

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**

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: NO

CASE NO: SS 100/2021

2022

_____ **16 September**

In the matter between:

THE STATE

And

MNWEBA, ARON MZUPHELA PHAKAMILE

Accused 1

GQOBA, NKOSINATHI MOSES

Accused 2

JUDGMENT

Mdalana-Mayisela J**INTRODUCTION**

- [1] The accused were charged on count 1 with housebreaking with intent to rob; count 2, robbery with aggravating circumstances as defined in section 1 of the Criminal Procedure Act 51 of 1977 (“the CPA”) read with section 51(2) of the Criminal Law Amendment Act 105 of 1997 (“the CLAA”); count 3 (accused 1 only), contravention of section 3 read with sections 1, 55, 56A, 57, 58, 59 and 60 of the Sexual Offences and Related Matters Amendment Act 32 of 2007 (“the Sexual Offences Act”) and section 261 of the CPA, read with section 51(1) of the CLAA as amended; count 4 (accused 2 only), contravention of section 55A read with sections 1, 55, 56(1), 56A, 57, 58, 59 and 60 of the Sexual Offences Act and section 261 of the CPA, further read with section 51(1) of the CLAA as amended; and count 5, murder read with section 51(1) of CLAA and further read with section 258 of the CPA.
- [2] On count 1 the state alleged that on or about 17 July 2020 and at or near house number [...], [...] street, Dobsonville, in the district of Johannesburg West (“deceased’s house”) the accused, acting in concert with each other did unlawfully and intentionally break open and enter the said house of J D (“deceased”) with the intent to rob. It is further alleged in count 2 that on or about the date and at or near the deceased’s house the accused, acting in concert with each other, did unlawfully and intentionally assault the deceased and N D and did then and with force take a laptop from the property or property in their lawful possession.
- [3] On count 3 the state alleged that upon or about a date and at or near the deceased’s house accused 1, did unlawfully and intentionally commit an act of sexual penetration with N, an adult female person by inserting his penis into her vagina without her consent.
- [4] On count 4 it is alleged that upon or about the date and at or near the deceased’s house accused 2, did unlawfully and intentionally attempt to have sexual intercourse with the deceased without her consent.

- [5] On count 5 the state alleged that upon or about a date and at or near the deceased's house the accused, acting in concert with each other, did unlawfully and intentionally kill J D, an adult female.
- [6] After the charges were put to the accused and before they pleaded, the court explained the relevant provisions of the CLAA to the accused. Accused 1 pleaded not guilty to all the counts and gave no plea explanation. His counsel confirmed that the plea was in accordance with his instructions. Accused 2 pleaded not guilty to all the counts and gave a plea explanation. His counsel confirmed the plea. Accused 2 in his plea explanation, denied involvement in any of the alleged crimes, and stated that in the early hours of 17 July 2020 he was sleeping at his aunt's place, house number [...] [...] street, Mofolo North.
- [7] By agreement between the parties, the state handed in the following exhibits:
- A Admissions made in terms of section 220 of the CPA;
 - B Declaration of death, chain statements and post mortem report; and
 - C Sketch plan, key and photographs of the scene
 - D A ring removed from accused 1's finger
 - E Report by authorised medical practitioner on the completion of a medico – legal examination (J88 for N D);
- [8] The section 220 admissions contained in exhibits A were read into the record and confirmed by both accused and counsel. In exhibit A, both accused have admitted the identity of the deceased; the date of her death; the cause of her death; the truth and correctness of the facts and findings of the post mortem examination by Dr Susara Catherina Fourie recorded in exhibit B; that from the time when the wounds were inflicted on 17 July 2020 until the post mortem examination was conducted on 21 July 2020, the deceased's body sustained no further injuries that contributed to her death; that the sketch plan, key and photographs in exhibit C depict the crime scene where the deceased was found and exhibits collected, and the correctness thereof is accepted.

THE EVIDENCE

[9] The following facts are common cause or not disputed.

[9.1] That on 17 July 2020 around 00:30 the deceased's house was broken into by two black males.

[9.2] That when N and the deceased went to sleep all the doors and windows were closed. The deceased's house has two entrances. The kitchen door was locked while the sliding door at the back couldn't lock because of defects in the locking mechanism.

[9.3] That the entry into deceased's house was gained through the sliding door while the occupants were asleep.

[9.4] That no permission was granted to the two black males to enter the deceased's house.

[9.5] That the two black males took a Lenovo laptop belonging to N without her consent.

[9.6] That the said laptop was recovered few hours later by community members and brought back to the deceased's house.

[9.7] That N identified the laptop as hers by the wires that were protruding and by successfully opening the system with her username and password.

[9.8] That one of the black males entered N bedroom and got on top of her. She tried to fight him and remove a balaclava on his face without success. He bit her on her fingers and stabbed her on her thighs with a sharp object. He removed her pyjama pants. He inserted his penis inside her vagina and had sexual intercourse with her without her consent.

[9.9] That N was examined by a registered nurse, Sylvia Matlou Hlaka at Discovery CFM hospital on 17 July 2020. She was sedated because she was hallucinating.

[9.10] That N sustained parallel bruises on the right side of her face, swollen lower lip, lacerations on both thighs, abrasion on right ring finger, parallel bruises on the right hand, bite marks on the left thumb and parallel bruises on the outside of left arm, as recorded in exhibit E.

[9.11] That N sustained genital injuries consistent with recent vaginal penetration as recorded in exhibit E.

[9.12] That a black male who raped and assaulted N was wearing a long-sleeved t-shirt, red shoes, balaclava and a faded gold lady ring with stones.

[9.13] That N later identified the said ring from the photographs, exhibit C and physical rings which were brought to her by the investigating officer and two other officers.

[9.14] That the other black male went to the deceased's bedroom and attacked her. The deceased was screaming during the attack.

[9.15] That when the screaming stopped, the deceased's assailant came towards N bedroom spoke in isiZulu screaming to N assailant that they should go. They left through the kitchen door and jumped the wall to the other street.

[9.16] That N reported the rape incident to her mother and her uncle L M, who were sleeping in the outside rooms. She also asked them to check on the deceased.

[9.17] That the deceased was found in her bedroom lying on the floor in between the wall and her bed. She was motionless and not talking. Her lower body was naked. There were broken glasses on the floor in her bedroom.

[9.18] That both N and the deceased were transported to Tshepo-Themba hospital where the deceased was declared dead on arrival.

[9.19] That during the post mortem examination, Dr Fourie found that the deceased was assaulted with a glass bottle in the perineal area, and a shard of a clear glass was found lodged in the incised wound on the right pubic mound, below the umbilicus and right of the midline. The post mortem examination showed the findings consistent with manual strangulation, including contusions of the strap muscles of the anterior and lateral neck and a fracture of the right hyoid bone. There was also evidence of non-fatal incised wounds on the perineum and mons pubis as well as superficial cuts on the hands. There were petechial haemorrhages of the conjunctivae and of the pleural surfaces of the lungs.

[10] The following issues are in dispute.

[10.1] The identity of the two perpetrators on all counts.

[10.2] Whether the ring identified by N was removed from accused 1's finger in hospital.

[10.3] The application of common purpose on count 5.

[11] To prove the issues in dispute, the state led the evidence of nine witnesses, N D, Yam Mggali, Thulani Ngobe, Nomathamsanqa Zaukane, Lehlogonolo Motseoane, Matlou Sylvia Hlaka, Dr Susara Catherina Fourie, Dr Sekanamisha Tema and Sgt Masuvhakele. Accused 1 testified in his defence and called his sister, Nonkululeko Mnweba. Accused 2 testified in his defence and called his aunt, Khonzi Mnweba.

State case

[12] The State relies on the evidence of the ring that was allegedly worn by accused 1 to prove that he was one of the two perpetrators. N testified that she would not be able to identify the two perpetrators. She saw a faded gold female ring on her assailant's finger. She identified the said ring to the investigating officer, Sgt Masuvhakele and during her testimony in court from exhibit D, photo 2. She was able to observe the said ring on her assailant's finger because there was good lighting in her bedroom coming from the side lamp and outside light. Her assailant was at a close proximity.

[13] Nomathamsanqa testified that in the morning of 17 July 2020, while in the company of the community members and accused 1 at Dobsonville she saw a gold female ring on accused 1's finger. She identified the said ring from exhibit D photo 2 in court during her testimony.

[14] Sgt Masuvhakele stationed at West Rand Trio Crimes Unit testified that on 17 July 2020 while on duty he received information from the local police about two black males who were assaulted by the community members in Dobsonville. He went to Bheki Mlangeni hospital where he found accused 1 and Yam. They were both injured. At the time of his visit he had already read N statement and was aware that her assailant was wearing a ring on his finger. He observed the ring on accused 1's finger and took photographs of accused 1's hand as depicted on exhibit D. Accused 1's hand was swollen and he was unable to remove the ring from his finger. He requested Dr Tema to assist in removing the ring. Dr Tema removed the ring and handed it to him in a clear plastic. On 22 July 2020 he went with other two police officers to N for the identification of the ring that was worn by her assailant. He had three photographs as depicted in exhibit D. Each officer held one photograph. He asked N to identify the ring that was worn by her assailant and to sign on the chosen picture. N identified picture number 2 in exhibit D and signed on it. He also put a police stamp and signed on the same

picture. Thereafter he fetched the actual ring from the car, and showed it to N. She confirmed it was the ring that was worn by her assailant.

[15] Dr Tema testified that on 17 July 2020 while on duty at Bheki Mlangeni hospital he was approached by a police officer who requested him to remove a ring from accused 1's swollen finger. Accused 1 was injured and admitted in hospital. He removed the said ring, placed it inside a clear bag and gave it to the police. He identified the ring depicted on photo 2 in exhibit D, as the one he removed from accused 1's finger. This was the same ring that N identified to Sgt Masuvhakele and in court as the ring her assailant was wearing at the scene of crime.

[16] The state further relies on the doctrine of recent possession to prove the identity of the perpetrators. N testified that the two black males took her Lenovo laptop and left with it. Nomathamsanqa testified that he knew accused 1 before the incident in question. In the morning of the incident she went to accused 1's home at Sgodiphola, Mofolo with the community members. Upon arrival she saw some community members with accused 1 standing at the gate. They were enquiring about a laptop. Accused 1 quickly answered and volunteered that he would take them to the places of the people who accompanied him when they committed the crime. One of the community members suggested that they searched accused 1's shack. Accused 1 led them and also pointed his shack to them. Some community members together with accused 1 went inside his shack. They came back with a black bag containing a laptop. The laptop was removed from the bag, shown to the community members and put back inside the bag. Then accused 1 informed them that he would take them to the people he was with. He was put inside a car. He took them to Zondi to point out the first male, and then they went to the corner where he pointed out the second male. The second male said that accused 1 came to him in the company of Madala. Thereafter they all went to Dobsonville where accused 1 and another male were assaulted by the community members. Accused 1 was not assaulted at Mofolo or Zondi. The laptop was taken to deceased's house and put on the table. The police fetched accused 1 and another male from the scene of assault. N further testified that she received her laptop from the community members on the same day.

[17] The state further relies on the confessions allegedly made by both accused to Yam and Thulani to prove the identity of the perpetrators and common purpose. Yam testified that he knew accused 1 by sight before the day of the incident in question. Accused 1 used to visit Msobho at a property in [...] street, Zondi where Yam was renting a shack. On 17 July 2020 approximately at 2H00, while in the company of Thulani smoking crystal meth, both accused

came to his shack. When they entered the shack they looked like people who were running because they were breathing heavily. Accused 1 was carrying a black school bag. He took it off and placed it behind the door. Accused 1 asked for drugs. There was little left and so they contributed money to buy drugs. Thulani and accused 1 went to Dobsonville to buy them.

[18] Yam and accused 2 remained in the shack. Accused 2 looked like he was trembling and he kept on looking towards the door. Yam enquired from him if he was okay. Accused 2 informed him that something bad happened in Dobsonville. They committed a robbery. He further told him that it looked like accused 1 had information about that house. He asked accused 2 what was inside the black school bag. He answered that it was a laptop. After a while accused 1 entered with Thulani. They smoked drugs. Yam slept and when he woke up both accused were not there. The black bag was also not there. In the morning around 8H00 accused 1 came with many people looking for Thulani. He took them to the corner where Thulani was selling cigarettes. Yam testified that he did not force or threaten or assault accused 2 to tell him about the robbery. He did not promise him anything in exchange for the information. He did not know him prior to the incident. He testified that although he was smoking drugs, he was not high and he was able to observe and appreciate what was happening at the relevant time. Yam was assaulted by the community members until he became unconscious in the morning of 17 July 2020. He regained his consciousness at Bheki Mlangeni hospital.

[19] Thulani testified that he knew accused 1 by sight before the incident in question. He met accused 2 for the first time in his shack on the day in question. Both accused came to Yam's shack in the early hours of 17 July 2020. He was not certain about time. He estimated it to be 2H00 or 1H00 to 2H00. They found them smoking and sharing a half of mandrax tablet. One of them was in possession of a black school bag. He could not remember who was in possession of a black school bag. Accused 1 asked for drugs. They contributed money to go buy them. He and accused 1 went to Dobsonville hostel to buy them. On their way accused 1 was scared and trembling. Yam wanted them to take a certain route but accused 1 objected and insisted that they take another route. Accused 1 told him that he did not want to take his route because him and accused 2 went to hustle or rob in one of the houses in that area. He pointed the corner house next to the pharmacy at [...] street in Dobsonville. He further told him that they were disturbed by a noise and only managed to take a laptop. Thulani enquired if accused 2 was his friend. He answered that he was his uncle. He did not threaten or force accused 1 to

give him the information about house robbery. It was given freely and voluntarily. Accused 1 was in his sober senses when he gave him the said information.

[20] On their way back from Dobsonville hostel they were stopped by community patrollers who asked them where they were coming from. They told them they were coming from the hostel. The community patrollers asked for a smoke. Thulani gave them his cigarette. They left them. As they continued walking accused 1 was acting strangely walking ahead and leaving Thulani behind until they got to the shack. Thulani slept while the accused were still in the shack. When he woke up at 5h00 they were not there. He went to the corner of the street to sell cigarettes. Around past 8 to 9 o'clock the community members came to fetch him. They took him to the scene of crime. When they arrived there they asked accused 1 if he was with him during the commission of the crimes and he answered no. They then instructed Thulani to stand aside and proceeded to assault accused 1. He testified that he also smoked crystal meth on the day in question but it was not a lot. He was not high and could appreciate what was happening at the relevant time.

Defence case

[21] It was put to N and Nomathamsanqa on behalf of accused 1 that he never wears a ring. The said ring was planted on his finger while he was unconscious after the brutal assault by the mob in order to implicate him in the house robbery. It was also put to N that the laptop was not found in accused 1's shack. He was not at his shack when the mob arrived. His cousin brother, accused 2 directed the mob to the shop where he was. The mob fetched him from the shop and started beating him, accusing him of committing house robbery, theft and rape. They also demanded a laptop from him. The beating continued until he was put inside the car. He did not go inside his shack with the mob. The mob went inside his shack and ransacked it looking for the laptop. He did not see them coming out with a laptop. He saw it for the first time when the police were interviewing him in hospital. It was planted by the mob after brutally attacking him in order to implicate him in the house robbery. He was beaten until he became unconscious and they drove around with him.

[22] It was put to Thulani and Yam that accused 1 did not go to their shack in the early hours of 17 July 2020. It was further put to them that they were implicating accused 1 in order to save themselves from the mob.

[23] Accused 1 in his examination in chief testified that in the early hours of 17 July 2020 he was at home sleeping. He did not visit Yam's room and did not smoke drugs during the said time. He denied being in possession of black bag and laptop. He also denied going to Dobsonville hostel with Thulani.

[24] He disputed the version put by his counsel to N and Nomathamsanqa that he was assaulted by the community members at his place in Mofolo. He also disputed the version put on his behalf to these witnesses that the ring was planted on his finger while unconscious in order to implicate him in the commission of the said crimes. He testified that he knows nothing about the ring. He never owned a ring and would not say anything about a ring. He said he could not remember if it was removed by a doctor from his finger in hospital. He also disputed the version put on his behalf that the laptop was planted on him in order to implicate him to the commission of the crimes. He said he knows nothing about a laptop. He denied that he committed the offences in question.

[25] During cross-examination by counsel for accused 2 he said that he was sleeping with accused 2 in his shack in the early hours of 17 July 2020. He left his shack just after midnight to accompany his girlfriend. He also said that he went out in the night around 11pm to 12pm. He could not remember what time he came back to his shack but it was still dark. He had an argument about time and tenant's gate key with his aunt Khonzi in the night. Her main concern was him going in and out of the yard at that hour of the night. Khonzi woke up because of the noise made by the gate. He could not dispute Khonzi's evidence that when the said argument took place it was just after 2 o'clock in the night. He could not recall whether he went out again after the argument and returned when it was already light in the day. He could not dispute that he locked accused 2 inside a shack and that Khonzi had to open for accused 2 in the morning. He agreed when put to him that he slept at Jabu's place in the night in question. He disputed accused 2's version put to him that in the morning he informed accused 2 that the mob wanted him to point out the people he committed the crime with.

[26] During the cross-examination by counsel for the state he testified that in the night of 16th of July 2020 he was with his girlfriend Nomonde at his place. He accompanied her to home because he could not sleep with her in the presence of accused 2. He had not seen her for two weeks before that night. He also testified that after accompanying Nomonde he went out to Dobsonville to buy dagga. He met four males on his way back from buying dagga. One of the males was the family member of the deceased. He went to the deceased's house with the four

males. They did not enter the house they stood at the gate. He was shown a photo of deceased's house in exhibit C and he confirmed that was the house where he was standing with the four males in the early hours of the morning of 17 July 2020. The four males were strangers to him. They brought him to the deceased's gate. They told him that robbery took place and also wanted to show him what actually transpired there. He also said that these four males were the ones that came to his place in the morning to fetch him and they planted evidence on him falsely implicating him. He went back to his house after meeting the four males. When he arrived it was about 1h00 after midnight. He left his shack again at 5h00 to visit his child, T at Nomonde's home and give her some items. He also accompanied T to school. He ate and went to bed. When asked why he had three versions about his whereabouts that night he said he was confused. He later said all the versions were true.

[27] His witness Nonkululeko testified about what transpired when accused 1 was discharged from hospital. She could not assist the court about the whereabouts of accused 1 in the early hours of the day in question.

[28] Accused 2 in his testimony denied all the charges he is facing. He said he in the night of 17 July 2020 he went to bed around 22h00 in accused 1's shack. He was visiting for few days at accused 1's place. Accused 1 left him alone in the shack that night. Accused 1 came back in the night and had an argument with Khonzi. They disturbed him in his sleep and he reprimanded them. It was around 2h00 in the morning when the argument took place. Accused 1 then left and said he was going to look for his girlfriend. He then went back to sleep. When he woke up in the morning accused 1 was not in the shack. He was locked inside and Khonzi opened for him. He disputed the version put by his counsel to the state witnesses that accused 1 left the shack just after 12 o'clock midnight. He also disputed that Nomonde was present in the shack between the night of 16 July to early hours of 17 July 2020. He further said that accused 1 lied when he testified that he asked him to lock a door when he was accompanying Nomonde.

[29] He denied that he went to Thulani's place with accused 1. He denied that he made a confession to Yam. In the morning after the mob arrived at accused 1's place, accused 1 told him that he was taking the mob to the crime scene. Accused 1 further told him that in the night in question he went to buy dagga at Dobsonville and he was with the guy he was beaten with. They met a group of people who accused them of committing a crime at the house where the incident took place. During cross-examination he denied that he said accused 1 informed him

that he was with other people when he committed the crimes. A week after accused 1 was arrested he was also arrested after accused 1 came to his place with the police and pointed him out. He does not know Thulani and Yam and he also does not know why they falsely implicated him. He did not make a statement when he was arrested because accused 1 advised him not to as he would forget what he said.

[30] He called his aunt Khonzi to confirm his alibi. Khonzi testified that at about 2h17 in the morning of 17 July 2020, she was awoken by a noise made by a gate when accused 1 was opening it. She had an argument with accused 1 at that time about the noise. She did not know where accused 2 was at that time. She disputed accused's version that he reprimanded them during the argument. She last saw accused 2 in the night of 16 July 2020 before she went to bed and she saw him again in the morning around 7h00 when she unlocked a shack door for him. She disputed that accused 1 and 2 are cousins. She said they are related by marriage.

Evaluation of the evidence

[31] N is a single witness regarding the events that took place at the scene of the crimes, and therefore her evidence should be treated with caution. Section 208 of the CPA provides that an accused person may be convicted of any offence on the single evidence of a competent witness. N is a competent witness. Her evidence was clear in all material respects. I find her to be an honest and credible witness. She was honest to this court that she could not identify the two perpetrators. Her evidence that her assailant was wearing a lady ring was corroborated by other state witnesses. Nomathamsanqa pointed out a ring depicted on photo 2 in exhibit D as the ring she saw on accused 1's finger. There was no question of mistaken identity in that regard because Nomathamsanqa knew accused 1 before the day of the incident in question. Dr Tema and Sgt Mavhukelela testified that a lady ring was seen and removed from accused 1's finger. All the said witnesses identified the same ring as the one that was found on the finger of accused 1. Her evidence was also corroborated by her uncle Lehlogonolo about the first report she made to him and the state the deceased was found in her bedroom, and that she was declared dead on arrival in hospital. I accept her evidence as true.

[32] Thulani and Yam used drugs in the night in question, however both testified that it was not a lot, they could still appreciate the events of that night. They gave good account of what transpired that night or in the early morning of the day in question. There were no material

contradictions in their evidence. They corroborated each other in material respects. I do not find their versions about the confessions made by the accused to be improbable. They both explained how it came about that the confessions were made. Accused 1 confirmed during cross-examination that he knew both of them by sight before the night or morning in question. He used to come to their yard to visit his friend Msobho. I accept that the confessions made by both accused to them were made freely and voluntarily. Their version that accused 1 and 2 came to their shack with a black school bag containing a laptop was corroborated by the evidence of Nomathamsanqa that a black school bag containing a laptop which was later identified by N as hers was found inside the accused's shack and taken back to deceased's house. Thulani's evidence was also corroborated by Nomathamsanqa that when the mob approached him at the corner in the morning he said that accused 1 came with Madala to their shack.

[33] I agree with the state's submission that the doctrine of recent possession should be applied in this case on the following reasons.

[33.1] The black school bag and laptop were found within hours after the robbery was committed.

[33.2] It is unlikely that they could have exchanged hands at that time of the morning. In fact it is not the accused's case that these items exchanged hands before they were recovered by the mob.

[33.3] The areas where they were robbed and recovered is a walking distance in Soweto.

[33.4] Both accused made confessions about a robbery of a laptop within 2 hours after it was robbed.

[34] On the reasons stated above I find that the state proved the identity of the perpetrators beyond reasonable doubt.

[35] Accused 1 was a bad witness. He contradicted himself and also contradicted accused 2 in material respects. He gave three different versions about his whereabouts in the night in question. He said he slept at Jabu, changed and said he slept in his shack the whole night, and later said he was moving in and out of his shack that night. He lied about his girlfriend that she visited him. Accused 2 disputed that version. He placed himself in

Dobsonville at the scene of crime in the morning in question telling lies that four strangers met him in the street and took him to deceased's house. This version only came out during his cross-examination. He disputed the versions put by his counsel to state witnesses about the evidence being planted on him in order to implicate him in the commission of the offences. He could not give a satisfactory explanation why he took the mob to Yam and Thulani if he was not in their shack in the early hours of the morning in question. I find that his version is not reasonably possibly true and it stands to be rejected as such. I find that the state proved his identity as a perpetrator beyond a reasonable doubt.

[36] Accused 2 was also not a good witness he contradicted himself in material respects. He disputed the versions put by his counsel to the state witnesses. His witness Khonzi disputed his version about the relationship with accused 1 and that he did not reprimand them during the argument. Khonzi did not confirm his alibi. He could not explain why Thulani and Yam whom according to him, he did not know them before his arrest, would implicate him in the commission of these crimes. He also could not explain why accused 1 would take the mob to Thulani and Yam if they were not together in the early hours of the morning in question at Yam's shack. He was not an honest and credible witness. He lied in material respects. His counsel conceded that his alibi defence was problematic. I find that his version is not reasonably possibly true and stands to be rejected as such. I find that the state proved his identity as a perpetrator beyond a reasonable doubt.

[37] On count 5 the state is charging accused 1 with murder on the application of a doctrine of common purpose. I find that the requirements of common purpose stated in *S v Mgedezi and others [1989] 2 ALL SA 13 (A)*, namely that in the absence of a prior agreement to commit a particular crime, what has to be shown is that the accused was present together with the other person at the scene, was aware that a crime would take place; and intended to make a common purpose with those committing the crime as evidenced by some act of association with the conduct of the others, have not been fulfilled on count 5. There is no evidence showing that there was a prior agreement to kill the deceased. There is also no evidence that it was foreseeable to accused 1 that accused 2 would murder the deceased by strangling her when they went inside the deceased's house. When accused 2 was attacking the deceased accused 1 was in N

bedroom. The state has not established the requisite *mens rea* for murder on the part of accused 1. I find that the state has not succeeded to prove beyond a reasonable doubt that accused 1 is guilty of murder.

[38] In considering the evidence in totality and also taking into account the admissions made in terms of section 220 and the common cause facts, I find that the state has proved count 1, 2 and 3 against accused 1. I also find that the state has proved count 1,2,4 and 5 against accused 2.

[39] In the premises the following order is made.

1. Accused 1 is found guilty on counts 1, 2 and 3.
2. Accused 1 is found not guilty on count 5.
3. Accused 2 is found guilty on counts 1, 2, 4 and 5.

**MMP Mdalana-Mayisela
Judge of the High Court
Gauteng Division, Johannesburg**

Date of delivery: 16 September 2022

Appearances:

On behalf of the State: Adv N Serepo

Instructed by: National Prosecuting Authority

On behalf of Accused 1: Adv FM Ndlovu

Instructed by: Legal Aid South Africa

On behalf of Accused 2: Adv AJ Greyling

Instructed by: Legal Aid South Africa