IN THE HIGH COURT OF SOUTH AFRICA
NORTH WEST DIVISION - MAHIKENG

CASE NO: CC 11/2022

Reportable:	YES/NO
Circulate to Judges:	**YES**/NO
Circulate to Magistrates:	YES/NO
Circulate to Regional Magistrates:	**YES/NO**

In the matter between:

THE STATE

and

JEAN PIERRE TROMBETTA **ACCUSED**

JUDGMENT

REDDY AJ

Introduction

[1] The accused duly represented by Mr. Gonyane from Legal Aid South Africa has been indicted in the High Court, North West Division, Klerksdorp Circuit on two counts. Advocate Nazo was the prosecuting Counsel.

[2] On the first count to the indictment, it is alleged that the accused on 19 October 2017 and at or near Pro Welding Corner, Lombaard Street Pienaarsdorp, Klerksdorp contravened section 3 read with sections 1, 56(1), 57, 58, 59, 60 and 63 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007, read with section 256 and 261 of the Criminal Procedure Act 51 of 1977 and further read with the provisions of section 51(1) and Part 1 of Schedule 2 of the Criminal Law Amendment Act 105 of 1997, in that the accused is alleged to have unlawfully and intentionally committed an act of sexual penetration with M[...] S[...] M[...] by penetrating her vaginally with his penis without her consent.

[3] On count two of the indictment, it is alleged that on 19 October 2017 and at the place described in count 1 the accused did unlawfully and intentionally kill M[...] S[...] M[...] a female person by strangling her. It was further alleged by the state that section 51(1) and Part 1 of Schedule 2 of the CLAA is applicable in that the death of the deceased was caused by the accused in committing or attempting to commit rape.

[4] The accused pleaded not guilty to both counts and made the following statement in terms of section 115(1) of the CPA. That on 19 October 2019, he walked past the address mentioned in the indictment. He saw the body of a naked female lying on the ground. The body was naked but clothed on the upper body with a T-shirt. At that time, he was using dependence producing substances to wit drugs. Upon seeing the naked body, he penetrated the corpse and left it lying at the place where he found it. Thereafter he went to the neighbors to raise the alarm and the police were summoned. On arrival of the police the body was pointed out by the accused but out of fear the accused did not make any report to the police. The accused admits that the DNA belongs to him because he had contact with the deceased. He, however, disputed being the owner of the T-shirt contending that same belonged to the deceased.

[5] The following admissions were recorded and admitted as **Exhibit “A”**:

[1] That on 19 October 2017 at approximately 11:40am, Constable Boitshwanelo Benjamin Motsage ("Motsage') and Constable Sothembele Ntanga, both members of the South African Police Services ("*the SAPS")* attended to a complaint of a body of an unknown black female found in a field in Pienaarsdorp, Klerksdorp, in the District of Matlosana.

[2] That on 19 October 2017 Motsage pointed out the body of the unknown black female as referred to in paragraph 1 supra to Bongani Mayo (*"Mayo'*). Mayo is attached to the Department of Health, North West Province and at approximately 13h00 on the same day, *Mayo* declared the unknown black female as referred to in paragraph 1 *supra* as being deceased.

[3] That on 19 October 2017 and at approximately 13h15, Sergeant Xolile Christopher Majola *("Majola")* a member of the SAPS and attached to the Local Criminal Record Centre ('the LCRC") attended the crime scene as mentioned in paragraph 1 *supra*. Majola took photographs, compiled a photo album, drafted a key to the photo album and collected exhibits from the crime scene. The photo album and key thereto are attached hereto, marked as **Exhibit "B**".

[4] That Exhibit "B" is a true reflection of the crime scene and exhibits as photographed by *Majola*, and that the key to the photo album is correct.

[5] That *Majola* collected and marked the following exhibits at the crime scene:

5.1 One (1) FSL bag number PW3000494340, "containing three (3) leggings found at the crime scene;

5.2 One (1) FSL bag number PAD001791691, "containing one (1) grey t-shirt suspected to be belonging to the suspect found at the crime

scene";

5.3 One (1) FSL bag number PA6000756168V, "containing one used condom found at the crime scene";

5.4 One (1) FSL bag number PA5001509063, "containing two(2) swabs swapped [sic] from the inside and outside of a used condom found at the crime scene";

5.5 One (1) FSL bag number PA3001287664, "containing one black jean found at the crime scene".

[6] That *Majola* properly sealed the forensic evidence collection bags as referred to in paragraph 5 *supra*.

[7] That on 19 October 2017 at approximately 15h30 Motsage handed the remains of the unknown black female as referred to in paragraph 1 *supra* to Gert Petrus Johannes *Kroukamp* ("*Kroukamp")* a forensic pathology officer in the employ of the SAPS and attached to the Medico-Legal Laboratory, Klerksdorp.

[8] That *Kroukamp* allocated a death register number, to wit DR507/17, to the remains as mentioned in paragraph 1 *supra*.

[9] That on 23 October 2017 the remains as referred to in paragraph 1 *supra* was identified by her brother S[...] A[...] M[...] as being that of M[...] S[...] M[...] ("*the deceased").*

[10] That the deceased is the person referred to in the indictment.

[11] That on 23 October 2017, Kroukamp pointed out and identified the body of the deceased to Dr Funtes Sanchez ("*Dr Sanchez").*

[12] That on 23 October 2017 Dr Sanchez perfomed a medico-legal post-mortem examination on the body of the deceased and noted her main observations and conclusions on a post-mortem examination report attached hereto as **Exhibit "C".**

[13] That Dr Sanchez concluded that the cause of death was "**strangulation by hands".**

[14] That the contents of **Exhibit "C**" are correct.

[15] That Dr Sanchez obtained a deoxyribonucleic acid ("DNA") reference sample from the blood and swab from under the finger's nail of the deceased, using a DNA reference sample collection kit bearing serial number 13D2AC8074.

[16] That the DNA reference sample collection kit as referred to in paragraph 15 supra was properly sealed in a forensic evidence collection bag bearing serial number PW4000938547 once the sample was obtained from the deceased.

[17] That on 23 October 2017 Captain Fabian Ragovan ("*Ragovan")* in the employ of the SAPS and attached to the LCRC, took photographs during the post-mortem examination of the deceased, which photo album is attached hereto, marked as **Exhibit "D"**

[18] That the photographs as referred to in paragraph 17 *supra* are a true reflection of the remains of the deceased before and during the post-mortem examination.

[19] That from the time the deceased died on or about 19 October 2017 as a result of the injuries noted as per Exhibit "D" until such time that Dr Sanchez conducted the post-mortem examination on 23 October 2017, the body of the deceased sustained no further injuries. PHOTO B

[20] That on 22 August 2019 D/W/O Van der Westhuizen (*"Van der Westhuizen"*) obtained a DNA reference sample from me on 22 August 2019.

[21] That the DNA reference sample collection kit, bearing reference number 16DBAD9371 containing the sample obtained from me and referred to in paragraph 20, was properly sealed in a forensic evidence collection bag bearing serial number PA4002765242.

[22] That the Forensic Science Laboratory *("the FSL")* of the SAPS received the DNA reference samples as referred to in paragraphs 21 *supra* in the same condition as when it were sealed, without the seals having been broken or tampered with.

[23] That the exhibits as mentioned in paragraph 5 supra were received by the FSL of the SAPS in the same condition as Majola sealed it, without the seals having been broken or tampered with.

[24] That the DNA reference sample collection kit as referred to in paragraph 15 *supra* was received by the FSL of the SAPS in the same condition as Dr Sanchez sealed it, without the seal having been broken or tampered with.

[25] That Warrant Officer Phokela Apollonarius Mogashoa ("*Mogashoa*") a forensic analyst in the employ of the SAPS and attached to the Biology Section of the FSL, received the exhibits as referred to in paragraph 5 supra, and the DNA reference samples as referred to in paragraphs 5, 15 and 21 supra, from the administration component of the biology section of the FSL.

[26] That Mogashoa conducted tests applying skills in the forensic field on the exhibits and DNA reference samples referred to in paragraph 25 *supra* and recorded his findings in **Exhibit "E**".

[27] That the findings recorded by Mogashoa are correct.

State case

[6] On 19 October 2017, police officers Sgts Motsoge and Ntanga were performing routine patrol duties when they were alerted to the presence of a female corpse. The specific geographic location was also conveyed. It took an estimated five (5) minutes for the police officers to arrive at the scene at Lombardy Street, Pienaarsdorp. The scene had attracted more than (10) bystanders. Immediately, after alighting from marked police bakkie, the accused approached both police officers. The conversation as initiated by the accused commenced with him disclosing that he was walking around in the veld collecting scrap material when he discovered the body of the deceased. The accused was requested to point out the corpse. The police officers accompanied the accused who took them to the exact place where he pointed out the deceased, about thirty (30) meters from where the police bakkie had been parked.

[7] What the police officers discovered is captured in the photo album that was handed in by agreement as **Exhibit B**. The deceased's upper body was clothed with the lower part being naked. The deceased was positioned between rocks which did not make the deceased easily visible. It is common cause that the crime scene was handed over to a Sergeant Majola from the Local Criminal Record Centre who compiled a photo album and collected forensic evidence.

The defence case

[8] The accused elected to remain silent and closed his case without adducing any evidence.

The Court witness

[9] Section 186 of the CPA provides that a court may at any stage of criminal proceedings subpoena or cause to be subpoenaed any person as a witness at such criminal proceedings if the evidence of such a witness appears to the court as essential to the just decision of the case. This Court invoked section 186 of the CPA and caused Dr Sanchez who performed the post-mortem examination of the deceased to be subpoenaed as a witness. This Court did so mindful of the fact that:

"A judge's position in a criminal trial is not merely that of an umpire to see that the rules of the game are observed by both sides. A judge is an administrator of justice, he is not merely a figurehead, he had not only too direct and control the proceedings according to recognised rules of procedure, but to see that justice is done." See: *R v Hepworth* 1928 AD 265 at 277.

[10] The decision of this Court was informed by the fact that, notwithstanding the admission of the post-mortem report of Dr Sanchez and the findings therein being admitted as being correct, the bare admissions justified elucidation to specifically understand the collection of the forensic evidence. In broad, Dr Sanchez performed the post-mortem examination of the deceased four days after her death. The cause of death was determined as strangulation by hands. This conclusion was predicated on the injuries observed on the neck of the deceased. Dr Sanchez explained that the compression of the neck impedes the movement of air into blood vessels in the neck, which results in a cession of air into the lungs.

[11] Dr Sanchez explained the detail of the process that she followed in the extracting epithelial cells under the fingernails of the hands of the deceased. Dr Sanchez explained that the presence of these epithelial cells under the nails of the deceased was probably as result of a defensive action by the deceased to ward off an aggressor.

[12] After the evidence presented by Dr Sanchez, the state accepted the invitation by the court to lead further evidence emanating from the evidence of the court witness. Warrant Officer Phokela Apollonarius Comet Mogashoa

("Mogashoa"), a forensic analyst was consequently called by the State. Mogashoa in essence confirmed his findings as recorded in Exhibit **E**.

[13] The defence elected not to present any evidence following the evidence of the court witness.

The approach to the evidence

[14] The basic principles of criminal law and the law of evidence that applies in this matter are trite. In criminal proceedings, the state bears the onus to prove the accused's guilt beyond reasonable doubt: *S v Mbuli* 2003 (1) SACR 97 (SCA) at 110D-F; *S v Jackson* 1998 (1) SACR 470 (SCA) and *S v Schackell* 2001 (4) SACR 279 (SCA). No onus rests on the accused to prove his or her innocence. See: *S v Combrinck* 2012 (1) SACR 93 (SCA) at paragraph [15]. The accused's version cannot be rejected only on the basis that it is improbable, but only once the trial court has found, on credible evidence, that the explanation is false beyond a reasonable doubt. See: *S v V* 2000 (1) SACR 453 (SCA) at 455B. The corollary is that, if the accused's version is reasonably possibly true, the accused is entitled to an acquittal.

[15] The various pieces of evidence called for an explanation from the accused. The accused elected to remain silent. The accused has a right to remain silent as enshrined in the Constitution of the Republic of South Africa, Act 108 of 1996. The right to remain silent is to be exercised conscious of the consequences thereof. In this trial, the right to remain silent was exercised at the close of the case for the prosecution. The only evidence at that stage was the evidence adduced by the State. In *S v Boesak* (CCT25/00) [2000] ZACC 25; 2001 (1) BCLR 36; 2001 (1) SA 912 (1 December 2000), Langa DP stated as follows:

"[24] The right to remain silent has application at different stages of a criminal prosecution. An arrested person is entitled to remain silent and may not be compelled to make any confession or admission that could be used in evidence against that person. It arises again at the trial stage when an

accused has the right to be presumed innocent, to remain silent, and not to testify during the proceedings. 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 Madala 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.""

See too: *S v Chabalala* 2003 (1) SACR 134 SCA at paragraph [20].

[16] Against the backdrop of the factual matrix in this matter and more so the circumstantial evidence inherent in the forensic evidence, inferential reasoning must be applied. It was explained as follows in *R v Mtembu* 1950 (1) SA 670 (A) at 679 that:

"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 is the line between proof by a balance of probabilities and proof beyond reasonable doubt. Just as a number of lines of inference, none of them in itself decisive, may in their total effect lead to a moral certainty (*Rex v de*

Villiers (1944, A.D. 493 at p. 508)) so, it may fairly be reasoned, a number of probabilities as to the existence of the 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. That was the view, I think, which underlay the use of the words "either proved or *shown to be probable*" in *Rex v Mthlongo* (1949 (2), S.A.L.R. 552 at p. 558 (A.D)) and see Wigmore on *Evidence* secs. 216 and 2497." See also R v De Villiers 1944 AD 493 at 508; S v Sibanda supra fn 6 at 246 B – H; S v Morgan and Others 1993 (2) SACR 134 (A) at 172 i – 173 a; S v Smith en Andere 1978 (3) SA 749 (A) at 755 A – B; and S v Ntsele 1998 (2) SACR 178 (SCA) at 189 c – d.

[17] The principles in relation to inferential reasoning are well established. The standard of proof beyond a reasonable doubt in criminal proceedings requires the application of, what the court in the oft-quoted case of *R v Blom* 1939 AD 188. referred to, as the two "cardinal rules of logic":

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

(1) The inference sought to be drawn must be consistent with all the proved facts. If it is not, the inference cannot be drawn.

(2) The proved facts should be such that they exclude every reasonable inference from them save the one sought to be drawn. If they do not exclude other reasonable inferences, then there must be a doubt whether the inference sought to be drawn is correct."

[18] In the assessment of circumstantial evidence, a piecemeal approached is deprecated. In *S v Reddy and Others* 1996 (2) SACR 1(A) at 8C-D, the court warned against a fragmentary approach to the assessment of circumstantial evidence when the following was said:

'**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 *Rex v Blom* 1939 AD 188 at 202-203, 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".'

[19] It is well established that in the application of circumstantial evidence the inference of guilt must be the only reasonable inference that is sought to be drawn from the proven facts. To enable such an inference to be drawn there must be some evidential foundation to support it. Therefore, it axiomatically follows that this inference cannot be founded speculation, conjecture, or remote possibilities. Significantly, even when the application of the principles of circumstantial evidence is to be applied, it is important to underscore that the burden of proof rests on the State throughout criminal proceedings to prove the guilt of the accused beyond a reasonable doubt. This being a trite principle in law the accused person is not required to establish that some other inference should be drawn, or to prove particular facts which are to support such other inference in circumstances where the state is placing store on inferential reasoning.

Evaluation

[20] There are several common cause issues which alleviates the burden on the state to prove same. These issues, insofar as they are not in dispute or common cause may be accepted as proven facts. They include the following:

(i) That on 19 October 2017 at approximately 11:40 am, Motsage and Ntanga, both members of the South African Police Services attended to a complaint of a body of an unknown black female found in a field in Pienaarsdorp, Klerksdorp. The exact location of the body of the

deceased was pointed out by the accused. The deceased was subsequently identified as M[...] S[...] M[...].

(ii) At approximately 13h00, the deceased was declared dead by Mr Mayo from the Department of Health North West.

(iii) The crime scene was duly photographed, and Exhibit B is an accurate photographical reflection thereof. At the scene three (3) leggings, one (1) grey shirt, one (1) used condom and one (1) black jean found at the crime scene. The collection process, the sealing and marking of these exhibits are not in issue. Swabs of condom

(iv) Dr Sanchez obtained a deoxyribonucleic acid ("DNA") reference sample from the blood and swab from under the fingernails of the deceased, using a DNA reference sample collection kit bearing serial number 13D2AC8074. The DNA reference sample collection kit was properly sealed in a forensic evidence collection bag bearing serial number PW4000938547.

(v) On 22 August 2019 Warrant Officer Van der Westhuizen obtained a DNA reference sample from the accused. The DNA reference sample kit bearing reference number 16DBAD9371 was properly sealed in forensic evidence collection bag bearing serial number PA4002765242.

(vi) The findings of Mogashoa are that blood on the t-shirt and epithelial cells matches the DNA of the accused.

[21] The accused failed to explain the presence of his epithelial cells under the fingernails of the deceased. The evidence called for an explanation particularly since the accused admitted that the epithelial cells matched his DNA. In the absence of an innocent explanation for this circumstantial evidence, it is left undisputed. The inescapable deduction from evidence is therefore that the deceased was alive when the accused encountered her. This circumstantial evidence lends credence to the evidence of Dr Sanchez

that the epithelial cells of the accused ended up under the fingernails of the accused because of a struggle by the deceased to ward off an attack.

[22] The accused further failed to explain the presence of his blood on the grey T-shirt recovered at the crime scene, when this too called for an explanation. The ineluctable deduction from this evidence is that the presence of the accused's blood on the grey T-shirt recovered at the crime scene speaks to a struggle.

[23] The reliability of the DNA evidence is not gainsaid by any refutable evidence. Mere suggestions through unfounded facts in cross examination does not challenge the credibility and reliability of the DNA evidence. The accused has not raised a clear and unambiguous dispute of fact to raise any doubt as regards the forensic evidence. Suggestions made in cross examination which was in conflict of formal admissions made in terms of section 220 of the CPA without a formal withdrawal of those admissions does not avail the accused. It was rather disingenuous of the accused to appear to challenge the admissions made. This is undoubtedly self-contradictory.

[24] Notwithstanding, the unjustified challenge to the evidence Mogoshoa the forensic expert, his expert evidence is accepted by this Court as being accurate and reliable. An expose on DNA evidence in the present circumstances is unnecessary. See: *S v Bokolo* 2014 (1) SACR 66 (SCA) at paras [8] to [16]. In *Bokolo* the court pointed to a few factors which it considered relevant in determining the weight of DNA evidence. For present purposes the relevant admissions form excludes the application of a scrutiny these factors.

[25] The accused admitted during the disclosure of his defence that he engaged in sexual intercourse with the deceased, albeit that on his version this occurred with the corpse of the deceased. Whilst the inner and outer swabs from the recovered condom excluded the accused as a donor, it is a neutral fact considering the accused's admission of sexual intercourse with the deceased. It is unassailable that the accused had sexual intercourse with the deceased.

This the accused has admitted. It therefore places him in intimate contact with the deceased. The accused contention that the deceased had passed on when he had engaged in sexual intercourse with her is rebutted by the evidence of Dr Sanchez. Dr Sanchez demonstrated the defensive action that the deceased would have resorted to ward of an act of aggression. The presence of the accused epithelial cells under the fingernails of the deceased unequivocally proves that the deceased was alive when sexual intercourse had occurred with her.

[26] The used condom proves factually that the accused was in the presence of an accomplice or co-perpetrator. This is established by the exclusion of the accused as a donor to the semen inside the condom. The accused attempt at introducing speculative hypotheses during cross examination is of no evidential value. I considered the totality of the evidence and in that process, weighed the evidence of the state witnesses holistically. The accused elected to present no evidence to explain the presence of his epithilial cells under the fingernails of the deceased.

[27] There are two inferences that can be drawn from the proven facts to the exclusion of any other inferences. The first inference is that the accused had sexual non-consensual intercourse with the deceased whilst she was alive. This inference is strengthened by the presence of the accused epithelial cells under the fingernails of the deceased which could only have been deposited there as a result of the deceased putting up a struggle with the accused. It establishes beyond any doubt that the deceased was alive. The contention by the accused that he had come across the deceased whilst searching for scrap metal is no more than calculated recent fabrication. The deceased this Court finds was very much alive when he encountered her. It must be borne in mind that for the accused to have had consensual intercourse with her, the deceased would have had to have acquiesced to this sexual act. The defensive action of the deceased in warding off the unrequited actions of the accused goes against the grain of recognized consent in our law. The inference is further strengthened by the admission of the postmortem report in conjunction with the *viva voce* evidence of Dr Sanchez, which incontrovertibly

established that the cause of death was asphyxia (strangulation by hands) as per the postmortem report.

[28] The second inference to be drawn from the proven facts is that the accused had unlawfully and intentionally murdered the deceased. The accused would have been one of the last persons to encounter the deceased whilst she was alive. It follows that the accused with the evidence regarding the epithelial cells, strangled the deceased.

[29] The only question which remains is whether the evidence proves the either of the jurisdictional facts relied on by the state in Part I of Schedule 2 of the CLAA. Part I of Schedule 2 of the CLAA provides the circumstances under which life imprisonment may be imposed for a crime or offence committed under certain circumstances (jurisdictional facts). In respect of murder relevant to the facts of the present matter it provides for:

"Murder, when –

(a) it was planned or premeditated;

…

(c) the death of the victim was caused by the accused in committing or attempting to commit or after having committed or attempted to commit one of the following offences:

(i) rape or compelled rape as contemplated in section 3 or 4 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, respectively; …"

[30] This Court is unable to conclusively find that the murder was planned or premediated. See: *Benedict Moagi Peloeole v The Director of Public Prosecutions, Gauteng* (740/2022) [2022] ZASCA 117 (16 August 2022), *Kekana v S* 2014 7 (*Kekana* 2014), and *Kekana v S* 2018 (*Kekana* 2018).

[31] On the jurisdictional fact that "the death of the victim was caused by the accused in committing or attempting to commit or after having committed or attempted to commit rape or compelled rape as contemplated in section 3 or 4 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, respectively; …", from the proven facts, the accused was one of the last persons with a probable co-perpetrator to see the deceased alive. This is borne out by the fact that a used condom was recovered with DNA which excludes the accused. The deceased put a struggle which resulted in the accused's DNA being caught under her fingernails. This DNA speaks for the deceased. The only probable explanation for this is that the deceased had put up a struggle to avert the rape which was perpetrated on her. There can be no other plausible explanation. The jurisdictional fact as aforesaid is phrased wide enough by the Legislature to cover the death of a victim in circumstances where she is being raped, an attempt at raping her is perpetrated or after such rape or attempt at rape.

[32] I am accordingly satisfied that the deceased was murdered in the circumstances envisaged in Part 1 of Schedule 2: Murder where "the death of the victim was caused by the accused in committing or attempting to commit or after having committed or attempted to commit rape as contemplated in section 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007."

[33] In respect of the rape of the deceased, Part I of Schedule 2 provides for life imprisonment in circumstances where "Rape as contemplated in section 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007 involving the infliction of grievous bodily harm." In Manopole v S (A203/2016) [2017] ZAFSHC 44 (16 March 2017), Musi AJP (as he then was) stated as follows:

'[10] The appeal against the holding that the applicable minimum sentence on count 2 is life imprisonment is meritorious. There are no jurisdictional facts that warrant a finding that it is a rape as contemplated in Part 1 of Schedule 2

of the Act. It is indeed a rape as contemplated in Part III of Schedule 2 of the Act. The applicable minimum sentence for a first offender is therefore 10 years' imprisonment. I say this because **there is no evidence whatsoever that the complainant sustained an injury let alone a serious injury. It can therefore not be a rape involving the infliction of grievous bodily harm. In order to classify a rape as one involving the infliction of grievous bodily harm the state must prove that the complainant sustained a serious injury. The state did not prove any serious injury in this case. See S v Rabako 2010 (1) SACR 310 (O)**. In fact, the complainant testified that she did not sustain any significant injury."

[34] In Director of Public Prosecutions: Gauteng Division, Pretoria v Moabi (959 of 2015) [2017] ZASCA 85 (2 June 2017), the SCA found that:

[12]…. The provisions of Part I and III of Schedule 2 of the CLAA do not create separate offences of rape.[1] They do, however, prescribe different penalties depending on the circumstances which warrant the categorisation of the rape as falling within the purview of either Part I or Part III of Schedule 2 of the CLAA. If the proven facts establish that the convicted person inflicted grievous bodily harm in the course of the rape, then that would bring the rape within the ambit of Part I of the CLAA, which prescribes a harsher minimum sentence than the one contemplated in Part III. Clearly, the question raised involves the interpretation of the CLAA in order to ascertain what must be proved to bring the rape within the ambit of either Part I or III of Schedule 2 of the CLAA. I am satisfied that the DPP has indeed raised a question of law.

[13]I now turn to determine whether the high court was correct in finding that the intention to do grievous bodily harm must be proven in a rape involving contemplated in Part I*(c)* of Schedule 2, read with s 51(1) of the CLAA. I deem it instructive to pay regard to the following remarks made by Hoexter JA in a concurring judgment in *R v Jacobs*[2] pertaining to the infliction of grievous

[1] *S v Kolea* [2012] ZASCA 199; 2013 (1) SACR 409 para 16.
[2] *R v Jacobs* 1961 (1) SA 475 (A) at 478A.

bodily harm, albeit in the context of the offence of robbery with aggravating circumstances:

'The question whether grievous bodily harm has been inflicted depends entirely upon the nature, position and extent of the actual wounds or injuries, *and the intention of the accused is irrelevant in answering that question.*' (My emphasis.)

[14] In the absence of any interpretative factors which would warrant a different approach in this matter, I am inclined to adopt the same reasoning in the interpretation of the same phrase in relation to the rape contemplated in Part I*(c)* of the CLAA. It is clear from this case that the test for ascertaining whether grievous bodily harm has been inflicted is factual and objective. The correct approach to that enquiry necessitates a holistic consideration of all objective factors pertaining to the incident, with a view to ascertaining whether bodily injuries were inflicted and whether they are of a serious nature.

[15] In my view, the high court's reliance on cases where the accused was charged with the offence of assault with intent to do grievous bodily harm was clearly wrong. By importing the intention of the respondent into the enquiry, the high court disregarded the principles laid down in *Jacobs.* It committed an error of law as 'intent' is irrelevant in the determination of whether grievous bodily harm was inflicted on a complainant in the rape envisaged in Part I*(c)* of the CLAA. Rather, the question to be answered is whether, as a matter of fact, the victim of such a rape sustained grievous bodily harm. It is evident from the high court's judgment that its erroneous conclusion that the DPP had failed to prove the element of intent resulted in it concluding that the rape committed by the respondent did not fall within the purview of s 51(1) read with Part I*(c)* of Schedule 2 of the CLAA and instead considered the applicable minimum sentence to be 10 years imprisonment as stipulated in Part III of the CLAA. This erroneous finding pertaining to the applicable

minimum sentence was clearly made in favour of the respondent.[3] The applicant has thus shown a basis for invoking the provisions of s 311(1) of the CPA and this court has jurisdiction to hear the appeal."

[35] In *S v Maselani and Another* 2013 (2) SACR 172 (SCA), by way of comparative analysis:

[3] The sole issue in regard to the appeals against conviction is whether, as a question of fact, aggravating circumstances were present in the form of the infliction of 'grievous bodily harm' upon the victim of the robbery, within the meaning of that term as contained in s 1*(b)*(ii) of the Act. The section provides as follows:

'**1 Definitions**

(1) In this Act, unless the context otherwise indicates —

"**aggravating circumstances**", in relation to —

(a) . . .

(b) robbery or attempted robbery, means —

(i) the wielding of a fire-arm or any other dangerous weapon;

(ii) the infliction of grievous bodily harm; or

(iii) a threat to inflict grievous bodily harm,

by the offender or an accomplice on the occasion when the offence is committed,

[3] In *S v Goabab* 2012 JD3 1063 (Nm) at para 8, the court found that alternative charges, viewed against maximum sentences constituted a lesser offence and therefore the decision of the court to acquit the accused on the main charge constituted a decision in favour of the accused.

whether before or during or after the commission of the offence.'

The SCA found:

> [13] Common sense dictates that, where the object of the provision is to penalise 'the infliction of grievous bodily harm' upon a victim, the consequences suffered by the victim are a relevant consideration. As pointed out by the trial court, 'what harm can be more grievous than death?' This must be so where the victim dies as a result of the infliction of bodily harm.
>
> [14] In addition, as pointed out by the trial court, if the harm suffered by the victim is excluded from consideration, absurd consequences could result where —'a mere threat to kill would result in a conviction with robbery by aggravating circumstances, but actual death would not if the degree or nature of the force applied in order to bring about the death could not be said to be grievous'.
>
> [15] In the result, because the deceased died as a consequence of the injuries inflicted upon her neck, grievous bodily harm was established on the facts.

[36] Applying the principles in *Moabi* and Maselani to the present matter, the question is what could be more serious in terms of an injury (caused by the infliction of grievous bodily harm) than the death of the deceased caused as a result of the rape or attempt thereto.

[37] I am accordingly satisfied that the jurisdictional fact for rape contemplated in Part I(c) of the CLAA has been proven beyond a reasonable doubt.

[38] The cumulative effect of all the evidence presented proves beyond a reasonable doubt that the state succeeded in proving the guilt of the accused beyond a reasonable doubt on both counts of the indictment.

Order

[39] The accused is accordingly found guilty as follows:

Count 1: contravening section 3 read with sections 1, 56(1) 57, 58, 59, 60 and 63 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 read with the provisions of section 51(1) and Part 1 of Schedule 2 of the Criminal Law Amendment Act 105 of 1997.

Count 2: murder read with the provisions of section 51(1) and Part 1 and Part 1 of Schedule 2 of the Criminal Law Amendment Act 105 of 1997.

A REDDY
ACTING JUDGE OF THE HIGH COURT
OF SOUTH AFRICA
NORTH WEST DIVISION, MAHIKENG

APPEARANCES

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Date of hearing:	13 October 2023 18 October 2023 06 November 2023 14 December 2023 23 January 2024 16 February 2024
Date of judgment:	25 March 2024 & 5 April 2024