

IN THE HIGH COURT OF SOUTH AFRICA  
(WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE NO:

SS09/11

DATE:

1 SEPTEMBER 2011

5 In the matter between:

THE STATE

and

SIBUSISO MTSAKO

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**JUDGMENT**

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MANTAME, AJ

The accused was charged with count 1, that is murder, count  
15 2, robbery with aggravating circumstances and count 3,  
contravening Section 90 read with Section 1, 103, 117,  
120(1)(a) and 121, further read with Annexure 4 and Section  
151 of the Firearms Control Act 60 of 2000, and further read  
with Section 250 of the Criminal Procedure Act 51 of 1977,  
20 hereinafter referred to as the Act. The State is represented by  
Mr Kelaotswe and the accused is represented by Ms Haldenby.

At the start of the proceedings the accused elected to enter a  
plea of guilty to culpable homicide in relation to count 1, and  
25 robbery with aggravating circumstances, in relation to charge 2  
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in terms of Section 112(2) of Act 51 of 1977. He made admissions which read as follows:

5       *"I admit that the deceased is the person named in the indictment to wit Jacobus Gerhardus Nicholas Smith. I admit that on 24 August 2010 I went to the residence of the deceased at 16 Bovertrek Street, St Helena Bay, in the District of Vredenburg, and I unlawfully and intentionally assaulted the deceased and forcefully took a*  
10       *television set and 3 x 100 Kwanza Angolan money notes from him. I admit that I did not have any right or permission to take these goods from him. I admit that on the same date and at the same place set out above I unlawfully and negligently tied two vests around the*  
15       *deceased mouth, thereby causing him to die by asphyxiation, although I did not intend to kill him. I admit that on 24 August 2010 I smoked methamphetamine, that is tik, and socialised with some friends under a tree, not far from the deceased's home, I*  
20       *drank brandy and several beers. When it started getting late I decided to leave and walk home. I admit that on the way home I walked past the deceased's house, I noticed that the house was dark inside and the glass panel door appeared to be open. I decided to go and*  
25       *look around inside the house to see if I could find some*

money that had been left lying around. I entered the house. I am partially blind in one eye and the alcohol had made me unsteady on my feet, I knocked over some furniture in the dark and made a loud noise. I heard the deceased calling from the bedroom. I went to the bedroom. I found him sitting on the bed. I went to the bed and grabbed him by the arms in order to subdue him and told him not to make a noise. I told him to tell me where his money was and said I would go once I had obtained it. He informed me that his money was in the bedroom cupboard, he offered to show it to me, he took me to the cupboard and reached into it and pulled out a hammer. He tried to hit me with the hammer, I was very angry and I grabbed him forcefully by the neck, in a neck hold, and threw him to the ground. He banged his head on the bedroom floor as he fell, I also fell. I fell on my back and felt the point of my knife which was in my jacket pocket against my hand. (I always carry a knife for purposes of self-defence, ever since I was stabbed in the eye by a man with a broken beer bottle.) I was very angry that the deceased had tricked me and I pulled out a knife and hit the deceased several times on the head and the face with the back of the knife handle. I also stabbed him in the head with the knife. I admit that I struggled with the deceased and knelt on the deceased

chest so that I could take the laces out of his shoes. I then told him to lie on his stomach so that I could tie his hands behind his back. I instructed the deceased to stand up and show me where he had hidden his money. I admit that I then tied the deceased to the bedpost after he refused to point out where his money was, unless I untie him. The deceased refused to cooperate and was calling out and making a lot of noise. I hit him on his chest and back with the knife handle and told him to keep quiet. I did not want him to alert the neighbours. I stuffed a piece of cloth into his mouth to keep him quiet. I then searched the house and the garage to see if I could find the money. I found 3 x 100 Kwanza Angolan money notes in a box in the sitting room. I took these and I decided to take the deceased television set. I then heard the deceased shouting out again. I returned to the bedroom and saw that the deceased had managed to dislodge the cloth. I admit that I took two of the deceased vests and tied them together around his mouth in order to stop him from shouting. I did not intend to kill the deceased and I only did this in order to stop him from making a noise and alerting the neighbours. I did not foresee that this action may cause him to suffocate. I thereafter left the deceased home. When I last saw the deceased he was still alive. I admit that the cause of the

*deceased death was asphyxia. I have given my full cooperation to the police. I did the pointing out and the 3 x 100 Angolan money notes and the television set have been recovered by the police and returned to the deceased family."*

Mr Kelaotswe for the State in turn refused to accept this plea and submitted that the content of the plea was not in accordance with the facts and does not reflect the nature or elements of the charges. Ms Haldenby for the defence applied that the admissions be accepted as such in terms of Section 220 of the Act and that the plea of guilty in terms of Section 112(2) of the Act be changed to the one of not guilty in terms of Section 113 of the Act in relation to charges 1 and 2. The said admissions were recorded and admitted as such, and the plea was changed to one of not guilty.

The first witness to be called by the State was Warrant Officer Charles Strauss. The Warrant Officer testified that he was the investigating officer in this case and was employed by the South African Police Services for a period of 8 years in the detective unit. On 25 August 2010 he was officially on duty when he and his partner received a complaint at about 10:45 in the morning of a person who was killed at number 16 Bovertrek Street at St Helena Bay. His evidence was that St Helena Bay

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is a small town situated along the coast. It is divided into sections, that is first, second and third section, and they are all around the coast.

5 On this day, they were the nearest police vehicle to the scene and they responded to the complaint. Upon arrival at the scene Warrant Officer Strauss was met with a Mrs Eunice Jones who was standing in the doorway of the crime scene, who advised that the deceased was in his room and was  
10 murdered. Warrant Officer Strauss entered the house through the kitchen door, whilst walking through the kitchen he saw some empty bottles of Tab and Coke that were standing on the table and there were some dishes that were undone. He identified the house he visited as photo number 69 in the photo  
15 album. According to the witness, the photos in the album were taken by the local crime record centre, that is "LCRC". The witness then proceeded to the main bedroom situated on the north-western side of the house, where the accused was found with his hands tied behind his back. The said bedroom was  
20 found in the album as photo number 165.

The witness further testified that when he entered the bedroom he immediately saw the bloodstains on the wall and carpet and the deceased was in an upright position, that is sitting  
25 position. The said scenario is reflected at photos number 175

and 177. The deceased was bloodstained and clearly unconscious and there were injuries to his head and body. His hands were tied on the bed post, he noticed that there was a belt around his waist where the ropes were connected and tied  
5 around the bedpost. He also noticed that the said ropes had already cut around the arms of the deceased. That can be found in photo 180. He also noticed a puddle of blood right underneath his hands and this is in photo 181. The injuries to his head that he mentioned can be seen in photo 183.

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He testified that basically the deceased was severely injured all over his body. To him it looked like stab or hit wounds. He observed that the deceased was wearing a white vest and red underpants as depicted on photo 184 and 193. Further it  
15 looked like there was a night shirt around his neck. Underneath the underpants from the waist down he wore only socks. He observed that the deceased was an elderly man. Furthermore he observed the closet on the left hand side of the room and it had blood on it. On the ground, he noticed  
20 that there was a hammer that was lying down next to the open closet and it seemed to be blood stained. The said hammer is reflected on photos 201 and 202. The bed was unmade, that is photo 204, drawers were open, one of the cupboards had a blood stained milk bottle and tea cups, that is photo 223, 224  
25 and 225. He also noticed bloodstains on the curtains, that is

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photo 295.

At that point the witness testified that he was certain that there was no signs of life in the body of the deceased. He started to  
5 phone the relevant people, that is, the station commissioner, Captain Lourens, the cluster commander Colonel van Litzenberg and the LCRC and Dr Scherman. As he walked through the entire house, he noticed that all the rooms were open. The impression he got was that someone was looking  
10 for something. In the room that was occupied by the son of the deceased he observed a TV stand with a DVD player and a sound system, that is photo 218 and 219. He observed that the area where the TV was supposed to be, was empty and there were some wires hanging around.

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He then suspected that the TV was stolen. Otherwise there were no visible signs of forced entry into the house. The backdoor was unlocked and all the windows were securely closed. Warrant Officer Strauss proceeded to investigate the  
20 rest of the yard. At the front door of the house he saw .22 rounds lying scattered on the cement, and they were unused, that is photo 38, 39, 40, 41 and 42. At that time he did not know where these rounds came from, up until the son of the deceased arrived and confirmed that the rounds came from the  
25 house. Whilst he was still outside the house, the dog unit

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arrived and they canvassed the whole area walking through the field behind the house and bushes. They discovered a silver Daewoo TV hidden underneath the bushes. The son of the deceased identified the TV set as the property of the deceased. The said TV was the set that was in the son's room at all times before this incident.

On the day after this incident, Warrant Officer Strauss testified that there was a pointing out that was led by Col Barkhuizen of the old Murder and Robbery Unit (now working under the Provincial Investigators). He was advised that he should not take part in the pointing out. Later on, he was advised that 3 Kwanza notes were discovered. The accused also pointed out certain elements, including the knife with the blue handle that was used in the commission of the offence. That is in photos 447 and 448. During this process, accused also pointed out a blue jacket, that is a windbreaker, that was completely soaked in blood and it was put in the exhibit register.

Warrant Officer Strauss gave evidence and said that the forensic team found numerous fingerprints in the house of the deceased and they were taken for investigation. On the following day, that is 26 August 2010, at about five o'clock in the afternoon, he was contacted by the leader of the group, Captain van der Westhuizen and they gave him a bail

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information form that was generated from a computer system. In this form, there was information of the accused, Sibusiso Mtsako. The conclusion was then drawn that he was a suspect and Warrant Officer Strauss and his colleague went out to his address, that is, 43 Jordaan Street, Laneville, St Helena Bay, the accused was known by Warrant Officer Strauss even before this incident. When they entered the residence of the accused, the accused was standing there with his brother and they immediately explained to him the case that they were investigating, and he immediately said he will give full cooperation. They then took him to the police station. At the time of the arrest, he was wearing a brown long sleeve shirt, a pair of blue jeans and a pair of Crocs. He noticed that there were blood spots on the shoes and on the jeans. He explained to the accused that he will seize the clothes and hand it in for forensic analysis of which he agreed.

After the accused was secured at the station he and his colleague went back to the accused house where his brother and other occupants were, to make further investigations. He then took statements from the brother and other occupants. They then requested if they can show them the closet where the accused keeps his clothes. The accused brother basically pointed a cardboard box where the accused clothes were kept. They went through the clothes and found brown pants that

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were completely soaked in blood. The said pants were seized and handed in into the exhibit register. The ammunition that was found on the scene was also handed into the exhibit register. All the exhibits were sent in for forensics, for DNA  
5 analysis against the DNA samples of the deceased. The results came back positive and indicated that the DNA of the deceased was on the jacket and the jacket that was pointed out as well as the pants that were found in the house of the accused.

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According to the information he received whilst at the deceased house, the deceased was staying with his son. At the time of this incident the son was away as he is a truck driver. He normally goes away for weeks due to the nature of  
15 his job. In his own analysis based on his experience in the police services, he formed a view that the deceased was assaulted tremendously, and the way his arms were bound, it appeared he struggled to get loose. He went on to say that the type of crime that was committed is not prevalent in that  
20 area. As a result of this incident some of the neighbours sold their houses and moved away.

At this stage the State applied that the photo album that was used in the proceedings be submitted as EXHIBIT A, there was  
25 no objection from the defence, and the album was admitted

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and recorded as EXHIBIT A.

The cross-examination by Ms Haldenby did not take the matter anywhere.

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The second witness to be called by the State was Johannes Nicolaas Smit. Mr Smit testified that the deceased is his father. His father was born in 1922, which means that he was 88/89 years old. Although he was living with him, at the time  
10 of the incident he was alone. He is employed as a truck driver and this requires him to drive long distances and be away from home for a long period of time. His father was very old, he was not a strong person, and was considerably weak. Although his father would do some chores every now and then,  
15 during the period of his absence Ms Willemina Smit, the neighbour, would come and do the chores in the house like washing the dishes and wiping the floors. He knows his father as a good person and almost everyone knows him in St Helena Bay. He confirmed that during the incident at his house, some  
20 items were removed including the TV and some clothing. Mr Kelaotswe referred him to photo 232 and 233 which depicts a hammer with pointers marked E, G and O. Mr Smit recognised the hammer, but did not know the one on the said photos. He did not know as to how it landed at his house. He mentioned  
25 that there was a hammer at home, but the one they had is the

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one that is used to pull out pins with.

On cross-examination by Ms Haldenby Mr Smit confirmed that he stayed in the house for some five and a half to six years.

5 He knows his father very well and he knows his possessions. He also confirmed that he is away at times for a long time and even drives across the country, to countries like Botswana and so on.

10 The third witness to be called by the State was Elizabeth Willemina Smit. She gave evidence that she is not related to the previous witness, they are neighbours. They have been neighbours for the past 14 years. She knows Oom Gert, as she refers to the deceased, and Tannie Marie who was the  
15 deceased's wife. They were good people and she used to visit them. Since the deceased was alone, she would go and assist him twice a week. She used to bath him as he could not climb out of the bath because of his age. The deceased was 88 years old, and he was not strong anymore. She also testified  
20 that she helped with cooking and washing his clothes. During the deceased lifetime, he used to walk slowly to the beach every morning. She knows him as a friendly and kind person to anyone and she used to accompany him to the bank.

25 On 25 August 2010 she received at telephone call from the

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deceased daughter in Pretoria. The daughter advised that she had received news that her father had been assaulted and she wanted her to go and check as to where is her father.

5 Immediately thereafter, she went to the deceased's house. On entering the deceased's house, she observed that everything was upside down. There was bread, butter that was opened, and milk on the table. Inside the bedroom, she found the deceased in his bed. She noticed that his hands were tied on  
10 his back and against the bed base. She then tried to see whether he is moving. Mrs Smit touched him, called him "Oom Gert", and even talked to him but noticed that his body was cold. She noticed further that the cupboards were wide opened and the clothes were lying around in the bedroom.  
15 The deceased was wearing his underwear and his body was full of blood.

During cross-examination Mrs Smit confirmed that when she arrived at the crime scene she met Mrs Jones and Karin  
20 Matthee. According to the information she received Ms Jones was inside the house, Ms Karin Matthee was never inside the house. She confirmed that during the day the deceased would either sit on the chair or take walks of about 40 metres to the beach. He would occasionally take walks about twice a day.  
25 She was the only person who was permitted to come and help

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the deceased twice a week.

The fourth witness to be called by the State was Dr Nadine Louise Scherman. Dr Scherman testified that she is a  
5 qualified medical practitioner employed by the Provincial Government of the Western Cape. She obtained an MBCHB from the University of Stellenbosch in 1991 and a Diploma for Medicine in Pathology in August 2007. She is employed by the Department of Health, Forensic Pathology Services and  
10 responsible for doing the post mortems in Vredenburg and Malmesbury. She has been in the service of the Department of Health since 1992, and in the Department of Pathology since 1<sup>st</sup> May 2008. On 13 August 2010, she performed a post mortem on the body of a male person with No:  
15 WC150080/2010. She compiled a report and she read the contents of the report into the record. Her findings were based on the examination that she conducted on the body as a Pathologist. She examined the body of an estimated age of 88 year old white male. Her observations were that the cause of  
20 death was consistent with asphyxia due to manual strangulation. She described asphyxia as when there is a lack of blood supply in the veins which then causes a lack of oxygen to the brain. She further defined manual strangulation as when somebody would place hands on someone's neck and  
25 press hard or apply force on the neck and then the neck  
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structures with the hyoid bones would fracture. Firstly, she testified that with manual strangulation there are different manners in which death could occur. She said the fracture of the hyoid bone does not cause death, but rather the mechanism used. If one applies pressure to the neck, one can firstly stimulate the vagal nerve, which is one of the big nerves that runs in the neck and the effects of the nerve are that it causes a bradycardia to the heart to cause the heart to stop. Secondly, one can close the trachea which is the airway. Due to the lack of oxygen, the person cannot breathe. Thirdly, one can close the arteries which could mean no blood supply to the brain, or if one closes the veins the blood that is in the brain already would not be able to come out of the brain again. With regards to time frame as to when death could happen, if one applies pressure and the vagal nerve gets stimulated, death can be instantaneous or if pressure was on the arteries, trachea or vein, death could occur within three to four minutes.

In this case she was not able to tell whether death was instantaneous or was it between three to four minutes. The post mortem cannot determine the mechanism of death. It is then customary that when they suspect strangulation on a neck injury they do neck dissection. This is one of their speciality techniques whereby they take neck muscles layer by layer to see which muscles are bruised. They then get into the hyoid

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bone, a small bone in the neck and it breaks due to the pressure in the neck. She reiterated that breaking of the bone is not the cause of death, but the pressure on the neck and the mechanism that goes with it causes death. She explained  
5 further that the incised wounds that were mostly on the deceased's head would usually be caused by a sharp object. Those wounds were in photos 389 to 390. She disputed accused version that the result of the deceased's wounds would be caused by hitting him with the back of a knife, and  
10 reference was made to photo 449. She observed some tear wounds that could have been caused by a blunt object. She also testified that she does not think that the back of the knife could have caused these wounds as they have been noted in her post mortem report. She noticed some impression bruises  
15 on the left occipital scalp, that is the back part of brain, which could fit with the falling down to the floor and a bruise on the left cheek. She further explained the injuries on the chest. On the exterior and the interior surface of the chest, there was a chest mark. On the chest posterior there was a scratch mark  
20 and an impression bruise on the left chest posterior.

During the post mortem, on opening the chest before removing the rib cage, there were quite severe bruises on the inside of the rib cage. That is in photos 430 and 431. These can be  
25 clearly seen in the inner aspect of the chest that there was

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some bruising and there were underlying rib fractures present as well. It was put to Dr Scherman by the defence that the accused admitted using the back of the knife hitting the deceased on the chest, perhaps that would be the cause of such injuries. She disagreed with that suggestion, pointing out that such fact would not be consistent with the injuries sustained by the deceased, more especially that he had 17 fractured ribs, that is 9 on the right hand side and 8 on the left hand side.

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Dr Scherman further testified that she visited the scene, her first impression before she conducted the post mortem was that the deceased was tortured. She noticed that the deceased was no longer fit as he was an 88 year old person. When the accused version was put to her that he put his vest around his mouth; she further mentioned that she does not recall seeing anything around his mouth. Even if the cloth was around his mouth, he could have been able to breathe through his nose. In her recollection, when she was at the scene, the cloth was not around the deceased mouth any more, it was below the chin and the tongue protruded. It was Dr Scherman's further testimony that looking at photo 188 one can see that the vest or clothing does not look very tight around the neck, so that could not have caused strangulation. Further, the deceased tongue was protruding, if strangulation

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was caused by the cloth or foreign object, she would have expected to see a ligature, abrasion or some form of indication that something was tight around the neck.

5 Mr Kelaotswe made an application that the said post-mortem report be admitted as EXHIBIT B, there was no objection from the defence, the post-mortem was then admitted as EXHIBIT B.

10 On cross-examination Ms Haldenby referred Dr Scherman to a yellow covering, photo page preceding photo 368 which is unnumbered and asked whether that was how she received the body of the deceased. Dr Scherman advised that the photo was taken after the body of the deceased was washed, the  
15 doctor confirmed photo 369 as reflecting the body of the deceased when it was received at the mortuary and the clothing that had been tied around his body has been removed.

She confirmed that in that photo there was a lot of blood on  
20 the deceased face and nose, she confirmed further that the deceased's estimated age was 88 years. Ms Haldenby requested the doctor to describe the skin of an elderly person. The doctor advised that the skin is thin as a result of age, more especially in the arms, it can tear easily. If it tears or  
25 bleed the amount of bleeding will depend on the size of the

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tear. She confirmed that an elderly skin will also bruise and breaks easily. She confirmed further that in an elderly skin the small capillary vessels under the skin rupture easily and the blood leaks out far more easily in an old person than in a  
5 young person. This is due to the fact that the elasticity in the skin has gone. It was the doctor's opinion that the skin is predominantly thin in the arms and the legs, this could apply to the whole of the body.

10 The doctor advised also that the bones in an elderly person are fragile and could break easily. As these people grow older the bones become dry and brittle as a person loses calcium as they grow older, as a result less force will be required to break these bones. The impression wound was described as when  
15 something is pressed against the skin or when the person was sitting on something or leaning against something or something presses into something. An abrasion is when there is a loss of the skin on the superficial epidermis, it is usually what happens when you fall on a carpet or get what is called a  
20 grass burn. It can also be consistent with a struggle taking place on a carpet.

Under cross-examination about the injuries to the deceased's head, she emphasized the fact that the tear wounds could  
25 have been caused by a blunt object and did not think that the

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back of the knife could be the cause of such a wound. The doctor agreed with Ms Haldenby that regardless of the age the scalp wounds tend to bleed more as there is a very good supply of blood in the scalp. As a result even small wounds could bleed profusely, by the same token and they heal faster than any other types of wounds. They heal properly between five to seven days. Concerning the point of whether the scalp wounds are serious or not Dr Scherman testified that the issue depends on the size and type of wound. Furthermore the other wounds found on the scalp of the deceased were incised wounds. The doctor disagreed with Ms Haldenby when she suggested that they were superficial scalp wounds. This means therefore that though they were limited to the scalp, they did not penetrate to the skull into the brain. Superficial wounds can only be described as one or two millimetres, that is, they would just break the skin. She emphasized that the wounds she found on the scalp of the deceased were a little bit deeper. This would also apply to tear wounds. Dr Scherman confirmed the testimony she gave in her examination in chief that the other wounds on the scalp could have been caused by a blade of the knife or anything that would be consistent with the plea tendered that he made stab motions to the deceased a number of times. In as far as the defence wounds on both hands and bruising on both forearms are concerned, they would have been consistent with the deceased defending

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himself against being hit on the face with a knife as the accused has admitted.

On being cross-examined about the omohyoid muscle, the  
5 doctor explained that one needs to dissect the neck muscles  
layer to layer in order to reach these muscles. This is a  
smaller muscle that is inside the neck. The hyoid bone lies  
above the thyroid gland and is L-shaped. Ms Haldenby put to  
Dr Scherman that the accused grabbed the deceased with a  
10 neck hold so his forearm could have been the cause of the  
bruising and fracture. Dr Scherman advised that if that was a  
forceful grip, that explains the bruising and fracture. Coming  
to the fracture of the ribs, Ms Haldenby put to the doctor that  
the accused admitted to kneeling with his knees on the  
15 deceased's chest in order to subdue him, and further given the  
age and brittleness of the bones of the deceased the rib bones  
should have broken easily. Dr Scherman admitted that if the  
kneeling was forceful it is likely that it would have caused such  
fracture.

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Furthermore Dr Scherman admitted that her knowledge of  
methamphetamine, that is tik, and her opinion was that it  
affects the decision making, rationality and it can also lead  
one to aggressiveness. Dr Scherman also disagreed with the  
25 suggestion that her post mortem report was consistent with the

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accused plea. She concluded by saying that the cause of death of the deceased was asphyxia due to manual strangulation.

- 5 Colonel Budela was formally excused from being a witness in the proceedings and the State closed its case.

Defence did not call any witnesses and elected to stand by the accused plea.

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- Mr Kelaotswe for the State argued that the accused is charged with one count of murder, one count of robbery with aggravating circumstances and one count of contravention of Section 90 read with Section 1, 103, 117, 120(1)(a) and 121; 15 further read with Annexure 4 in Section 151 of the Firearms Act 60 of 2000, further read with Section 25 of the Criminal Procedure Act 51 of 1977, that is possession of ammunition and further that the provisions of Act 105 of 1977 are applicable.

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- The accused pleaded guilty to culpable homicide on the count of murder, he further pleaded guilty to the charge of robbery with aggravating circumstances and he pleaded not guilty on the possession of ammunition. The State did not accept the 25 pleas and the admissions were made and recorded in terms of

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Section 220 of the Criminal Procedure Act 51 of 1977. Mr Kelaotswe argued that the deceased is Jacobus Gerhardus Nicolaas Smit. On 24 August 2010, the accused went to the residence of the deceased, being number 16 Bovertrek Street, 5 St Helena Bay in the district of Vredenburg. He unlawfully and intentionally assaulted the deceased and forcefully took a television set and 3 x 100 notes of Kwanza while he did not have the right or permission to do so. He then unlawfully and negligently tied two vests around the deceased's mouth 10 thereby causing him to die by asphyxiation although he did not intend to kill him. He argued further that on 24 August 2010 he smoked tik, drank brandy, and several beers and socialised with some friends under a tree not far from the deceased's home. On the way home, he walked past the deceased's 15 house. He noticed that the house was dark and the door appeared to be open and decided to go inside and see if he could find some money lying around. He entered the house, knocked some furniture over, making a loud noise because it was dark. He heard the deceased calling from the bedroom, 20 he went to him, grabbed him by the arms in order to subdue him and not to make noise and asked him where the money was and he would go home once he told him. The deceased informed him that the money was in the cupboard. He offered to show him in the wardrobe where it was and thereby pulling 25 the hammer and tried to hit him. The accused became angry

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and grabbed the deceased forcefully by the neck and they both fell on the floor. The accused fell on his back and thereafter pulled out the knife from his jacket and hit the deceased with the back of the knife several times on his head and face. He

5 also stabbed him on the head. Apparently the accused was very angry that the deceased tricked him. He always carried a knife for self defence ever since he was stabbed in the eye by a man with a broken bottle. The accused struggled with the deceased and knelt on the deceased's chest so that he could

10 take out the laces of the shoes. He told him to lie on his stomach so that he could tie his hands behind his back. He instructed the deceased to stand up and to show him where the money was hidden. He tied the deceased to the bedpost after he refused to point out where the money was unless he

15 unties him. The deceased refused to cooperate and was making a lot of noise. He hit the deceased on his chest with the back of the knife and told him to keep quiet. He did not want him to alert neighbours. He stuffed a piece of cloth into his mouth to keep quiet and went on to search the car to see if

20 he could find some money. He found 3 x 100 Kwanza notes in a box in the sitting room and took them together with the deceased television set. He heard the deceased shouting again. He went to the bedroom to find that the cloth was dislodged. Accused further admit that he took two vests and

25 tied them around the deceased mouth in order to stop him from

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shouting.

The State submitted that the accused admitted that he did not intend to kill the deceased and did this in order to stop him  
5 from making noise and alerting the neighbours. He did not foresee that his actions may cause him to suffocate and he thereafter left the deceased's home. When he last saw the deceased he was still alive. He admitted that the cause of death of the deceased is asphyxia; he admitted further that he  
10 gave full cooperation to the police. He pointed out the items that were taken from the deceased and have been returned back.

Mr Kelaotswe argued further that the State called four  
15 witnesses in support of the charges, that is Ernest Charles Strauss, Johannes Nicolaas Smit, Elizabeth Willemina Smit and Dr Nadine Scherman. The evidence of Charles Strauss was that he was a police officer, he investigated the matter and attended to the crime scene. He is the person who  
20 arrested the accused after he was linked through fingerprints. Johannes Smit's evidence was that he is the son of the deceased. The deceased was 88 years old and was no longer strong. He testified that the deceased did not own the hammer which was found on the scene and he was not present during  
25 the time of the incident. Willemina Smit testified that she is

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the neighbour of the deceased. She was taking care of the deceased. She used to cook and bath him, she was also at the crime scene after the incident.

5 Dr Scherman's evidence was she is the Pathologist who performed a medico legal post mortem examination on the deceased. The cause of death of the deceased is asphyxia due to manual strangulation. Mr Kelaotswe argued that the accused denies having the intention to kill the deceased, but  
10 admitted killing the deceased negligently. He made reference to S v Reddy 1996(2) SACR 1 (A) from pg 8c-g. In this case the Court stated that one needs to be careful when dealing with the circumstantial evidence. It need not be approached on a piecemeal basis and to subject each individual piece of  
15 evidence for consideration. The evidence needs to be considered in totality. He further referred to R v Bloem 1939 AD 188 at 202 where reference is made to two cardinal rules, firstly that the inference to be drawn must be consistent with all the proven facts and secondly that the proven facts should  
20 be such that they exclude every reasonable inference from them, save the ones to be drawn. He further referred to R v de Villiers 1944 AD 508 to 509 where Davies, AJA, the learned judge said:

25 "The Court needs to take each circumstance separately

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and give the accused the benefit of any reasonable doubt as to the inference to be drawn. 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 guilty may be drawn.”

The State also referred to R v Herbert 1929 TPD 630 at 636 and S v Clegg 1973(1) SA 34 (A) at 38H where it was held that:

“In considering the effect of evidence one need not be concerned with the remote possibilities, and that it is not incumbent upon the State to eliminate every conceivable possibility. The fact that a number of inferences may be drawn from a certain fact taken in isolation does not mean that in every case the State in order to prove the onus which rests upon it is obliged to indulge in conjecture and find an answer to every possible inference may suggest and more than the Court is called on to seek speculative explanation for conduct which on the face of it is incriminating”.

The State submitted that the accused in his own admission had a knife in his possession that he used to subdue the deceased. The accused stabbed the deceased several times. He clearly

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had intention to kill the deceased, further he throttled and strangled the deceased which was the cause of his death. It has to be noted that the evidence of Dr Scherman was that the injuries inflicted on the deceased was caused by a blunt object  
5 that is not consistent with the back of a knife. Mr Kelaotswe further argued that Dr Scherman's evidence was that a person can die from strangulation instantly or within 3 to 4 minutes as opposed to accused admission that he left the deceased alive. It was his argument further that the deceased could not have  
10 been able to dislodge the cloth from his mouth as he was tied from the bed.

All witnesses testified that the deceased was old and fragile and could not have fought back. Accused admitted assaulting  
15 and robbing the deceased. But similarly, the accused wants to create an impression that he strangled the deceased first by holding him with a neck hold and thereafter stabbing him. It was submitted by the State that it can be inferred that the stabbing incident happened first and thereafter the throttling  
20 and strangulation happened afterwards.

He referred to S v Boesak 2001(1) SA 912 CC where it was stated that the fact that an accused person is under no obligation to testify does not mean that there are no  
25 consequences attached to the decision to remain silent during  
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the trial. If there is evidence calling for an answer and then 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 any explanation to  
5 prove the guilty of the accused. Whether such conclusion would be justified will depend on the weight of the evidence. The accused in this case did not come and explain what happened on that day, he chose to remain silent. The State then argued that it has proven its case beyond reasonable  
10 doubt.

Concerning count 3, the State considered that there is no evidence on which the Court may convict as there was no ballistic report tendered to prove that the accused was indeed  
15 in possession of ammunition. The State applied that the accused be convicted on both counts.

Ms Haldenby argued that the accused pleaded guilty to the competent verdict of culpable homicide in respect of count 1,  
20 and guilty in respect of count 2. A statement was drawn up and handed in on his behalf in terms of Section 112(2) of the Criminal Procedure Act which is referred to as the plea explanation in her heads of argument. In as far as count 3 is concerned the accused pleaded not guilty as the defence has  
25 not been placed in possession of a ballistic report by the  
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State.

The State did not accept the plea that was tendered by the defence and thereafter the plea was converted in terms of  
5 Section 113 of the Criminal Procedure Act to that of not guilty. Ms Haldenby argued that the State wanted to prove a case of murder in all respects and she went on to read the contents of the indictment. She went on to state that the State has led four witnesses and the bulk of their evidence is circumstantial  
10 evidence. There has been no direct evidence so far. There is no direct evidence to prove that the accused strangled the deceased as a result the Court is left with the situation whereby it has to draw inferences on the facts that have been proved before it. The onus rests on the State to prove beyond  
15 reasonable doubt that the deceased was strangled or throttled. If that is not the case, the accused must then be convicted of culpable homicide in accordance with his plea explanation.

Counsel for the defence argued that this offence was not  
20 planned, there was no sign of a break-in into the house and that was never in dispute. She argued that Warrant Officer Strauss corroborated the accused version that the deceased went to the cupboard in his bedroom and removed the hammer and wanted to hit him. His testimony was that he found the  
25 hammer in close proximity to the cupboard in the deceased's

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bedroom. She did not deal with the evidence of the son and the neighbour of the deceased as their evidence had no bearing on this case. She went on to Dr Scherman's evidence and submitted that with the exception of the last step on  
5 gagging, she conceded all of the accused's version, all of the injuries that she found at the autopsy were consistent and could have occurred in the manner the accused has described in his plea explanation. Dr Scherman materially corroborated the accused plea explanation in material ways, in as far as the  
10 hammer is concerned it is irrelevant in as far as the commission of the offence is concerned and nothing was broken into.

The crime was committed opportunistically or on the spur of  
15 the moment. Further the head wounds that the doctor found were all consistent with the explanation that was given by the accused in his plea explanation, that is, the stabbing and the hitting by the accused of the deceased on the back of the head with the back of the knife. All the head injuries, that is,  
20 incised wounds, tear wounds, are consistent with the accused explanation. This was after the accused had grabbed the deceased with a neck hold and thrown him to the ground. Dr Scherman, according to defence counsel's submission admitted that minimal force would have been needed to cause  
25 the type of injuries because of the fragile skin type of an  
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elderly person. The doctor even reiterated that these were flesh wounds that didn't penetrate, they were about 1mm to 2mm deep and she would have regarded them as superficial injuries.

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The impression bruise on the left occipital scalp of the deceased would be consistent with the deceased knocking his head when he fell after the accused grabbed him in the neck. The defensive wounds on the forearms and the hands of the deceased could have been sustained while the accused was attacking him in the head and face. Bruises on the legs could have been sustained during the struggle and appear as carpet burns. The rib fractures could have been sustained when the accused forcefully kneeled on the chest of the deceased in order to subdue him. This evidence corroborate the accused plea. The doctor confirmed that the deceased died of asphyxia due to manual strangulation, and she described it as the lack of air in the airways, which then causes a lack of oxygen in the blood that leads to no oxygen in the brain which results in the unconsciousness and death. From her post-mortem she could not tell as to what mechanism was used to cause asphyxia. Defence counsel argued that the accused needed to be given the benefit of doubt. The bruising on the left omohyoid muscle with the left side fracture of the underlying hyoid bone was consistent with the forceful neck throw. The injuries the doctor

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found during autopsy does not give rise to the only reasonable inference of strangulation. It also gives rise to the innocent inference favourable to the accused. These injuries were non-lethal and therefore on their own could not have caused the death of the deceased.

The doctor materially corroborated the accused plea in that her findings are not only consistent with strangulation but also consistent with the neck throw. The bruising of the left omohyoid muscle and the left hand side fracture of the underlying hyoid bone are also consistent with the forceful neck throw. In all, the State has failed to prove its case beyond reasonable doubt that the accused murdered the deceased and referred to R v Bloem *supra*. She argued further that Dr Scherman on the other hand completely discounted the fact that the deceased could have suffocated on the gag because she has not seen the gag herself when she visited the crime scene. The doctor completely refused to review her findings. Counsel for the defence went on to suggest that a reasonable inference can be drawn that the asphyxiation which is the lack of air in the airways was due to the blood from scalp wounds, clogging and running down his face and clogging the deceased nostrils and the gag obstructing the deceased's breathing.

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In as far as S v Boesak *supra* is concerned Ms Haldenby argued that this case is completely irrelevant. She then asked that the Court convict in accordance with the plea.

5 In reply the State emphasized that the fact that Charles Strauss testified that the door was opened did not mean that the crime was unplanned. Also the fact that the defence wants to create an impression that the hammer was always in the house is unfortunate. The son of the deceased well told the  
10 Court that they have a claw hammer. As he was staying in that house the round hammer is unknown to him. Further the argument that the deceased died of strangulation because of the neck throw, or that he was short of breath because of the gag is unfortunate. There could be no way that one can doubt  
15 the evidence of the doctor insofar as the strangulation is concerned. It is however highly improbable that the kneeling on someone's chest can lead to broken ribs, or the fracture on the ribs could be consistent with hitting by a blunt object. Also the fact that the deceased could have asphyxiated due to  
20 blood running down from scalp wounds to the nostrils is far fetched from Dr Scherman's evidence. Insofar as the Boesak case is concerned, he stands by it, that it is relevant.

Indeed crime is rife in our society, and most of the time it is  
25 perpetrated by people who are loitering around without any

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responsibility. In this case the State led four witnesses and the accused made some admissions and elected to exercise his right to remain silent. It is common cause that the accused committed the offence whilst under the influence of drugs and  
5 alcohol. At this point I will not repeat the evidence of these witnesses as it has been outlined above.

I have noted the fact that the defence tried to trivialise the injuries sustained by the deceased to his head, face, ribs up to  
10 his legs. This ended up to the accused pleading to a competent verdict of culpable homicide. The fact of the matter is that the deceased was assaulted on that day, not once or twice, but on several occasions. The inference to be drawn by this Court is that the accused had all the time he needed to do  
15 whatever he did. It is unfortunate that the accused has not taken this Court into his confidence by explaining fully, step by step, as to what happened on that day, but instead he elected to exercise his constitutional right to remain silent. Further it is worth noting that the evidence of the Pathologist was the  
20 most important evidence in this court, although it falls under circumstantial evidence. The doctor concluded in his post mortem examination that the deceased died of asphyxia due to manual strangulation. In the accused own admission the accused admitted putting some cloths and tying two vests over  
25 the deceased's mouth. Although there has been no evidence

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adduced in this court, the inference can be drawn that over and above the accused did something to the deceased's neck, as there was bruising of the left omohyoid muscle and the left hand side fracture of the underlying hyoid bone. That in my  
5 analysis can never be consistent with only a neck throw. Further the deceased's head was populated with wounds. These were different wounds, that is tear wounds, incised wounds, impression bruises and scratch marks. This is evidence that the accused assaulted the deceased several  
10 times, as he had time to do so, although we do not know how much time he spent in that house.

It is therefore difficult to comprehend that if the accused indeed was in the house to get some money how come the  
15 deceased suffered and had such terrible wounds. This was an offence that was committed by a coward to an 88 year elderly man. All evidence adduced in this court pointed in one direction, that the deceased was an old fragile and defenceless man. There was no need at all on the part of the  
20 accused to have gone to such great extent in assaulting the deceased. I reiterate that it shows clearly that the accused actions were that of a coward. I am mindful that this offence was not planned, and it happened by chance, but at the same time it was not necessary. There were unexplained weapons  
25 that were found at the scene of the crime, and also the

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accused admitted using a knife to assault the deceased. It was the doctor's evidence that although there were wounds inflicted by a blunt object those wounds would not be consistent with the back of a knife. Similarly the Court is not  
5 aware as to how these wounds were inflicted.


The defence submitted that the doctor's evidence corroborated with that of the accused plea explanation. I cannot agree with that suggestion. Another inference that can be drawn in this  
10 matter is that the deceased died a slow death. This is evidenced by the accused own admission that he did so many things at different intervals, that is from throwing the deceased on the ground, pressing forcefully on the ground, putting his knee on the chest in order to subdue him, untying the shoe  
15 laces in order to tie his hands, asking him to stand up so that he can tie him on the bedpost, putting clothes on his mouth, physically assaulted him, putting two vests on the mouth, and the list is endless.

20 I am in no doubt that the State has proved its case beyond reasonable doubt and therefore the **ACCUSED IS FOUND GUILTY OF MURDER AND ROBBERY WITH AGGRAVATING CIRCUMSTANCES** and **NOT GUILTY ON THE COUNT OF POSSESSION OF AMMUNITION.**

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MANTAME, AJ

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