

REPUBLIC OF SOUTH AFRICA



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

CASE NUMBER: 082/2017  
DPP REF: JPV 052/2017

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|-----|--|
| (1) | <u>REPORTABLE: YES / NO</u>                |
| (2) | <u>OF INTEREST TO OTHER JUDGES: YES/NO</u> |
| (3) | <u>REVISED.</u>                            |

19/12/2018  
DATE

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SIGNATURE

In the matter between:

**THE STATE**

and

**M A**

**ACCUSED**

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**J U D G M E N T**

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**MATSHITSE AJ**

## INTRODUCTION

- [1]. The state alleges that Mr M A, being accused before court, and here in after referred to as accused, and Miss N A, the wife, were married to each other.
- [2]. State farther alleges that during the subsistence of the marriage between the accused and his wife, accused had assaulted his wife. On the evening of the 13th March 2015 accused and his wife were at their residence and accused assaulted her and thereafter he reported her missing.
- [3]. Upon investigations at their residence, Ms N As blood traces where found in one of the rooms and also on her tracksuit pants, pillowcase and also some screams were, heard by their neighbours, coming from their residence allegedly during the time accused was assaulting her. As a result, the state alleges that accused killed N A and thereafter disposed of or hide her body and since then she has been missing up to date.
- [4]. Therefore, the state preferred the charges of Murder read with the provisions of section 51(1) and (2) of Act 105 of 1997 and defeating or obstructing the course of Justice against the accused.
- [5]. The Court is dealing with the case of what is commonly known as No-body that is the body of Ms N A is missing up to date and cannot and be accounted.
- [6]. A *no-body* case is difficult to prove, as the first burden is to prove that she is dead, not just missing, thereafter one has to prove—without a body for evidence—that she was murdered and in these circumstances the prosecution is to rely on other kinds of evidence, usually circumstantial evidence.
- [7]. Murder consist of the unlawful and intentional killing of a human being (another person). The best way to prove a killing is with a dead body without the body that is always a chance the victim could turn up somewhere alive. In deciding the No-body cases most evidence of the death of the missing person

can be found in one or more of the three categories of forensic evidence, like (1) blood found or (2) any confession or statement made to a friend who later tells on the accused (snitches), or (3) a confession made in accordance with the law and any other enough further evidence that the prosecution may have managed to present before court.

- [8]. No-body murder cases are unique. Unique legally. Unique factually. Unique in their effect on the victim's family, friends, and loved ones. It is this uniqueness that poses a significant challenge for police and prosecution (investigating these cases) more difficult for the Presiding officer since he has to decide the case, if there is no direct evidence, because only evidence available will be circumstantial evidence. The victim's body remains the single most important piece of evidence in any murder case. Thus, even with the advance of forensic, no-body cases remain incredibly rare. Consider the amount of useful information a body provides. It can reveal the cause of death. Was the victim shot, stabbed, strangled or poisoned?
- [9]. Today forensic pathologist can determine the length of a knife as well as the width and shape of its blade the marks left behind on several flesh and cut bone. Of course, of the best forensic clues, body fluids such as blood and semen used to conduct DNA of test, are not available when the body is gone. Evidence of bite marks, blunt force trauma, and even fingerprints are simply not available when a body is permanently disposed off.
- [10]. No- body, however, often means no crime scene, and no crime scene means no tracking dog or crime scene reconstruction or search for trace of evidence. Thus, a murderer who can successfully disposed of a body is like a sprinter who starts a 100-meter race on the 20 m ahead of others; he gets a tremendous head start that can be almost insurmountable. Since the advantages of disposing of the best evidence of one's crime are so great, the list of ways murderers has disposed of their victim's is astonishing for its creativity. See the book of "No-Body Homicide Cases: A Practical Guide to

Investigating, Prosecuting and Winning the Victim is Missing was published in November 2014. By Thomas A (Tad) Do Biase "No Body" Guy"

## **THE CHARGES**

[11]. Mr M A (Accused) is charged with: -

11.1 First count of murder, read with section 51(1) and (2) of Act 105 of 1997 in that upon or about the 13 March 2015 and at or near house number [...] A. Court, S. Street, Chrisville, in the district of Johannesburg Central, accused did unlawfully and intentionally kill N A, an adult female person

11.2 Second count defeating or obstructing the administration of Justice in that or about the date and at near place mentioned in count 1, the accused unlawfully and with intent to defeat the course of justice hide the body of his wife N A which defeated or obstructed the administration of justice.

11.3 Adv M T Ntlakaza appeared for the DPP and Ms L Qoqo appeared for Mr A. Mr A pleaded not guilty to both counts. He exercised his right to remain silent and gave no plea explanation.

## **ADMISSIONS**

[12] No admissions where made on behalf of the accused.

## **ISSUES IN DISPUTE**

[13]. The sole issue for determination by this court is did accused kill his wife, Ms N A (hereinafter referred to as N) and disposed off her body or will his wife one day turn up, that is, return from wherever she is residing. It is noted She has been missing from 13 March 2015 to date

- [14]. The only evidence that is before court is circumstantial evidence.
- [15]. There is an overwhelming evidence that N is missing and probably dead but not much beyond that. What was she like? What did she like to do? What was her relationship with her family, more so her daughter, she had left behind, could she had stayed away from her up to date? What was her relationship between herself and the accused, how was their life together?
- [16]. There is often so much focus on the accused and who the witnesses are, what and how they will testify on the stand, that the victim becomes uninvited guest to a party, not much is said about her/him, whereas she/he is the main guest of honour, the person why we are here in the first place.
- [17]. In this case however the Court knew it was going to have to know more about N, if the State is going to prove she was indeed dead, it needs to show what she was like when she was living.
- [18]. A body can potentially tell you. A skilled medical Examiner and not all are skilled, can measure the spread of powder deposits left on the skin (shoot and staple) to determine the distance between the barrel of a gun and the victim's body. Recovering a bullet or shell casing means a ballistic expert can identify not only the calibre of the weapon used but the exact weapon used if a gun is also recovered. Poisoning can be detected through advance toxicology tests. Was the victim, at any stage strangled? If so, contusions may appear on the neck. Minute bleeding in the eyelids, called petechial haemorrhaging, may be present.
- [19]. Killers have thrown bodies out of aeroplanes into the sea, pushed them off ships into the sea, and dumped them into canals. They have buried bodies

deep in the woods, thrown them into landfills, and dump them on the ground where they are left to rot. Certain perpetrators have burned bodies in furnaces, in the victims on homes and or buried them in their own homes. They have sawed bodies apart, rip them apart with chain saws, ripped them apart with woodchoppers, and feed them to animals. Some perpetrators in order to eliminate their victims uses sulphuric acid, while the others may boil their victims in sausage plant. Dumpsters, and large bodies of water are perennial resting places for victims.

## THE EVIDENCE FOR THE STATE

- [20]. The first witness to be called on behalf of the State was **Sergeant Wiseman Suta Nkuna** who testified that he has 10 years' experience as a police officer of which 8 years he was attached to Local Crime Record Centre (LCRC) he is currently, based at Sandton. Previously he was based at Johannesburg LCRC. He had done some training among trainings that he had attended to was training on blood spatter, toxicology lifting of DNA evidence. On the 18 March 2015, he investigated the Flat where N and the accused were residing from which he compiled Exhibit "A", photo album. Inside the flat he found, amongst others, blood on the floor from an empty room. This blood shows that something was moved he lifted blood samples by using swabs. Photographs 8, 9, 10, 11 and 13 indeed resemble blood which was moved on the floor as opposed to droplets. He inserted them in a unique forensic bag 14DCA5191 and thereafter put them inside a sealed evidence bag with serial number PA4001915598.
- [21]. Blood droplets were also found on two pillows (cases) which were also taken in as exhibit. These are reflected in photographs 18, 19, 20, 21, 22 and 23. He

then inserted both pillow case into two separate forensic bags with serial numbers PA 4000447610I and PA4000447609Q respectively.

[22]. Blood was also found on a pair of navy-blue track suite pants which were on top of ironing board. Photographs 24, 25, 26, 27, and 28 indeed reflect those pair of pants. He had inserted them inside forensic bag PA4000447612K thereafter he took them back to his office, wherein he then drafted a memo, covering minute, to send them to Forensic Laboratories at Pretoria. (FSL). The investigating officer, Constable Kubayi, then took them to FSL.

[23]. He acknowledged that during the time he was typing the covering minute he made the mistake of typing a wrong forensic bag number PA 400 191 8998 instate of the correct one being PA 400 191 5598, however the swabs that were lifted from the crime scene where never tempered with. All the exhibit that he had lifted from accused flat where inserted into a big forensic evidence bag with serial number PA 3000756814.

[24]. During his cross-examination the defence concentrated more on the typographical error on the bag. It was further put to him that the Forensic bag that was opened at the FSL was not the bag wherein he had lifted the evidence from accused Flat. Of which he replied that should the evidence have been tempered with the FSL would not have opened it or even look at, but simply send it back without any further attention.

- [25]. The State called **Doctor Sibongile Thandeka Nobengu Nhlabathi** to testify, she testified that she has obtained her degree of MBCHB at University of Natal in 1986, she also has a Diploma on HIV which she also obtained at University of Natal in 2013, she is a sexual care Practitioner, she is currently working for the Department of Health placed at Hilbrow clinic. She has been working at the crisis Centre since 2016. As a Doctor she has been taking DNA samples from patients.
- [26]. On the 05 May 2015 she saw a minor child by the name of Z wherein she took a sample in the form of buccal (saliva) swap from her. Same was sealed inside a crime kit 11 DBAB 0159 and it was handed over to Constable Kubhayi. Also, on the 01 September 2015 at 11hrs 25 she saw M A and she took saliva specimen (buccal swap) from him which was also sealed inside a crime kit 11 DBAB 0160 and was given to Constable Tshundsuka Kubhayi.
- [27]. The State called a Forensic Analyst being **Ms Trishen Naidoo** who testified that she is a police officer with 12 years' experience and currently holding a rank of Warrant officer, and she has since 2008 been stationed at FSL, in the Biology Department. She has obtained a B.SC degree in Genetics and Microbiology, she has also attended in house trainings, she is a forensic analyst and reporting officer.
- [28]. The exhibits that she received from their Administration office was not tampered with. She explained that DNA will always remain constant whether it



is in the semen and or blood. DNA is unique to each and every person except on the identical twins.

[29]. The DNA which was found on the two floor swabs [blood], stain 3 [blood] in the pillowcase, and on the pair of pants [blood] matches that the donor of the reference sample of A N. The donor was N A who is the daughter of N. Since they did not have the reference sample of the victim, they used the reference sample that they obtained from the daughter.

[30]. During cross examination she testified that the blood on the pants were found around the pocket area, right front thigh and also towards the foot, at an angle of the foot. At the back side it was found bellow the buttocks, left below the knee. They look like they were smeared not spots.

[31]. Blood was found on both sides of the legs. She testified that if a lady was menstruating and she had an overflow you will definitely had to find blood on the crouch whereas in this case it was not. On the pillow she found spots and they were on the left-hand side. It was put to her that N had a problem of bleeding heavily.

[32]. The other State witness called was **Warrant Officer Surprise Mnisi** who testified that: he is a member of the South African Police services stationed at FSL, Pretoria, Acardia, as a forensic analyst, he has B.SC (Biology Technology) which he obtained in 2013 at Tshwane University of Technology. He opened the exhibit which contained a pillow case which had blood on it

and by the time he opened the said exhibit it was not tempered with. Should he had discovered that it was tempered he could have returned it without doing any analysis on it. The blood which was found on one of the pillowcases had spots and droplets. The blood stain found matched the reference sample of the Accused.

[33]. During his cross examination he confirmed that it was not possible to determine whether the blood found on the two pillowcases was new or old.

[34]. There is also no doubt that blood from a pair of track suite pants belonged to N. The Accused's explanation of this blood differs. The court will point out those different explanations below: There is also no doubt that the blood from the pillow (cases) belonged to N and the Accused.

[35]. It was put to the Forensic Analyst Trishen Naidoo that the blood on the pair of pants could be menstrual blood. She responded that menstrual blood could have been found on the crotch area. The blood on the pair of pants was on the front, left and right. There was also blood at the bottom of the pants and the pocket area.

[36]. During the court's questions, the analyst explained that blood was also below the buttock's region. On both left and right. It was also on the right leg ankle just below the knee. The blood appeared to be smeared and not in spots on both sides of the pants. There was no blood on the crotch area where menstrual blood would be found.

- [37]. The next State witness was **Ms T S** who testified that: She was once in a love relationship with accused and out of this relationship they have a child, a boy, who is currently 03-years-old. On 15 March 2015 between 07:00 and 07:30 the Accused called her on her cell phone. He wanted to borrow her car (a red Renault) because his daughter (K) and her grandfather (G L) were involved in car accident. They were admitted at Lenmed Hospital in Lenasia. He needed a car in order to go and see if his daughter was okay.
- [38]. The Accused arrived at her house at about 07:50. She gave her car keys to the Accused. He left with the car. He returned at about 08:30 and 08:40. The Accused took about 40 minutes to and from Hospital.
- [39]. She asked the accused how was his daughter. He said she was fine, it was just the grandfather (G L) who needed to remain in hospital. The accused left on foot.
- [40]. On the 15 March 2015, the accused once again called her. The accused was at the police station with N's family because N was missing and he was assisting the family, since N was his ex-wife. The Accused told her that should anyone asked her, if he had borrowed her vehicle, she should not tell him/her that she did. She then asked why should she lie for him, if he really went to the hospital he had nothing to lie about, of which accused responded by saying that he does not want her to get into trouble and she replied by saying she is not going to lie to anyone she is going to tell the truth.

- [41]. On the 20 March 2015 the police then visited her. They subsequently questioned her about her car. She told the police that the Accused had borrowed her vehicle. They did some investigations on it but she was never informed of the outcome of their investigations
- [42]. During cross-examination it was put to her, among others that, accused arrived at her house at around 08h05 and that he had informed her that at the Clinic, he could not find anyone at there. She responded that the Accused had stated that K was fine, only her grandfather was still in hospital.
- [43]. She further testified that the distance between her house and Lenmed Clinic was about 7 to 8 km and it was put that accused had said that it took him about 20 minutes to go to the clinic, she further testified that the distance between her house and accused house could be about 20km.
- [44]. She had informed the police that traces of blood that was in the boot of the vehicle was that of meat. The first time they came with a dog but the forensic people never came.
- [45]. She had also on the 14 March 2015 borrowed accused her motor vehicle to go to his place at Chrysville and to visit his sister who was also residing around Chrysville.

[46]. The witness was excused however she was recalled at the request of the Accused. She was further cross-examined to the effect that the accused did not deny that he told her not to tell anybody about the car. The Accused did so to protect her as many people were calling. she confirmed that the accused said he did not want her to get into trouble and that people started calling her, and she did get some calls on Friday following the day she had borrowed accused her motor vehicle.

[47]. The next State witness was **Mr G L** who testified that: He is the grandfather of K. The Accused is the father of the. During March 2015, he and her granddaughter were never involved in an accident. He was never admitted at any hospital.

[48]. During cross-examination, this witness was asked if he knew Darren Anni. He confirmed knowing this person as his other son-in-law. It was put to him that Darren had psychological problems due to drugs. The accused stated that Darren called him to inform him that the witness and his granddaughter were involved in a car accident. It was further put to this witness that on Sunday his phone was off of which he refuted that his phone was off of Sundays.

[49]. The next State witness was **Ms Majory Oulden** who testified that: On the 15 March 2015 she was at Booyens police station. She had accompanied her sister there, they then meet with 02 females and 01 male who was light in complexion. One of those ladies where known to her sister and her sister spoke to that lady who was known to her, her sister asks why they were at the

Police Station and she was informed that their sister was missing. She then had a conversation with one of the two females and she showed her a picture and she said that lady, in the picture, looks like her neighbour. Unfortunately, she was not the lady whom they were looking for. She denied ever telling them that she had seen the said lady who was in the picture at Eldorado. That was the last time that she had spoken to them.

[50]. She was cross-examined wherein it was put to her that she was not telling the truth since she had informed that family, that she met at the police station, that she had seen that lady who was in the picture at Eldorado location and he was in the company of another male person and they were consuming alcohol, of which, she vehemently denied having seen that person who was on the picture, N, at Eldorado Location. She stated that she did not even know who N was.

[51]. She was cross examined on the contents of her statement which she had made before a police officer. It was put to her that she changed her statement after she told the police that she saw the missing person. She responded that she did not change her statement. She insisted that when she read the statement before she testified, she had brought it to the attention of the State that the contents contained therein were not altogether truthful. She was adamant that she did not know the missing person in the picture and had never taken the accused and the two ladies at Eldorado place/ location.

[52]. It was put to her that she was shown picture with the full face of that person, whom she had said she had seen at Eldorado, of which she denied ever saying that. She was only shown a picture which was not clear. She denied that she hates the accused and further she denied that she was forced by the community to change her story and then implicate accused. She testified that accused was uneasy at the police station he was doing the up and down and also shaking, not being able to stand in one spot for a minute.

[53]. The State further called **Ms Cynthia Crouse** to testify of which she testified that she is a neighbour of accused and N. She resides at [...] A. Court. In the evening at around 20h00 on the 13<sup>th</sup> of March 2015, they were seated outside in the garden at the back. She was seated about 5 meters from the accused flat. She then heard N shouting as if she was being beaten. The Accused and N were fighting. She called the police. The police took the Accused away, but the accused shortly returned. She never saw N again.

[54]. During her cross-examination, she admitted that she did sign a petition from the community wherein they were against accused being granted bail. She denied that she assumed that accused and N were fighting on that night, she was adamant that they were fighting as always. One could clearly hear that they were fighting. Accused denied that any police came to take him away. She insisted that police were called, like they previously did, they went away with accused but he came back later. It was put to her that the Accused still believes that N was still alive. The Accused conceded that they would have a

fight and the family of N knows about it, but there was no fight on 13 March 2015.

[55]. It was put to the witness that the community in the flat were ganging against him. Of which the witness testified that they did not it was just that they were not happy the way accused was fighting N.

[56]. It was put to her that yes accused and N will sometimes fight and the family was also aware of that it was further put to her that the screaming had nothing to do with the fight. They were talking and N will normally speak in a loud voice. Witness was adamant that it was a fight, one could hear it.

[57]. It was also put to her if she was aware that about 2 to 3 years back N had stabbed accused with a knife and he had to be hospitalised. Also, that at one stage N did disappear and later came back. She testified further that accused had threatened her mother that he would rape her and shot her daughter.

[58]. It was also put to her that the family of N wanted him to go forever that is why they are fighting so much. She was aware that N did drink alcohol. During her re-examination she further testified that after they had fought one could see bruises on N on her body and hands. Accused and N used to fight at least twice a week. Accused denied that they used to fight at least twice a week.

[59]. The State further called **Ms Esme Patricia Hogarth** to come and testify, she testified that She is a next-door neighbour of the Accused and N. At about



21:00 on 13 March 2015, she was sitting on her lounge watching television. Her lounge wall separates the bedroom of number [...] A. Court where the Accused and N reside. Her couch is standing against that wall.

[60]. She heard banging on the wall three times. N was screaming: (***“My kop”, “My kop”***) my head my head. She opened her gate to look what was happening. The other neighbours were out already outside and they had called the police. The police took the accused away, but let him come back. In the Flat there was the accused and N only. She was sure it was N who screamed because she went to the balcony and through the kitchen did see it was her.

[61]. On the 14<sup>th</sup> of March 2015 she woke up at around 05h10. She made herself a cup of tea. She opened the curtains and went to sit down. Her flat is on the ground floor. That is when she saw accused standing in front of the balcony and he was in the company of someone, this person was wearing a gown which had a hoody on and she could not recognise this person. Accused and this person spoke and later they walked away. She does not know what happened thereafter. She never saw N again.

[62] In cross-examination she was confronted with her statement that she had made at the police, she said the police did not read it back to her. It was put to her that she stated in her statement that she saw N. She responded that she did not see her. She stated that she never said it was N. She could not see that person's face. She insisted that she never told the police that she saw N

on that morning and that she was wearing a blue gown. She told the police that she saw a person wearing that gown with the hoody over the head and did not see his/ her face.

[63]. She further testified that accused and N were shouting and screaming to each other and also accused was insulting N. She did not put same on the statement as she thought it was not necessary. She went to sleep at around 09h30 and the shouting was still going on. She further testified that they accused and N used to fight maybe once or twice a week, and they would push each other against the wall and the cupboards. In the mornings accused used to take N to the taxi.

[64]. The other State witness called was **Ms Elizabeth Nomalizo Sonti** who testified that: She is a store administrator at Woolworths Market Street, Johannesburg. On 14 March 2015, she was on duty. At about 09:00 she received a landline call from a person who introduced himself as N's husband. This person said that N's bus left her, he is accompanying her to the taxis.

[65]. N never came to work. She reported the message to Phindile Ludidi who was the manager. The following week on Tuesday or Wednesday the same man called again inquiring if N had arrived at work. She responded that she never came to work since the last Saturday.

[66]. During cross-examination it was put to her that the Accused called at 08h30 and not at 09h00 since Woolworths was very strict when it comes to late

coming. The witness stated that she received the call at 09h00. She explained that the normal working hours during the week between 09h00 and 18h00 and on Saturdays the shop opens at 08h00 in the morning, however depending on what shifts an employee is expected to start at 08h00 or 09h00.

[67]. The next State witness called was **Ms Phindile Ludidi** who testified that: She is the manager at Woolworths Market Street here in Johannesburg. On the 20 January 2015, she issued the accused with a banning order being Exhibit "M". On that day she found N hiding behind the rails which they use to hang clothes and N approached her. They then went to her office wherein she closed her door and N informed her that there was someone who wanted to assault her. The Accused was following her. She called the Accused. She informed the Accused that fighting is not allowed inside Woolworths if they wanted to fight, they must go outside, then accused apologised. She then issued the banning order that is exhibit "M", she explained that it says he must not enter Woolworths store at all even if it is only to pay an account. She then give the original to accused and she retained a copy thereof.

[68]. On 14 March 2015, Elizabeth Nomalizo Sonti reported to her that she received a call from the Accused regarding N's late coming. According to her, when N is delayed, she would personally call.

[69]. During cross-examination, she explained that she only knew accused name however during the time she was completing exhibit M accused give her his surname as well as his date of birth. Accused denied the fight with N at

Woolworths and that his date of birth is wrong. She stated that it was the Accused who gave her his surname and date as well as his address, as they appear on the exhibit M. She confirmed that there are cameras inside the shop. However, the video footage is only kept for a week only the cash office footages will sometimes be kept long. If the footage is requested during that week it shall be downloaded on a USB.

[70]. It was put to her that during this date N was hospitalised for a period of about 3 weeks. She replied that she was aware that at one stage yes, she was hospitalised, but cannot precisely say when was this. It was further put to her that during this time it was when accused was frequenting Woolworths bringing in N's medical certificates and they were handed over to Mary at the reception. She replied that it was the sister who would bring the Doctors note. From that date on she used to see accused standing at the street corner, that did not bother her as that did not concern her.

[71]. **Ms Alinah Liau** came and testify on behalf the State to the effect that: While she was at Mafikeng, she received a call from the Accused asking her if she saw his wife. The Accused asked her if she was working at Woolworths. She confirmed, but she was on leave at the time. She told the Accused why was he not asking N's friends V and R. The Accused said: he heard that N left in a Taxi occupied by 04 (four) men to Soweto". She responded that she was not in Soweto.

[72]. During cross-examination her testimony it was not denied that accused did call her, since accused was shocked and was phoning around trying to find where was N. It was further put to her accused never said N left in the company of 4 men to Soweto she heard him wrong. He actually said N was going to work. The witness was adamant that Accused stated that N was going to Soweto and accused was insisting should she see N at Soweto she should call him.

[73]. The State further called **Ms V D** to testify. She testified that she worked with N at Woolworths. On 14 March 2015 at about 21:00 she received a call from the Accused. He was asking whether N was with her. She responded by asking the Accused how can N be with her since he called at work alleging that she missed her bus.

[74]. She asked the Accused why he does not call N. The Accused said: he has her phone since she left it in order for him to put air time on it and his was being repaired.

[75]. During her cross examination it was not denied that accused called her. However, regarding his phone, he was embarrassed to have informed her that his was pawned for money. She testified further that she did not know where E reside or even his number and whether E and N had a love relationship or not or even if they were very close.

[76]. The State further called **Ms J A** to come and testify and she testified that: She is the sister-in-law of accused and N is her sister. On the 15 March 2015 she, accused and C, her elder sister, went to Booyens police station to report a missing person being, N since she did not come back home on Saturday. A lady police officer realised that the Accused was intoxicated and told them to come the next day. She met a lady (Marjory) at the police station who wanted to know who was this missing person. She had a phone. She showed her photo of N when they were walking at the zoo. The photo was taken from the right-hand side. Marjory responded that this person I have seen at Eldorado Park. She is not sure if really Marjory did know N. At the police station accused was in possession of N cell phone.

[77]. On Saturday accused came to their house coming to inquire if N had returned back from work he then left but returned later on at about 07:30 he had brought along a bowl of chicken livers indicating that they had made them the previous night. He said nobody was going to eat them at his place since no one was there. The last time that she saw N was on Friday the 13 March 2015 up to date she has not seen her.

[78]. During cross-examination the witness confirmed that accused and N did not have a fridge and anything that needed refrigeration will be brought at accused mother-in-law to be put in the fridge. It was put to the witness that accused brought the uncooked chicken livers, however the witness responded that it was already cooked as she is the one who took them from accused at the time they were watching TV and they did ate them the same night.

- [79]. She confirmed having showed the photo to Marjory. However, the said photo was on her Iphone, of which she has since lost it. Marjory had said the short hair on this person looks like someone that she had seen at Eldorado Park, in actual fact this person looks like her neighbour. She was confronted about this evidence, that she is trying to cover the case. She denied that was not what she was trying to do.
- [80]. It was put to her that she drove accused to his place to go and collect a picture of N, she confirmed that and it was the same photo was shown to Marjory, of which the witness denied that it was shown to her (Marjory). The photo was given to the lady police officer who still refused to open a case of missing person saying accused was still intoxicated.
- [81]. She testified that the Accused had scratches on his face, head and neck and also the police officer (lady) did ask him about them and accused responded that he was working at a house and the ceiling fell on him.
- [82]. It was also put to her that N disappeared for 03 (three) months previously without the Accused knowing where she was. She said that was not for that long N was running away from accused since accused was abusive to her and it was only for a month. However, during that period, they were in contact with each other and accused knew where N was residing, she was living with their Aunt at Jeppestown, it was not like she did not want him to know where she was or hiding from him.

[83]. The Flat was owned by N. It was also put to her that N had a serious medical problem. She responded that she did not know that. She confirmed that during February 2015 she was hospitalised. Since she was complaining of about her stomach.

[84] During the court's questions she described the relationship between N and the Accused as very abusive. The Accused was assaulting her at least once a week. N will arrive at their house with some bruises but will try to hide them from them but ultimately will tell what happened, that accused assaulted her. N has a child who is now 08 years old with the Accused. N was very close to the child. As every morning she would pass at her mother's house to take her to school and when she returns from work will pass by to see her again. Every weekend the daughter will go and visit her at her house.

[85]. She was also referred to her statement that she had made to the police more so at paragraph 11 thereof, where in among others she had stated that the lady (Marjory) recognised her sister at Eldorado.

[86]. The next State witness was **Mrs D A** who testified that: The Accused is her son-in-law. She is the mother of N. The Flat [...] A Court belonged to N. She was sharing it with accused. The accused and N had a child Z who was staying with her. The Accused started to abuse her daughter during 2011 after the passing of N's father. He was assaulting her. She always had bruises under her eyes. She loved accused like her son, after the passing of accused



mother accused came to her and ask her to be his mother since he does not have any mother any more.

[87]. N loved her child very much. N was working for the child. Every morning before going to work N would come at her house and assist her child to be ready for school. When she comes from work, N would come to see the child. If she would be late, N would contact her.

[88]. On 13 March 2015, N came from work to see the child. She told her that she sold her shares at Woolworths. Accused was present. She told the Accused that she was tired of him abusing N. N took out R300.00. She told her to buy a comforter at China town. She took back R100.00 and gave her R200.00. N would have come from work to fetch her comforter. It has been 3 (three) years since she last saw N.

[89]. During cross-examination it was put to her that N was an aggressive person. It was put to her that N once stabbed the accused on his mouth when he did not have any weapon. She did not know that. She went on to testify that she would time and again see bruises on N and she will ask her what happened. At one stage accused had stabbed N on her left-hand side near her breast. It was too much to have seen how accused had abused her child. It was also put to her that she and her family knows that N is still alive. She denied that her family knows her whereabouts.

[90]. She responded that N will not leave her 05-year-old child and not even contact her child something she used to do every day. The Council was about to move other people in the Flat. She explained to Council that was Z's Flat. N got a title deed for the Flat. She remembered N had a stomach problem and she was once hospitalised for that. She also testified that at one stage N had to go and stay with her Aunt at Jeppestown for a period of about one month not three months.

[91]. The other State witness was **Sergeant Victoria Maluleke** who testified that: She is a police officer at Booysens police station. She has 15 years' experience as a police officer. On 15 March 2015 she was on duty when a male and 02 female coloured persons arrived at the station.

[92]. The Accused was reported to be the husband of the missing person. It was reported that the missing person had left to town on the 14<sup>th</sup> of March 2015 to work.

[93]. She asked the Accused if he phoned the missing person. He said his wife does not have a cell phone. The Accused was smelling of alcohol. The Accused was the last person to have seen the missing person. She was unable to take a statement from him as the accused was smelling of alcohol.

[94]. She noticed some scratches on the accused's head. They were fresh. The scratches were from centre of the head on both sides. She enquired whether

he fought with his wife. The accused denied. He said he fell from a ceiling where he was doing a piece job.

[95]. They agreed that they will make enquiries at work place and come back the following day to update about her progress.

[96]. During cross-examination, Accused disputed that he said he fell from the ceiling. It was put to the Sergeant that the Accused said that the ceiling fell on him. The Sergeant was adamant that the Accused said he fell from the ceiling. It was also put to her that it was a small scratch. She responded that it was like fingernails. They were scratch marks.

[97]. It was also put to her that there was a conversation about the person being seen. She responded: that she did not hear them as they were speaking amongst themselves.

[98]. The next State witness called was **Constable Tsundzuka Kubhayi** who testified that: She is the investigating officer of this case. As part of her investigations, she discovered that N had applied for a protection order against the accused in respect of assaults she suffered. An interim protection order was granted and it was dated 23 January 2012 and was handed to court as Exhibit "S". She is the one who collected the exhibits, sealed, from Sgt Nkuna, and delivered them at FSL in Pretoria and they were not tampered at all.

[99]. She confirmed that there was a diligent search in a wide area for the body of N to no avail. Dogs were also used.

[100]. During her cross examination she confirmed that she is the one who took the Statement that was made by Marjory and she wrote what the witness was telling her, like what was said at paragraphs 4 and 5 of Exhibit "F". It was put to him both phones that where pawned belonged to accused. Confirmed that the interim order was never confirmed. Further that during the bail application of accused the community of Bellvista and Chrisville signed a petition opposing the granting of bail to accused. She further confirmed that a search of the body of N was conducted around Booyens area, they had used Helicopters, sniffer dogs and they failed to can find anything.

[101]. The other State witness was **Ms Bridget Nguruve** who testified that: She was employed at Supreme Buy and Sell shop, which its nature of business was to pawn or buy and/or sell goods. When a customer comes to pawn his/her good they will make a copy of his/her identity document and thereafter will be given a slip as prove that he/she had pawned a his/her goods. When he comes back he is supposed to bring that slip so that he/she can get his/her goods back, also after paying the amount they would have stipulated in the receipt slip.

[102]. The Accused pawned a Samsung cell phone on 12 March 2015 for R150,00 and he was supposed to come back and pay an amount of R180.00. On 19 March 2015 accused again pawned a Nokia C3 cell phone for an amount

R100,00 and he was supposed to have paid back an amount of R120,00 at the time he was collecting them. These phones were eventually taken by the police. Exhibits “P” and “R” confirm the transactions, and Exhibit “Q” being the Identity document of the accused.

[103]. The last State witness to be called was **Mr Burn Don Johnson** who testified that: In 2016, he met the Accused. The Accused promised to sell a Flat ([...] A. Court) to him for an amount of R6000.00. An affidavit was signed at Eldorado Park police station dated 11 February 2016. He gave the Accused R1000.00 as a deposit. The Accused wanted the balance. After the deposit was paid, the Accused started to give different stories. He never eventually moved into the Flat. He did not get his deposit back.

[104]. During his cross examination it was put to him that this was a temporary arrangement, he was going to reside with the accused, accused wanted someone to stay with him since Ns’s family was harassing him. The reason he could not give him occupation was that his in-laws had broken into the flat and had taken occupation. Accused apologised for not repaying back his R1000,00.

[105]. He further testified that he was approached by Donovan to come and make a statement, of which it was put to him the same Donovan, has taken occupation of his flat and is doing this to make sure that he does not come back to claim his flat back. Donovan is also son-in-law of N’s mother

That was the case for the State

## THE DEFENCE CASE

[106]. The defence case comprised of the evidence of the Accused as well as 02 witnesses. Their evidence was as follows:

[107]. **The Accused** testified that: N was his wife. He testified that he last saw N on 14 March 2015. He did not fight with N. They woke up late on the 14<sup>th</sup> of March 2015. She was preparing to go to work while he was busy making breakfast. His wife went out to buy cigarette. They left the house together. She missed the 07:45 metro bus.

[108]. They walked to Johanna Street to get a taxi. His wife reminded him not to forget to take liver to his mother-in law's house (D). They do not have a fridge. N took out a packet of jelly tots sweets so that he could give them to their daughter Z. At around 08h30 he bought a taxi to town. Inside the taxi it was the taxi driver, two women and a man at the back.

[109]. He went home and took the liver to his mother in law and gave jelly totts to Z. His mother-in law asked where was N. He responded that they missed the bus, she took a taxi.

[110]. N had reminded him to phone Woolworths and to ask for Mary-Ann, R was very strict when it comes to people who comes late to work, upon calling he did not find R however he reported to a lady that N missed the bus and she is

going to be late. After the 14<sup>th</sup> of March 2015, he never saw his wife again. He never had a fight with his wife, why would he kill her.

[111]. When the accused was asked about the blood of his wife which was found on the floor of the empty room, on the track suite and in one pillow, he stated that he knew nothing about that. Regarding his blood which was found on the other pillow, he testified that N had stabbed him, on his head, nose and he has a scar there and she also stabbed him on his mouth. This happened about 6 to 12 months back prior to the disappearance of N.

[112]. Regarding the scratches which were on his head, he testified that that was a small scratch, which was even far from his ear. How he got it on the 15 March 2015, he was in the company of his friend and they went to fit a ceiling at the back rooms of one lady who is known to him as Glenda. He was holding a ceiling, which was about 3 meters long, on one end and his friend was holding the other end, and he was climbing on the scaffolding and he thinks he must have slipped because the ceiling that they were holding came and fell on top of him and it only scratched him little bit (small) on the head. Upon knocking off he washed his face and head and he felt the stinging sensation he was unable to see his top of the head (crown) that is where he was injured. It was not true that he was beating his wife almost every day.

[113]. He confirmed borrowing Ms S's vehicle and what has been put to her during her cross examination. At the time that he borrowed Ms S motor vehicle she had told him that she wanted to go to church and the motor vehicle did not

have enough petrol. He further testified that since he had to sell his camp chair and paint for R50,00 in order that he can put petrol on Ms S vehicle. He lied to Ms S, by saying that his daughter was fine but his ex-father-in law had to remain in hospital. The reason he lied was afraid that Ms S will be angry with him for driving from Chrisville to Eldorado Park unnecessarily so.

[114]. During cross-examination among others he testified that on the night of 13 March 2015, he and N where happy they even made love that evening. Since N was using the blue track suite as pyjamas, she had to take them out, fold them and put them, originally, he said in the cupboard, however he later changed to say on top of the ironing board, which was about 1,5 meters away from the bed. The said track suite was worn out that is why it was torn.

[115]. He testified that at one stage N complained of stomach cramps and was bleeding seriously so, and they consulted a private doctor, who did a sonar, and said that it seemed like N had miscarried. She was booked off sick for three days however she was then admitted in hospital on the 27 January 2015. Upon her discharged she was still sick she could not walk properly.

[116]. When asked again how did his blood got to the pillow, he testified that about 6 to 12 months back N stabbed him on his mouth and also threw bottle glass at him and she also hit him with it.

[117]. He pawned the cell phones because they had financial problems, on the 12 March 2015 he pawned the cell phone because N did not have a bus-ticket.



On the 19 March 2015 he pawned the other cell because he needed money to visit the hospitals looking for his wife.

[118]. He also had a protection order authorised against N. He testified that every marriage had its problems and during 23 January 2012 when the interim order was made against him, they were only about 2 years in their marriage. N used to say that she will one day leave him and leave their daughter with her mother and she will never see her again. She used to say that "*It is better to be an old man's darling than to be a young man's slave*" She will say these while she was consuming alcohol and she will be in the presence of their neighbours. She said the same thing twice in the presences of her mother.

[119]. He was also at pains to explain why he told T S that *If she is asked, she must not say that he borrowed her car*. He said he did not want her to be in trouble. He could not explain what trouble he was referring to.

[120]. He said his neighbours might have confused the screams of N with singing. N was a loud person. N abused alcohol and did not cook for him.

[121]. He denied attacking N at Woolworths. He denied the issuing of the banning order by Phindile Ludidi at Woolworths. He further stated that during the alleged date that he was given the order in actual fact N was in hospital.

[122]. During the court's clarifying questions, he testified further that the injuries he got over his head, nose and mouth did not take place at the same time, they happened in three separate dates.

[123]. Also, when asked about the issue of the selling of his camp chair and paint, he said he had to sell them first before he left Chrisville to Ms S place, she is resident at Eldorado Park. The money received from selling those items was used as a taxi fare money. Further that Ms S does not stay far from Lenmed Clinic, and that there are no taxis that comes from Chrisville to Lenmed Clinic, but there are taxis from Eldorado Park to Trade Mall Centre. Trade Mall Centre is adjacent to Lenmed Clinic, it is divided by a fence.

[124]. Regarding the N's track suite pants, he further testified that the reason that they were torn was because they were burned by iron.

[125]. The defence then called **Professor (Dr) Robert Huddle** to testify and he testified that: He is a doctor by profession. Since 1990 to 31 March 2015 he was specialist Physician, heading the Department of Medical, Oncology and Diabetes while working Chris Hani Baragwanath Hospital.

[126]. During 27 January 2015 to 11 February 2015 when N was admitted as a patient at South Rand Hospital. He asks for her hospital records from South Rand Hospital and they could not find any He did not examine her. He only relied on the referral letter and hospital notes being Exhibits "V 1 to V3". She had an inflamed liver. He did not know the cause. Someone with inflamed

liver could easily bleed if the patient has severe liver inflammation, however the patient, Ms N, it was not stated if she had a severe hepatitis-Liver problem. Upon her discharge from South Rand Hospital she was given a referral letter, Exhibit "V2" to take along to Chris Hani Baragwanath Hospital for further investigations or check-up. He did not know if she was an in or out patient.

[127]. The only thing that he could see from the notes Exhibit "V1" upon her discharged at South Rand hospital, on the 11 February 2015 was that she was well. She did not have any severe liver inflammation that is why she was discharged. There was no evidence of severe liver inflammation, although she was supposed to attend to further examination.

[128]. The last defence witness called was **Ms Glenda Ramsunda** who testified that: The Accused had worked at her house about 2 years back he was in the company of one Hassan and they were fitting in a ceiling. She cannot remember which year or even a month or even the date what she knows is it was Saturday and Sunday, they started working at her place on Saturday and finish off on Sunday. While they were working a ceiling fell and it fell on top of accused it cut him just above his ear, she cannot remember which side was he cut. It was an open wound. She could not remember whether ceiling fell on him or he fell on the ceiling. She had to clean it with Dettol.

[129]. When asked by the Court the type of ceiling, she said her ceiling was a chalk board, however, they were able to re-installed it. Where the ceiling fell it is still visible. She only painted it, it is in the main bedroom.

[130] She testified that accused and Hassan came early in the morning and she had informed them that her husband had gone to buy some nails. And ask them, while still waiting, if she should make tea for them, accused said no he must take his wife to the taxi rank because she was on her way to work. The Accused left. He said he must take his wife to the Taxi Rank.

Accused then closed his case.

### **ARGUMENT BY BOTH THE STATE AND DEFENCE**

[131]. Both the State and the Defence filed their written heads of argument and the court appreciate them very much. Both State and the defence addressed the court on conviction and they each summarised their arguments on record, the court will not repeat every submission made on their written arguments and or during their summations in court save to state that the court where necessary will refer to some of the points raised on their arguments.

[132]. The state submitted that the case of **S v Nkuna 2012(1) SACR 167 (B)** is more relevant in this matter:

132.1. There are striking similarities between this matter and the **Nkuna case**. They are:

132.1.1 The lapse of time since Frances's disappearance which was in excess of a year. In this case more

than 03 years have elapsed since N's disappearance;

132.1.2 Despite diligent investigations by the police, no information came through. In this case Constable Kubhayi explained that a wide search was done to no avail.

132.1.3 Frances had a happy family life. In this case N visited her child every day after work and in the morning, she was also helping her child to go to school as D explained. She had also given her Mother R200.00 to buy a comforter. D was waiting for her to pick up her comforter.

132.1.4 Frances had a happy professional life. N was happy at work and protected by a banning order.

132.2 Frances had a turbulent relationship with the accused and had a protection order against him. In this case, N had a turbulent relationship with the Accused. She had an interim protection order.

[133] The Defence had submitted that the said case of S v Nkuna is not relevant since Mr Nkuna on that case had failed to testify or even call any witnesses. Further that the blood of the deceased was found at boot of his motor vehicle.

133.2.1. I humbly submit that; the state overlooks the calibre of the evidence which was presented in Nkuna visa vi the case before the Honourable Court. In Nkuna case, the blood found in the boot of the car of the accused was tested and was found to be that of the disappeared person. How else can one explain this? It was reasonable that an inference was that the accused in that case was responsible. In this case the car that the state was used, was tested and no human remains were found.

133.2.2 The blood of the disappeared person in this case was found in her house. Accused explained why his blood was also found on the pillow. The expert said it clearly that, the blood can be tested even if it's been lying there for years, the calling of the Experts did not help the state in the determination of the age of the blood drops.

133.2.3 The proven facts anyway are that, accused got injured when he was working and it can even be that he bled on that pillow. All that I'm saying the presence of blood on that pillow and in the house could have been from any cause. It's not farfetched that N could have been bleeding vaginally that day. There could have been many inferences. If the tracksuit pants were part of the scene, how probable was it that the accused to hide other clothes and decide to leave exposed, bloody track suit pants.

133.2.4 The accused in Nkuna, never got to testify and his credibility was never tested. Also, he never contested the prima facie case that was presented by the state. He chose to remain silent when he actually had a case to answer to. It was important to come and answer about

the presence of the missing persons blood in his car. It was strange, but he chose to remain silent.

133.2.5. In this case accused took the Court in his confidence and he testified. He stuck to his version and never contradicted his evidence. Although the state would like the Court to believe that there were contradictions between the accused and his witnesses there was nothing material that the state could successfully pin point

[134]. The Court does not agree with the defence when it submitted that Mr Nkuna did not testify on his case, He did testify and his testimony can be found at paragraph 76 to 108 of the judgment.

## **EVALUATIONS AND FINDINGS**

[135]. It is the duty of the State to prove the case against the accused beyond a reasonable doubt, a conspectus of all the evidence is required. Evidence that is reliable should be weighed alongside such evidence as may be found to be false. Independently verifiable evidence, if any, should be weighed to see if it supports any of the evidence tendered. In considering whether evidence is reliable, the quality of that evidence must of necessity be evaluated, as must corroborative evidence, if any. Evidence, of course, must be evaluated against the onus on any particular issue or in respect of the case in its entirety. **S v Trainor** 2003 (1) SACR 35 (SCA) para [9].

[136]. The main issue for determination in this matter is, is Ms N A (herein after referred to as N) just missing and one day she will pitch up or is she alive somewhere unknown where she does not want to be found either by her family, more so, the accused, or has accused killed her and hidden or destroyed her body

**N (“N”) A Is she Missing has she left on her own?**

[137]. Accused had submitted that N has voluntarily left and she is still alive wherever she is. State says N did not leave accused had killed her and hidden her body.

[138]. According to the evidence the family and neighbour the last time they saw N alive on the 13 March 2015, however according to the accused the last time he saw N was on the 14 March 2015 at 08h30 when she allegedly boated a taxi which was going to town and she was going to work at Woolworths and up to date none of them have seen N or they have not made any contact with her or she has not made any contact with any of them wherever she may be.

[139]. It was put to the two State witnesses, J A and D A, by the accused that at one stage N had disappeared for a period of about three months without knowing her whereabouts, however the two witnesses testified that, accused knew where she was, since she was communicating and keeping in contact with him. The only thing is that she was hiding and wanted to stay away for a while from accused abusive behaviour. She only stayed away for a period of one month and during that time she was leaving with her Aunt at Jeppestown.

[140]. During his testimony accused also indicated that after N was discharged from hospital, one and half month back, just before she disappeared, she was sick and she couldn't walk properly.

[141]. It is not in dispute that N loved her daughter very much, she would go to see her at her mother's place, D, every morning and also when she comes back from work.

[142]. Accused also testified that N used to say to him, especially when she was under the influence of alcohol, or when she was seated with their neighbour drinking alcohol, she would say one day she was going to leave him and he won't see her anymore, she is going to leave their daughter with her mother, and further he testified that she used to say that “It is better to be an old man's



darling than to be a young man's slave" and she said this twice in front of her mother. This version was never put to any of the witnesses. It was important to have put this version to the witnesses, especially, D, in order to have allowed the court to hear their reaction to such allegations.

[143]. **S v SHAW [2011] ZAKZPHC 32; AR342/10 (1 AUGUST 2011)**

*"Adducing evidence in chief and cross-examination effectively in cases where the evidence is entirely circumstantial assumes special importance. Testing all reasonable possibilities fully is indispensable not only for discrediting evidence and for enabling the witnesses to refute attacks on their credibility, but also for eliciting for the trier of fact, not speculation, but explanations which, if reasonable, would enable appropriate inferences to be drawn. Failure to examine and cross-examine effectively may not only bar a party from later seeking to draw inferences from facts not attested to or disputing the truth of a witness' evidence, but also impair the ability of the trier of fact to draw the most reasonable inferences".*

[143]. **S v FORTUIN 2008(1) SACR 511 (C) AT [13]–[15]**

*If a party wishes to lead evidence to contradict an opposing witness, he or she should first cross-examine the witness upon the fact he or she intends to prove in contradiction, so as to give the witness an opportunity for explanation. Similarly, if the court is to be asked to disbelieve a witness, he or she should be cross-examined upon the matters which it will be alleged make his or her evidence unworthy of credit.*

In **Small v Smith 1954 (3) SA 434 (SWA) at 438**, Claassen J said:

*"It is grossly unfair and improper to let a witness's evidence go unchallenged in cross-examination and afterwards argue that he must be disbelieved."*

Failure to cross-examine may therefore prevent a party from later disputing the truth of the witness's evidence. According to the rule in ***Browne v Dunn (1894) 6 The Reports 67*** a party who calls a witness is entitled to assume that a witness's testimony has been accepted as correct if it has not been challenged. The rule has been consistently followed by our courts but, as was pointed out in ***President of the RSA and Others v South African Rugby Football Union and Others 2000 (1) SA 1 (CC)***, it is not inflexible. For instance, it has no application to testimony that is manifestly incredible.

[144]. Accused wants the court to draw an inference that N has come to make her threats true, that is, she has left and had made sure that accused would never see her again and she has left their daughter with her mother. And a day before she disappeared, she had left her shares with her mother. However according to Exhibit N J statement, she wanted her mother to keep her shares book from work up until Monday when she was going to take it together with additional forms, and it is now clear that she never managed to complete those forms.

[145]. Since this version was never put to the State witnesses the court will not draw any inference from this version.

### **Witnesses Statements contradictory to their viva voce evidence**

[146]. Based on the statements of two of the State witnesses, being Ms Marjory Oulden, exhibit "F" and Mrs Esme Hogarth Exhibit "L" the Defence has submitted that these two witnesses, had seen N being alive on the 14 March 2015. Ms Hogarth saw her in the early hours of the morning in front of their flat, whereas Marjory saw her at Eldorado Park extension in the company of another gentleman and they were drinking alcohol, from there they left together.

[147]. The two witnesses when they testified, they denied that they have said that they have seen N, the police officer who took their statement did not properly record what they wanted to say

[148]. Let us pause here and look at both Statement exhibits "F" and "L" If one reads and compare what has been written in paragraphs 4 (first) and second 4 and compare with what has been written in paragraph 5 of Exhibits "F" it is really confusing *"I also met a family which was reporting a missing person. The family is unknown to me they showed me a picture of a lady but the picture showed only half of the face but I told the family that I saw the lady drinking beer (N) at Eldorado Extension one with an unknown male"*

[149]. The contents of second paragraph 4, from line one it says *"I told the family which was two sisters with their mother and one male who is said to be the missing persons husband (M A) that I saw the lady at Block PP drinking beer there with a male who is unknown to me.....it went on and say" I did not say anything about seeing the missing person (N) nor any car what-so-ever because there was no car when I thought it was her*

[150]. Paragraph 5 says "The lady that I saw was or later on left the flats with male by foot they had no car. I did not meet the family at Eldorado or at Booyens SARS> Neither did my son meet them. That's the only time that I meet them. Ms Marjory when she testified, she said she did say she saw N, she said she was shown a half picture and the person who was on that picture had short hair, and she looked like her neighbour, not that she saw her (N) at Eldorado.

[151]. The excerpts quoted above from exhibit "F" it is not clear if really Ms Marjory saw two families, and both families had a missing person(s) because in first paragraph 4 , she said to the said family after seeing the half picture that she saw that lady at Eldorado Extension. However, on the second paragraph 4, M A family at the top of the paragraph it is written she saw the lady at Block PP

[152]. With regard to Exhibit “L” Ms Hogarth statement, from line 4 of paragraph 3 it says

*(“.... I look outside I saw the men who stays next door at no.7 standing outside, looking at direction of their flat, while I was still wondering why the man is standing outside early in the morning I saw “N” coming out of her flat and she went straight to her husband and they left. I did not see the direction they took the lady N was wearing a blue and white gown with the hoody on, I could see one side of her face. Since that day I never saw N)”*

When Ms Hoggard testified she denied saying the above paragraph, she indicated that she was just given the statement to sign she did not know what was contained on it.

[153]. According to the accused testimony, on the morning of the 14 March 2015 he and N woke up late, he prepared breakfast while N took a bath, thereafter, he went to take a bath and N went to the shop to buy a cigarette. N was unable to can do without a cigarette even when she had to go to the toilet. Thereafter they left together to go to the Johanna street to look for a taxi.

[154]. On accused evidence it is clear that he never went outside, and they woke up late, N missed her 07h45 bus, which means as stated at Ms Hogarth statement that at 5 am she was looking outside and saw accused standing there and N joined him it is not truthful.

[155]. It is well known that police statements are as a matter of common experience not taken with the degree of care, accuracy and completeness.

[156]. This was dealt with in **S v Xaba 1983 (3) SA 717 (A) at 730B-G**. In cases where there are contradictions between the statement made by a witness to

the police and subsequent viva voce evidence, the approach is the same as dealing with the contradictions between two witnesses.

[157]. In **S v Mafaladiso en Andere** 2003 (1) SACR 583 (SCA) 593E-594H reads as follows:

*“ . . . in neither case is the aim to prove which of the versions is correct, but to satisfy oneself that the witness could err, either because of a defective recollection or because of dishonesty. The mere fact that it is evident that there are self-contradictions must be approached with caution by a court. Firstly, it must be carefully determined what the witnesses actually meant to say on each occasion, in order to determine whether there is an actual contradiction and what is the precise nature thereof.”*

[158]. In Mafaladiso the approach is that not every error by a witness nor every contradiction or deviation adversely affects the credibility of a witness. Non-material deviations are not necessarily relevant. Furthermore, it was held that the contradictory versions must be considered and evaluated on a holistic basis.

[159]. In addition to weighing up the previous statement against the viva voce evidence of both witnesses, the Court considered their evidence with the necessary cautionary rules they were credible and satisfactory in all material ways. Evaluated on a holistic basis I am satisfied that both Ms Marjory and Mrs Hogarth of the events of 15 March 2015 and 14 March 2015 their reliable and notwithstanding any shortcomings, the court is satisfied that their evidence is credible in all material respects.

[160]. Accused also testified that the family knows where N is, more so they want him out of their flat. They have put one of their daughters and her husband in their flat. Ms D had testified that City Council was planning to repossess the said flat as it was standing empty, and she said to them that it belongs to her grand-daughter Z. So, they put in one of her daughters inside it to look after it.

[161]. The Defence further submitted that the Investigating officer had testified that a thorough search was conducted that is sniffer dogs, helicopters were used in searching the body of N at manholes, dump area around Booyens and nothing came out of it.

[162]. The Defence further submitted that since the state wants the court to draw an inference to the fact that accused borrowed Ms T S motor vehicle on the 15 March 2015 and he must have used it to transport the body of N from their flat, however the police did search the said motor vehicle for any traces of blood by the use of the police dogs and they could not find any, Defence submitted further that it was not possible to can disposed the body of N in that short space of time, since it is was testified by Ms S that accused only took the motor vehicle for about 40 minutes.

[163]. As a result, the only inference that the court should draw is to the effect that N is alive and hiding somewhere.

[164] The Court take cognisance of the warning that has been echoed in several decided cases that a distinction must be drawn between the drawing of inferences and in making assumptions when dealing with circumstantial evidence. Like what was stated in **S v Cooper 1976 (2) SA 875 (T)** it was stated that: "When triers of fact come to deal with circumstantial evidence and inferences to be drawn there from, they must be careful to distinguish between inference and conjecture or speculation.

[165]. There can be no inference unless there are objective facts from which to infer the other facts which are sought to establish. In some cases, the other facts can be inferred with as much practical certainty as if they had been actually observed. In other cases, the inference does not go beyond reasonable probability. But if there are no positive facts from which the inference can be made, the method of inference fails and what is left is mere speculation or conjecture.”

[166]. During accused testimony it came out that accused not only borrowed Ms S motor vehicle on the 15 March 2015 he also borrowed it on the 14 March 2015, allegedly he went to visit her sister who also stays in the same area as that of accused. The searches by the police was only conducted few days after the N was reported missing. Therefore, possibilities are many things could have happened in between this 13 March 2015 and the time the police conducted their search.

[167]. Accused further testified that the reason he asks Ms S to lie that she must not tell anyone that she borrowed him her motor vehicle was that the family of N more particularly the community were starting to harass her, it was more to protect her than any other thing. The community was not aware that he had a son with her. But the question that comes into the court's mind is that how did the community come to know and say the motor vehicle which they saw accused driving at the flats which was a Red Renault belonged to Ms S and also how did they know where she resides.

[168]. Therefore, after careful consideration of all the above facts the only inference that the court can draw is in this respect is that N did not voluntarily leave and that she does not want to be found to be untruthful. Something happened to her.

## **ABUSIVE RELATIONSHIP**

[169]. Now comes the question if she did not leave on her own but she is still missing what happened to her. And the State is alleging that accused must have killed her. Has accused really killed her or did really something happened to her and what happened her. In order to answer some of these questions, the court is of the view that it has to go back and look and the way the accused and N lived, conducted their lives together in their marriage relationship, prior to N went missing.

[170]. The State had submitted that accused is or was an abuser. According to accused he is not an abuser, he loved his wife (N very much) Like any married couples they had their share of up and downs in their marriage. At the beginning they had problem but they had worked them out.

[171]. According to the evidence of four State witnesses being Ms Cynthia Crouse, Ms Esme Hogarth, Ms J A and Mrs D A accused used to assault N at least twice a week.

[172]. Ms J and D A testified N will come at their house and they will see that she had bruises on her eyes and hands. As I have stated above at one stage N had to hide from accused because of he was abusing her. She went to stay with her Aunt at Jeppestown.

[173]. According to exhibit S on the 23 January 2012 N went to the Domestic Violence Court and obtained an Interim Protection order against accused. Ms Janest testified further that at one stage accused had stabbed N on her left-hand side just next to her breast.

[174]. Ms Phindile Ludidi testified that during the 20 January 2015 she saw N hiding behind the clothes in the shop, and she took her to the office to inquire from her what was the problem. N told her that accused was chasing her. She then wrote exhibit "M" and give it to accused, which is an order by Woolworths which is to the effect that accused should not come to the Woolworths shop, even if it is only to pay his account. He was banned from entering their shop.



[175]. During the testimony of accused he testified that during 2012 they were only two years in their marriage, and like any marriage couples they had their problem. He also went to Market Street to go and issue a protection order against N. At one stage he was arrested and he also did the same thing by having N to be arrested. N at one stage did stab him, on his head, mouth, nose and he has a scar to that effect. She was the one who was abusing him. Like verbally harassing him and not even cooking for him threatening him by saying she will one day leave him.

[176]. Accused presented exhibit T, wherein the community signed a petition to the effect that he should not be granted bail. Accused also testified that the community in their flats did not want him or them there. They allege they were always fighting.

[177]. According to exhibit "N" Ms J's statement she has stated that since the dating time of accused and N accused has abused her sister, more so when he is under the influence of drugs.

[178]. As much as accused says he loved his wife and he has never assaulted her, evidence and also on his own evidence they did not have a healthy marriage relationship it was volatile. Therefore, I have come to the conclusion that accused was an abuser, he abused N. He was used to assaulting her.

**Is the accused untruthful person.**

[179]. State wants the court to draw an inference that accused is a liar. Based on the behaviour of accused. The State went on to call several witnesses to demonstrate this fact.

[180]. The State presented evidence that on the 12 March 2015 just a day before the disappearance of N accused pawned N cell phone for R100,00. Accused testified that N did not have money for bus ticket. So, they pawned the said

cell phone Samsung, in actual fact N did not own any cell phones, both cell phones belonged to him. He had borrowed N the said Samsung phone during the time she was admitted in hospital and when they were in financial constrained, they had to pawn the said phone in order that N could buy a bus ticket for the month.

[181]. However according to the evidence of J A and D A on the 13 March 2015 N came to their house and took out an amount of R300,00 from which she gave her mother R200,00 so that she could go and buy her comforter set at China Mall the following day and she will come and collect it when she comes back from work. She also give her mother her bank card so that she could go and draw money from her account so that J could go and buy Z shoes at Woolworths. Therefore, the court cannot accept that the reason accused pawned the cell phone was for bus ticket. N had money, if she needed bus ticket, she could have used the R100,00 that she retained from the R200,00 that she give to her mother.

[182]. On the 19 March 2015 accused pawned another cell phone Nokia. And the explanation that he give was that he needed money so that he could go and search for N at the hospitals. Like at Helen Joseph and Chris Hani Baragwanath Hospitals. However according to exhibit N, J A, the family had split themselves as to which group should go where, there is no where it is mentioned that accused needed money or was running short of money to can go with C.

[183]. Accused had also testified that he had fitted a ceiling at Ms Glenda's house and he finished same on Sunday, possibilities are that he was paid for that work, if he really did work there. Does it mean accused had used the said pay within 4 days that is from the 15 to the 19 March 2015. This the court found it to be not truthful.

[184]. State further presented the evidence of Elizabeth Sonti who was N's colleague at Woolworths shop, she testified among others that accused called

Woolworths shop in the morning of the 14 March 2015 at 09h00 saying he is N's husband and that Nicolatte has missed her bus and she was going to be late. According to her since she worked with N, she has never been late, however she cannot deny perhaps other employees were aware that she sometimes comes late.

[185]. However, the only thing accused denied was he called at 09h00 but he is sure he called at 08h30. On accused on testimony he had stated that N boarded a taxi to town at 08h30, from there he went to his mothers-in-law's house, to deliver the chicken livers and to give his daughter the Jelly Totts sweets that he got from N, and he was reminded by his mother-in law not to forget to call Woolworths store (shop). The court does not understand why should accused insist that he called Woolworths shop at 08h30, since it clearly shows that at 08h30 N allegedly boarded a taxi to town, he had to walk to his mother in law's house, surely by the time he called it must have been after 08h30 at around 09h00.

[186]. Among the evidence of Alina Liau is to the effect that she received a call from accused while she was at Mahikeng, and accused was inquiring if she has seen N, because accused told her that he saw N boarding a taxi which had four men inside it and headed to Soweto. Should she see N she must call him and accused was insisting even when she was telling him that currently she was not in Soweto but at Mahikeng. She confirmed that she does stay in Soweto but on that day, she went home at Mahikeng. Accused insisted that he did not say N travelled to Soweto in the company of four men. Alina must has misheard him.

[187]. According to Ms V D when she ask accused as to why he did not call N on her cell phone he replied by saying he was in possession of N's cell phone. It was put to her that accused was embarrassed to have informed her that they had pawned the said cell phone. She further testified that accused had informed her that he was no longer drinking alcohol for the past 2 months. This is surprising because Sergeant Maluleke testified that on the 15 March 2015

when accused came to Booysens Police Station he was smelling of alcohol, and very strong so.

[188]. Mr Don Johnson testified to the affect that accused sold him his flat for R6000,00 and give him R1000,00 deposit, however accused failed to can give him occupation of the said flat, because he kept on laying and he ultimately avoided him. Accused denied that he sold him the flat, he only wanted him to come and look after the flat while he was going to work at Cape Town. However, he admitted taking Mr Johnson's deposit of R1000,00. When court looks at exhibit U1, at the bottom of the said exhibit it is clearly stated that "... stay at the flat and as time goes on, He must sort out the matter with the Council". The interpretation of this document confirms that accused sold the said flat to Mr Johnson, it does not speak of rental. From the evidence of Ms D A those flat where controlled by City Council, and the court accept that accused sold the said flat to Mr Johnson, he is not truthful when he testified that he only wanted him to look after it while he went to Cape Town.

[189]. Lastly when it comes to this aspect the State presented the evidence of Ms S and Mr G L. It is not in dispute that accused borrowed Ms S motor vehicle after telling her that he received a call that his daughter K together with her grandfather, accused ex-father-in-law, where involved in motor accident and have been admitted at Lenmed clinic at Lenasia. Upon his return, wherein he allegedly searched for them and he could not find them, he lied further to her by telling her that daughter was fine the only person who is remaining in hospital is K's grandfather. Mr G L denied that they were ever involved in any motor accident together with his granddaughter. Accused testified that one of Mr G L son-in-law who is abusing drugs, is the one who told him that story. He further requested Ms S to lie if anyone could ask her if at any stage, she had borrowed him, accused, her motor vehicle, a fact that Ms S was not prepared to do.

[190]. Therefore, when the court looks the totality of all the above facts, regarding this fact, of accused being a liar, untruthful it is clear that the only conclusion that one can come to is that accused is indeed not a truthful person.

### **BLOOD INSIDE THE FLAT (OF N AND ACCUSED)**

[191]. It is not in dispute that accused and N blood was found inside their flat.

[192]. Defence had an issue regarding the chain of evidence with regard to the blood, exhibit, that was lifted from the empty room. They were alleging that because the exhibit number that was written on the exhibit bag and on the covering letter that Sergeant Nkuna had written, sending the exhibits to FSL, where different, it meant that those exhibits which were lifted at accused flat where tempered with or they were not same exhibits as the ones that were lifted at accused flat and ultimately send to FSL.

[193]. Sgt Nkuna testified that at the time he was lifting the exhibits, the two swabs A1 and A2 as depicted on exhibit A, photos 11 to 13, he placed the unique serial numbers on the floor where he was lifting the samples from. The number that is appears there is 14DCA5191, he then inserted the said exhibits, swabs into one forensic bag which had number PA 400 191 5598.

[194]. During the time that he had to write a covering letter that accompanied all the exhibits that he had lifted inside the flat of the accused, he made a typing error by writing PA 400 191 8998 instate of the correct forensic bag number of PA 400 191 5598 (the difference is on the middle digit numbers 89 instate of 55).

Sgt Nkuna further testified that after collecting all samples and exhibits at accused flat he then put all those exhibits in one big forensic bag, number PA 300 0756 814 and give same to the investigating officer Constable Tsunduka Kubyayi to deliver at Pretoria, Forensic Science Laboratories (FSL)

[195]. According to exhibit “J” which is an affidavit made in terms of section 212(4) of the **Criminal Procedure Act 51 of 1977** by Ms Selina Khelina Mahlangu and administrative Clerk in the South African Police services attached to the Biology Section of the Forensic Science Laboratory wherein at paragraph 3 she had stated that “During the course of her official duties on the 2015-05-08, she received one sealed Evidence sealing bag with reference number PA 3000756814 and marked inter alia “ BOOYSENS CAS 225/04/2015” from Constable Kubhayi

[196]. She went on to state at paragraph 4 that *“No breaking of the seal and examination of the contents in the Evidence sealing bag was carried out by her”* At paragraph 5 she stated that she then handed over the above sealed Evidence sealing bag to the Administration of Biology Section at FSL in the same condition that she received it.

[197]. Then when one looks at exhibit “K” which is an affidavit made in terms of **section 212(4) of the Criminal Procedure Act 51 of 1977** by Warrant Officer Sihawusenkosi Ignatius Manzini, wherein at paragraph 3 He had stated that “ During the course of my official duties on the 2015-05-20, I received one sealed Evidence sealing bag with reference number PA 3000756814 and marked inter alia “ BOOYSENS CAS 225/04/2015” from the Administration component of the Biology Section of Forensic Science Laboratory. It contained the following:

3.1 One sealed evidence bag with reference number PA 400 191 5598 and marked inter alia “BOOYSENS CAS 225/04/2015 containing:

3.1.1 One sealed swab guard box with reference number 14 DCA5191 marked inter alia “A1” containing one swab.

3.1.2 One sealed swab guard box with reference number 14 DCA5191 marked inter alia “A2” containing one swab, he

went on to mention all the exhibits which were lifted at accused flat.

[198]. The court is therefore satisfied that the correct samples blood swabs that were lifted in the empty room of accused flat were received by the Forensic science Laboratories at Pretoria

[199]. Now coming to the evidence of expert witnesses, like Sgt Nkuna, W/O Naidoo, W/O Mnisi, and also whether the court should accept that Professor Huddle, who testified on behalf of accused, was an expert witness or the court should accept his testimony in this matter as that of an ordinary witness who is but doctor and professor. The evidential value of the expert's testimony will depend on the expertise of the expert (with reference to qualifications, experience, knowledge of the subject) as well as the reliability of the evidence, including corroboration of the evidence. The opinion should be accurate, impartial and objective.

[200]. During the testimony of Sgt Nkuna he placed his qualifications on record and the training that he has undergone. He testified that he is also an expert on blood spatter. He has been a police officer for the past 10 years of which 8 years was spend while at LCRC, as an expert in that department.

[201]. Warrant Officer Trishen Naidoo also placed her qualifications into record, and also appears on Exhibit "G" she is a Forensic Analyst and a reporting Officer she has 12 years' experience in the Biological sciences

[202]. Warrant Surprise Mnisi also placed his qualifications into record, and also appears on Exhibit "H" he is a Forensic Analyst and a reporting Officer he has 09 years' experience in the Biological sciences

[203]. The court must be of the opinion that the person is an expert and competent to testify as an expert. The expert testimony must comply with three basic requirements:

- (a) The basis for the expertise: the expert's qualifications, experience, expertise and knowledge must be put before the court.
- (b) The basis for the opinion and reasons for the opinion must be put before court, which must be based on the facts in the case.
- (c) The opinion of the expert must not displace that of the court – the prime function of an expert is to guide the court to a correct decision on questions falling within the expert's specialised field (**S v Gouws** 1967 (4) SA 527 (EC) on 528D) See also: **R v Vilbro** 1957 (3) SA 223 (A) and **S v Haasbroek** 1969 (2) SA624 (A).

[204]. It is generally required from experts to comply to high standards of accuracy and diligence when they conduct inquiries and perform tests (for ex ballistics, fingerprints, DNA). Mere referring to text books would be inadmissible hearsay. The expert must have personal knowledge of the subject, and should use text book only to refresh memory, to explain a theory or to strengthen opinion.

[205]. At the stage the court is satisfied that Sgt Nkuna W/O Naidoo and W/O Mnisi has the required expertise on the field that they have testified on and as such the court accept them as being expert in this matter.

[206]. Regarding Professor Huddle, he may be an expert in his field however the evidence that he tendered in this matter was only based on what was written on the Exhibits "V1 to V3" he did not personally attend to N, he was at a disadvantage because he was only given one document which he was expected to can make an opinion on it, and also from the say so of accused. the court will also deal in more detail about his opinion when it deals with the whole evidence involving the blood. The court is also aware that Doctor Huddle has never testified in any court in his life time and his knowledge on



the issue of a person who suffers from hepatitis or liver disorder has never been put to the test.

[207]. It is not in dispute that, Sgt Nkuna lifted blood from one of the empty rooms of accused's flat, he also found blood on the blue track suite, which was worn by N and blood was also found on the two pillow(cases) and these items were found inside the main bedroom of accused flat.

[208]. Sgt Nkuna also testified that the way the blood was seen on the floor of the empty room, it was on a straight line and it showed like something was moved, or dragged or even pulled. If someone tried to wipe the blood from the floor, there could have been some foreign items on them. This did not show that there was any pull of blood which was left there or even if someone was standing and the blood became droplets.

[209]. The blood found was dry however it could be seen by naked eyes, however in order to lift those swabs he had to put some chemicals on the said blood. He further testified that the blue track suite was torn as if it was also pulled.

[210]. Warrant Officer Nadioo did the DNA test on the samples taken from the two swabs, lifted from the empty room, and also from the blue track suite and one pillow case and found that all belong to N, after comparing same with the controlled sample of N's daughter Z. Since is the biological mother of Z, and according to testimony she also donated some of her DNA to Z.

[211]. She also testified that, the blood which was found on the track suite were found around the pocket area, right front thigh and also towards the foot, at an angle of the foot. At the back side it was found bellow the buttocks, left below the knee. They look like they were smeared not spots.

[212]. Warrant Officer Minisi after doing the DNA analysis on the blood found on the remaining pillow case and comparing it with the controlled samples obtained from accused. He came to the conclusion that it was accused blood that was found on the pillow case.

[213]. The question is how and why did N's blood end up in the empty room. When did her track suite get torn, how was it torn? How did her blood get into the pillow and lastly when did this blood get into the said pillow?

[214]. During cross examination of the witnesses, by the defence, it was put to the witnesses that N used to suffer bleeding and also that the blood that was found on her track suite could have been or it was due to her menstruations.

[215]. The defence called Professor Huddle to confirm that due to the illness that N was suffering from it will make her to bruise easily and whenever she bleeds will have a severe blood loss.

[216]. As I have indicated above Professor Huddle did not receive the complete history or file(s) of the illness of N, he only based his answers on the two documents that he received from South Rand Hospital, being exhibits V1 and V2. Does not say anything about N being admitted and or suffering from any severe bleeding. The only thing Professor Huddle testified to was N had a query Hepatitis and it was related to having a problem with her liver. She was referred to Chris Hani Baragwanath for further check-ups. After being discharged at South Rand Hospital being declared "clinically very well"

[217]. Professor Huddle did not get the report from Baragwanath Hospital as to what was the follow up or what was the outcome of the further investigations. Professor Huddle give his opinion of a situation wherein a person who is suffering from hepatitis can be expected to suffer more like having a loss of

blood, as I have stated above, he did not get a full medical history of N therefore his opinion is based on one word only suffering from hepatitis and accused say so. In **Mathebula v Road Accident Fund (05967/05) [2006] ZAGPHC 261 (8 November 2006) at paragraph 13** the Court held that:

*“An expert is not entitled, any more than any other witness, to give hearsay evidence as to any fact, and all facts on which the expert witness relies must ordinarily be established during the trial, except those facts which the expert draws as a conclusion by reason of his or her expertise from other facts which have been admitted by the other party or established by admissible evidence.”*

[218]. N was discharged at South Rand Hospital having being declared clinically very well. Secondly there is no evidence, even from accused as he was leaving with her, that she continued to have the same problems, it seemed her life continued to be normal.

[219]. According to accused evidence N complained of stomach pains and she was taken to a private doctor who did some sonar, and said that she might have had a miscarried. After three days she was admitted at hospital for the same complains.

[220]. Therefore, the court does not accept defence version that N suffered from blood problems.

[221]. Accused had testified that on the 13 March 2015 everything was fine between himself and N, they even made love on that evening, and N was wearing her “pyjama” track suite, at the time they made love she took it off and folded it and put it on top of ironing board, when it comes to blood that was found on the that track suite he testified that he does not know anything about it, which means he did not see when they were making love that N was bleeding or she

was on menstrual period. W/O Naidoo testified that menstrual blood was bound to be found on the crouch, even if the lady was overflowing during her menstrual period, in this respect none was found, instate it was found at the buttocks and on the legs almost outside the legs around the pockets of the track suite.

[222]. There is also the blood of N that was found on the pillow, accused testified that he does not have any knowledge how it came there. There was no version which was put to the witness as to how the said blood could have been there.

[223]. As a result, the Court reject the defence version that the blood that was found in the main bedroom, more so the one that was found on the track suite was a result of N's menstruations.

[224]. Now coming to accused blood that was found on the other pillow. Accused give an explanation that it was some blood that came about some times about 6 to 12 months back. He was assaulted by N on three different times, even on the mouth, and while he was sleeping, he felt some blood coming out of his mouth again, earlier on he did rinse the said blood from his mouth, apparently it seemed it came back again while he was sleeping. that is why his blood was found there.

However, the blood that was found on the pillow was not one stain of blood droplet, however it was several droplets almost all over the pillow (case).

[225]. Accused testified that the said the pillow was washed several times, however due to the material that made the pillow, which is thick, it was not easy to can thoroughly clean or erase the said blood. Possibilities are if really the accused was assaulted about 6 to 12 months back, and the pillow case was washed several times there wouldn't be any blood that could be seen by the naked eyes. That is why Sgt Nkuna was able to can take that pillow case and send it to the FSL. As a result, the court reject accused version that his blood that

was found on the pillow case is as a result of having been assaulted by N some 6 to 12 months back.

### **Scratches over Accused head**

[226]. Accused had a scratch or scratches on his head, or around his ear Constable Maluleke and Ms J A testified that they saw that accused was injured on the head towards his ear(s), accused give an explanation and called Ms Glenda Ramsunda to confirm that the scratches that were seen on his head where as a result of ceiling falling on his head. Accused had testified that while he was busy fitting a ceiling at the backroom of Ms Ramsunda he slipped while getting on the scaffolding and the ceiling must have fallen on his head, it was on the crown of his head, it was far from his ears. The said injuries were just a small scratch, which he felt it when he was washing his face and head, it had that stinging feeling.

[227]. However, Ms Ramsunda testified to the effect that as accused and his friend where working on the ceiling it feel on accused, he was injured on the head towards one ear she is not sure which side left or right. He had an open wound blood was coming from that wound she had to wash it with Dettol. They were fitting a ceiling in his main house, even where the ceiling came out it is still visible, she just painted it

[228]. The two version are contradictory, and court regard them as material to each other, If really accused was injured at Ms Ramsunda place while fitting a ceiling surely, he could have testified to the effect that Ms Ramsunda washed him with Dettol, but he emphasised that the injury was just a scratch which one feels when is washing himself there was no blood that came out it.

[229]. Further Ms Ramsunda testified that the said ceiling was a chalkboard ceiling, which means probabilities are that it would not scratch the accused it could at least had caused a blunt force injury and secondly according to accused the ceiling had not as yet been fitted but they were on the process of doing that

whereas from Ms Ramsunda's evidence it was more like a piece that came out of the ceiling, it was already fitted but it fell down. What the court does not understand is if it came out of the "ceiling" and currently the place where it came from is still visible and that space has just been painted, what kind of a ceiling was it, if it was really a chalkboard ceiling, probabilities are once it fell it will break, and once it breaks it will never be assembled and put back again, is it truthful that accused fitted a ceiling at Ms Ramsunda's place or not?

[230]. As a result, the court finds that the version that the injuries that accused got over his head was just a scratch and he got it while working at Ms Ramsund's place is not possible and as a result it is rejected.

#### **DID ACCUSED KILL N OR NOT**

[231]. As I have indicated earlier the State case is based on circumstantial evidence and once evidence is identified as being of a circumstantial nature, the question arises as to how it should be dealt with in view of all the other evidential material.

[232]. Circumstantial evidence is not necessarily weaker than direct evidence. In some instances, it may even be of more value than direct evidence. Inferences are drawn from circumstantial evidence. In this process certain rules of logic must be followed.

[233]. The concept "circumstantial evidence" has become virtually synonymous with the landmark decision in **S v Blom 1939 AD 188**. This decision has been quoted in several cases and it has stated clearly that certain rules of logic have to be complied with once inferences are called for. At page 202 it is stated that:

*"In reasoning by inference there are two cardinal rules of logic which cannot be ignored: (1) The inference sought to be drawn must be consistent with all the proved facts. If it is not, the inference cannot be drawn. (2) The proved*

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

[234]. Can the court draw the inference that accused knows the whereabouts of N and as the State put it, he killed N and he knows what he did with her body. Is this the only inference that can be drawn in circumstances?

[235]. Court has already found that accused was an abuser, on the 13 March 2015, the two neighbours, Ms Crouse and Ms Hogarth testified that they heard that accused and N were fighting and Ms Hogarth testified further that she heard N saying “my head, my head” (My Kop, Me Kop).

[236]. Accused testified that he does not know how the blood of N came to be at the empty room, and Sgt Nkuna testified that due to the straight line of blood that was found in that room one can come to the conclusion that something was moved. The track suite of N was torn, accused testified that the said was due to the track suite being old and further when asked by court he said it was due to ironing, it was burned by iron, which the court found that it is not consistent. Further if one looks at the track suite at picture 27 and 28 of Exhibit “A”, one can see that it was not burned but more like it was pulled on the ground.

[237]. Accused had borrowed Ms S motor vehicle not only once but twice, he even requested her to lie, saying that should she be asked by anyone if he had borrowed her motor vehicle she should say no, he testified that the N’s family and the community were starting to be inquisitive, however he told her to lie as early as the 15 March 2015 on that day they went to the police station to open a case of a missing person and by that time the family were not as yet suspicious of him.

[238]. Another factor which the court cannot ignore is that he testified that he was working at Ms Ramusanda's place on the 14 March 2015. As the State has correctly pointed out the time line between what accused had testified to and that of Ms Ramsunda they do not tally at all.

[239]. According to accused testimony, on the 14 March 2015, after leaving his mother-in-law's place, he went to Ms Ramsunda's place. However, Ms Ramsunda testified that accused and his friend Hasaan came to her house early in the morning, and while they were waiting for her husband, she asks them if she could make tea for them, of which accused replies that no he is going to take his wife to the taxi rank, which is totally different from accused testimony as stated above. Ms Ramsunda cannot remember anything about accused, except that he was injured, when he came to fix ceiling at her place. The court finds that accused story that he went to Ms Ramsunda to work on her ceiling as a fabrication.

[240]. Circumstantial evidence often forms an important component of the information furnished to the court. In these instances, the court is required to draw inferences, because the witnesses have made no direct assertions with regard to the fact in issue. These inferences must comply with certain rules of logic. Circumstantial evidence furnishes indirect proof. Like in this case where the facts have proven that:

1. N did not just disappear.
2. Accused was abusive towards N and their marriage relationship was turbulent.
3. Accused is not a truthful person.



4. Blood of accused that was found on the pillow was not “old blood” that came about 6 to 12 months back, probabilities are that those bloods droplets came about at the time they were fighting with N.
5. Blood of N which was found on her track suite and pillow case were not menstrual blood as accused had stated and the said track suite was torn by being pulled on the ground.
6. The scratches on accused head and near his ear(s) which he received where not from fitting the ceiling at Ms Ramsunda’s place instate there are strong probabilities that he got those scratches while he had a fight with N, as was testified to by the two neighbours, Ms Hogarth and Crouse that they had a fight on the 13 March 2015.
7. Accused testified that he does not know how the blood of N came to be at the empty room, and Sgt Nkuna testified that due to the straight line of blood that was found in the empty room one can come to the conclusion that something must have been moved.

[241]. Therefore, following upon the principles stated in **S v Blom** and upon the following cases:

[241.1] In **S v Jackson 1998 (1) SACR 470 (SCA) @ 476e-f** Burden is on the State to prove the guilt of an accused beyond reasonable doubt, no more and no less. The evidence in a particular case may call for a cautionary approach, but that is a far cry from the application of a general cautionary rule.

[241.2] In **S v Nyembe, 2014 (1) SACR 105 (GSJ)** Van Oosten, J held as follows at para [8]

“...In **S v S. [2012] ZASCA 85** the Supreme Court of Appeal held: 'A court does not look at the evidence implicating the accused in isolation to determine whether there is proof beyond reasonable doubt nor does it look at the exculpatory evidence in isolation to determine whether it is reasonably possible that it might be true.

The correct approach is set out in the following passage from **Mosephi and Others v R LAC (1980 – 1984) 57 at 59F – H:**

*“The question for determination is whether, in the light of all the evidence adduced at the trial, the guilt of the appellants was established beyond reasonable doubt. The breaking down of a body of evidence into its component parts is obviously a useful guide to a proper understanding and evaluation of it. But, in doing so, one must guard against a tendency to focus too intently upon the separate and individual part of what is, after all, a mosaic of proof. Doubts about one aspect of the evidence led in a trial may arise when that aspect is viewed in isolation. Those doubts may be set at rest when it is evaluated again together with all the other available evidence. That is not to say that a broad and indulgent approach is appropriate when evaluating evidence. Far from it. There is no substitute for a detailed and critical examination of each and every component in a body of evidence. But, once that has been done, it is necessary to step back a pace and consider the mosaic as a whole. If that is not done, one may fail to see the wood for the trees.”*

[241.3] The cogency of circumstantial evidence depends on the circumstances of each case and in particular on the totality presented in court. In **Nthele v S 1998(3) ALL SA 517 (A) at 518** it was stated that where the State relied on circumstantial

evidence it is sufficient that the accumulative effect of the evidence before the Court indicate that the accused is guilty beyond reasonable doubt

[241.4] **S v Reddy and Others 1996 (2) SACR 1 (A) at 8 c-h:**

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

The matter is well put in the following remarks of Davis AJA in **R v De Villiers 1944 AD 493 at 508-9**:

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

[242]. If one puts aside the far-fetched conjecture it seems to me that the circumstantial evidence in this case, consisting of so many probative factors, all pointing in the same direction, leads the court to the irreversibly to the conclusion that accused had planned and killed N and he has disposed off her body or he knows where he had placed it.

[243]. The last question is can accused be convicted of the murder of N without her body.

[244]. In this regard one has to look at the case of **S v Nkuna 2012 (1) SACR 167 (B)** and those cases that were referred thereto in that case at paragraph [116] The absence of the body (*corpus delicti*) is not an insurmountable bar to finding an accused guilty of murder. The learned authors make it a prerequisite that *there must be a reasonable explanation for why the body should be missing*. What will be a satisfactory explanation will most definitely depend on the evidence tendered? I think that not only must the explanation be satisfactory to the court but it must also be reasonable and reconcilable with the evidence tendered. In this case it is clear that accused well planned the removal of the body of N and he made sure that he alone will know what happened to the body, notwithstanding the thorough search which was conducted by the police, I find that accused had an advantage in that before he could be regarded as a suspect he already had about 3 to 5 days within which probabilities are he disposed of the body. He was seen on the 14<sup>th</sup> and 15<sup>th</sup> March 2015 driving Ms S's motor vehicle. Accused looks like a very intelligent person, he testified that he was advised to write each and everything that happens the minute he was informed that he was a suspect. Which makes it probable that he was able to look at the evidence which the state had against him and plan around it.

[245]. “[111] To require the production or discovery of the body (*corpus delicti*) in all cases would be unreasonable and unrealistic and, in certain cases, would lead to absurdities. To my mind it would lead to a gross injustice

particularly in cases where a discovery of the body is rendered impossible by an act of the offender himself.

[246]. [113] It is not hard to think what the state of affairs would be in this country if the legal position were to be that, whenever a murder is committed and the body (*corpus delicti*) of a deceased is not found, the accused is then entitled to his acquittal; and that being so, despite the existence of overwhelming circumstantial evidence that points a finger to the accused person. See **S v Nkuna**.

[247]. It is true that a crime, even murder, may be proved without the motive being established. But it is always very important to consider whether the accused had or may well have had a particular motive for killing the deceased. It is clear that accused was already angry on the night of the 13 March 2015 when they left his mother-in-law's house with N, according to J A's statement Exhibit "N" at paragraph 5 she had stated that

*"When she was talking to my mother M A was panicking he wanted them to leave and she kept on talking to my mother. He stood up letting her alert that they must leave he was acting so rude...Then my sister give my mother her works share book to keep it for her till Monday when she has to submit it at work with other forms"*

[248]. "[112] It is thus proper for a court to convict an accused on circumstantial evidence provided it has the necessary probative force to warrant a conviction, and the fact that death can be inferred from circumstances that leave no ground for a reasonable doubt. See: **S v Nkuna**, and **S v Sikosana 1960(4) SA 723 (A)**.

[249] Therefore, the court is satisfied that the State succeeded in proving the guilt of the accused beyond reasonable doubt. The accused is therefore found guilty as charged that is:

249.1 Murder read with provisions of section 51(1) of the Criminal Law amendment act 105 of 1997;

249.2 Defeating or Obstructing the course of justice.

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**C K MATSHITSE  
ACTING JUDGE OF THE HIGH COURT,  
GAUTENG LOCAL DIVISION, JOHANNESBURG**

**Appearances:**

Date of Trial: 05 - 16 March 2018;  
04 - 06 July 2018;  
25 - 27 September 2018;  
10 -15 October 2018; and  
10 - 19 December 2018

Date of Judgment: 19 December 2018

On behalf of the State: Adv M T Ntlakaza  
Instructed by: Director of Public Prosecution

On behalf of the Accused: Ms L Qoqo  
Instructed by: Legal Aid South Africa