



OFFICE OF THE CHIEF JUSTICE  
REPUBLIC OF SOUTH AFRICA

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

Case No: SS89/2017

(1)	REPORTABLE: YES / <del>NO</del>
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED.
20/12/2018	
DATE	SIGNATURE

In the matter between:

**STATE**

and

**MARILEE HIBBERS**

Accused 1

**ENLYN PILLAY**

Accused 2

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**JUDGMENT DELIVERED ON 20 DECEMBER 2018**

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**MATSHITSE, AJ:**

**INTRODUCTION**

- [1] On a winter day of the 25<sup>th</sup> June 2016 at around 7:30 in the morning there lay the lifeless body of an innocent child called R who was 3 years old, who was found with some burns almost all over his body and in addition he had some blunt forces injuries on his body.
- [2] R was the son of first accused and stepson to the second accused. First accused used to live in Nelspruit with her mother in one of the farms and she was in a relationship with R E out of this relationship two sons were born being J and R. The relationship of first accused and second accused started around 2015 she came to stay with accused number 2 at Naturena Johannesburg.
- [3] Around February 2016 R was injured. Accused number two indicated that he was injured well he was playing with a bicycle, accused number 1 then took him to South Rand Hospital where he was diagnosed as having a ligament injury he was then taken to Baragwanath Hospital where in he was operated.
- [4] Around March 2016 R had his femur fractured he was then taken to Rahima Moosa where in the doctor who treated him discovered injuries under his eyes under his nipples and on the rib cage he was taken to Helen Joseph Hospital to be operated upon, he came back to Rahima Moosa Hospital for further treatment
- [5] As a result the accused are facing two counts

#### **Count 1**

5.1 Contravention of section 305(3)(a) read with the provisions of sections 1,18,

305(6) and 305(7) of the Children's Act 38 of 2005 further read with the provisions of section 92, 25, and 270 of the Criminal Procedure Act 51 of 1977.

5.2 In that on or about 31st of March 2016 and at or near a place the exact

location there of unknown to the State in the district of Johannesburg Central accused unlawfully intentionally abused or deliberately neglected a child R.

## **Count 2**

5.3 Murder read with the provisions 51(1) as well as schedule 2 of the Criminal Law Amendment Act 105 of 1997 and further read with the provisions of section 92, 256, 258 8 of the Criminal Procedure Act 51 of 1977.

5.4 In that on or about 25<sup>th</sup> day of June 2016 and at or near the residential premises situated at Naturena in the district of Johannesburg Central the accused unlawfully kill a juvenile male person R.

5.5 Alternatively, to count 1, Contravention of section 305(3)(a) read with the provisions of section 1,118, 305(6), and (305(7) of the Children's Act 38 of 2005 further read with the provisions of section 92, 257 and 270 of the Criminal Procedure Act 51 of 1977 in that on or about the date and or near the place mentioned in count 1 the accused , unlawfully and intentionally abused, or deliberately neglected a child R.

[6] Further Alternatively to count 2, a contravention of section 305(4) read with the provisions of section 1,118, 305(6) and 305(7) of the Children's 38 of 2005 read with the provisions of section 92, 257 and 270 of the Criminal Procedure Act 51 of 1977. In that on or about the date and or near a place mentioned in count 2, the accused unlawfully failed to provide medical assistance to a child R well able to do so.

[7] The provisions of section 305(3) of the Children's Act states that "a parent, Guardian, other person who has parental responsibilities and rights in respect of a child caregiver or person who has no power until responsibility and rights in

respect of a child but who voluntarily cares for the child either indefinitely temporarily or partially is guilty of an offence if that parent or caregiver or other person.

(a) abuses or deliberately neglects the child.....

[8] In proving its case the state called Dr Hansmeyer, a pathologist who performed autopsy on the body of R, Doctor Yachad, who first saw R when he was brought to Rahima Moosa Hospital by accused number 2, on the 31st of March 2016, Captain Makwakwa, the detective who came to the scene of the offence where the body of R was found. Captain Markovich who took from accused number 1 a statement which was submitted to court and made Exhibit "F" and constable Peter Munyandizwa a police officer who visited the scene of the incident.

[9] Exhibit "A" to "L" were presented as evidence the court will refer to the said exhibits during its deliberations.

9.1 Exhibits "A" Photo Album compiled by Constable Magwaza

9.2 Exhibit "B" Affidavit by Pauleli Chokoe made in terms of Section 212(7) of Act 51 of 1977

9.3 Exhibit "C" Affidavit by Azidowi Nevondo made in terms of Section 212(7) of Act 51 of 1977

9.4 Exhibit "D" Dr Candice Geraldine Hansmeyer's Affidavit in terms of sections 212(4) and 212(8) of Act 51 of 1977 and Post Mortem Report

9.5 Exhibit "E" Affidavit made by Captain Masenyane Makwakwa's



- 9.6 Exhibit "F" Affidavit made by Ms Marilee Hibbers (taken by Captain Markovich)
- 9.7 Exhibit "H" Affidavit made by Constable Peter Munyandizwa;
- 9.8 Exhibit "J" Statement (affidavit) made by Ms Marilee Hibbers in terms of the Provisions of section 60(11) of the Criminal Procedure Act 51 of 1977 made during her formal bail application at the Regional Court Johannesburg;
- 9.9 Exhibit "K" Transcript of the formal bail application which was brought by both accused at Regional Court Johannesburg;
- 9.10 Exhibit "L" What's up messages between Accused 1 and Accused 2 from 27 July 2017 04:20 to 27 July 2017 06:39.

The two accused testified, on their own without calling any further witnesses in respect of their respective cases.

## **SUMMARIES OF EVIDENCE**

### **THE WITNESSES FOR THE STATE:**

- [10] The state called **Peter Munyadizwa** to come and testify in short he testified that he is a member of the South African police Services with the rank of a constable and he's got 8 years being a police officer and stationed at Mondeor Police Station he was in the of company of his crew member Constable Zwane.
- [11] They went to the accused house they were welcomed by accused number 2 who informed them that he is the child's father. He ask him what happened wherein he responded that the child fell into the hot water in the bathroom the

previous night when ask why he did not take the child to hospital he told them that he did not have transport and it was at night and a child was not that much injured.

- [12] He then took them to where the child was lying they found the child on top of the bed and the child was fully clothed when they look at the child they observed that his legs and feet were burned, his body was also burned and below his neck he had marks that he was burned by something hot. They also found paramedics there they then proceeded to go and open an inquest case or docket because the child had fell into boiling water accidentally.
- [13] There were other people in the house he cannot recall if the mother of the child was also there it was the paramedics who had certified that the child died.
- [14] During the time he was cross examined by accused number one's Council he was ask if he had touched the clothes of the disease and whether the said clothes where fused to the skin of the deceased or whether they were loose from his skin and he then replied that the said clothes were loose and they were not wet or fused to the body of the child. He was further cross examined by accused number 2 counsel and it was put to him that will deny that, he told them that he could not take the child to hospital because the he was not badly injured and he will further deny that, he told them that he could not take the child to hospital because he did not have transport and it was already late.
- [15] The Witness was referred to his statement which he had made involving the events of this matter on his statement he did not mention that the Father of the child had informed him that he could not take the child to Hospital due to the fact that he did not have any transport.

- [16] Witness further testified that accused number two was in a fighting mood, of which he denied that he was in a fighting mood. He will only admit that he had a confrontation with the duty officer, Captain Makwakwa.
- [17] The Witness further testified that after taking off the duvet cover which was covering the child, he did some inspection on him that is when he observed the injuries on his body, he could see that the forehead of the deceased was burned.
- [18] The other witness for the state was **Masinyane Sam Makwakwa**, a member South African Police Services holding a rank of a Captain with an experience of 30 years being a police officer, a detective attached to Mondeor Police Station. On this particular day he was on standby duty, he received a call, he went to Naturena scene of crime or where the incident took place, he found two police officers they informed him that the father of the child, being accused two, said that the child was burned with hot water.
- [19] They then took him where the child was lying, which was on top of the bed and further that the child was 3 years old. The Witness was further referred to Exhibit A photo number 10 and 11. He was shown the father of the child where in him inquired from him what happen, his demeanour was someone who was nervous and was very aggressive and he informed him that the child burned himself on the bath with hot water while taking a bath until he passed away. He inquired from him why he did not call someone or even an ambulance to come and assist he replied that he did not have any money to enable him to call the ambulance and he started insulting him he called him "f... (word) you do you think that I'm the one who killed the child" that shocked him. He observed the child and according to him the face of the child was burned as well as the child body.
- [20] He was then called to another incident and before he left, he instructed the two police officer to open an inquest docket.

- [21] During cross-examination he was asked if he did touch the clothes of the deceased of which he replied that he did not. It was further put to him that accused one will come and testify clothes that the deceased was wearing were damp.
- [22] He confirmed that the he instructed the two police officers to open an inquest docket on the information that he has received from the deceased father that the child burnt himself while taking a bath, and have no contrary evidence to that fact which would have indicated that the child could have been killed.
- [23] During cross examination by accused number 2's counsel it was put to him that accused number two will deny that he told him that the child fell into the hot bath and stayed inside until he passed on. However, accused 2 will confirm and testify that the child fell into the bath. The witness was referred to his statement and it was put to him that he did not mention on his statement that accused number two informed him that the child burnt himself with hot water when he was in the bathroom, he indicated what he had written down was just a summary of what actually happened he did not write each and everything that took place at the scene of the incident
- [24] It was put to him that accused 2 will come and testify that the child was still alive on the 25th of June 2016 on the day of his passing, he immediately shouted for the neighbours and calls were made by members of his family and also by the neighbours for the paramedics and further he himself and accused number 1 they, together with the neighbour tried to perform CPR on the child.
- [25] The Witness was also referred to photo number 10 and 11 of Exhibit A, he is not sure whether the bed cover was removed or not as depicted of photos 10 and 11.
- [26] The next state witness was **Doctor N Yachad**, who indicated that she qualified at University of Cape Town in the year 2016 on the 31st of March 2016 she was

working as an intern at Rahima Moosa Hospital which is a mother and child Hospital dealing with gynaecology, obstetrics and paediatrics. On this particular day she was working at casualty.

[27] R was brought by one person that she described as a man who was not overweight or underweight, he was Brown skinned, he had very little hair he was bald at the time and that is all she could remember about this person.

[28] R came in as an emergency at the hospital, after checking his vital signs he found that he was stable and R was complaining of pain on the femur, he did an assessment of femur she discovered that there were no associated injuries. She discovered a number of injuries of varying ages. With regard to associated injuries of the femur, she discovered there were none which could have happened at the time of the injury of his left femur.

[29] Injuries that she said were older were

- 1) R had a bilateral infraorbital contusion;
- 2) R had some bruising under both eyes;
- 3) R had a bruising over the right nipple;
- 4) R had a bruising on his left rib cage.

These injuries were older than a day or two and she was informed that the child received the said injuries when he walked into a door two days ago. She also discovered a scar on the left elbow and an explanation that was given was to the effect that he suffered the said fracture during the preceding year end 2015 he was treated at Baragwanath Hospital. In order to get answers to these injuries she had to prompt answers from the person who brought the child to the hospital.

- [30] She was given a history that R fell from the tree she indicated that a fall from a tree can result in other areas of bruising fractures or abrasions none of this were present.
- [31] She is not sure whether she stabilized the injury or the fracture. Thereafter R was referred to Helen Joseph Hospital for further treatment, he had to be seen by an orthopaedic surgeon. After he was treated at Helen Joseph Hospital, he was returned back to Rahima Moosa Hospital for further treatment and stabilisation.
- [32] After the child was returned back to Rahima Moosab hospital she gave the social worker a statement she indicated that the patient had high index of suspicion of non-accidental injury. The reason she had this high index suspicion was the femur fraction by itself, more so when it happened to a child of between the ages 0 and 3. The other thing that raised her suspicion was the number of injuries that he had sustained previously of varying ages as well as the elbow fracture which had been treated in a different Hospital. She did not know what happened to the said report, since it was the last time that she saw the child at that time.
- [33] She further confirm that the bone of a child is pliable. That is, it is hard to break the bone of a child than it is to break the bone of an adult, in order to break a child's bone, it will require a high velocity impact which can be sustained from falling from a high wall, also be sustained from torque falling from a different angle can also cause a fracture injury or a non-accidental injury. She further testified that if a person had a fractured femur or something like that one will expect to find some bruising in the area of the hands trying to protect themselves from the fall.
- [34] During the time that she was examining the child she realised that the child was very calm he was not screaming was not crying excessively he was very withdrawn and this surprise her as this was not expected from the child who was seriously injured or an injury of a femur. And in her experience a child is

expected to scream or any person who is injured or had his femur broken he will experience a terrible pain an unbearable pain.

- [35] The father of the child was speaking a lot to him and he was overly attentive to the child and this surprised her also since the father was not reacting like a normal parent who had his child injured who wanted to know more of what is going to happen and the steps that will be taken to correct the injury. During cross examination by first accused counsel it was put to her that accused one and two were not married and they were in a long term relationship they had different surnames and accused number 2 was not the biological father of R.
- [36] She was further ask if she had experience that if the child's surname is different from the person who brought the child to the hospital, the child will not receive any attention, of which the witness indicated that she has not experienced that and according to her they always treat the child no matter who brought the child to Hospital.
- [37] It was fed put to the witness that the reason why they brought the child to the hospital is that the couple were taking care of one of their friends house and that Rahima Moosa Hospital was closer to where they were residing at the time of which she replied that she did not know that. She further confirmed that a femur fracture on a child of the age between 0 and 3 it automatically comes to her attention as a suspicion of abuse.
- [38] She was then asked with regard to the bruises on the rib cage underneath the eye, and on the nipple, she confirmed that it is possible if a person walk on a closed door to receive those injuries. She further testified that accused number two was ask if he knows anything about the injuries on the rib cage and the nipple bruising he indicated that he does not know anything about them.

- [39] She further testified that once the child has been admitted at casualty to be transported to Helen Joseph Hospital and back is done by to the hospital and if admitted in a ward of the Hospital it is the responsibility of the physician or surgeon who takes over and who decide to discharge or not to discharge the child from casualty. It was put to her that there was an investigation which was conducted by the social worker, who came to the accused place, and said she is not taking the matter any further, she felt that there was no abuse a proper and reasonable explanation was given to her.
- [40] With regard to those injuries of varying ages, of which she had noted earlier, she confirmed that they were not of the same date as that of the femur fracture. She further testified that it might be possible that there might not be any associated injuries if a person falls from a tree.
- [41] During cross examination by accused number two counsel it was confirmed that it is accused two who took the child to the Hospital. She confirmed that it was her first case of dealing with femur injuries. According to her and her studies any femur fracture is associated with high index suspicion of non-accidental injury and she always look for signs of non-accidental injury.
- [42] She went on to testify that regardless of any other associated injuries as indicated above she would have still escalated the matter due to the fact that the behaviour of gentleman who brought the child to the hospital and how the child behaves with the fracture it just made her feel uncomfortable.
- [43] The reason why she said the child was out of character was that generally when she deals with children who had fractures they are more uncomfortable, they scream they cry in this case the child was very quiet very dorsal he did not complain and this child was withdrawn despite being so injured.
- [44] It was put to her that R was a quiet and strong child who will not always cry over



everything and he presented a very quiet resilient character

- [45] The next state witness was **Ms Delia Markovich**, she testified that her rank is that of a captain, stationed at Mondeor Police station on the 1st July 2014 she was ask to come and take a statement from the mother of the child who passed on at Naturena which was in connection with an inquest docket which has been opened of the passing of a child at under case number Mondeor Case 476/7/2016.
- [46] She met accused number 1 who was in the company of her mother and another lady whom she does not know her. Upon arrival they wanted to open a case against accused number two. Accused 1 ask if accused two can attend the funeral of the child she replied that there is no way the police can stop accused 2 from attending the funeral she informed them that it was only through a a protection order that they can only be stopped accused 2 from attending the funeral. However, it can only be done on Monday the 4th of July 2016. Accused one then received a phone call of which she answered it, at that stage she was angry and aggressive she then said she cannot stop her from opening a case.
- [47] She then replied that she can, assist her, in opening a case, but that does not mean that it will stop accused 2 from attending the funeral. She then agreed to open a case of attempted murder against accused 2. They then proceeded to another office where in accused 1 proceeded to make a statement. She was making notes while accused 1 was speaking, after that she wrote it neatly. She then told accused number one that she can read it or she will read it back to her of which she did read it back to accused number 1. The case that was open was Mar 33/7/2016. She was no longer involved with the matter.
- [48] She was cross examined by accused number 1 thereafter accused number 2 also cross-examined her.

[49] Accused 2 put it to her that he will come and testify that he was never charged with attempted murder, he will further inform the court that accused number 1 came back to him voluntarily.

The main State witness was Dr Candice Geraldine Hansmeyer (Dr Hansmeyer):

[50] Dr Hansmeyer's CV as to her qualifications, experience in autopsies and medico-legal experience was placed on record. She obtained a Bachelor of Medicine in Surgery in 2005 from the University of the Witwatersrand also known as WITS. She also obtained a Masters in Medicine in 2015 again from Wits, she also obtained a fellowship from the College of Forensic Pathologists in South Africa in 2014. FC4PATHSA, that is her speciality qualification.

[51] She is currently in the employ of the Department of Health and Social Services. She was first employed by the Forensic Pathology Services in 2011. She has conducted about 2,500 autopsies of which a ball park figure would be about 15% have been children estimating or approximating about 370 odd children or paediatric autopsies.

[52] Dr Hansmeyer referred to her chief post mortem report and explained certain of her observations made therein which was accepted in court as EXHIBIT D with two annexes, Annexure A, being a photo album and Annexure B being a radiology report. In terms of that report she conducted a post mortem on the 28<sup>th</sup> of July 2016 in respect of body number 13812/2016, the body which is not in dispute being that of R.

[53] As per standard procedure of the Department, any child case that is regarded as irregular, two pathologists are then asked to look over the case together and in consultation with each other. In this case Dr Moeng attended the post mortem examination as a second pathologist.

- [54] An irregular case may as an example be a case of a child that has died suddenly and unexpectedly, this is a phenomenon known as S.U.D.I. Sudden Unexpected Death in Infancy. Also, in a case where the history has been given and seems to be incongruent with the post mortem findings, the post mortem examination.
- [55] When they start with their post mortem examination which includes an autopsy, they start off the session by receiving a case docket. Housed within the case docket is an SAP180 which is the form that the police fill in at the scene of death, this form will give you (them) the demographics of the individual, the place of death.
- [56] The demographics which included the identity of the individual, it also made provision for mechanism of death for example blunt force injury versus sharp force injury or possible natural cause of death, this includes suicide, homicide or undetermined or accidental and lastly it made provision for the personal belongings that are found on the deceased or in the possession of the deceased.
- [57] The report will then also contain a form that is filled out by the forensic officers who are then sent to pick up the deceased from the scene of death. She will peruse the said report prior to the post mortem examination which includes the external investigation examination as well as the performance of the autopsy and the performance of any ancillary tests. Prior to the performance of the autopsy one is fairly limited by what is written in the forms, for example before the performance of this autopsy all that she had was a very scanty information filled in on both the SAP180 and the, the form filled in by the forensic pathology, forensic officer that went to fetch the deceased.
- [58] Once one had perused the docket, case file, one then will proceed into the autopsy suite where the body has been laid out and they can then start the

performance of the post mortem examination, which includes amongst other things viewing the body, undressing the body and doing a physical examination of the external wounds and injuries.

- [59] At the time of the post mortem examination when she viewed the body, she realized that she was dealing with more than just burns to the body.
- [60] At that time she decided or elected to send the deceased for a skeletal survey. She explained that a skeletal survey is a series of X-rays that are taken of the deceased before the start of the autopsy process.
- [61] The reason they do this is so that they should exclude any arti-factual wounds or fractures. All their skeletal surveys are performed by the paediatric radiology department at the Charlotte Maxeke Academic Hospital.
- [62] She then re-bag the body, body bag and then handed the body over to a forensic officer to transport to the hospital for a radiological examination. Therefore, the post mortem examination was then only concluded the following day.
- [63] It is also their common practise within their department to then call the investigating officer in whose jurisdiction or whose, who is responsible for the case to attend the autopsy and the performance of the post mortem examination. It was therefore on the 27<sup>th</sup> of June that she telephonically notified the investigating officer of the possibility of this case being regarded as irregular and therefore requested his attendance during the performance of the post mortem examination.
- [64] What she learned from the skeletal survey that she had not picked up on examination was the fact that the deceased had a left mid femoral fracture. Furthermore, she also learned that he had a left pneumothorax. She had

already seen that there had been some sort of a surgical intervention to the elbow which was confirmed by a, the comment of a left medial distal humeral corner fracture.

[65] She testified further that she did meet up with the family of the deceased if she remember that two women were then escorted to her office by a security guard. One of the individuals was the mother who appeared distraught, upset, followed by a second individual who she then gathered was the grandmother or a mother, she was not sure whether it was paternal or maternal. She might have been the maternal grandmother because she said she should explain to her daughter what the cause of death was.

[66] At that stage she explained that there was no cause of death as the post mortem had not been done and that if she wanted to see the deceased, she was more than welcome to view the deceased. She further added that if she needed any further information, she was to contact the investigating officer.

**Dr Hansmeyer then referred to her chief post mortem report and explained certain of her observations made therein**

[67] As stated above at the time of performing R's post mortem examination, as she had conducted approximately 2500 post mortem examinations, of which, approximately 15% were children or paediatric autopsies.

[68] Dr Hansmeyer's described in detailed and explained the said injuries found and seen on R as per Exhibit "D".

[69] In respect of the **external appearance** of the body of Sweet R:

#### PARAGRAPH 4.1 BURNS

70. As per paragraph 4.1 (of Exhibit D) his body was **at least 60%** Partial , and/to Full thickness burns she explained that:

70.1.1 The severity of a burn depends on the degree of temperature of the offending substance as well as the time exposed thereto.

70.1.2 A superficial burn is to the top layer of the skin; a partial thickness burn goes beyond the top layer into the lower layers of skin and a full thickness burn goes through all the layers of skin and affects underlying tissues.

70.1.3 20% burn wounds of a child is associated with a high level of death.

70.1.4 In addition to the burn wounds, R also had "splash marks" over his lips, nose, chin and forehead as well as "tidal marks" on the lateral and dorsal aspects of his feet.

70.1.5 The wounds were not dressed or bandaged.

70.1.6 A burn wound amounting to a 60% coverage of a body would result in an almost immediate seepage of fluid.

70.1.7 R had not sustained any superficial burn wounds

70.1.8 The burn wounds were consistent with having been caused by hot water or a hot fluid.

- 70.1.9 Certain parts of R's body, based on the severity of the wounds, were exposed to the hot water or fluid for a longer period of time than others.
- 70.1.10 The entirety of the burn wounds was inflicted whilst R was alive.
- 70.1.11 Although unable to specify the temperature, the water/fluid that inflicted the wounds must have been "scolding hot".
- 70.1.12 Having sustained burn wounds to more than 20% of the surface area, a body will undergo three processes simultaneously; namely:
- A. **Firstly**, there would be a breach of the epithelium resulting in leakage of fluid, which is referred to as plasma capillary leak. A 60% surface area burn would result in significant loss of fluids.
  - B. **Secondly**, internally, the body undertakes various compensatory mechanisms which affects the adrenal glands, the vessels, the heart, lungs and other internal parts of the body. Fluid shifts between cells as they try to maintain equilibrium.
  - C. **Thirdly**, the surge response, which is an inflammatory response, is a process of the body trying to save itself and working harder to do so, which can ultimately lead to the heart failing.
- 70.1.13 The three-process happening together is referred to as "burn shock".

70.1.14 The timeframe from sustaining the injuries until the time of death could be as little as **12 hours**.

70.1.15 The pain experienced in sustaining such wounds would be catastrophic.

70.1.16 Timely medical intervention, after sustaining such wounds, could have a significant effect on the chances of death.

70.1.17 R was naked at the time the burn wounds were inflicted.

70.1.18 Dressing R would have been significantly painful.

#### PARAGRAPH 4.2 Abrasion on the Right Temporal

70.2 An imprint abrasion over the right temporal region (as per Paragraph 4.2).  
Dr Hansmeyer explained:

70.2.1 The wound is depicted in the photo on Page 14 of Exhibit "D"

70.2.2 This imprint abrasion is a blunt force injury consistent with an impact of a hard object with a rough surface.

70.2.3 This was an acute wound, which was likely **24 to 48 hours**  
old

#### PARAGRAPH 4.3 A semi-circular C-shaped bruise



70.3 A semi-circular C-shaped bruise over the left forehead (as per Paragraph 4.3). Dr Hansmeyer added:

70.3.1 The wound is depicted in the top photograph on Page 15 of Exhibit "D".

70.3.2 This injury was consistent with a blunt force injury.

70.3.3 The bruise was **only a few hours** old.

#### PARAGRAPH 4.4 Irregular Faint Bruise Left Forearm

70.4 An irregular faint bruise over the posterior aspect of the left forearm (as per Paragraph 4.4). Dr Hansmeyer specified:

70.4.1 This injury is consistent with a blunt force injury.

70.4.2 This injury was **two to three days** old.

#### PARAGRAPH 4.5 Another Irregular Faint Bruise

70.5 An irregular faint bruise over the posterior aspect of the left forearm (as per Paragraph 4.5). Dr Hansmeyer stated: This wound was **two to three days** old.

#### PARAGRAPHS 4.6 and 4.7 A Discoid Bruise on Left and Right Arms Arm

70.6 A discoid bruise over the lateral aspect of the left upper arm (as per Paragraph 4.6).

70.7 A discoid bruise over the anterior aspect of the right upper arm. (as per Paragraph 4.7). Dr Hansmeyer stated, in respect of wounds 4.6 and 4.7:

70.7.1 These wounds were blunt force injuries consistent with having been grabbed by somebody on the arm.

70.7.2 The wounds **were fresh** wounds.

#### PARAGRAPH 4.8 Focal Bruise the right buttock

70.8 A focal bruise below the right buttock (as per Paragraph 4.8). Dr Hansmeyer stated:

70.8.1 The focal bruise is consistent with a blunt force injury.

70.8.2 It was difficult to estimate a timeframe for this injury, which is depicted in the bottom photo on page 16 of Exhibit "D".

#### PARAGRAPH 4.9 Six Contusions over right upper back

70.9 Six focal contusions over the right upper back, mid back and left flank (as per Paragraph 4.9). Dr Hansmeyer explained:

70.9.1 The wounds are consistent with a blunt force injury.

70.9.2 Due to involvement of the burns, it is difficult to determine the ages thereof.

70.9.3 These wounds, as well as the wounds in paragraph 4.8, were inflicted whilst R was alive.

70.9.4 The wounds are consistent with six separate applications of blunt force.

#### PARAGRAPH 4.10. Bruise over right cheek

70.10 A focal bruise over the right cheek. (as per Paragraph 4.10) Dr Hansmeyer specified:

70.10.1 This bruise is consistent with a blunt force injury.

70.10.2 This injury is depicted in the bottom photo on page 17 of Exhibit "D".

70.10.3 The **burn wounds** complicate **any possible** age determination.

#### PARAGRAPH 10.11 A Linear scar over Left elbow

70.11 A linear scar over the left elbow (as per Paragraph 4.11). Dr Hansmeyer stated:

70.11.1 Previous surgical intervention had taken place.

70.11.2 The eyes are sunken bilaterally (as per Paragraph 4.13). Dr Hansmeyer, in respect of this wound, stated:

70.11.3 This indicates that R was dehydrated.

70.11.4 The dehydration is directly attributable to the burn wounds.

[71] The description and discussion of injuries to the **“Skull and Scalp”** included:

71.1 There is 30 x 50 mm of a focal haemorrhage over the right occipital region; a focal haemorrhage over the left forehead; a focal haemorrhage over the right temporal region and; a focal haemorrhage over the left parietal region (as per paragraph 5 of Exhibit “D”).

71.2 The 40 x 43 mm focal haemorrhage over the left forehead corresponds to the semi-circular C shaped bruise over the left forehead (as per paragraph 4.3 of Exhibit “D”).

71.3 The 40 x 40 mm focal haemorrhage over the right temporal region corresponds to the imprint abrasion over the right temporal region (as per paragraph 4.2).

71.4 The remaining two focal haemorrhages were not “picked up on external examination”.

71.5 All of the focal haemorrhages are consistent with blunt force injuries.

[72] Under the heading “**Intracranial contents**” the following descriptions and details were provided:

72.1 25ml of clotted blood forming a subdural haemorrhage situated over the parasagittal region of the parietal lobes bilaterally; as well as global swelling of the brain (as per paragraph 6 of Exhibit “D”). In this regard, Dr Hansmeyer stated:

72.1.1 A subdural haematoma is a collection of blood below the dura covering the brain.

72.1.2 An epidural haematoma is a bleed above the dura.

72.1.3 In order to suffer an epidural haemorrhage, a hard-direct force is required.

72.1.4 A fall from height comes into this category of a hard-direct force. A fall from height would however have to be from **at least** 3 meters.

[73] A subdural haemorrhage is caused by a deceleration acceleration and/or rotational force. Epidural and subdural haemorrhages can be caused by blunt force injuries.

The various degrees of force are:

73.1 **Firstly**, a mild amount of force: is comparable to a simple fall, possibly causing a bruise or scalp laceration.

73.2 **Secondly**, a moderate amount of force: is comparable to tripping down the stairs and bumping of the head against a table, which may or may not

cause a laceration or bruise and is unlikely to cause intracerebral or cerebral haemorrhages.

73.3 **Thirdly**, a severe or large amount of force: is comparable to a fall from height or a car accident, which will not necessarily cause a skull fracture but will likely cause an intracerebral haemorrhage.

[74] A child's skull can withstand an enormous amount of force before it fractures. A **large amount of force** is required to cause a cerebral haemorrhage. The subdural haemorrhage was inflicted a **minimum of 24 hours** prior to R's death. All cerebral haemorrhages require medical intervention.

[75] Under the heading of "**Chest and diaphragm**" paragraph 10 of Exhibit D states as follows:

75.1 There is a linear fracture of the lateral aspect of **the eighth rib** of the left chest cavity. There is evidence of associated haemorrhage of the fracture site and of the intercostal muscles. There is no collection of blood-stained fluid in the chest cavity.

75.2 These injuries were inflicted whilst R was alive.

75.3 A rib fracture in a child can be **caused by a direct force** or a compression force. Which meant a lot of force was required to fracture a child's rib. In addition to the rib fracture and lung contusions, there was a pneumothorax present.

75.4 A pneumothorax is a collection of air in the chest cavity. A pneumothorax, which is regarded as a surgical emergency, always requires medical intervention. The pneumothorax was an acute injury.

[76] Dr Hansmeyer further testified, in general, that all three of the individual mechanisms of injury, namely:

76.1 the blunt force head injuries;

76.2 the blunt force chest injury; and

76.3 the burn wounds, could have individually caused the death of R.

[77] According to Dr Hansmeyer, R suffered at least 15 separate applications of force.

[78] In respect of R's previous elbow injury, Dr Hansmeyer stated:

78.1 The fracture could have been caused by a blunt force injury, the grabbing or twisting of R arm;

78.2 A moderate amount of force is required to inflict such a fracture.

[79] Dr Hansmeyer further testified, in respect of the previous femur fracture, as follows:

79.1 The femur is commonly known as the thigh bone.

79.2 A large amount of force is required to fracture a femur of a child.

[80] Dr Hansmeyer concluded her evidence-in-chief by stating:

*"Again, looking at the multiplicity of wounds. Different regions, different wounds, different ages these wounds are consistent with none accidental injury syndrome..."*

[81] During cross examination of Dr Hansmeyer by accused 1 counsel, she was confronted with the following version on behalf of accused 1:

**81.1 In respect of the elbow injury:**

81.1.1 On a Sunday afternoon during February 2016, whilst she was inside the house caring for their infant (L), R was outside the house in the company of Accused 2. She was informed by Accused 2 that R fell from his bicycle and complained of pain. She gave him some medication

81.1.2 Accused 1 took R to the South Rand Hospital on the Monday morning. Wherein X-rays were taken of R's elbow and she was informed that it was a torn ligament. However, on Thursday R was still in pain, then on Friday she took him to Chris Hani Baragwanath Hospital, wherein another X-rays were taken and she was then informed that R had suffered a fractured elbow and required a surgery.

**81.2 In respect of the femur fracture:**

On the 31<sup>st</sup> of March 2016, accused 1 was inside the house caring for the baby (L). Accused 2 came into the house stating R had fallen from a tree. R was hospitalised, treated and released.

**81.3 Pertaining to R's death and the discovery thereof:**



81.3.1 Accused 1 returned home from work on the Friday evening at approximately 19:00 when Accused 1 and Accused 2 had an argument which almost got physical. During the argument, accused 2 informed Accused 1 that he "I fucked him up for good". She then went to check on R, wherein she saw a reddish mark on his cheek, and he look dizzy, disorientated, accused 2 then said the reddish mark was from the pillow and the reason he looked disoriented was because he just woken up from sleep. She then ask R if he is okay, of which he replied that he is ok.

81.3.2 Again during the night while accused 2 was sleeping, at around 23:00 on the Friday evening, accused 1 then went to R and asked him if he was okay. R replied by saying "I am fine mummy" (he confirmed that he was okay). That is when she went to sleep.

81.3.3 During the night, at an unknown time, R said he wanted to go to the bathroom. Accused 1 ask his brother, J, to open up for him so that he could go outside and relief himself on the garden, the bathroom was at the main house. They were sleeping at the back room. R opened the door and went out of the room. Accused 1 then fell asleep she does not know what happened to R up until the following morning.

81.3.4 Accused 1 was woken up by Accused 2 at approximately 07:30 on the Saturday morning, when accused 2 was calling the name of R. She then rushed to where R was, at that time R was still on top of the bed she noticed that R was not breathing properly.

81.3.5 Accused 1 saw a red mark on the left of R's face. She further noticed that R clothes were damp.

81.3.6 Accused 1 picked R up, put him on the floor and attempted CPR. Accused 2, and a neighbour, thereafter also attempted to perform CPR on R.

81.3.7 It was further put to Dr Hansmeyer that R did not have any burn wounds at the time Accused 1 spoke to him at 23:00

81.3.8 Accused 1 did not undress R at 23:00 at the time she was checking upon him.

81.3.9 According to Dr Nel's testimony during the accused formal bail application she had indicated that R could have been burned within six hours.

[82.] Accused 2's version was put to Dr Hansmeyer as follows:

82.1 Accused 2 heard R screaming, as well as noises that sounded like R was hitting a wall or something. Accused 2 then rushed into the bath room wherein he found R in the hot bath water. After Accused had 2 removed R from the bath. Accused 2 first dried R, with a towel, thereafter he applied a white ointment from a tube all over his body.

82.2 When Accused 2 removed R from the bath, the burn wounds did not appear as red as they do in the photos.

82.3 The bruises and imprint abrasion might have been suffered by R at the time he was hitting his head on the tap while falling into the bath.

82.4 Accused 2 would explain that the rib fracture might have happened during resuscitation, performing of CPR on R.

82.5 The wounds described in Exhibit "D" at paragraph 4.6 and 4.7 could be consistent with the picking up of R, out of hot bath water, in a state of panic.

82.6 It was put to Dr Hansmeyer that she not an expert in reconstructing an accident and in light of the fact that she was not present, she cannot exclude the possibility of an accident. Had Accused 2 inflicted the burn wounds intentionally he would also have suffered burn wounds.

[83] Dr Hansmeyer replied in short to the versions of accused

83.1 That she was adamant that the R's injuries on his elbow and femur where intentionally caused, since his bones where flexible it required a strong force to break them.

83.2 Regarding the bruises on his body some of them were caused earlier than the time he was burned. Also, that a bath tap will cause more of a laceration than a blunt force, also a bath could cause such blunt forces. Some blunt forces where to severe to have been caused by a falling into a bath, they fall under severe or large force which must have been applied on his head to cause such injuries.

83.3 Regarding the burns on his body he must have been held inside the body, that is why his back was the most burnt, and one can see from the photos that he had lifted his feet up and that is why the area around his pelvic, private part was not much burned. Due to the severity of the burns this should have resulted in the immediate leakage of fluid from R's body and after a short while, while the body is trying to balance its self would have resulted in R's being disoriented and going into a state of "burn shock".

83.4 She further testified that due to the total injuries that R had suffered to she differs with Dr Nel's opinion that R could have died within 6 hours as alleged but he should have died within 12 hours.

There after state closed its case.

**DEFENCE WITNESSES:**

**ACCUSED 1'S CASE**

[84] Accused 1 gave evidence to the following effect:

- 84.1 She is R's biological mother and, at all times relevant to the charges, she has other three other children, R E is the biological father of J and R. J was born on the 9<sup>th</sup> of March 2010 and R was born on the 1<sup>st</sup> of October 2012. Accused 2 is the biological father of both of the other two remaining children a girl and a boy.
- 84.2 R was in and out of hospital from the age of 2 months until he was 1 year old. She and R E ended their relationship in 2014, leaving her, accused 1, looking after both boys, J and R.
- 84.3 She moved in with Accused 2, in Johannesburg, during February/March 2015. They stayed at Accused 2's mother's residential place, at Naturena.
- 84.4 Accused 2 was affectionate towards J and R and he took them as his biological children, he looked after them very well there was no point wherein, she could suspect that accused 2 might be abusing them. She was comfortable leaving her children with Accused 2.
- 84.5 L was born on the 17<sup>th</sup> of December 2015, in South Rand hospital. After the birth of L, she moved into a bedroom in the main house. The two boys

shared the room with her and L. And later, accused 1 and L went to reside with accused 2 at the back room, of which that room was left to the two boys.

[85] In respect of **R elbow injury**, accused 1 testified that:

- 85.1 On a Sunday afternoon in February 2016, R was riding his bicycle in the yard with his brother J, in the presence of Accused 2. (Accused 1 in cross-examination, having looked at an old cellular telephone, realised that R actually sustained the elbow injury during January 2016.). She was in the main house caring after their little daughter L. She heard R crying and went outside to investigate.
- 85.2 She found R crying with Accused 2 comforting him. They then told her that R fell off from his bicycle. She noticed that R's elbow was hurt and the skin was scratched, she give him Stopain, at around 16:00/17:00. R however continued playing for a while after the incident.
- 85.3. The next morning, she became worried about the swelling to the elbow, she then took R to South Rand Hospital at approximately 08:00. After X-rays were taken, a Doctor informed her that R had torn a ligament. R was not admitted in Hospital. She noticed, on the following Thursday, that the elbow started swelling again.
- 85.4 She made the necessary arrangements, to take R to Chris Hani Baragwanath Hospital on Friday. X rays where taken and a Doctor eventually informed them that R had a broken his elbow and required surgery.

85.5 R was admitted in hospital and eventually underwent the operation 2 days later. R spent 4 days in hospital. Although R did not have a complete cast, he had to rest for 6 weeks.

[86] In respect of the **fractured femur**, accused 1 testified that:

86.1 On the 31<sup>st</sup> of March 2016, accused 1, R, J, L and Accused 2 temporarily stayed at Accused 2's cousin's house, the location thereof was unknown to her.

86.2 She and L were asleep in the bedroom. Accused 2 woke her up, at approximately 14:00, and stated that R fell from a tree. R was laying on the bed crying and confirmed that he fell from the tree.

86.3 Accused 2 contacted his cousin who transported them, Accused 2 and R to hospital. R was admitted in hospital and Accused 2 returned to the house at approximately 22:00. Accused 1 visited R at least 2 or 3 times a week at hospital

[87] In respect of the other bruises, as testified to by Dr Yachad, she stated:

87.1 She noticed the bruises under R's eyes and put an ice pack on it. Accused 2, and R, explained that the bruises were sustained when R ran into a sliding door. The bruises under the eyes were seen by her the day prior to R falling out of the tree.

87.2 She noticed the injury near the right nipple and left ribcage on the day R fell out of the tree.

[88] She testified that a social worker was appointed to investigate possible abuse of R. The Social Worker informed her that she could not find anything untoward.

[89] Approximately a week after R was discharged from hospital another two persons attended the house making further enquiries about potential abuse. The two persons informed her that they considered the matter closed as they could see the boys were happy.

[90] Accused 1 testified about the events of the **23<sup>rd</sup> of June 2016** by stating:

90.1 when she was at her place of employment and R was home ill accused 2 was taking care of him. Upon her arrival at home, she found aunty Marleen, in the presence of R and J, who informed her, accused 1, that the boys had already eaten.

90.2 Like she does every evening she then supervised the bathing of R and J, and bathed L.

90.3 The boys slept in the middle bedroom in the main house where she put them to bed at 20:00.

90.4 They, herself and accused 2 slept outside at the backroom together with L she did not have any suspicion of poor treatment of R, by Accused 2.

90.5 She had an argument/ disagreement with Accused 2 however she could not recall what was the disagreement all about, but it never became physical. This led to Accused 2 leaving the room and going outside to work on his bakkie. He only returned back into the room after she had fallen asleep.

90.6 The following morning she did not wake up the boys as J was on school holidays and R was off sick due to flu. She requested Accused 2 that he should assess if R was well enough to attend school (creche). She proceeded to her place of employment.

[91] Accused 1 described the events of the **24<sup>th</sup> and 25<sup>th</sup> of June 2016** as follows:

91.1 She arrived back home around 7:00 pm, J opened the garage door for her. Who, J, went and sat on the couch next to R, who was sleeping. She was not concerned about R being asleep since she was aware that R was sick and had taken medication.

91.2 She went to hang up her handbag when Accused 2 approached her from behind and handed L to her. Accused 2 was immediately aggressive and pushed her into the corner.

91.3 Accused 2 pushed his fists into her neck/chin he and informed her that he would show her what it is to be bitter.

91.4 She was too scared to call for help and merely did what Accused 2 told her to do. Accused 2 was extremely upset and using profound language. Accused 2, later, pressed her onto the bed and pushed his finger into her face.

91.5 Once L was asleep, she asked Accused 2 if she could go and smoke. Accused 2 agreed. At this point she was outside the room standing by the door, R and J were on the couch sleeping, L was also sleeping and Accused 2 was sitting on the bed.



- 91.6 Accused 2, whilst looking at R, then said ***“I fucked him up for good this time”***. She immediately went to R, woke him up and asked if he was okay. R confirmed that he was. At that point, she noticed a red mark on the left side of R face. The said mark was near the middle of his temple toward his ear.
- 91.7 She was under the impression that the red mark was as a result of R sleeping on his left side. She confronted Accused 2, who merely stated that R was sleeping.
- 91.8 At that time R was fully dressed she only saw his face. She was satisfied that R was okay, and she proceeded to set on the bed.
- 91.9 Accused 2 was continuously aggressive towards her and repeated his threats about showing her what it was to be bitter. Accused 2 did not allow her to freely move around the room. Accused 2 later turned off the television and stated that he is going to sleep she was also allowed to go to sleep
- 91.10 She then waited until accused 2 was sleeping and it is only then that she went to check the “boy” R again who once again confirmed that he was okay. She then went to sleep. Later during the night, the exact time is unknown to her, she heard R calling J, she enquired from R what was wrong. R said he wanted to go to the toilet. She told him he could go.
- 91.11 She saw R standing up and opening the door but was not sure where he went. Since they were all sleeping at the back room, in the past whenever R wanted to pass water, he would go in the garden to do that. She then went back to sleep,

- 91.12 The following morning on the **25 June 2016** at around **7:30** she was woken up by the anxious voice of accused 2 calling saying "R! R!". She jumped out of bed and went to the sleeper couch. R face looked completely different to the night before. There was a mark on his right cheek that was not there the night before.
- 91.13 She picked up R and ran outside, screaming for help. As R was wearing long sleeved t-shirt and long pants, she did not see the injuries on R's body. It was at this stage that she noticed the feet of R as he was no longer wearing any socks on his feet. She did not pay attention to R hands at that stage.
- 91.14 The injuries that she saw on R were not present when she had seen him at 23:00 the previous night. She was not aware if R was already dead in the morning but his lips were blue and he was not breathing.
- 91.15 She took R back into the room, placed him on the floor and attempted to perform CPR. She asked Accused 2 to call someone or to do something. She went outside leaving Accused 2 and R in the outside room, going to the main house to seek help from aunty Marleen.
- 91.16 Aunty Marleen and Blake, accused 2's brother, woke up. Blake said he would call a paramedic. She and aunty Marleen went to the outside room and found Accused 2 performing CPR on R. Whilst Accused 2 was busy with the CPR, she noticed some air that came out of R nose.
- 91.17 A neighbour arrived and also performed CPR on R. She then asked Accused 2 what happened to which Accused 2, angrily responded by asking "what do you mean what did I do?" R was moved into Blake's room.

91.18 The paramedics arrived and after being busy with R for approximately 15 minutes they said that R had died. While the paramedic was still present, the police arrived.

91.19 Accused 2 took the police into the house and showed them where R was (laying). Accused 2 took the police into the bathroom and explained that R fell into the bath and burnt himself. This was the first time Accused 1 heard this explanation.

91.20 One of the police officers who attended the residential premises said to Accused 2 that he was negligent, causing Accused 2 to become angry. She did not get involved with the police, due to the confrontation. R body was collected and removed.

[92] Accused 1 testified about the events that transpired after R death:

92.1 R biological father was informed of his death and visited the residential premises on the same day of the passing of R. Mr R E and Accused 2 had confrontations with each other and they had to be separated from one another as they wanted to fight each other.

92.2 It was decided that J should leave with his biological father Mr R E. A lady who identified herself as Ms Michelle Pelser from Community Policing Forum arrived at the house saying he had come to remove L from them.

92.3 She, in the company of her mother, went to the Johannesburg mortuary where Dr Hansmeyer said she could not tell her anything and denied her the opportunity to see R body.

- 92.4 She met with her family, including her father, at Irene Mall. She told them that she did not know what happened to R but explained the events of the 24<sup>th</sup> of June 2016 to them. She further explained to them how Accused 2 had treated her during the week of passing of R.
- 92.5 Accused 1 explained that she enquired from Accused 2 why he said those words and did the things he did. She specifically related to her family how she asked Accused 2 about his statement "I fucked him up for good this time".
- 92.6 Accused 2 initially informed her that he was merely trying to scare her but then later denied making such a statement. As she was relating the whole event to her family she then, realised something didn't make sense.
- 92.7 She contacted Michelle Pelser who made arrangements for Accused 1 to attend Mondeor S.A.P.S. Accused 1, her mother and father as well as her father's wife, met Captain Markovich at Mondeor S.A.P.S.
- 92.8 Captain Markovich was under the wrong impression that Accused 1 intended to confess her involvement in R death. She informed Captain Markovich that she was there to open a case against Accused 2.
- 92.9 She contacted her sister who informed her that the police cannot refuse her to open a case against accused 2. She returned to Captain Markovich and they eventually went into another office where she made her statement.
- 92.10 Captain Markovich initially took notes and then wrote the affidavit (**Exhibit "F"**). After completing writing, it, she offered her if she wants to read it or she can read it for her, of which she read it back to her

[93] She took exception to paragraph 2 of Exhibit "F" as it did not reflect what she told Captain Markovich. She expressly stated that she agreed with the content of paragraph 6 of Exhibit "F".

[94] She confirmed the content of the affidavit she presented during her bail application. (**Exhibit "J"**) she further submitted a copy of the record of the bail proceedings as **Exhibit "K"**. She later, produced a document of a "Whatsapp" conversation between herself and Accused 2. (Exhibit "L")

There after accused 1 closed her case without calling any further witnesses

## **ACCUSED 2'S CASE**

[95] He agreed with Accused 1's description of how their relationship started and progressed. R and J referred to him as "daddy". Though it took J slightly longer to do so. But with regard to R it was spontaneous, he never ask them to call him daddy, they did that on their own.

[96] Him and accused 1 would argue with one another, on numerous occasions, about Accused 2's ex-girlfriend. He described Accused 1 as being paranoid in that regard. He felt like he could no longer take the strain of the continuous arguments. The trust relationship between them was severely affected.

[97] Regarding the previous elbow injury Accused 2 stated:

97.1 He was working underneath the car while R and J were playing on a bicycle. Accused 1 was inside the house. He heard the bicycle fell and R "coming down". He 2 picked R up, consoled him and took him inside to Accused 1. He returned outside and was unsure what Accused 1 did further to R.

97.2 He could not recall the details of how, when and where R was taken to hospital. He denied having inflicted the elbow injury.

[98] In respect of the fractured femur:

98.1 Both Accused, with the 3 children, were house sitting. He was outside cleaning a motorbike and R was also playing outside. J was watching television inside while Accused 1 and L were sleeping.

98.2 Accused 2 heard a bang and immediately ran to R, he was crying, but not as much as when he fell in the bath. He could feel that R leg was swaying different. As he only had the motorbike, he called a friend to transport R and himself to hospital.

98.3 The staff at the hospital, having seen his driver's licence, noted R surname as Pillay. The bruises to R eyes were inflicted when R ran into a glass door while chasing kittens out of the house. He was unaware of the other injuries on R body. He denied having inflicted the femur fracture.

[99] Accused 2's version of events relating to R death can be summarised as:

99.1 He had an argument with accused 1, about his ex-girlfriend, on the Thursday evening, which was left unresolved.

99.2 R and J both stayed home from school, on the Friday, as they were sick, while Accused 1 went to work. They had breakfast and then the boys watched a movie. He was working on the car and at one stage R come and enquired what he was doing.

- 99.3 In the afternoon he decided to bath the boys before Accused 1 got home. Having instructed J to get their pyjamas ready, he and R went into the main house he opened the hot water tap but only opened the cold-water tapa a little bit.
- 99.4 He instructed R to get undressed while he went to fetch J. As he was walking down the passage, he heard a banging noise and the sound of something falling into water. He immediately turned back to the bathroom. The banging continued.
- 99.5 He found R standing in the bath with his arms reaching up. He grabbed R out of the bath and realised that the water was very hot. He noticed that the cold-water tap was closed.
- 99.6 He took R to the outside room, dried him with a towel and applied an ointment for burns all over his body. He then asked R what was he doing to make him fell into the water, he said he wanted to reach the stone on the side of the bath.
- 99.7 Bath time was cancelled and R dressed himself in underpants. Bun, having arrived with L, told R and J that they must get dressed as it was cold. Once R and J had worn their pyjamas, they, along with Accused 2 who was holding L, watched a movie. R and J were on the couch, while he sat on the bed with L.
- 99.8 Later J opened the door for Accused 1 on her return from work. R was already dozing off at that point.
- 99.9 The previous day's argument between him and accused 1 continued. He put one of his fists on Accused 1's cheek, to show that he could also use his power over her.

99.10 Accused 1 asked, in a sarcastic manner, whether she may go and smoke. As Accused 1 was standing outside smoking, he was seated on the bed with L lying behind him, he then said that "our relationship is fucked for good this time."

99.11 After this exchange, he then informed Accused 1 that R had fallen in the bath and she must check on him, which she did. Accused 1 enquired from him what was wrong with R. Accused 2 responded by saying that R was sleeping and had just woken up. They kept out of each other's way. He was in and out of the room until he went to sleep at about 21:30.

99.12 He, at an unknown time, heard Accused 1 telling R that he could go to the toilet. He woke up, on the 25<sup>th</sup> of June 2016, and noticed R was lying off the couch. He then called R and he did not respond, rushed to him, picked him up, placed him on the floor and attempted CPR.

99.13 Accused 1 was hysterical. He noticed some air coming out of R. He stopped doing CPR and Accused 1 shouted at him to do something. Accused 1 picked up R and ran outside to his mother at the main house.

99.14 He went across the road to look for a paramedic and he went to his neighbour's house. The neighbour was not home, but his uncle telephonically contacted the paramedics. He went back to the uncle to make sure that the paramedics were on their way.

99.15 He returned to find his mother removing R socks. Accused 2, having looked at photos of R burn wounds, said the burns were not initially as bad as they appeared in the photos.



99.16 In denying having caused R blunt force injuries, he explained that R would often bump himself and not complain. R would only inform them of his injuries if he was bleeding. He checked on R after he fell in the bath, he did not complain about any pain at that stage.

[100] In respect of the events that unfolded after R death, Accused 2 stated:

100.1 Accused 1 stayed with her family for a few days. Accused 1 changed the venue of R funeral without informing him.

100.2 Accused 1 wanted to return home but her family would not allow it. They continued having contact with each other. Accused 1 starting asking legal/formal questions regarding R injuries.

100.3 He was unable to can fetch Accused 1, as her family would not accept him due to his race. Accused 1 later returned home unannounced.

100.4 He confirmed the Whatsapp messages as per Exhibit "L", but unable to recall content, believed Accused 1 had deleted certain messages. Although Accused 2 used the words "I killed R" he maintained, contextually, it was not a confession.

100.5 Accused 2, in spite of his allegations in Exhibit "L" held the view that Accused 1 was a good mother that did not abuse alcohol.

100.6 As a parent yes at one stage he did previously discipline R, by striking him on his buttocks. After R's death, on an unknown date, he once hit Accused 1 as she was disrespecting him and "making herself cheap" while intoxicated.

There after accused 2 closed his case without calling any further witnesses.

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

[101] Counsel for the State and the Counsel for Accused 2 filed their written heads of argument sometimes back, however accused 1 attorney only filed his head on the day of address on conviction. The court appreciate the written heads of arguments. Counsel for the state succinctly summarised the evidence and the court is highly appreciative of that. The 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.

## **ISSUES IN DISPUTE**

[102] The sole issue for determination by this court is did the accused jointly or individually unlawfully and intentionally directly cause the death of R or through their negligence caused the death of the deceased ®. There is no direct evidence that any or both of the accused caused the death of the deceased (R), the court has to draw inference (s) from the evidence(facts) that both or anyone of the accused deliberately caused the death of R. That is, State relies on circumstantial evidence in proving the guilt of both the accused.

[103] 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 675 (T)** in which 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. 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.”*

## EVALUATIONS AND FINDING

[104] 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]**.

## APPLICABLE LEGAL PRINCIPLES:

[105] The concept “circumstantial evidence” has become virtually synonymous with the landmark decision of the case of **S v Blom 1939 AD 188**. This decision has been

quoted in several cases and it had 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.”*

#### **EXPERT EVIDENCE:**

[106] As the court had indicated above that the main witness for the State was Dr Hansmeyer, who performed an autopsy of R's body and she was testifying in her capacity as an expert, the State has also made a submission that also Dr Yachad's evidence be accepted as that of an expert. Our law has through various decided cases developed principles applicable to the admissibility of expert opinion evidence. **Holtzhausen v Roodt 1997 (4) SA 766 (WLD) at 771H- 773C**. See also **Twine v Naidoo 2017 JDR 1732 (GJ)** at para 18. The list is not exhaustive.

[107] 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)**.

[108] The qualifications of both Doctors, Hansmeyer and Yachad have already been stated above, same will not be repeated here, safe in stating that it was for the first time that Dr Yachad testified before court, she had shown that she does understand what she was testifying about. She mostly testified about what she observed during the time she was examining R at Rahima Moosa Hospital when asked for her opinion she was able to can refer to her studies and what she had read regarding that fact of which she was ask to give an opinion on.

[109] The opinions of both Doctors were based on the facts of case, they were not one sided because they were called to testify on behalf of the State. They were not biased. In the matter of **Stock v Stock 1981 (3) SA 1280 (A)**, the Appellate Division at 1296F held that:

*"An expert . . . must be made to understand that he is there to assist the Court. If he is to be helpful, he must be neutral. The evidence of such a witness is of little value where he, or she, is partisan and consistently asserts the cause of the party who calls him."*

[110] These facts are either within the personal knowledge of the expert or on the basis of facts proved by others. The expert must properly identify his or her sources of information and set out a factual basis upon which the opinion is based.

[111] Dr Hansmeyer was called to give evidence on her specialization skill or/and knowledge as a pathologist.

[112] The court is of the view that both doctors have satisfied the above guidelines as being expert and as a result the court regard them as expert, and their evidence is accepted by the court as that of experts.

### **Points not in dispute**

[113] As the whole post-mortem report Exhibit "D" of Dr Hansmeyer is not in dispute, the court will not over burden the record with repeating her evidence save to summarise those points in which the Defence did not agree with her findings. However, the court will emphasise that her whole evidence is very important to the court. It is the cracks of the State evidence in respect of the charge that they have preferred against the accused.

[114] It is not in dispute that R suffered the following injuries:

- a) He had an elbow injury
- b) He had a fracture of the Femur
- c) He had a bilateral infraorbital contusion;
- d) He had some bruising under both eyes;
- e) He had a bruising over the right nipple;
- f) He had a bruising on his left rib cage;
- g) He had blunt force head injuries and about 15 blunt force injuries all over his body;
- h) He had a blunt force chest injury; and
- i) He had the burn wounds of up to 60%.

What is in dispute is did any or both of the accused intentionally caused the said injuries. Was R abused during his life time or not?

[115] According to the evidence whenever the above-mentioned injuries took place, R will be in the company of accused 2. Accused 1 will only be informed after the incident had taken place.

### **The Elbow Injury**

[116] Accused 2 testified that while he was busy underneath his motor vehicle R was riding a bicycle, and he saw R falling down. And he complained about his arm, he then took him to accused 1 who was inside the house.

[117] There is no evidence as to how high was this bicycle that R was riding at the time, he had this accident, the evidence is to the effect that while R was riding bicycle he fell and his elbow got broken. Accused 1 had testified that R confirmed that he had fallen from the bicycle.

[118] However according to Dr Hansmeyer the said fracture could have been caused by a blunt force injury, the grabbing or twisting of R arm; A moderate amount of force is required to inflict such a fracture.

[119] Which means Dr Hansmeyer is of the opinion that this injury was not caused by falling from a bicycle but it was caused by a person, a human being. Accused 1 testified that she saw some scratches on the hands of R, however accused, of whom the R was in his company did not mention any scratches that he observed. During the testimony of accused 1, originally when she testified more so during her cross examination by the State, she confirmed that she studied Dr Hansmeyer's evidence, and her evidence was based on her testimony, just denying what she had stated in here testimony. Originally when Dr Hansmeyer testified it was never put to her that accused 1 did see those scratches. Therefore, court does not accept her evidence that she did see scratches on R after it was alleged that he fell while riding a bicycle. Therefore, the court came

to the conclusion that there were no associated injuries, like scratches on the arm or anything that will indicate that really the child fell from a bicycle.

### **The Femur**

[120] Also in this aspect while accused 1 was sleeping inside the house, accused 2 came and informed her that R had fallen from the tree. When Dr Yachad examined R she observed that there were no associated injuries of a person who had fallen from a tree. She testified that it is expected that if a person or more so a child who fell from a tree there should be some associated injuries, like tearing of a skin, scratches. She did not agree that the child did fall from a tree, in order for this kind of fracture to occur, it required a high height, at least above 1 meter, but also it will depend on the velocity.

[121] Dr Hansmeyer further testified, in respect femur fracture, that:

121.1 The femur is commonly known as the thigh bone.

121.2 A large amount of force is required to fracture a femur of a child

[122] She was also of the same view which was expressed by Dr Yachad that the said injury could not have been caused by falling from a tree. It required a large amount of force to break a femur more so of a child, thigh bone, which means it can only have been caused by a human being

### **The Injuries observed by Dr Yachad**

[123] When Dr Yachad examined R, she observed that he had these injuries, he had some bruising under both eyes, a bruising over the right nipple and a bruising on his left rib cage which were older than two days. The explanation that was given



to her, more so with regard to the bruising's underneath the eyes, was that the child was injured by walking on to the door.

[124] Both accused testified that they were aware of the bruises which were underneath both eyes, and R got them while he was chasing the kittens at home, he bumped against the door, as to the others they were not aware of them or how he got them. Accused 1 testified that she observed the bruising's underneath the eyes the previous night, before R broke his femur, but the other injuries were not there. Which means she wants the court to draw an inference that these other injuries are "associated injuries" of a person falling from the tree. Court cannot draw that inference since it is not consistent with what Dr Yachd testified to that those injuries were older than two days, which means they cannot be associated with the falling of R from the tree.

[125] The court ask itself how is it possible and if a child hit the door he will get injured underneath both eyes. Accused 1 testified that she was supervising the children whenever they were taking a bath or when she was washing them, did she not observe or see those other injuries? Same with accused 2 who when accused 1 was not present will wash the two boys, none of them did not observe this injury.

#### **Events leading to the Death of R / The injuries that caused the death of R**

[126] Since it has been accepted that any of the injuries could have caused the demise of R, the court will not go into more details of those injuries as it has been testified to by Dr Hansmeyer.

[127] The factual dispute is was the said injuries deliberately caused or not. Accused 1 testified that she also wants to know what actually happened to her son R. Accused 2 testified that R fell into the hot water in the bath and during the time he fell he might have hit his head on the bath. All this was an accident.

Regarding the fractured rib, it could have happened when they were performing CPR on R.

[128] Accused 1 testified that during the night, time unknown, when R requested to go out to pass water, accused 2 must have followed him, then hit him with something on the head to make him unconscious and thereafter poured him with hot water. That is why she could not hear R when he was crying. R could not cry because he was unconscious.

[129] According to the testimony of Dr Hansmeyer, all the injuries that where on R, took place while he was still alive, including the fractured rib. She also disputed the opinion that the fractured rib could have happened at the time when CPR was applied on R. According to her the rib that was fractured was far away from the chest, where one, even a clumsy person, will press trying do CPR. The fractured rib was the eight rib. She also opined to the effect that a child rib is elastic, that is, it is not easy to fracture it. It will require a strong force and to let it break.

[130] The same is applicable to a child's bones they are not easy to can break them. Since the child is still growing therefore his bones are pliable and they have a large amount of elasticity. They will require a strong force to break them

[131] Accused 2 had testified that he took the boys to go and wash this was before arrival of accused1 and also of L, who in most times is brought home, from creche around 17h00 in the afternoon.

[132] He opened both taps of water, more of hot water and a little bit of cold water. He then aske R to take off his clothes while he went to look for J who was delaying in bringing their pyjamas.

- [133] The question was there any necessity or urgency to go and look for J, since he, J, also at the end of the day was expected to come and take a bath. What stopped him continuing washing R and only then when he was done, and if J was still not back then go and look for him.
- [134] He further testified that he was still inside the house, at the passage when he heard that R was screaming and making a lot of noise. He came back running wherein he found R standing inside the hot water, and he was surprised that the cold tap was closed. R had raised up his arms. He then grabbed him taking him out of the water. He had grabbed R by his upper arms that is why there were some thumb print on his upper arms.
- [135] He then put some lotion/cream all over his body. He then took him to the back room. R then put his cloths without any difficulty. R had some redness but it was not as severely depicted on exhibit "D" post mortem report and pictures therein.
- [136] The court ask itself since accused 2 found R with his arms raised, why still grabbed him with his upper arm, why not under his arm pits, which the court beliefs that it will give a better grip without hurting the child on the arms.
- [137] Dr Hansmeyer disputed that the imprint on both arms, where inflicted at the time that accused 2 was lifting the child out of the bath. However, they are more in line with the person who was pressing, holding the child down inside the hot water. More so that the child was severely burned at the back. Certain parts of R's body, based on the severity of the wounds, were exposed to the hot water or fluid for a longer period of time than others.
- [138] She further disputed that the head injuries that R received could have been as a result of hitting his head against the bath. R had received several blunt force injuries on his head to such extend that he had cerebral haemorrhage, which must have been caused by a very strong force, like when a person is involved in

a car accident, a head on collision, where the impact is very high. R's brain was swollen, it was oedematous, and this was not just caused by a mild fall, it meant it was again caused by a very strong force.

[139] There were other several blunt force injuries which R had on his body, on his arms, back and face, and therefore if one takes them cumulatively, and at the minimum they were older than 24 hours before the passing of R. They were not caused in one single incident of falling in the bath.

[140] When it comes to burns R was burned from partial to full thickness of 60% of his body. Dr Hansmeyer opined that it was no way that a person was unable to see those burns. With this degree of burns the child will be in an excruciating pain, and should be crying hysterically so.

[141] Dr Hansmeyer indicated the way R was injured, burning blunt force injuries and the going into "shock" as a result of burns, at about 6 hours, without any medical intervention, he should be starting to be disoriented and also had a leakage of body fluid and burn wounds must have started to be visible with immediate effect.

[142] Based on accused 2 evidence, the time that the R fell into the water, and what Dr Hansmeyer had testified to that after a certain time R must have started, minimum of about 6 hours, when the body parts are trying to balance itself and without any assistance from medication R started to become disoriented, and also when accused 1 checked upon him, wherein she said that R looked like he was disoriented, the court therefore do not accept her (accused1) version that accused 2 must have followed R, during the night when he went to pass water, then assaulted him and burned him with hot water.

[143] When did accused 1 become aware that R was burned? According to her testimony when she got home R was already inside the blanket sleeping. She testified that after accused 2 had said "I fucked R for good this time" she went to

check upon him and she only saw a small reddish mark on his left of his face. It was not so big, and he spoke to him asking him if he is ok, wherein R replied that "I am fine mummy"

[144] According to exhibit "F", accused 1's, statement that she had made before Captain Markovich, at paragraph 3 she said "I went to R and he looked very confused his hand was red and his on(e) side of his face was red, I asked Enlyn what did you do he said what do you mean..."

[145] Again on her affidavit made during her bail application Exhibit "J" at paragraph 31 thereof "I saw that he had a red mark on his face, from his temple to his jaw it look like he was hit in the face, at paragraph 32, she went to say "I asked Emlyn whether he had something to do with mark on R face, whereby he replied by jumping up and yelling at me "what do you mean? There is nothing wrong with him he is just sleepy"

[146] On her testimony before court she testified that what she saw on R's face was just a red mark, however in accordance with the other two excerpts quoted above from Exhibits L and J is clear that accused 1 was aware or must have been aware that something was wrong with R as she wants the court to belief that she did not have any knowledge of R's conditions, burning or injuries.

[147] She had testified that accused 2 did not allow her to do anything, as he was in a fighting mood and was angry with her, but she testified that at 23h00 while accused 2 was sleeping she went to check upon the boys J and R. However, it surprises the court that she did thoroughly check R, notwithstanding seeing earlier those markings, red hand and chick on him (R).

[148] At exhibit J paragraph 48 she had said that "I have lived in constant state of fear from my co-accused, whom has repeatedly beating me since my little boy's

death-telling me over and over that he will kill my other children and if I ever talk to anyone about what he did to my son, or if I even try to leave him.”

[149] Accused 2 had a strong influence on accused 1. Accused 1 went to her parents to stay with them, however at some stage accused 2 came to her at her place of work, notwithstanding the fact that they parted not in good terms, it surprises the court that she then decided to go back and stay with accused 2 again up until they were arrested. Accused 1 testified at some stage that during the time they were staying together after the passing of R, they discussed this case and if she answers in a manner that does not suite accused 2, he will tell her that will not be right and it will put them in goal.

[150] Lastly, I wish to refer to Exhibit “L” which is whatsapp messages, in short, the tone in them is that accused 2 is threatening or fighting accused 1. At 27/07/2017 06:10 “Marilee: You know everything you saying is not true. But its okay. I won’t defend myself against lies. For a long time, I believed and defended you. Only to learn that you were laying to me.....I am standing up for R and everything else we had to endure

[151] 27/07/2017 06:39 Emlyn: Ja alcoholic we will see. I have witnesses. You turned your back ne. That’s all you did but I killed R.....

When Accused 1 was asked if she did not ask accused 2 what did he meant when he said he killed R, she said accused 2 said it was just a threat nothing else it was not true. The court cannot accept that as a valid reason, there is, a saying that the truth always comes out when people are fighting. Possibilities are accused 1 was constantly leaving in fear of accused 2. She did whatever accused 2 was telling her to do. There is, strong possibilities that accused 1 was aware of what accused 2 was doing to R, however being afraid that she will lose her children she did become a party to whatever accused 2 was doing.

[152] According to accused 2, he also testified that when he said "I fucked him for good this time" he did not mean R, he meant that their relationship was now fucked up for good. Which the court find it not to being truthful, if really their relationship was fucked up, the court beliefs that after accused 1 had left to stay with her parents he would not have tried to make any contact with accused 1, since he how she felt about his ex-girlfriend, and she being paranoid in that regard.

## CONCLUSION:

[153] In the final analysis of all the evidence before Court, I am guided by various legal principles to determine whether the charges against the accused have been proven beyond reasonable doubt. In the case of **S v Reddy & Others 1996 (2) SACR 1 (A) 8 C-E** the court held that:

*"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 off-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.'"*

[154] Proof beyond reasonable doubt does not involve proof to an absolute certainty. It is not proof beyond any doubt, nor is it an imaginary or frivolous doubt. This is the standard that must be met by the State's evidence in a criminal prosecution. No other logical and reasonable explanation can be derived from the facts, except that the accused committed the crime, thereby overcoming the presumption that a person is innocent until proven guilty.

[155] In **R v De Villiers 1944 AD 493 at 508 – 9** it was held that a Court should not consider each circumstance in isolation and drawn inferences from each single circumstance. The onus on the State is not to prove that each separate item of evidence is inconsistent with the innocence of the accused, but that taken as a whole, the evidence is beyond reasonable doubt inconsistent with such innocence.

[156] In **S v Shackell 2001 (2) SACR 185 (SCA)** at 194 the court states:

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

See also: **S v Chabalala 2003 (1) SACR 134 (SCA)** at para 15; **S v Mia and Another 2009 (1) SACR 330 (SCA)** at para 12

[157] In **State v Hadebe and others 1998 (1) SACR 422 (SCA)** at 426 E-H the Court enunciated the correct approach for evaluating evidence with reference to **Moshephi and Others v R (1980 – 1984) LAC 57 at 59F-H** as follows:

*"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 aid 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."*

- [158] There is no onus on the accused to prove the truthfulness of any explanation which he gives or to convince the Court that he is innocent. Any reasonable doubt regarding his guilt must be afforded to the accused. **S v Jochems 1991 (1) SACR 208 (A)** and **S v V 2000 (1) SACR 453 (SCA)**. See **S v Jaffer 1988 (2) SA 84 (C)** where the Court held:

*"The test is whether there is a reasonable possibility that the accused's evidence may be true.... the court does not have to believe the accused's; still less does it have to believe it. It is sufficient if the court thinks that there is a reasonable possibility that it might be substantially true."*

- [159] In unpacking evidence on a piecemeal basis, the Court has to consider the strength and weaknesses in the evidence and consider the merits, demerits and the probabilities. See the case of **S v Trainor** and **S v Chabalala** referred herein above. Accused 2 testified that after bath time was cancelled, while J and R were wearing their pyjamas they all watched a movie. During the testimony of accused 1 she testified to the effect that R was wearing long sleeves t-shirt when she picked him up from where he was sleeping. It was further put to the

witnesses, by accused 1 counsel, that when accused 1 picked up R from the bed, his clothes were wet. However, the witnesses indicated that his clothes were dry.

[160] According to photos 10 and 11 of exhibit "D" R was laying on top of bed with track suite. The question that the court ask itself is what happened to the pyjamas which accused 2 had testified that R was wearing at the previous night.

[161] Accused 1 testified that in the morning she was woken up by accused 2 calling R's name, she then rushed to pick up R from where he was sleeping and ran outside screaming for help, that is when he realised that R was injured on his feet, she then brought him back, applied CPR on him. However, accused 1 testified that he put R on the ground and attempted CPR. That is when accused 1 came to pick him up run with him to his mother in the main house. He went outside looking for some help, it is only when he returned that he saw his mother removing socks from R's feet that he saw the injuries on his feet.

[162] Dr Hansmeyer had testified that a 60% surface area burn would result in significant loss of fluids and there would be a breach of the epithelium resulting in leakage of fluid, which is referred to as plasma capillary leak. As a result, the clothes will be fused to the body.

[163] The sequence of events or versions of how R ended up being in the main house with different clothes are contradictory to each other. Probabilities are upon the accused realising that the pyjamas that R were wearing the previous night have fused on his body, they must have removed them, including the socks that he was also wearing and when removed they must have come out with the deceased skin. The accused manipulated the scene, that is why R was placed in the different room than the one he previously went to sleep and they must have also changed his pyjamas and put on him his track suite which was dry and did not have any seepage fluids on it.

[164] In **S v Kubeka** 1982 (1) SA 534 (W) at 537 F-H, the Court held in regard to the version of the accused:

*“Whether I subjectively disbelieved him is, however, not the test. I need not even reject the State case in order to acquit him. . . I am bound to acquit him if there exists a reasonable possibility that his evidence may be true. Such is the nature of the onus on the State.”*

[165] If one takes the totality of the evidence, the court reject accused 2 version that R fell by accident in the bath and also hurt his head and body during the time that he fell on it. Dr Hansmeyer found some injuries on R which were more that 24 to 48 hours, meaning R was assaulted not only on the day that he was burned. The elbow and femur injuries, and also the injuries that were observed by Dr Yachad, being bilateral infraorbital contusion, bruising under both eyes, bruising over the right nipple and bruising on his left rib which were older than 2 days which meant R was previously and constantly being assaulted. And that it was accused 2 who had inflicted those injuries upon R and he also burned R while he was holding him inside hot water. In the circumstances the inference that the court can draw is that the evidence points out that R was abused during his life time.

[166] There is no evidence that Accused 1 had directly participated or she should have subjectively foreseen that by being afraid of accused 2 and more particularly the actions of accused 2 on or about 25 June 2016, by causing the blunt forces that were discovered during the performance of the post mortem on R's body and the burning of R with hot water would result in the death of R. Therefore, with regard to Count 2 that is, of Murder, there is no evidence that she participated in the killing of R or any inference that can drawn that she did participate in the killing of R.

[167] However was accused 1 aware of what was happening to R, was she negligent or was she party to what accused 2 was doing, she turned a blind eye to that. As the court had indicated above that evidence shows that accused 1 must have been aware or should have foreseen what was happening to R. However, being afraid of accused 2, she became silent, and her salience caused the death of her son.

[168] However, as a Parent she deliberately neglected to give R proper care, notwithstanding the fact that she was aware that R was being abused. Or even on the night of the 24<sup>th</sup> June 2016

[169] Therefore, the court is satisfied, taking into account the entire conspectus of the evidence that the State had discharged the onus resting upon it to prove the guilt of the accused beyond reasonable doubt. The accused's version cannot reasonably possibly be true and is accordingly rejected. In short Accused 1 is found guilty as charged in terms counts 1 and in respect of count two, she is found guilty of the alternative count and accused 2 is found guilty as charged of both counts.

[170] In the result the verdict is as follows:

- 170.1 Accused 1 is Found guilty of Two Counts of Contravening the Provisions of Section 305(3) (a) of the Children Act 38 of 2005.
- 170.2 Accused 2 is Found guilty as charged.
- 170.2.1 Count 1: Contravening the Provisions of Section 305(3)(a) of the Children Act 38 of 2005.
- 170.2.2 Count 2 Murder read with the provisions of section 51(1) of Act 105 of 1997.



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

**Appearances:**

Date of Trial	:	29 January 2018 09 February 2018 7,8,9,12,16,19,22,23 March 2018, 09 -13 July 2018 15 October 2018 18 - 20 December 2018
Date of Judgment	:	20 December 2018
On behalf of the State	:	Adv S Rubin
Instructing Attorneys	:	Director of Public Prosecution
On behalf of Accused 1	:	Mr C Coetzee/ R W Smith
On behalf of accused 2	:	Adv M Nemaudzeni