

Editorial note: Certain information has been redacted from this judgment in compliance with the law.



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

**CASE NO: SS 046/18**

(1)	REPORTABLE: <del>YES</del> / NO
(2)	OF INTEREST TO OTHER JUDGES: <del>YES</del> /NO
(3)	REVISED: NO
	<b>29 July 2022</b> .....
	DATE

In the matter between:

**STATE**

And

**H, H**

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**JUDGMENT**

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**Coram NOKO AJ***Introduction*

[1] The state proffered charge of murder read with section 51 (1) of the Act 105 of 1997 against the H H (*accused*) which case was set down for trial on 16 May 2022. The charges were read to the accused who pleaded not guilty and the plea was accordingly confirmed by the defence's counsel. The defence submitted a plea explanation and the crux thereof is that the accused suffered from sane automatism and therefore denies having intentionally killed Solomon Sibusiso Mkwana (*the deceased*).

*Background*

[2] The prosecution handed in the following documents with heading as set out herein. Joint Psychiatric report which the court marked exhibit A, post mortem report and chain of statements of the deceased, marked C, sketch plan and photograph of the crime scene marked exhibit D and exhibit E being the opening address. The defence on the other hand handed in admission in terms of section 220 of the CPA marked exhibit B.

[3] The charge was read for the accused which is that he intentionally and unlawfully killed Mkwana by stabbing him on 5 December 2016.

[4] The accused submitted a plea explanation in which he averred that he was a victim of sexual assaults over time. He stated in the plea explanation that he was sexually assaulted but'... *is unable to recall when this first assault happened. These sexual*

*assaults frequently occurred in the hut that the deceased used to consult with his clients. These assaults happened over and over again”* and became more frequent and violent between 2013, 2014, 2015 and 2016. The accused averred further that on this specific day the deceased accosted the accused for sex with a knife and *“the accused then grabbed the knife from the deceased and stabbed the deceased.”* His mind went blank while he was stabbing the deceased. As set out above the essence of the plea explanation is that the killing of the deceased was not intentional.

### *Evidence*

#### State

[5] The state called Selina Dube (*Dube*) who testified that on 5 December 2016 she woke up early for her medication and heard the scream by one Gogo Popo. On making enquiries from Gogo Popo, she directed her to the deceased’s house to see for herself what is happening. She proceeded to the house where the deceased and accused were residing got into the kitchen and found the deceased lying on the floor. The accused had his knee on top of the deceased and was busy stabbing the deceased. She attempted to stop the accused and the accused threatened to stab her too by wielding the knife in her direction. She then walked outside and started praying for him stop during which time the accused continued stabbing the deceased. The accused was disarmed by Thabo Makhoza who arrived later on to the scene of the crime and was followed shortly by three other unknown men. She cannot give account as to how and who started the fight between the deceased and the accused.

[6] The state called its second witness, Thabo Makhoza (Makhoza), who testified under oath that he was called by one Nthabiseng who informed him that the accused and the deceased were fighting. On reaching the scene of the crime he found the deceased lying on the floor and the accused busy stabbing him. He immediately disarmed the accused of the knife and put it in the bucket outside the kitchen. The accused immediately took another knife which was on the table and proceeded to stab the deceased further. There was some white powder on the table which the accused was sniffing. At this time the first state witness, Dube, was praying. Some minutes later, the accused stopped stabbing the deceased who was lying on the floor motionless. The members of SAPS thereafter came and arrested the accused. The members from the SAPS forensic department subsequently came to the scene of crime and removed the deceased body to the mortuary.

[7] The third state witness was Sergeant Maria Kanyane Napo who testified that she attended the scene of the crime and found the deceased lying on the kitchen floor. There were already other people on the scene and she then called the crime investigation team and photographers. Subsequently Sergeant Ledwaba came to the scene and arrested the accused who was covered in blood.

[8] The fourth state witness was Constable Solomon Mashego who testified under oath that at the time when he arrived at the scene of the crime, he found the deceased lying on the floor in the kitchen with multiple stab wounds on his upper body. He was given an exhibit bag which had accused's clothing. He found two knives with blood stains, one in the bucket outside the kitchen and the other one on the table in the kitchen. The accused was already arrested at that time. This was the last witness and the prosecution closed its case.

Defence

[9] The defence called two witnesses, namely, Tshoabedi Oscar Modipa (*Modipa*) and Bella Skhosana. Modipa, a clinical psychologist testified that he is an independent psychologist and has a Masters Degree in Clinical Psychology. He qualified as a psychologist in 2000 and has been in practice for 22 years. He has made several appearances in court as a expert witness since 2006.

[10] He testified that the accused was referred to him in 2018 by his legal representative who was concerned with his mental stability after it was conveyed that he attempted to commit suicide after he was charged with murder of the deceased. The accused appeared to be depressed. At the first assessment he noted that the accused may not afford long term treatment and therefore focussed on his high-risk aspect of suicide. He established during the assessment that the accused did not have a good upbringing which had impacted on his life at a later stage. The accused painted a remarkable history of incidence of trauma due to sexual assaults starting from when he was 5 years. He was at that stage still emotionally vulnerable.

[11] Modipa averred that the effects of sexual assaults have been well researched and chronicled. The victim of sexual assaults loses trust in the world and as it happens consistently such victims ask themselves why the world treat them as sex slave. Sexual predators can easily identify their targets who are ordinarily from poor stricken family backgrounds. Such victims would not have assistance or support from their family members. One loses his confidence and hence stripped of his capacity to resist unpalatable advances from perpetrators.

[12] The accused informed him that he became a victim of sexual assaults very early in his life. And his first perpetrator was the employer of his grandmother. He approached the employer for food as the grandmother was sick and could not work. That was when he first experienced sexual assault in his life. The accused further informed him that he first met his father in the latter years of his life who unfortunately abused him and often beaten him for no reasons. He was not residing with his mother who was doing some business elsewhere, hence he was left in the care of his grandmother. The accused only went to until grade 11 whereafter his performance deteriorated. He subsequently worked at a tavern and lost focus on his studies.

[13] Being from an impoverished background forces one to look for a sense of belonging. This would compel a victim of molestations to find it difficult to resist advances from the perpetrators. He would easily give in so as to avoid psychological stress which ensued after losing a relationship if he presents some resistance or negative reaction to sexual advances. The accused did report this to the family members where he was told not tell anyone as that would embarrass the family. In general, he could not have approached the members of the community as a recourse since homosexuality is frowned upon by the general populace. This is aggravated by the fact that it is even shameful for male person to report sexual assaults.

[14] Where a perpetrator of sexual violence is someone familiar to the victim it creates more trauma for the victim in contrast to where the perpetrator is a stranger. Ordinarily a family member is expected to provide security and it becomes more frustrating where the assault is perpetrated by such a member.

[15] Physical contacts, gestures which are suggestive can cause trauma and may also elicit what Modipa called Post Traumatic Sexual Disorder (PTSD) due to repeated sexual assaults. There are three behavioural reactions, namely hyper vigilance, avoidance and re-experiencing. The accused informed Modipa that he experienced the trauma due to continuous assaults and has in fact experienced another assault recently when he was in prison whilst awaiting trial.

[16] The accused informed him further that on the day of the death of the deceased, deceased had his hand around his neck and holding a knife in his other hand. He was terrified as he was being dragged to the deceased's hut from where he was sexually assaulted on previous occasions. In this instance the accused found himself in a flight or fight mode. In view of the fact that he could not run away he was left with no option but to fight the deceased. He could not free himself and the level of fear and anxiety pushed him only to choose to fight. He was hyper vigilant. He became angry and this anger was towards what happened to him throughout his life. Reliving the experience and reminder thereto would lead to regression. The accused trauma was compounded by this experience. He was not in his normal mental faculties. The level of anger blinded him and he got into an altered state of consciousness, which is characterised by inability to plan and evaluate his actions. He experienced what is called emotional flooding which was triggered by intense emotions. He acted unwittingly and did not appreciate his actions which included the stabbing of the deceased. He experienced what is called sane automatism.

[17] Modipa retorted under cross examination that the primary source of information to him was the accused himself. Further that he also interviewed the accused's brother and his friend. On being pushed by the prosecution for failing interview other people like the state witnesses the expert retorted that on being given information he made a series of logical choices as to who will be necessary for the interview and would therefore not interview everyone.

[18] He further confirmed that he is the one who recommended that the accused should be taken for psychiatric evaluation who was then referred to Sterkfontein Hospital where he was assessed. The objective for the referral was to assess the accused for his suicidal moods and not for mental observation. He has received and perused the psychiatrists' report which clearly indicated that the accused was fit to stand trial and further that the accused was able to appreciate his actions at the time when he stabbed the deceased. He replied that he saw the conclusions on that psychiatrists' report but did not refer to it in his report as it was not comprehensive and he could not identify the tools employed in assessing the accused without which it was difficult for him to comment thereon. He would have needed the full basis of the tests and examinations undertaken by the psychiatrists.

[19] When asked by the court at what stage did, the accused regain consciousness, Modipa stated that it is difficult to ascertain but the accused did confirm that he remembered putting a towel on the deceased neck to stop the bleeding. He further replied that the decision taken when one is in a fight or flight state is more instinctive and does not require a conscious process through which it can be said the accused reflected and decided that now that he could not run away and he had to fight. Finally,



that the emotional flooding was due to repeated sexual molestation, rejection and the trauma he was subjected to, from the age of 5 years.<sup>1</sup>

[20] The defence called its second witness, Bella Skhosana, who testified under oath that she is a member of the street committee and she knew the accused since birth. The defence requested that member of the SAPS present in court should be requested not to allow members of the public to enter the court room since the witness was concerned about her safety as the community members were still angry at what the accused did. She testified that she knew the accused and the deceased very well since their birth as they resided in her neighbourhood. She also knew their parents very well and unfortunately both their parents passed on. There were occasional fights between them as boys and their grandmother would more often side with the deceased. On one occasion when they fought and the accused came and reported same to her. At some stage the accused reported that the deceased stole his clothes. She requested the accused to invite the grandmother and the deceased to come together to the street committee and nothing came out of this invitation as they did not react positively to the invitation.

[21] The witness was approached by the accused again at some stage who reported that he was sexually assaulted by the deceased. She was surprised as she expected that rape or sexual assaults are normally between a man and a woman and she enquired from the accused as to how that was possible. She got frightened when the accused was providing the graphic details and was about to take off his trouser to show her and she stopped him immediately. This matter could not be resolved as the deceased could not be found. The accused came again and reported sexual assault by the deceased for the second time and also on this occasion she advised the accused to proceed and lay a criminal charge with

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<sup>1</sup> In his plea explanation the accused stated that he cannot recall when assaults commenced.

the police. She is not aware of any other criminal activities which the accused may have been involved in, if any. She is also not aware of any drugs being used any the accused, except the occasional cigarettes smoking when he is with Njabulo, her grandson. The accused was reported to have stolen lap tops elsewhere and he also stole some empty bottles at her house.

[22] The witness stated, when asked by the court, that she has been a member of the committee for a long time but could not assist the accused further except to state that she did not think it was necessary to accompany the accused to SAPS to report the rape accusations against the deceased. The defence closed its case without calling the accused to testify.

#### *Application to re-open the state case*

[23] The prosecution submitted after the defence has closed its case that it has previously reserved the right to re-open the States' case in the event the defence called an expert witness. It has therefore become important that in view of the reservations by the expert that the psychiatrists should be called to testify. The report by the psychiatrists was accepted by the defence and despite several inquiries by the court the defence reiterated its position that the report of the psychiatrists is admitted and this rendered their coming to court unnecessary. I decided against the State's application to re-open its case.

#### *Closing Arguments*

[24] In summation the prosecution contended that the according to the plea statement submitted on behalf of the accused, the accused raised a defence of non-pathological or sane automatism. The accused stated that he momentarily lost inhibitions due to anger, rage and resentment towards the deceased. Further that he lost his faculties (*sic*) and his mind went absolutely blank while he was stabbing the deceased.<sup>2</sup> Further that Non-pathological incapacity for a very brief moment can be triggered by stress, intoxication and provocation. The prosecution submitted that the accused is enjoined to prove on a balance of probabilities that his criminal capacity was diminished due to severe emotional stress.

[25] Though Modipa opined that the accused could not appreciate the consequences of his action at the time of the crime the psychiatrist whose report in terms of section 78 of the Criminal Procedure Act was accepted by the defence concluded that the accused was able to appreciate the consequences of his action at the time of the commission of the offence and further that he was fit to stand trial.

[26] The state further contended that the accused is entitled to remain silent and such a posture would not per se justify the negative inference being drawn against the accused. But where the state has presented a prima facie case against the accused refusal to testify may strengthen drawing of inference from the state's prima facie case. The prosecution referred and quoted for the court the case of *S v Boesak* 2001(1) SACR 1 (CC) where the constitutional court held at para 47 that “...of course, a prima facie inference does not necessarily mean that if no rebuttal is forthcoming the onus would have been satisfied, but once the main acknowledged instances where it can be said that a prima facie case becomes conclusive in the absence of a rebuttal, is where it lies exclusively within the

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<sup>2</sup> See para 27 of the accused's plea explanation.

*power of the other party to show that the true facts were and he or she fails to give an acceptable explanation”(sic).*

[27] The defence on the other hand contended that the Ms Dube, the first state witness' evidence is not credible and there were contradictions in her evidence. The witness was unable to describe the knife used by the accused. Further that during her testimony she stated that the accused threatened her with the knife but this was not disclosed in her statement which was made six years before. She admitted that though the statement was not written by her she admitted that it was read to her in Zulu before she signed it. She failed to give a proper description of the knife in terms of colour, type and size thereof. Finally, the account of events does not tally. It is unlikely that the accused stabbed the deceased over a period of one and half hours.

[28] The defence further submitted that the evidence of the state's second witness is also not credible as his allegations of white powdery substance was not mentioned by the state's first witness and is also not listed on the evidence inventory list. He further testified that he did not touch anything and later conceded that he grabbed a knife. The evidence of the third witness also falls to be discredited due to some discrepancies between the facts and his statement. The written statement reflects that he could not identify injuries whereas his colleague, Constable Amos Nkosi recorded that the accused had injuries on his back and hands. This witness also came to court with his statement and read same in court before he was stopped and to this end, he was manipulative and deceitful.

[29] The report of the psychiatrists submitted by the state should be rejected by the court as without same been confirmed by the psychiatrists it remained hearsay evidence and the state should have mounted a persuasive argument as to why the said hearsay evidence should be admitted. The defence further referred to the SCA judgments<sup>3</sup> where it was held that the propensity of the state not to call medical experts is lamentable.

[30] The defence further summarised the evidence of the expert witness that the accused suffered from sane automatism and was not in control of his mental faculties at the time when the offence was committed. The summary was consistent with what I have already set out above.

[31] It was argued further that the constitutional rights of the accused were infringed by the deceased conduct in raping the accused. To this end reference was made of sections 10 and 12 of the Constitution which are self-explanatory. The crime of rape which was perpetrated against the accused infringed on his right to physical integrity, freedom of movement, right to dignity and equality.

[32] The accused, so the defence went further, had the right to defend himself and the attack in retaliation cannot be construed unlawful. In such an instance *[T]he accused must prove that there were extenuating circumstances involved and the killing was the only option available at the time. The accused had no choice or option but to try and protect himself from imminent incestuous rape.* The defence further submitted at para 141 of the heads that “...*the accused lacked the intention to commit the crime of murder. The accused acted in self-defence he had no other option to escape the vicious, frequent sexual assaults by the deceased.*”

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<sup>3</sup> *S v Madiba* 2015(1) SACR 485 (SCA) and *S v ML* 2016(2) SACR 160 (SCA)

[33] The defence further contended that the accused was provoked and acted in a heat of moment without proper reflection. The defence read the heads of argument into the record and stated at para 105 that “[I]n law, provocation is when a person is considered to have committed a criminal act partly because of a preceding set of events that might cause a reasonable individual to lose self-control. This makes them less morally culpable than if the act was premeditated and done out of pure malice.” In support of the argument for the defence of lack of *mens rea* based on provocation and intoxication reference was made by the defence of the judgment in *S v Van Vuuren* 1983 (2) SA 12 (A) where the court referred with approval principles set out in *Chretien* case (*sic*) where it was held the element of unlawfulness will be excused where the accused failure to comprehend was attributable to combination of drinking, provocation, and severe mental or emotional stress. The defence further referred to *R v Buthelezi* 1925 AD 125 where it was held that where the accused acted in the heat of passion caused by sudden provocation murder may be reduced to culpable homicide.

[34] With regard to the accused deciding to remain silent the defence read at para 86 of the heads and contended that the accused “*is facing an internal emotional turmoil*”, he was sexually assaulted whilst in prison by inmates, he was refused medical attendance and Department of Correctional Services having been ordered by the court to take him for medical examination. He was threatened by the two female correctional services officers not to lay criminal charges. On why the accused cannot testify the defence contended further at para 131 of the heads that “*As a result of these unfortunate events, the accused is in very emotionally fragile state, him talking about these incidents over and over again, might even cause severe regression to the attempts that have been made*

*so far to try and help him deal with his past.* The accused should however not be punished for not testifying as he has the right to remain silent.

### *Analysis*

[35] The state bears the onus to prove a charge beyond reasonable doubt against the accused and there is no obligation on the part of the accused to testify. The state is required therefor to prove all elements of the offence and in this case, this will be, intention (*mens rea*), act of killing (*actus rea*), person and unlawfulness.

[36] The application by the state to re-open the state's case for the purpose of calling the psychiatrists on the basis that in view of the occupational psychologist's evidence it became imperative that the psychiatrists be called to testify. The defence re-iterated, after an inquiry by the court that the report of the psychiatrists is admitted. In view hereof the state wanted to call the psychiatrists to confirm what is their reports.

[37] The report by the psychiatrists is submitted in terms section 79 of the Criminal Procedure Act and was admitted by the accused shall in terms of section 77(2) of the Criminal Procedure Act be dealt with without oral evidence being adduced before the court. The report was not challenged by the accused and Modipa testified that he could not express an opinion on that report as he does not know the process and examination undertaken by the psychiatrists. As set out above the defence counsel persisted that the accused has no qualms with the contents of the report. In any event the reference of the accused for the psychiatric assessment was at the instance of the defence on the advice from Modipa. In the premises the report which concluded that the accused appreciated the consequences of his action at the time of commission of the crime and furthermore

that the accused was capable of understanding the procedure and to make a proper defence stands. On a proper consideration of the report, the examination, assessment and conclusion and the fact that it was compiled in accordance with relevant legal prescripts I find no reason to quarrel with it and same has been accepted.

[38] It need be noted that the defence raised for the first time during the closing argument that the psychiatrists' report was provisionally admitted in terms of section 220 of the Criminal Procedure Act and defence was under the impression that the psychiatrists would be called to testify and be cross examined. The plea explanation by the accused makes no reference to a provisional admission of the psychiatrists' report.

[39] It was not apparent as to the basis for the counsel's alleged impression as the counsel re-affirmed that the accused has no qualms with the psychiatrists' report and I took this into consideration before I dismissed the application by the state to re-open the case for the purpose of calling the psychiatrists to attend court to confirm the contents of their reports which both parties accepted.

[40] That notwithstanding the defence counsel in her closing arguments failed to take issue with any specific aspect of the report which made her to change her mind with regard to the contents of the report. This is also an area which would have required the defence to procure service of an expert in the same discipline, being a psychiatrist who will take issue with how the report was compiled, or how the investigation was conducted or the basis of the conclusion. The submission by the defence contending that the report by psychiatrists remain hearsay evidence and not admissible does not upset the conclusion I arrived at in accordance with section 77(2) of the CPA above. The



contentions in the closing arguments cannot be considered as they were raised only when the cases were closed and does not form part of the evidence and reference thereto in this judgment should not be construed as granting any credence or condone or accord any weight thereto.

[41] It is worth noting that the accused through his counsel pleaded self-defence<sup>4</sup>. Such a defence is pleaded where a party directly or indirectly admit killing of another person but contends that it was the last option to do so in order to defend himself against the attack by the victim. To this end the accused should provide evidence to prove the defence without which such an accused maybe found guilty to have failed to proof hi defence.

[42] The other defence pleaded by the accused though through his counsel is that he was provoked. This defence, if it still exit, was outlined in detail through submissions made from the bar. There is no evidence presented by or on behalf of the accused to back up the defence. The assertions which was made on behalf of the accused by his counsel is hearsay as it was not confirmed by the accused and cannot be admitted unless proper motivation is advanced to warrant exception to the general rule that hearsay evidence is not admissible. In any event it would be ground breaking or ingenious to accommodate in our legal jurisprudence the practice where evidence in criminal cases starts to be presented by the accused's legal representatives.

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<sup>4</sup> See para 98 of the defence heads "Murder was the consequence of the self-defence mechanism employed by the accused to try and protect himself as he was under attack. The accused had no choice or option but to try and protect himself from imminent incestuous rape." This was not supported through oral evidence by or on behalf of the accused.

[43] The attempt by the defence counsel to contend that the evidence of the state's witnesses should be discounted is unsustainable. The defence has already accepted the killing of the deceased except that this was not done intentionally in respect of the defence of automatism and or provocation or his conduct was not unlawful in respect of the defence of self-defence.

[44] That notwithstanding credibility of the state witnesses was unscathed during cross examination despite contention that Dube contradicted herself and the fact that her recollection of exact times at which the offence may have occurred were inaccurate. It would be over stretching it to expect that the witness should have remembered the colour, type and size of the knife. In any event the accused appears not to dispute that he used the knives to kill the deceased.

[45] The criticism of the second state witness has no sound basis either. The contention that the witness' statement did not refer to a powdery substance does not detract from the cogency of his evidence in other respects. In any event the said powdery substance was not examined and no report has been produced by the state. If the essence of the contention is to dispel the possible inference that the accused could have been using drugs, the expert's report do confirm that the accused indeed admitted using drugs.<sup>5</sup> The expert was informed by the defence counsel that the accused dispute the contents of the report in this respect. Nothing came out of this statement by the defence counsel as the accused chose not to confirm this under oath and if it is unchallenged then it is admitted.

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<sup>5</sup> See para where Modipa stated that the accused presented a history of use of substance of abuse, mainly dagga and "*he also used other substances, albeit occasionally, including nyaope and tik.*"

[46] The submission that the investigating officer is not credible as he claimed not to have identified the injury on the accused hands which was confirmed by his colleague Constable Nkosi does not also aid the accused with his defence or discredit the witness's evidence. He failed to testify to confirm that there were injuries he sustained probably to support the defence of private defence and to this end the defence counsel submission is of no moment.

[47] It does not appear that the state witnesses had motive to falsely implicate the accused. I am therefore constrained to conclude that the inconsistencies or contradictions which found expression in the defence counsel's submission were minor and not material as they did not bear direct relevance or impact on what the state needed to prove.

[48] The main defence which was corroborated by expert evidence is that of sane automatism. In terms of this defence the contention is that in view of the accused compromised mental faculties he cannot be considered to have intended to kill the deceased. In compiling the report Modipa interviewed the accused, his brother and his friend. Based on the information obtained from these three individuals and specifically the accused as the primary source of information Modipa came to the conclusion that the accused acted unwittingly. The expert opinion in general terms may not avail the accused and the accused need to provide factual basis upon which the expert opinion was expressed. If such factual basis cannot be tested by the court the opinion therefore remains hearsay and not admissible. The basis of the expert opinion needs to corroborate the evidence presented by the accused. This resonates with the prosecution's submission at p15 of the heads that "*in general the law presume that a person had criminal*

*capacity. Thus, although there was no onus on an accused in cases where the present defence was raised, it was expected of him to establish a factual basis for the defence.”*

[49] The defence counsel persisted when asked by the court that the alleged defences of self-defence, provocation and sane automatism are put up by the accused. The court further requested that it appears that those defences cannot co-exist in the same case and encouraged the counsel to ensure that in her closing arguments she should persuade the court that indeed such defences can be raised conjunctively. It being noted that in the defence of private defence the accused is admitting all elements of the offence except unlawfulness whereas in the other defence/s the only element not admitted is *mens rea*. These defences are at war with each other.

[50] An attempt to raise the private defence by the accused's representative also remained hearsay and unless properly canvassed within the purview of the legislative framework is inadmissible. That notwithstanding the expert is ordinarily required to state the methods and techniques he used during his assessment. When the court asked the expert as to what is the basis of his assessment or examination of the accused, he said the process is based on some guidelines which he could not delineate during his testimony. In addition, the expert or his opinion does not state the basis of deciding not to interview other parties as was raised by the prosecution and to this end an impression is created that the findings and conclusions may be lopsided and not objective. In this regard the evidence is found wanting and his conclusions cannot be relied on.

[51] The second defence witness was intended to support the allegations that indeed the accused was raped or sexual assaulted by the deceased. The decorum of the witness

was not inspiring. The witness was a mother and further a leading member of the community who was elected several times into the committee. She failed to assist the deceased who allegedly reported the allegations of rape to her at least twice. In the first instance she advised the accused to invite the deceased and the grandmother to appear before the committee. This did not bear any fruit. The accused reported the assault on the second occasion and she did not find it important to assist the accused in reporting the criminal case instead just advised the accused to approach the police. Her conduct fell short of what should be expected of her as a community leader. That notwithstanding her evidence regarding the interaction with the accused and the reports of rape and or sexual assaults is hearsay evidence which should have been confirmed by the accused.

[52] The defence was correct that the accused is not a compellable witness and in fact the Constitution entrenched the accused right to remain silent in terms of section 35. However, the Constitutional Court held in *Boesak's* case that drawing of negative inference as a failure of the accused to give evidence does not violate the accused right to remain silent in instance where such a right is exercised in the face of strong evidence presented against the accused. The SCA further held in *S v Chabalala* 2003(1) SACR 134 (SCA) that the accused who remain silent leaves a prima facie and uncontroverted case which becomes proof positive when considered having regard to the complete embodiment of all the material of evidence led.

[53] The evidence before me proves that the accused killed the deceased. The evidence further demonstrate that it was intentional. This conclusion would have been displaced had the accused led oral evidence in support of the defence of sane automatism as suggested by the clinical psychologist. In addition, the uncontroverted and admitted

psychiatrists' report which is admissible prima facie evidence as stated in the Criminal Procedure Act concluded that the accused knew what he was doing at the time of murder. The SCA held in *S v Eadie* 2002 (1) SACR 663 that "*in discharging the onus the State is assisted by the natural inference that in the absence of exceptional circumstances a sane person who engages in conduct which would ordinarily give rise to criminal liability, does so consciously and voluntarily.*"<sup>6</sup> The accused refused or chose not to provide evidence to support the defence of self-defence (which would have excused unlawfulness), or the evidence and facts forming the basis of the defence of provocation or underpinning the diagnosis of sane automatism were not presented. In essence the accused was through his legal representative approbating and reprobating as he admitted intentional<sup>7</sup> killing though that conduct of killing being excusable in private defence and at the same time denying the intention when raising a defence of sane automatism or provocation.

[54] In this premise I found that the state has proved its case beyond reasonable doubt and same has not been weakened by the defence or defences of the accused purportedly through evidence by the clinical psychology or through his legal representative.

### *Conclusion*

[55] In consequence, I make the following order:

The accused is found guilty of murder.

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**Noko AJ,**  
GAUTENG LOCAL DIVISION, JOHANNESBURG

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<sup>6</sup> Referred to the prosecution's heads of argument.

<sup>7</sup> This is consistent with the finding of the psychiatrists.

**APPEARANCES**

State	Adv VS Sinthumule, DPP, Johannesburg.
Accused	Adv PE Khanyile, Sandton Chambers.
Date of hearing	6, 8 and 14 July 2022
Date of judgment	29 July 2022