[579] Having regard to Exhibits 'N', 'O' and 'P':

- (a) the accused's cell phone is in the vicinity of various cell phone towers in the Phoenix area;
- (b) most importantly it places him in the vicinity of the Eastbury and Longcroft towers which cellphone towers covers the area of his home and the area of the bush where the body of M[....] was recovered;
- (c) in the afternoon of 17 July 2018 from approximately 15:37:45 until 16:27:06 the accused was in the Phoenix area;
- (d) and again in the evening from 19:49:24 and between 20:01:52 until 20:26:51 once again in the vicinity of the Longcroft tower sector 2. This cellphone tower covers the residence of the accused and the area where M[....] 's body was found.

[580] On 18 July 2018, Mahomed telephones the accused to say report to the Sydenham SAPS. It is at this stage that the accused says that he is in Pinetown. R[....] , Mrs Vetter (a school teacher at Rippon Primary School and R[....] 's ex sister-in law, the deceased's relative) and principal interview T[....] and he is shown the picture of the accused on R[....] 's cell phone.

[581] At 11h40 the statement of T[....] is taken down by Constable Mahomed.

[582] On the evening of 17 and 18 of July there is a social media frenzy in relation to the missing child M[....] L[....].

[583] Between 17 July 2018 and 20 July 2018 the accused's cellular phone records place him in the CBD and he does not return to Phoenix.

[584] On 20 July 2018 at approximately 20h00 - 21h00, the accused is arrested on the corner of Grey and Victoria Street by Mahomed who at the time is accompanied by Sergeant Ngcobo.

The defence's hypotheses

[585] Briefly this was the main thrust of the defence's challenge to the State's case. The defence put forward the following hypothesis regarding other potential suspects who may have been responsible for the commission of the offences for which the accused was charged.

[586] The main culprit according to the defence briefly for the following reasons was Mike, who is the brother of R[...] 's ex-husband. It is common cause that Mike's current whereabouts are unknown, and have been unknown since M[...] went missing. It is common cause that he was previously in a relationship with R[...] which according to her had ended and they were just friends. She was seeing him at the time of M[...] 's disappearance and whilst K[...] was attempting a reconciliation.

[587] The defence made much of R[...] ' apparent alcohol and drug abuse to the extent that it was postulated that this was related to the death and disappearance of M[....] .

[588] The lack of direct evidence in regard to the cause and time of death, was suggested by the defence, as impacting on whether the state had discharged the onus resting on it. Mr *Naidoo* suggested that as the PMI interval was placed at 25 to 27 July 2018, this exonerated the accused as being responsible for the death of M[...] as the accused was arrested on 20 July 2018 and he remained in custody until 25 September 2018 when he paid bail.

[589] In addition the further submission was that as M[...] 's body was discovered on 3 September 2018, one cannot exclude the possibility that he was killed by someone else and the body placed close to the home of the accused to cast

suspicion on him as it was public knowledge the accused was the last person to be seen with M[....] and detract suspicion from the actual murderer.

[590] I propose to deal with each count separately as they appear in the indictment and shall return to these hypothesis. It must be borne in mind that although these hypothesis were advanced, no evidence was led by the accused to support them.

Count 1 - Theft

[591] 'Theft' is committed when a person:¹⁰³

'Unlawfully and intentionally appropriates movable, corporeal property which as the unlawful and intentional appropriation of movable, corporeal property which: -

- (a) belongs to, and is in the possession of another;
- (b) belongs to another but is in the perpetrator's own possession, or
- (c) belongs to the perpetrator but is in another's possession and such other person has a right to possess it which legally prevails against the perpetrator's own right of possession,

provided that the intention to appropriate the property includes an intention permanently to deprive the person entitled to the possession of the property.'

[592] The act of appropriation in theft, is the removal of the property whereby X deprives the lawful owner or possessor of the property. See *R v Sibiya*¹⁰⁴ and *S v Kotze*.¹⁰⁵

[593] R[....] testified and there is no reason to disbelieve her, (despite my impressions of her as a witness) that she kept the original identity document and birth certificates in a black hardcover book, in her cupboard in her underwear drawer in her room. These are important and valuable documents and one would have expected her to keep them in an area which she considered safe.

¹⁰³ C R Snyman *Criminal Law* 6 ed (2014) at 475.

¹⁰⁴ *R v Sibiya* 1955 (4) SA 247 (A) at 250-251.

¹⁰⁵ *S v Kotze* 1965 (1) SA 118 (A) at 125.

[594] The evidence was that these documents were always there until they went missing. And she made it a point to return the documents to their original place even if she used them for example when she went to the CCMA with the accused. It is thus improbable that she would have left these documents lying around let alone outside in the yard.

[595] The accused at no stage during the WhatsApp conversations mentions that he had these documents with him. There is thus no evidence before me (save what is said in the transcript of the bail proceedings) and what he told Mohamed as to how he came to be in possession of them. In the absence of any evidence from the accused before me as to how he came to be in possession of these documents, the only reasonable inference, I can draw is that he stole them from the R[....] 's room sometime on 17 July 2018 when he was alone at the house.

[596] The proven facts show that both R[....] and her mother had left the home that morning before the accused had left and accordingly he had ample time and opportunity to remove the documents from R[....] 's room. Warrant Officer Govender testified that according to M[....] 's grandmother, she had locked the house and placed the key under the mat before leaving for the hospital. This excludes also the defence hypothesis that Mike could have accessed the house. M[....] testified when she arrived home the bricks were moved and the key was sticking out from under the mat.

[597] R[....] had no reason to lie about this and although she is a single witness in this regard, I accept her evidence. As mentioned earlier in the judgment the probabilities are overwhelming, that as depicted in the KFC CCTV footage the accused showed M[....] the identity document he had in his possession at the time although we do not know the reason for him doing so.

[598] I am therefore satisfied on the totality of the evidence on this count that the state had proved its case beyond reasonable doubt in respect of count 1.

Count 2 - Kidnapping

[599] Kidnapping is defined as the unlawful and intentional deprivation of a person's freedom of movement and if such person is under the age of 18 years, the

custodians of their control of their child.¹⁰⁶ Child stealing has also been included in the crime of kidnapping and as a consequence, kidnapping has assumed a dual character. It may infringe either of two interests, namely a person's freedom of movement or a parent or custodian's control over a child.

[600] Where a child is removed without either his or her own consent, or the lack of consent of his or her parents', both these interests are of course infringed. For the crime to be committed, it is sufficient if X intend to deprive Y of her freedom of movement or Y's parents or custodians of their control.

[601] In relation to the deprivation of freedom of movement, the removal is usually effected by force but forceable removal is not a requirement. In this regard, I refer to the decision of *S v Fraser*¹⁰⁷ where the court indicated that kidnapping did not, by its nature, imply violence and not every case of kidnapping was a violent offence.

[602] As force is not an element of kidnapping, sometimes the removal can be effected by craft or cunning. In *R v Long (2)*,¹⁰⁸ the accused in that matter had posed as a photographer's assistant and, based on the strength of a letter which he provided, the teacher had excused the learner. The accused in that matter was convicted of kidnapping.

[603] In *S v Levy & another*,¹⁰⁹ the court held, per Hiemstra J, that the deprivation of liberty can be done 'by any means'. This definition makes it clear that it applies to man, women and child and deprivation of liberty by any means, be it forcibly carrying away, enticing away by craft or cunning or locking up in premises where the person already finds himself.

[604] In *S v Naidoo & others*,¹¹⁰ an appeal only in respect of sentence, the appellants had been convicted of kidnapping the 13-year-old son of a business contractor. The child had been lured into the vehicle from school, after he was told that his father had been involved in an accident and that his mother had instructed

¹⁰⁶ See C R Snyman *Criminal Law* 6 ed (2014) at 472-474; *S v Burger & others* 2010 (2) SACR 1 (SCA) para 32.

¹⁰⁷ *S v Fraser* 2005 (1) SACR 455 (SCA) para 24.

¹⁰⁸ *R v Long (2)* 1969 (3) SA 713 (R).

¹⁰⁹ *S v Levy & another* 1967 (1) SA 351 (W) at 353B.

¹¹⁰ *S v Naidoo & others* 1974 (3) SA 706 (A).

the stranger to collect him. There was no force involved and the guilty plea of the appellants was accepted.

[605] In *S v Olivier*¹¹¹ Moosa J convicted the accused of kidnapping. In that matter, the child had been playing outside in a tree, when approached by the accused. No force was used and neither had the accused told the child that his parents had given him permission to go with him, but he managed to persuade the child to go with him and climb the trees in his yard, to which the child had agreed. There was no force involved in relation to the kidnapping. The accused had after kidnapping the child subsequently indecently assaulted him and murdered him by strangling him.

[606] Having regard to the aforementioned authorities, force is not an element of the crime of kidnapping.

[607] The evidence is overwhelming that R[....] did not give the accused permission to take M[....] from school nor take him to the KFC. This is to an extent supported by the evidence of M[....] that the accused enquired about what time they both finished school on 16 July 2018 and further that the accused said to her that he would wait for them to which she had responded there was no need for him to wait for them. In any event there is no evidence that the accused had ever fetched M[....] from school on any prior occasion. In addition thereto on the occasions that he had taken M[....] to the KFC he was either accompanied by M[....] or R[....] watched them from her mother's kitchen window.

[608] The KFC footages shows that on 17 July 2018, the accused and M[....] were at the KFC with M[....] in his school uniform and books. Rhyman observes the accused and M[....] leaving the KFC, crossing the road in the opposite direction away from M[....] 's home, with the accused holding M[....] 's hand. The CCTV footage depicts the accused holding M[....] 's hand running toward the taxi. Both M[....] and R[....] identify M[....] and the accused at the rear of the taxi in such CCTV footage.

[609] Although the accused and M[....] are not seen boarding the taxi when the taxi leaves M[....] and the accused are nowhere to be seen. In the footage the taxi is

¹¹¹ *S v Olivier* 2007 JDR 0667 (C).

seen on Randles Road heading in the direction of the CBD. For a period of approximately four to five minutes after the taxi is observed in the footage no other taxi is seen stop at the place taxis usually stop to pick up passengers.

[610] It therefore can be safely concluded that M[...] never went home after school and if he did surely his schoolbag and books would have been at home. The CCTV footage depicts M[...] as having his schoolbag on his shoulders whilst he is in the KFC, whilst crossing the road and whilst running toward the rear of the taxi. The schoolbag and books were recovered in the bush close to M[...] 's body in the vicinity of the accused's home.

[611] From the WhatsApp exchanges with R[...] and M[...] on 17 July 2018, it is clear the accused denied all knowledge of having been with M[...] and his whereabouts. The evidence establishes that this denial of knowledge of M[...] 's whereabouts was intended to deprive M[...] of his liberty and R[...] of her control over her minor son.

[612] Although it was suggested by the defence that the KFC footage shows the exchanges between the accused and M[...] as being congenial and there is no indication that any force or pressure was exerted over M[...] , this is not an element of the offence and is not a factor to be considered as is evident from the authorities I have referred to above.

[613] In relation to the crime of kidnapping, the offence is defined as the intentional, unlawful deprivation of the liberty of a person. If M[...] consented or volunteered to accompany the accused, a conviction would not be warranted. However, there is nothing suggested, by the accused, to show that M[...] consented or volunteered to accompany him. In fact, what can be gleaned from the proven facts is that the accused indicates that M[...] did not accompany him and rather that he left M[...] behind, either at the KFC outlet, alternatively at the taxi, alternatively at the driveway entrance to his home.

[614] One can therefore safely exclude the possibility that M[...] consented or volunteered to accompany the accused. Having regard to the proven facts, namely that the accused was the last person to see M[...] , that he did not have either K[...] or R[...] 's permission and consent to fetch M[...] from school and have him in his

custody, the requirements for kidnapping are met. I have already indicated that force is not a necessary requirement for the offence of kidnapping.

[615] On the totality of the evidence and the probabilities, I have no hesitation in finding that the accused took M[....] from school to the KFC bought him a meal and thereafter took him by taxi to the CBD and thereafter to Phoenix.

[616] The State has proved beyond reasonable doubt that the accused kidnapped M[....] on 17 July 2018.

Count 3 - Murder

[617] In dealing with this count I have considered the entire mosaic of evidence presented by the state. This includes the medical and forensic evidence, the cellphone evidence as well as the fact that the last person M[....] was seen with was the accused before he disappeared.

The medical evidence

[618] Given that the exact cause of death and time of death could not be determined, the court had to have regard to the medical evidence of Dr Prahladh who performed the post-mortem of the deceased and also of the entomologist, Captain Pienaar.

[619] It is perhaps useful at this juncture to deal with some of the relevant case law in respect of the exact cause of death and how it impacts on inferential reasoning. This was the subject matter of the decision in *S v Maqubela*.¹¹² The appeal court in deciding on the weight to be attached to such evidence considered the onus and the proof required. Reference was made to the decision in *Michael & another v Linksfeld Park Clinic (Pty) Ltd & another*¹¹³ in which the court emphasised the distinction that must be drawn between the scientific and judicial measures of proof when one is dealing with expert scientific evidence.

[620] The court held the following:

‘Finally, it must be borne in mind that expert scientific witnesses do tend to assess likelihood in terms of scientific certainty. Some of the witnesses in this case had to be diverted from

¹¹² *S v Maqubela* 2017 (2) SACR 690 (SCA).

¹¹³ *Michael & another v Linksfeld Park Clinic (Pty) Ltd & another* 2001 (3) SA 1188 (SCA) para 40.

doing so and were invited to express the prospects of an event's occurrence, as far as they possibly could, in terms of more practical assistance to the forensic assessment of probability, for example, as a greater or lesser than fifty per cent chance and so on.'

[621] This essential difference between the scientific and the judicial measure of proof was aptly highlighted by the House of Lords in the Scottish case of *Dingley v The Chief Constable Strathclyde*¹¹⁴ and the warning given at 89D-E that:

'One cannot entirely discount the risk that, by immersing himself in every detail and by looking deeply into the minds of the experts, a judge may be seduced into a position where he applies to the expert evidence the standards which the expert himself will apply to the question, whether a particular thesis has been proved or disproved – instead of assessing, as a judge must do, where the balance of probabilities lies on a review of the whole of the evidence.'

[622] As stressed by the Supreme Court of Appeal in *S v Maqubela*.¹¹⁵

'The scientific measure of proof is the ascertainment of scientific certainty, whereas the judicial measure of proof is an assessment of probability.'

[623] In *Maqubela* the court found that the court a quo, in some instances applied the assessment of probability, being the judicial measure of proof to the evidence and at other times, applied the scientific measure of proof which was scientific certainty. As a consequence, the Supreme Court of Appeal found that had the court a quo applied the judicial measure of proof in concluding that it was a reasonable inference and reasonable possibility that death was as the result of natural causes, the court would have acquitted the accused.

[624] At para 16 of the judgment, the court criticised the court a quo's stance that the absence of proof of a probable or certain cause of death justified an inference of proof of murder beyond reasonable doubt, based on the conduct of the appellant showing consciousness of guilt. The question which the court ought to have applied when applying the rules of inferential reasoning, as formulated in *R v Blom*, was that an inference of murder must be consistent with all the proven facts.¹¹⁶

[625] The warning which must be heeded in relation to the function of an expert was

¹¹⁴ *Dingley v The Chief Constable Strathclyde* 2000 SC (HL) 77.

¹¹⁵ *S v Maqubela* para 5.

¹¹⁶ *Ibid* para 17.

dealt with by Lamont J in the South Gauteng High Court, Johannesburg in the decision of *S v Ncube & others*¹¹⁷ as follows:

‘It must never be forgotten that the function of the expert is not to decide the case. The function of the expert is to provide the court with the tools to assist it in deciding the case. The function of the expert is only to assist insofar as the court requires assistance with the skills which the court will use in the process of comparing the pictures with the appellants. The extent to which the opinions advanced by an expert are to be accepted will depend upon whether, in the judgment of the court, those opinions are founded on logical reasoning or are otherwise valid.’

[626] Here the court referred to *Michael v Linksfield* specifically para 36. The court, citing *Michael* with approval, and its reference to *Dingley* noted that it was important to bear in mind the distinction between ‘the scientific and the judicial measure of proof’.

[627] I propose to deal with the defence’s hypothesis of the date and time of death of M[...] before considering the other hypotheses as in my view this submission loses sight of the detailed evidence provided by Dr Prahladh and Captain Pienaar and the inferences to be drawn from such evidence.

[628] Dr Prahladh testified that the cause of death was undetermined, due to decomposition and skeletonization, however strangulation ought not to be excluded given the positioning of M[...]’s limbs and the manner in which his clothing had been placed over his body. One of her findings on examining the body at the scene of discovery, was that the arms were above the head, the clothing completely covering the head, the body was in a supine position and the arms were still in the sleeves of the clothing. *Mr Naidoo’s* questions in relation to cause of death focussed on the tissue test that would need to be performed to establish definitively that strangulation was a cause of death. Despite this Dr Prahladh was not seriously challenged in relation to this finding as being a probable cause of death.

[629] She estimated the post-mortem interval to be more than four weeks from the date of discovery being 3 September 2018, given the extent of the decomposition, the insects present on the body, predation injuries, temperature, climate and the prevailing winter weather conditions. She had regard to the weather patterns for the

¹¹⁷ *S v Ncube & others* 2011 (2) SA SACR 471 (GSJ) at 478A-C.

months of July, August and September 2018.

[630] The weather conditions which prevailed at the time were cold and dry and the temperature was below 20 degrees Celsius. These were winter conditions which would decelerate the rate of decomposition of the body and would slow down the rate of decomposition. This conclusion of the slow rate of decomposition and the cold dry weather conditions was confirmed by the condition of M[....] 's clothing which was stained with putrefactive fluids and the surface of his chest and abdomen which had very dry skin. She indicated that one usually finds dry skin in cold dry weather conditions. Her estimation of more than four weeks from the time of discovery of M[....] 's body was the minimum time period of decomposition taking into account all the factors.

[631] Captain Pienaar gave detailed and compelling evidence regarding various stages of decomposition and insect activity which has already been detailed earlier in this judgment.

[632] She also confirmed that there are four stages of decomposition which occur over time. These stages are the fresh stage, followed by the bloating stage followed by active decay or advanced decay stages. A period of time would need to elapse for the body to reach the stage of active and or advanced decay. This time period is affected by the temperature and other variables.

[633] In her first report Exhibit 'V1' dated 2 October 2018, the conclusion which she reached was that based on the samples which she received from Captain Viljoen, she concluded that the PMI minimum interval commenced during the period 27-30 August 2018. In her second report marked Exhibit 'V2' dated 27 August 2019, the specimens of first and second wave species as identified in her reports, indicated that infestation by these insects most probably occurred during 27-30 August 2018 (the PMI minimum interval) while the identified specimen such as the carrion beetle suggests that infestation most likely commenced during 25-27 July 2018 being the PMI maximum interval.

[634] She opined that the time of death in this case would be closer to the PMI maximum interval, 25-27 July 2018 taking into consideration that infestation of the piophilids, the late arrival insects will commence during active decay. What also

affected the accuracy of the calculations was that the insect samples were removed from M[....] 's body two days after it had been recovered and the absence of scene data.

[635] In addition she testified that in respect of the PMI indicators and their relationship to the estimated time of death, the PMI maximum is a clear indication that M[....] died very soon after the time of his disappearance being 17 July 2018. This conclusion was based on the development of the piophilid species that were identified. The piophilids that were collected, at the temperatures that were measured would take 35 to 44 days to complete their life cycle. Bearing in mind that piophilids are late arrival insects and that some time would have had to pass to reach active to advanced decay before infestation occurs, which she estimated to be between 12 to 20 days.

[636] During cross-examination, Captain Pienaar was asked to comment on the significance of the late arrival of the calliphorids and she indicated that the late arrival of the first wave insects was indicative that they did not have access to M[....] when his body was still fresh. As a consequence of this it was suggested that this raised the possibility that M[....] 's body was placed at that location sometime after he had died. Although she acknowledged that there were many possibilities, she responded by saying that she preferred not to stray from the science which was telling her that the first wave insects did not have access to the M[....] for primary infestation.

[637] She confirmed that certain conditions promote active decay and others delay active decay. She agreed with the suggestion by *Mr Naidoo* that a body that is placed in a casket would take longer to decay than a body in an open veld. She confirmed that active decay is accelerated by temperature, water, insect activity and other natural elements.

[638] The PMI minimum indicated that the first wave insects or insects which are usually found on primary infestation did not have access to his body.

[639] Although *Mr Naidoo* postulated several possibilities to Captain Pienaar in my view in the absence of evidence being led to support the suggestion of such possibilities, these do not translate into probabilities which swing the pendulum in

favour of the accused. Possibilities do not translate into probabilities in the absence of evidence. In addition the possibility as suggested by the defence that the body “may have been moved” in my view given the evidence, is ex post facto the death of M[....] and is not material to the guilt of the accused.

[640] All the possibilities postulated by the defence, melt into insignificance when regard is had to the following:

- (a) the evidence of Prahladh and Pienaar that the predation injuries and decomposition fluids indicate that the body had been lying there for a long period of time, longer than the PMI minimum being 27 to 30 August 2018;
- (b) the accused was arrested on 20 July 2018 and M[....]’s body discovered on 3 September 2018, a period of 45 days;
- (c) the direct evidence of Captain Pienaar that M[....] died soon after he had disappeared in all probability around the time he disappeared and this is based on the following:
 - (i) the development of the piophilid species that were identified (flies and beetles);
 - (ii) the piophilids that were collected, at the temperatures that were measured would take 35 to 44 days to complete their life cycle;
 - (iii) the 25 to 27 July 2018 is the date the piophilids most likely commenced infestation;
 - (iv) piophilids are late arrival insects and that some time would have had to pass for the body to reach the stages of active to advanced decay before infestation occurs between 12 to 20 days;
 - (v) this takes one closer to 17/18 July 2018, when M[....] went missing;
 - (v) the samples of insects were only collected at the mortuary two days after removal of M[....]’s remains from the scene, which complicated precise calculations due to the lack of information regarding the environmental influences on the development and infestation behaviour of these forensic insects; and

- (vi) due to the absence of scene data, the estimation was calculated based only on data received by the South African Weather Services for the area and time in question.

[641] *Mr Singh* did the scientific calculations in his heads of arguments and during the course of his oral submissions. However, I am mindful that when dealing with the medical and forensic evidence one is not dealing with the scientific method of proof but rather the judicial method of proof being the probabilities. These probabilities as testified to by Pienaar that M[....] died soon after he disappeared are fortified and corroborated and bolstered by the cellphone evidence.

Circumstantial evidence and cell phone evidence

[642] In *S v De Vries and Others*¹¹⁸ the court held that:

“... subject to adequate proof that individual cellphone numbers can be attributed to the accused or other parties involved in the robberies, not only is such evidence admissible against the accused, but potentially carries significant evidentiary weight.”

[643] After analysing the weight of the cellphone evidence for each of the accused in that matter, the court held the following at paragraph 109:

“The cellphone evidence can be likened to a cobweb, both in its intricate and interlinked nature and its potential to enmesh the users of the cellphones in its strands.”

[644] Cellphone evidence is treated like any other evidence and is often used as corroboration. The importance of cellphone evidence serving to corroborate a version, was also acknowledged in the decision of *Mthembu and Others v S*.¹¹⁹

[645] The State relies on the cell phone records of the accused, in respect of the WhatsApp messages exchanged with M[....] as well as R[....], on the day M[....] disappeared. The use of cell phone evidence to support the inferential reasoning that the accused was near the scene of the crime has been endorsed repeatedly by our

¹¹⁸ [2008] ZAWCHC 36; and 2009 (1) SA CR 613 (C) at paragraph 108.

¹¹⁹ [2011] ZAWCHC 45 at paragraph 24.

courts. Considering the cumulative effect of the circumstantial evidence in this case, the picture which emerges from the cell phone evidence is the following:

- (a) the cell phone records place the accused in Phoenix in the vicinity of his residence and the area where the body of M[...] was found (see annexure 'A'-this photograph shows the taxi stop on Longbury Drive, the clearing toward which leads toward the bush, and the accused's house);
- (b) the records place the accused in the Phoenix area from 15:37:45 on 17 July 2018 until 16:41:19;
- (c) thereafter his cell phone is still in the Phoenix area but moving away from the area as it uses the Clayfield VC Tower, then the Mount Edgecombe Tower, the Prospect Hall tower, Stamford Hill South tower which is close to the Moses Mabhida stadium and the at 19:06:04 picks up off the Butterworth Hotel tower, sector 3 which is a roof top tower situated in Joe Slovo Street in the Durban CBD;
- (d) on the same evening of 17 July 2018, he is then again in the Phoenix area in the vicinity of the Longcroft Tower at 19:49:24;
- (e) from 20:01:52 up to and including 20:26:51 his phone is in the vicinity of the Longcroft Tower 2 which tower covers his residence and the area where the body of M[...] was found, (see annexure 'B')
- (f) the records also show that the accused's cell phone then left the Phoenix area in the early hours of the morning on 18 July 2018 at 05:04:21 heading towards the Durban CBD;
- (g) the accused's cell phone records show he never returned to the Phoenix area after he left on the morning of 18 July 2018; and
- (h) the accused was arrested on 20 July 2018 and at the time this cell phone was on his person and was seized from him.

[646] The use of cell phone evidence to justify the conclusion in relation to the approach to circumstantial evidence, specifically cell phone evidence has been

endorsed, specifically by the Supreme Court of Appeal in *Nxumalo v The State*.¹²⁰

[647] The evidence implicating the accused in the commission of the offence of murder is wholly circumstantial in nature. The cellphone evidence in my view corroborates the forensic evidence relating to the probable time of death referred to by Pienaar. Whether or not the State has discharged onus beyond a reasonable doubt must be evaluated against the following:

- (a) the failure by the accused to advance evidence in the face of a prima facie case;
- (b) the post-mortem examination conducted by the pathologist, Dr Prahladh concluded that the approximate time of death of the deceased was more than four weeks from the date of discovery of the deceased's body on 3 September 2018;
- (c) the conclusion that strangulation as a probable cause of death ought to be considered;
- (d) the evidence of Pienaar that M[...] died around about the time he disappeared;
- (e) the cellphone evidence placing him in the immediate vicinity of the area in which M[...] 's body was found;
- (f) the cellphone evidence placing him in Phoenix from the afternoon of 17 July 2018 until the early morning of 18 July 2018.

[648] Having carefully analysed the evidence in its entirety and taking into consideration the evidence of Dr Prahladh, Pienaar, Kanti, Du Plessis, Exhibits 'N', 'O', 'P', 'R' and 'S', the CCTV footage of the KFC outlet and [...], the irresistible and inescapable inference to be drawn from the foregoing evidence is that the accused took M[...] without R[...] 's consent, from school on 17 July 2018, took him to Phoenix and killed him on 17 July 2018 either in the afternoon of 17 July 2018 alternatively later that evening, disposed of M[...] 's body in the dense bush

¹²⁰ *Nxumalo v The State* [2010] 1 All SA 325 (SCA).

approximately 360 metres away from his residence. Early on 18 July 2018 he left the Phoenix area and did not return. These are the inferences from the proven facts.

Premeditation

[649] The State bears the onus of proving all of the elements of the offence of murder, including an onus to prove beyond a reasonable doubt, that the murder of M[...] was planned or premeditated, as it contends that a minimum sentence of life imprisonment ought to be imposed.

[650] In *S v Raath* 2009 (2) SACR 46 (C) para 16 the court stated that there is no statutory definition for premeditated murder, and thereafter laid down its interpretation of premeditated as follows:

'[16] Planning and premeditation have long been recognised as aggravating factors in the case of murder. See *S v Khiba* 1993 (2) SACR 1 (A) at 4; and *S v Malgas* 2001 (1) SACR 469 (SCA) (2001 (2) SA 1222; [2001] 3 All SA 220) at para 34. As Terblanche *Guide to Sentencing in South Africa* 2 ed states at 6.2.2, planned criminality is more reprehensible than unplanned, impulsive acts. However, there must be evidence that the murder was indeed premeditated or planned. See for example *S v Makatu* 2006 (2) SACR 582 (SCA) at paras 12 - 14. The concept of a planned or premeditated murder is not statutorily defined. We were not referred to, and nor was I able to find, any authoritative pronouncement in our case law concerning this concept. By and large it would seem that the question of whether a murder was planned or premeditated has been dealt with by the court on a casuistic basis. The *Concise Oxford English Dictionary* 10 ed, revised, gives the meaning of premeditate as 'to think out or plan beforehand' whilst 'to plan' is given as meaning 'to decide on, arrange in advance, make preparations for an anticipated event or time'. Clearly the concept suggests a deliberate weighing-up of the proposed criminal conduct as opposed to the commission of the crime on the spur of the moment or in unexpected circumstances. There is, however, a broad continuum between the two poles of a murder committed in the heat of the moment and a murder which may have been conceived and planned over months or even years before its execution. In my view only an examination of all the circumstances surrounding any particular murder, including not least the accused's state of mind, will allow one to arrive at a conclusion as to whether a particular murder is 'planned or premeditated'. In such an evaluation the period of time between the accused forming the intent to commit the murder and carrying out this intention is obviously of cardinal importance but, equally, does not at some arbitrary point, provide a ready-made answer to the question of whether the murder was 'planned or premeditated'.'

[651] In *Montsho v S* [2015] ZASCA 187 the SCA held that the facts of the matter determine whether the crime was premeditated:

'[13] In the view I take of the matter, I do not consider that there is any benefit to be derived, on the facts of this case, in formulating a general definition of whether the phrase 'planned or premeditated' denotes a single concept. The inquiry as to whether or not any given facts would at the very least sustain an inference to be drawn from them as to whether or not an accused had manifested a plan or premeditation to commit the offence in issue can properly be determined on a case by case basis. Thus the circumstances in which a crime was committed and the peculiar facts of each case will determine whether or not the commission of the crime was planned or premeditated.'

[652] *Kekana v S* [2014] ZASCA 158 para 13 where it was held that planning long in advance is not necessary:

'[13] In my view it is not necessary that the appellant should have thought or planned his action a long period of time in advance before carrying out his plan. Time is not the only consideration because even a few minutes are enough to carry out a premeditated action.'

[653] As can be seen from the authorities, whether or not a murder is planned or premeditated, is determined upon a consideration of the facts of a particular matter, in my view, the following facts are relevant to the issue as to whether, or not it could be said, that the murder of M[....] by the accused was planned or premeditated.

[654] The following emerges from the facts:

- (a) the accused was in love with R[....] and told her so; and he considered himself to be her boyfriend;
- (b) the accused had two arguments with R[....] ; the second argument being on the Sunday, 15 July 2018, immediately prior to M[....] going missing. During such argument, the accused had said to R[....] , 'I will show you';
- (c) on Monday afternoon, 16 July 2018, the accused had asked M[....] what time she and M[....] finished school. When she told him the times they finished school, he responded and indicated that he would wait for them. She responded and said that it was not necessary for him to wait for them;
- (d) the accused had never fetched M[....] or M[....] from school before, nor had

he sought permission to do so. On all occasions that the accused sought to be alone with the children, he obtained permission from R[....] ;

- (e) it appears that the only time he was ever alone with the children was on a Saturday evening, when R[....] had gone out and similarly her mother attended a school reunion. This, however, was prior to the second argument;
- (f) on the occasions that the accused took M[....] to KFC, he was either accompanied by M[....] , alternatively R[....] testified that she stood at the window of her mother's kitchen and watched the accused and M[....] go to KFC and come back.
- (g) the accused went to the school and fetched M[....] and took him to the KFC. Instead of taking him home, he crossed the road with him in the opposite direction of his home and ran with him towards the rear of a taxi;
- (h) the CCTV video footage reveals that the last time M[....] was ever seen was with the accused was at the rear of the tax;
- (i) from the proven facts, M[....] never went home;
- (j) the accused intended to deprive R[....] of her custody and control over M[....] ; the accused never intended to return M[....] and intended to deprive him of his liberty;
- (k) the kidnapping in my view, was clearly with the view to cause harm to M[....] ;
- (l) in addition, the accused did everything in his power to deny that he was with M[....] . In fact, when the search for M[....] began, early on the afternoon of 17 July 2018, he denied that he knew where M[....] was or that he had seen him;
- (m) when M[....] contacted him and similarly when R[....] contacted him he denied having seen him. He deliberately did not disclose that he had in fact taken M[....] to the KFC after school;
- (n) over the course of the evening of 17 July 2018, the cell phone evidence reveals that although he was in the Phoenix area, he did leave the Phoenix area; co-incidentally this ties in with the time that R[....] and K[....] had arrived at his home looking for him and M[....] ;

- (o) he went to the Durban CBD and subsequently returned to the Phoenix area;
- (p) the cell phone evidence, places his phone in close proximity to his home and in close proximity to where the body of M[....] was subsequently found;
- (q) his phone was off when R[....] and M[....] were trying to contact him;
- (r) despite being asked to assist in the search for M[....] , he did not do so;
- (s) he avoided the Sydenham area from the time of M[....] 's disappearance;
- (t) he evaded the police, subsequent to M[....] going missing until the time of his arrest on 20 July 2018;
- (u) even when he was confronted by the police, with suggestions that he had taken M[....] from school and he was last seen with him, he denied any knowledge of M[....] 's whereabouts;
- (v) this persisted right up until the discovery of M[....] 's body on 3 September 2018.
- (w) in fact on the morning of 3 September 2018, when R[....] attended at the Westville Prison pretending to be his girlfriend Rehana, she similarly pleaded with him for the safe return of M[....] ;
- (x) he continued to deny any knowledge of M[....] 's whereabouts; and
- (y) the accused concealed the death as well as the kidnapping and subsequent murder of M[....] .

[655] The cell phone evidence, as well, as part of the mosaic of evidence presented by the State shows that the accused was in the vicinity of his home, as well as the vicinity of the crime scene where M[....] was and in all probability murdered, at the crucial times on the 17 and 18 July 2018 before the accused left Phoenix. The cell phone evidence (Exhibits "N", "P" and "O") indicate that the accused was in the Phoenix area shortly after M[....] raised the alarm that M[....] was missing on 17 July 2018.

[656] We know that:

- (a) at 15:55:39, the accused's cell phone is in the vicinity of the Eastbury tower 2 for a phone call.;
- (b) at 16:09:40, the accused's cell phone is picked up in the vicinity of the Gem City tower 2, receiving a call;
- (c) thereafter, at 16:11:46, his cell phone is in the vicinity of Longcroft Tower 1, receiving a call;
- (d) at 16:11:48, R[....] telephones the accused to ask him if he had seen M[....] . He responds and says that he had not seen M[....] the whole day;
- (e) at 16:22:18, the accused is in the vicinity of the Eastbury tower 3 to receive a call; and
- (f) shortly thereafter, at 16:27:06, the accused's cell phone picks up in the vicinity of the Longcroft tower, sector 2, a GPRS signal.

[657] Having regard to Exhibit 'N', read with Exhibit 'O':

- (a) on 17 July 2018 at 15:37:45, an incoming call is made to the accused's telephone number and this was an unsuccessful call that went into the voicemail service of the accused's cell phone. This call picked up from the Sea Point tower;
- (b) on the same day at 15:55:39, an incoming SMS is received by the accused's cell phone and picked up off the Eastbury cell phone tower on sector 2;
- (c) at 16:09:40, a call is made by R[....] to the accused's cell phone and his phone, at that stage, was at Gem City;
- (d) at 16:11:48, R[....] once again calls the accused's cell phone and, at that stage, the phone was using sector 1 of the Longcroft base station;
- (e) the call, at 16:22:18, was an unsuccessful call that once again went to the voicemail service of the accused's cell phone, which is then in sector 3 of the Eastbury Tower;
- (f) the GPRS contact made at 16:27:06 was an internet connection using the

Longcroft tower panel 2.

[658] If one correlates this with Exhibit 'O3', this relates to the Longcroft tower. There are three yellow pins depicted on Exhibit 'O3'. The first pin which reflects 3336 Longcroft on the green portion is to show where the tower is located. The pin on the top of the purple area is the residence of the accused and the third pin in the middle of the purple area are the coordinates showing where M[....] 's body was found. Longcroft panel two's coverage area marks the point where M[....] 's body was found and the home of the accused.

[659] In addition, it would appear that from about 16:41:19 up to and including 19:06:04, the accused was moving around the Phoenix area and went to the Durban CBD. This is evident, if one looks at Exhibit 'O5', which shows the movement of his phone from the Clayfield VC tower to the Mount Edgecombe tower, thereafter to the Prospect Hall tower, thereafter to the Stamfordhill South tower, which is situated close to the Moses Mabhida Stadium, then the Butterworth Hotel tower, which is a rooftop tower situated in Joe Slovo Street in the Durban CBD. Thereafter, there is a break from 19:06:04 up to 19:49:24 on 17 July 2018.

[660] This call, at 19:49:24, is an unsuccessful incoming call that went to the voicemail service of the accused's phone. Here, the accused's phone is using sector 2 of the Longcroft tower, once again in the Phoenix area. The call records from 20:01:52 up to and including 20:26:51 on 17 July 2018, shows that the cell phone was picking up off the Longcroft tower 2. This is the same cell phone tower, except that different frequencies are being used from the same tower. This Longcroft tower, we know, covers the residence of the accused as well as the area where M[....] 's body was found.

[661] If regard is had to the conversations he had with R[....] where he said 'I will show you' after she rejected his advances and declarations of love for her and told him they were only friends, and regard being had to M[....] 's evidence that he enquired from her as to what time they finished school, I am driven to the conclusion that the accused planned and premeditated the kidnapping and murder of M[....] as a mark of revenge against R[....] for having rejected him.

[662] Insofar as the other hypotheses postulated by the defence referred to earlier in this judgment and with regard to my findings set out above, specifically the forensic , medical evidence, cell phone evidence and CCTV footage, such hypotheses have no merit.

[663] I say so for the following reasons. It would take an inordinate amount of skilful planning for someone to kill M[...] and then frame the accused for the kidnapping and murder and placing his body close to where the accused lives so as to falsely implicate the accused.

[664] The accused advanced the theory that other persons were responsible for M[...] 's death and suggestions were made during the course of cross-examination that it could have been Mike, as on the accused's version, Mike attended at the home earlier on in the day. As suggested by the defence Mike would also have a motive to kill M[...] , given that he was also in the same position as the accused, being a scorned lover. However, the facts do not support this. The door of the house was locked when Ms Omardien left-Mike could not have gained access.

[665] There is no indication that after leaving the KFC, M[...] returned home. In the KFC footage and even whilst running with the accused holding his hand towards the rear of the taxi, M[...] is seen carrying his school bag. It is common cause that M[...] 's school bag, books and juice bottle were found in close proximity to his body. The inference to be drawn from that is that he had his school bag with him at the time he demised. There is no indication that M[...] returned home after school as he would have left his school bag there. The inference to be drawn is that he did not return home and travelled with the accused to Phoenix, where he met his death.

[666] There is also no indication that R[...] and Mike had an argument which would have caused him or given him a possible motive to harm M[...] . R[...] , in her evidence, was clear that there were many people in and out of the home at the time of M[...] 's disappearance and many people who conducted the search, whose names and identities she cannot remember. She indicates that Mike did come and assist, although she could not recall the exact date that he was there. The fact that Mike could not be traced by the Investigating Officer months after M[...] 's death, to my mind, does not justify an inference that he is a suspect and involved in M[...] 's murder. In my view, he can be safely excluded as a suspect.

[667] Even if I am wrong in concluding that he is not a suspect and did not have a motive to kill M[....] or hurt R[....], the proven facts do not support this hypothesis advanced by the defence, that Mike was a suspect and was responsible for M[....]'s death. There is no evidence that Mike threatened R[....] or the family in any way, around the time of M[....]'s disappearance. There is nothing to suggest that either M[....], R[....] and M[....]'s life were being threatened from other quarters.

[668] The only 'evidence' we have of Mike having come to the house on 17 July 2018 in the morning is that which emanated in the accused's whatsapp exchange with R[....]. The accused elected not to testify, and in light of the mosaic of evidence, when considered in its entirety this hypothesis falls to be rejected.

[669] I am mindful of the fact that the accused was untruthful in his interactions with Mohamed, Zondo and the L[....] family. However, this in itself, on the facts of this matter, do not prove the guilt of the accused. I am mindful of the words of Navsa JA in *S v Burger & others*¹²¹ where he held the following:

'There might be suitable cases in which it is safe to conclude that lies, together with other acceptable evidence, prove the guilt of an accused. However, courts should be careful to decide against an accused merely as punishment for untruthful evidence.'

[670] In *S v Mtsweni*¹²² the following is stated:

'Voordat 'n skuldigbevinding aan moord kan geskied moet daar bewese feite wees wat by wyse van afleiding die appellant aan die dood van die oorledene koppel. By ontstentenis daarvan bestaan daar nie 'n *prima facie* saak teen die appellant nie, en kan sy leuenagtige getuienis, net soos in die geval waar hy nie getuig nie, nie die leemtes in die Staat se saak aanvul en 'n gevolgtrekking van skuld regverdig nie.'

[671] I am satisfied that the death of M[....] is an inference that can be drawn in the face of the proven facts in relation to the murder count. The hypothesis and theories advanced by the defence are so far-fetched and improbable that they can be safely rejected, regard being had to the overwhelming circumstantial evidence pointing the finger of guilt clearly in the direction of the accused.

¹²¹ *S v Burger & others* 2010 (2) SACR 1 (SCA) para 30.

¹²² *S v Mtsweni* 1985 (1) SA 590 (A) at 594E-F.

[672] What also resonates with me when considering the evidence is the dictum in *R v De Villiers*¹²³ where the court held the following

“Not to speak of greater numbers; even two articles of circumstantial evidence-though each taken by itself weigh but as a feather-join them together, you will find them pressing on the delinquent with the weight of a millstone....It is of the utmost importance to bear in mind that, where a number of independent circumstances point to the same conclusion the probability of the justness of that conclusion is not the sum of the simple probabilities of those circumstances, but it is the compound result of them.’

Closing remarks

[673] Given the circumstances surrounding this case I am constrained to make a few remarks. Firstly, I am disappointed at the manner in which the investigation of this matter was conducted initially. During the course of cross-examination of a number of the police witnesses, it became apparent that the focus for all was the location of M[....] . At times the zealously resulted in basic investigative procedures being overlooked and at times not followed. What is most concerning, is that the initial investigating officer, Zondo who was allocated this case on 18 July 2018 did not seem to share in the zealously of his fellow officers.

[674] Despite being allocated the missing person’s report and the kidnapping case on 18 July 2018, he did nothing. He appears to have merely interviewed the deceased’s mother and does not appear to have been involved in the search for M[....] . In fact he did not even know that the accused had been arrested, until he was informed thereof on 20 July 2018 by a superior officer according to his evidence. He did not even see the need to interview or speak to the arresting officers concerning the accused and what information they had gathered leading to his arrest.

[675] Another most disconcerting feature of this case was the apparent trial by media and the family’s role in social media and apparent interference in the investigations. R[....] during the course of her evidence spoke about investigations being done by an ex policeman, Dominic King. Why this was necessary or what role

¹²³ 1944 AD 493

it played in the investigations one will never know. In addition, on the evening of 17 July 2018, she and members of her family published the identity, and address of the accused and circulated that he was the main suspect in the disappearance of M[....] .

[676] They took it upon themselves and assumed the role of Judge, jury and executioner, before proper investigations could be done. Even after informing the police that a school pupil had seen M[....] at school and someone ask for him, she together with the deceased's aunty, a teacher at the same school, took it upon themselves to interview T[....] and canvass what he told them the night before and also show him the photograph of the accused on her cellphone, thus diminishing the value of his evidence.

[677] As indicated R[....] did not impress me as a witness. Her memory was extremely selective especially in respect of issues that would have been easy to remember. I gained the impression that as she had made up her mind about the accused on 17 July 2018, and given the media postings she was not going to sway and assist the court in establishing the truth. I appreciate that she was a mother who lost her son, but any sympathy I may have had for her was diminished by her lack of candour and honesty with the court.

[678] As regards the reporting in the media. I am alive to the fact that sensational news sells newspapers and increases the number of people who watch certain news and TV channels. But the cctv footage was in the public domain before the veracity and authenticity was even tested in court. In addition the manner of reporting had convicted the accused before the trial commenced. This conduct is to be deprecated and frowned upon.

[679] Having mentioned them and although these are concerning factors, this has not influenced me in coming to my findings as having regard to the objective facts and the evidence the finger of guilt points to the accused.

Conclusion

[680] I am indebted to counsel for their written and oral submissions during the course of the trial. Considering the body of circumstantial evidence as a whole, I am therefore satisfied that the State has proved its case beyond a reasonable doubt.

In the result, in respect of the counts as contained in the indictment I find as follows:

Count 1 : **THEFT** the accused is found guilty;

Count 2 : **KIDNAPPING** the accused is found guilty;

Count 3: **MURDER, READ WITH SECTION 258 OF ACT 51 OF 1977 AND SECTION 51 (1) AND PART 1 OF SCHEDULE 2 OF ACT 105 OF 1997** the accused is found guilty, in respect of this count I find the murder of M[...] was premeditated.

HENRIQUES J

CASE INFORMATION

APPEARANCES

Counsel for the State	:	Mr K L Singh
Instructed by	:	Deputy Director of Public Prosecutions KwaZulu-Natal 88 Joe Slovo Street DURBAN Cell: 083 2650 981
Counsel for the Accused	:	Mr N.R.Naidoo Advocates Chambers Suite 202 40 Masonic Grove Chambers DURBAN 4001 Tel: 031 – 307 1212 Cell: 082 770 7739
Instructed by	:	Clinton Short Attorneys 564 Marine Drive BLUFF Tel: 031- 467 1071
Date of Hearing	:	21 October 2019; 22 October 2019; 23 October 2019; 24 October 2019; 25 October 2019; 28 October 2019; 29 October 2019; 30 October 2019; 31 October 2019; 04 November 2019; 05 November 2019; 06 November 2019; 18 December 2019; 19 December 2019; 27 January 2020; 20 February 2020; 25 February 2020; 18 May 2020; 6 July 2020; 27 July 2020;
Date of Judgment	:	7 December 2020