

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

REPUBLIC OF SOUTH AFRICA



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

Case Number: 1/2023

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES / NO
(3)	REVISED: YES / NO
_____	_____
DATE	SIGNATURE

In the matter between:

THE STATE

and

B[...], R[...]

Accused 1

VAN NIEKERK, CORNELIUS

Accused 2

JUDGMENT

AFRICA AJ

Introduction

[1] Ms. **B[...], R[...]**, an adult female 23 years of age (hereinafter referred to as accused 1) and Mr. **VAN NIEKERK, CORNELIUS STEFANUS**, an adult male 35 years of age (hereinafter referred to as accused 2), are charged with:

AD COUNT 1: Contravention of section 4(1) read with the provisions of sections 1, 2, 3, 11, 13(a), 14, 29, 30, and 48 of the Prevention and Combatting of Trafficking in Persons Act 7 of 2013 and further read with the provisions of section 94, 256, 257, 261A(1) and (2), 268 and 270 of the Criminal Procedure Act (“CPA”) 51 of 1977 and further read with the provisions of section 51(1) of Schedule 2 of the Criminal Law Amendment Act (“CLAA”)105 of 1997 as amended and further read with the provisions of sections 1, 50(2)(a), 50(2)(b), 58, 59 and 60 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act (“SORMA”) 32 of 2007- **TRAFFICKING IN PERSONS;**

In that during the period of June 2021 to April 2022 and at or near Plot [...] Drive, Eikenhof and/ or [...] Street [...], Klopper Park in the district of Midvaal and/or Ekurhuleni Central, the accused did unlawfully and intentionally deliver and/or sell and/or exchange the complainant **CJR** (a female child born [...] April 2017), for sexual purposes:

- The abuse of vulnerability, and/or;
- The abuse of power, and/or;
- Intimidation, and/or;
- The direct or indirect receiving of payments, compensation, rewards, benefits or any other advantage to wit drugs and or money to buy drugs and/or;
- For the purpose of exploitation.

AD COUNT 2: Contravening the provisions of section 5(1) read with sections 1, 2, 50, 55, 56(1), 56A, 57, 58, 59, 60 and 61 of

SORMA, as amended. Further, read with sections 94, 256, 261 and 270 of the CPA. Further, read with section 120 of the Children's Act ("CA") 38 of 2005- **SEXUAL ASSAULT;**

In that on or during the period and at the places referred to in count 1, the accused did unlawfully and intentionally sexually violate the complainant, to wit **CJR** (a female child born on [...] April 2017) by allowing unknown males to touch her vagina with their hands, without the consent of the said complainant.

AD COUNT 3:

Contravening the provisions of section 3 read with sections 1, 2, 50, 55, 56(1), 56A, 57, 58, 59, 60, and 61 of SORMA, as amended. Further, read with sections 94, 256 and 261 of the CPA. Further read with sections 51 (1) or 51 (2)(b) and Schedule 2 of CLAA, as amended. Further, read with section 120 of the CA - **RAPE;**

In that on or during the period and at the places referred to in count 1, the accused did unlawfully and intentionally commit an act of sexual penetration with the complainant to wit, **CJR** (a female born on [...] April 2017) by penetrating her vagina with his penis and or penetrating her vagina with his finger and/ or penetrating her anus with his penis without the consent of the complainant.

AD COUNT 4:

Contravening the provisions of section 5(1) read with sections 1, 2, 50, 55, 56(1), 56A, 57, 58, 59, 60 and 61 of SORMA, as amended. Further, read with sections 94, 256, 261 and 270 of the CPA. Further, read with sections 120 of the CA - **SEXUAL ASSAULT;**

In that on or during the period and at the places referred to in count 1, the accused did unlawfully and intentionally sexually violate the complainant, to wit **CJR** (a female

child born on [...] April 2017) by touching her vagina with his hand and/ or instructing her to touch his penis, without the consent of the said complainant.

AD COUNT 5:

Contravening the provisions of section 305(3)(a), read with sections 1 and 18, 305(6), 305(7), and 305(8) of the CA. Further, read with sections 92, 257 and 270 of the CPA 51 of 1977 - **CHILD ABUSE**;

In that on or during the period and at the places referred to in count 1, the accused being the parent and/or guardian and/ or other person who has parental responsibilities and rights in respect of **JR** (a male child born on [...] July 2018) and/or caregiver and/or person who has no parental responsibilities in respect of the said child, but who voluntarily cares for the said child either indefinitely, temporarily or partially, unlawfully and intentionally abused the said child, by hitting him with a wooden plank and/or cutting his head with a grinder and/or hitting him with the grinder and/or hitting him with several unknown objects and/or hitting him with a fist and/or forcing him to smoke a drug pipe and/or hitting him with a pipe and/or burning him with a drug pipe and/or burning him with a lighter.

AD COUNT 6:

ATTEMPTED MURDER read with sections 51(2) of the CLAA and further read with sections 92, 257 and 270 of the CPA;

In that on or during April 2022 and at or near Plot [...] Drive, Eikenhof and/or [...] Street [...], Klopper Park in the district of Midvaal and/or Ekurhuleni Central, the accused did unlawfully and intentionally attempt to murder **JR** (a male child born [...] July 2018).

AD COUNT 7:

Contravening the provisions of section 305(3)(a), read with sections 1 and 18, 305(6), 305(7), and 305(8) of the CA. Further, read with sections 92, 257 and 270 of the CPA - **CHILD ABUSE**;

In that on or during the period and the places referred to in count 1, the accused being the parent and/or guardian and/or other person who has parental responsibilities and rights in respect of **CR** (a female child born on [...] October 2019) and/or caregiver and/or person who has no parental responsibilities in respect of the said child, but who voluntarily cares for the said child either indefinitely, temporarily or partially, unlawfully and intentionally abused the said child by hitting her with a wooden plank and/or hitting her with unknown objects and/or hitting her with hands and/or forcing her to smoke a drug pipe.

AD COUNT 8:

MURDER read with section 51(1) and schedule 2 of the CLAA. Further, read with the provisions of sections 92, 256, 257 and 258 of CPA 51 of 1977.

In that on or about 11 May 2022 and at or near [...] Street [...], Klopper Park in the district of Ekurhuleni Central, the accused did unlawfully and intentionally kill **CR** (a female child born on [...] October 2019).

[2] The State is represented by Adv. Williams. Adv. Lerm represents accused 1 and Adv. Dingiswayo represents accused 2.

[3] The provisions, application and implication of section 51(1) as mentioned in Part 1 of Schedule 2; section 52(2) as mentioned in Part 2 of Schedule 2 and section 51(3)(a) of the CLAA, as amended were explained; the provisions, application and implication of competent verdicts in terms of sections 262, 260, 270, 92(2), and 264 of the CPA were explained to the accused. They

indicated that they understood. The defence also confirmed that they fully explained the aforementioned and the accused understood.

[4] The state indicated that it would place reliance on the doctrine of common purpose.¹ The accused indicated that they understood the charges proffered against them and pleaded not guilty thereto.

[5] The accused elected not to give a plea explanation in terms of section 115 of the CPA, calling on the state to prove each and every element of the alleged offences.

[6] The state at the onset of the two-child witnesses' testimony brought a three-fold application in terms of:

[a] Section 158(2)² and (3)³ of the CPA, for the child witnesses to give their evidence by way of close circuit television which facility is available, and prevents the likelihood of harm. The said application was not challenged.

¹ It is not known to the state who are all the parties to the said common purpose or when and exactly where this common purpose was formed. It is, however alleged that all the accused were parties to the common purpose. It is further alleged that the common purpose was at least operative, immediately before and for the duration of the commission of the crimes as set out.

² "(a) A court may, subject to section 153, on its own initiative or on application by the public prosecutor, order that a witness, irrespective of whether the witness is in or outside the Republic, or an accused, if the witness or accused consents thereto, may give evidence by means of closed circuit television or similar electronic media."

³ "A court may make an order contemplated in subsection (2) only if facilities therefor are readily available or obtainable and if it appears to the court that to do so would—

- (a) prevent unreasonable delay;
- (b) save costs;
- (c) be convenient;
- (d) be in the interest of the security of the State or of public safety or in the interests of justice or the public; or
- (e) prevent the likelihood that prejudice or harm might result to any person if he or she testifies or is present at such proceedings."

[b] Section 153(3)⁴ of the CPA, for the proceedings to be held in camera due to the sexual nature of the evidence to be tendered. The said application was not challenged.

[c] Section 170A⁵ of the CPA, for the evidence of the two child witnesses to be tendered via the use of an intermediary, due to their youthfulness as set out in exhibit “T”. The said application was not challenged.

[7] The Court granted the aforementioned applications.

[8] **ELIZABETH JOHANNA STRUWIG** (“Ms Struwig”) testified under oath that she received her Certificate of Competency, marked Exhibit “U”, which she

⁴ “ In criminal proceedings relating to a charge that the accused committed or attempted to commit—

- (a) any sexual offence as contemplated in section 1 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, towards or in connection with any other person;
- (b) any act for the purpose of furthering the commission of a sexual offence as contemplated in section 1 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, towards or in connection with any other person; or
- (c) ...

the court before which such proceedings are pending may, at the request of such other person or, if he is a minor, at the request of his parent or guardian, direct that any person whose presence is not necessary at the proceedings or any person or class of persons mentioned in the request, shall not be present at the proceedings: Provided that judgment shall be delivered and sentence shall be passed in open court if the court is of the opinion that the identity of the other person concerned would not be revealed thereby.”

⁵ “(1) Whenever criminal proceedings are pending before any court and it appears to such court that it would expose any witness—

- (a) under the biological or mental age of eighteen years;
- (b) who suffers from a physical, psychological, mental or emotional condition; or
- (c) who is an older person as defined in section 1 of the Older Persons Act, 2006 (Act No. 13 of 2006),

to undue psychological, mental or emotional stress, trauma or suffering if he or she testifies at such proceedings, the court may, subject to subsection (4), appoint a competent person as an intermediary in order to enable such witness to give his or her evidence through that intermediary.

[Sub-s. (1) substituted by s. 68 of Act No. 32 of 2007 and by s. 8 (a) of Act No. 12 of 2021 w.e.f 5 August, 2022.]

(2) (a) No examination, cross-examination or re-examination of any witness in respect of whom a court has appointed an intermediary, except examination by the court, may take place in any manner other than through that intermediary.

[Para. (a) substituted by s. 8 (b) of Act No. 12 of 2021 w.e.f. 5 August, 2022.]

(b) The said intermediary may, unless the court directs otherwise, convey the general purport of any question to the relevant witness.”

undertook on 03 October 2022. Ms Struwig said that she has six (6) years' experience as an intermediary and bears no knowledge of this case, neither has she been involved in the investigation of this matter. She knows neither the accused nor the witnesses and has not discussed the merits of this case with the witnesses involved. She confirms that she has not previously been dismissed for any misconduct.

[9] This Court ruled that Ms Struwig, a person properly qualified, has the necessary experience and taken the oath, and is a competent person to act as intermediary in these proceedings.

[10] **The Court ruled in terms of section 154 (2)⁶and (3)⁷ of the CPA, prohibiting the publication of the identities of the child witnesses, in these proceedings.**

[11] The Court proceeded to hold an enquiry into the competence of the two child witnesses, **JR** and **CJR**. After certain questions were posed and no questions by either the state or the defence, this Court ruled that due to the youthfulness of the witnesses, they did not understand the nature and the import of the oath.

⁶“(a) Where a court under section 153 (3) directs that any person or class of persons shall not be present at criminal proceedings or where any person is in terms of section 153 (3A) not admitted at criminal proceedings, no person shall publish in any manner whatever any information which might reveal the identity of any complainant in the proceedings: Provided that the presiding judge or judicial officer may authorize the publication of such information if he is of the opinion that such publication would be just and equitable.”

⁷“(a) No person shall before, during or at any stage after the conclusion of criminal proceedings, in any manner, including on any social media or electronic platform publish any information which reveals or may reveal the identity of—

- (i) an accused who is or was under the age of 18 years at the time of the alleged commission of an offence;
- (ii) a witness who is or was under the age of 18 years at the time of the alleged commission of an offence; or
- (iii) a person against whom an offence has allegedly been committed who is or was under the age of 18 years at the time of the alleged commission of the offence,

unless the publication of such information is authorized in terms of subsection (3B).”

[12] The Court then proceeded in terms of section 164(1) of the CPA and posed certain questions to the child witnesses to ascertain whether they knew the difference between the truth and a lie and explained the consequences of not telling the truth.

[13] Neither the state nor the defence had any questions for **JR** or **CJR**.

[14] The Court ruled that it is satisfied that the child witnesses indeed know the difference between the truth and a lie and the child witnesses are accordingly warned (admonished) to speak the truth and nothing else but the truth.

[15] The evidential material consisted of the *viva voce* evidence of **nineteen (19)** state witnesses, the accused and no defence witnesses.

The documentary evidence consisted of:

EXHIBIT FILE:

EXHIBITS “A to V”

EXHIBITS “1 to 6”

[16] The following Admissions in terms of Section 220 of the CPA, which both accused confirmed was freely and voluntarily made, without being unduly influenced thereto, was read into the record, as per **Exhibit A**:

[a] That accused 1 is the biological mother of the two complainants being, **CJR**, a female child born on [...] April 2017, and **JR**, a male child born on [...] July 2018.

[b] That accused 1 was also the biological mother of the deceased referred to in counts 7 and 8 of the indictment, **CR**, a female child born on [...] October 2019.

[c] That accused 1 and 2 were in a relationship during the period of June 2021 to May 2022.

Counts 1 to 4: C[...] R[...]

[17] That Purity Shabalala, a nurse stationed at the Bertha Gxowa Care Centre, Germiston, examined the complainant referred to in counts 1 to 4 on 29 June 2022 and correctly noted her findings on the J88 medico legal examination form- **Exhibit B**.

[a] That the facts and findings by Purity Shabalala as contained in **Exhibit B** are true and correct.

[b] That the J88 medico legal examination is accepted as correct and admitted as **Exhibit B**.

*Counts 5 to 6: **JR***

[18] That Dr. Mozammil Rehman, a registered medical practitioner stationed at Linksfield Hospital, examined the complainant referred in counts 5 to 6 on 20 April 2022 and correctly noted his findings on the J88 medico legal examination form- **Exhibit C**.

[a] That the facts and findings by Dr. Rehman as contained in **Exhibit C** are true and correct.

[b] The J88 medico legal examination form is accepted as correct and admitted as **Exhibit C**.

[19] That Purity Shabalala, a nurse stationed at the Bertha Gxowa Care Centre, Germiston, examined the complainant referred to in counts 5 to 6 on 29 June 2022 and correctly noted her findings on the J88 medico legal examination form- **Exhibit D**.

[a] That the facts and findings by Purity Shabalala as contained in **Exhibit D** are true and correct.

[b] The J88 medico legal examination form is accepted as correct and admitted as **Exhibit D**.

*Counts 7 to 8: **CR***

[20] That the deceased is the person named in count 8 of the indictment, to wit, **CR**.

[21] That the deceased died on or about 11 May 2022 and was declared dead upon arrival at the Wannenburg Clinic, Germiston.

[22] That the body of the deceased sustained no further injuries from the time the deceased was declared dead upon arrival at the Wannenburg Clinic, Germiston on 11 May 2022, until the postmortem examination was conducted thereupon.

Forensic Skeletal Survey

[23] That the body of the deceased was transferred to the Charlotte Maxeke Johannesburg Academic Hospital for a Forensic Skeletal Survey on 16 May 2022.

[a] That Dr. H Moodley reviewed the Forensic Skeletal Survey of the deceased and compiled a report - **Exhibit E**.

[b] That the facts and findings by Dr. H Moodley as contained in **Exhibit E** are true and correct.

[c] The Forensic Skeletal Survey report is accepted as correct and admitted as **Exhibit E**.

Post Mortem Examination

[24] That Dr. Emefa Apatu conducted a post mortem examination on the body of the deceased on 20 May 2022 and correctly noted her findings on a post mortem report - **Exhibit F**.

[a] That the facts and findings by Dr. Emefa Apatu as contained in **Exhibit F** are true and correct.

[b] The post mortem report is accepted as correct and admitted as **Exhibit F**.

Histology

[25] That during the post mortem examination, Dr. Apatu correctly collected tissue from the body of the deceased and conducted histology examination thereupon.

[a] That the facts and findings by Dr. Apatu as contained in the histology report - **Exhibit G** - are true and correct.

[b] The histology report is accepted as correct and admitted as **Exhibit G**.

Photo Albums

- [26] That the photo album, **Exhibit H**, contains 35 images that were photographed during the post mortem examination.
- [a] That the images contained in the photo album, **Exhibit H**, correctly depict the body of the deceased and injuries noted by Dr. Apatu during the post mortem examination.
- [b] The photo album is accepted as correct and admitted as **Exhibit H**.
- [27] That Constable Simphiwe Zulu compiled a photo album that depicts the body of the deceased at the Germiston Mortuary on 20 May 2022 - **Exhibit J**.
- [a] That the photo album prepared by Constable Simphiwe Zulu correctly reflects the body of the deceased during the post mortem examination on 20 May 2022.
- [b] The photo album is accepted as correct and admitted as **Exhibit J**.

DNA

- [28] That during the post mortem examination, Dr. Apatu correctly collected samples from the body of the deceased and correctly placed the samples in a Sexual Assault Evidence Collection Kit with seal number PW3000734005; PA4004337039; and PA4004217295.
- [a] That these Sexual Assault Evidence Collection Kit with seal number PW3000734005; PA4004337039; and PA4004217295 were delivered to the Forensic Science Laboratory in Pretoria.
- [b] That the said Sexual Assault Evidence Collection Kit with seal number PW3000734005; PA4004337039; and PA4004217295 were received by the Forensic Science Laboratory in the same condition as it was when Dr. Apatu collected and sealed it and that there was no tampering with it.
- [c] That the samples of the Sexual Assault Evidence Collection Kit with seal number PW3000734005; PA4004337039; and PA4004217295 were analysed at the Forensic Science Laboratory.
- [29] That Warrant Officer Dereshen Chetty, a forensic analyst attached to the Biology Section of the Forensic Science Laboratory, received the case file

pertaining to Bedfordview CAS 64/05/2022. That Warrant Officer Dereshen Chetty correctly evaluated the results from samples that were subjected to DNA analyses.

- [a] That Warrant Officer Dereshen Chetty correctly documented his/her findings in a statement in terms of Section 212 of Act 51 of 1977 - **Exhibit K.**
- [b] That Warrant Officer Dereshen Chetty's said statement is accepted as correct and admitted as **Exhibit K.**

General

- [30] That a direction was issued in terms of Section 22(3) of the National Prosecuting Authority Act 32 of 1998 read with Section 111 of the CPA. See **Exhibit L.**

Summary of Evidence

- [31] **NDUMISO FORTUNATE MAKHUBO** ("Makhubo") testified under oath that she is a registered nurse, employed at Wannenburg Clinic, Germiston. She qualified as a nurse in 2013 and received her degree from Ann Latsky Nursing College, in Auckland Park. She commenced working as a nurse in 2002 and was on duty on 11 May 2022.
- [32] She said that the incident happened between 13h00 and 14h00 in the afternoon when she was posted at the emergency section. An older man resembling accused 2 came in holding something wrapped in a soft blanket over his left shoulder, whilst a younger man was standing by the door. She was told that the child is not feeling well and accused 2 proceeded to unwrap the blanket. Makhubo observed that the white girl child appeared blueish in colour. She asked accused 2 what happened, and he said that whilst bathing the child, the child appeared to be losing power, and collapsed.
- [33] Makhubo proceeded to examine the child and could not find a pulse. There was no movement. Accused 2 kept saying "eish, eish, eish". Makhubo said that she enquired about the mother's whereabouts and was told that she is at

home. The paramedics were summoned, who then declared the child deceased.

[34] Makhubo said that a blueish colour would indicate that the person is not breathing. Makhubo also asked the younger male what happened and he said that he does not know as he is just a family friend who was asked to bring the child.

[35] Nothing emanated during cross-examination.

[36] **BRANDON MKHWANAZI** (“Brandon”) testified under oath that he knows accused 1 as the girlfriend of accused 2. He knows accused 2 for many years as accused 2 is friends with Simon, his uncle, and they used to hang-out together.

[37] Brandon recalls 10 May 2022; on a Tuesday. He and Simon were asked to clean the yard at the house of accused 2’s father. They were picked up by car and accused 1 and 2 were with the children, a little girl and little boy (CR and JR). Whilst outside, Brandon’s mother and grandmother enquired about the rash on CR’s mouth. Accused 1 said that the child fell from a high-stoep. Brandon said that CR’s mouth was swollen and it appeared as if the child’s mouth had burnt wounds. When they asked why the child is not being taken to hospital, accused 1 said that they are still going to take the child to hospital.

[38] They then drove off and when they arrived at Klopper Park, they unpacked the things needed to clean the yard. Accused 1, Simon, and JR alighted from the car, and Brandon, accused 2, and CR drove to the workplace of accused 2 and loaded his clothes, furniture and pots.

[39] When they arrive back at the house, they made chicken and bread to eat. They all ate of the chicken, except the little girl, as her mouth was extremely swollen. She was given something like soft porridge in a bottle. There were two (2) couches in the lounge, where Brandon and Simon slept on. The room

where accused 1 and 2 slept, had no bed, neither did the little girl sleep on a bed.

- [40] As Brandon and Simon were lying on the sofas, the little girl came to them, in the early morning hours, saying she is hungry. They had nothing to give her, so Brandon had to get up and he gave her some milk. Accused 1 and 2 were still asleep in the room.
- [41] When they woke up the next morning, accused 2 made soft porridge for them to eat, using a small pot from the kitchen. There was no power in the house and they used a generator to warm the water in a kettle. CR again had porridge from the small bottle.
- [42] Accused 1 was busy in the room with her nails, accused 2 was outside and CR was in the room. Later Brandon prepared coffee and biscuits for him and Simon, more soft porridge for the child, whilst accused 1 was standing outside, smoking a cigarette.
- [43] Accused 2 went inside to bath CR, whilst accused 1 was in the room, busy with her nails. Accused 2 left the child in the tub and came to the back yard, where Brandon and Simon were. He told them to have a rest, so they went into the kitchen. Whilst in the kitchen, accused 2 went back to the bathroom, to fill the tub with cold water. There was no hot water because the geyser was not working. Brandon and Simon could hear the child crying in the bathroom and Brandon told Simon to inform accused 2, not to allow the child to cry like that. Simon came back saying that accused 2 is bathing the child.
- [44] Brandon again asked Simon to go and tell accused 2 not to bath the child so roughly, as the sounds they heard sounded as if the child was drowning. Brandon said that the sounds lasted about 30 minutes, whilst accused 1 was still in the room busy with her nails, despite the fact that Simon told her to go and bath the child. Accused 1 responded that her nails are wet.

- [45] Brandon and Simon went back to the yard to clean. When they came back into the lounge, they saw accused 2 carrying CR over his right shoulder and the child was blue. Accused 2 ran to the room where accused 1 was and asked for warm water for the child and she responded “nee fok”. She did not want to take the child, and accused 2 ran to the lounge and called for Simon as he did not know what to do. Simon said that they must take the child to the hospital. Accused 1 refused to take the child as she was not interested and stood in the backyard, smoking.
- [46] Brandon told accused 2 to give the child mouth-to-mouth. He did and water came from the child’s mouth. Brandon started to panic and asked accused 1 why is she not taking the child to the hospital. As accused 1 did not respond, he ran back to accused 2 and said that they must take the child to the hospital. Brandon took the child and wrapped her in two blankets. Brandon handed the child to accused 1, but she did not want the child. Brandon told accused 1 to “fok-off” and he went and sat with the child in the backseat, whilst accused 2, was the driver.
- [47] They drove to the clinic and by then the child was still alive. CR clutched Brandon tightly and he told her that they would be at the hospital soon. He saw a tear rolling from CR’s eye and she died in his arms, around the corner from the clinic.
- [48] Brandon confirms that he knows JR and he was seated next to him in the car, having a blue eye and blue marks on his upper thigh and right upper arm. When he enquired about the injuries he saw, accused 2 said that they were boxing. When Brandon asked how accused 2 could box such a young child, accused 2 told him that it was just a game. Accused 1, who was seated next to accused 2, said nothing.
- [49] Brandon explained what some of the photos (1- 43) in Exhibit “M” depicted. The crux of his evidence in this regard is that the photos mostly did not depict the way the house or yard looked when he and Simon were there. Some of

the items depicted on the photos appear to have been staged or placed there after the fact.

- [50] Brandon said that he does not use drugs but accused 1 and 2 smoke every day. Brandon wanted to become a professional rugby player but this incident has affected him and he cannot sleep. He said that accused 1 and 2 smoked drugs from a small pipe with a round ball at the front and they even smoked the night before the child passed away.
- [51] During cross-examination, Brandon conceded that 10 May was on a Tuesday and that the child passed away on 11 May. Brandon said that he did not see accused 2 bathing the child, he only heard the sounds. He said that accused 2 went to the room to ask accused 1 for a hot water bottle to put on the child's back but she refused to help. Water came from the child's mouth and she could not breathe properly. Even when Brandon asked accused 1 to take the child to the hospital, she refused and carried on smoking a cigarette.
- [52] Brandon said the child's mother was asked to help, and taking the child to the hospital was the least she could do but she refused.
- [53] Brandon denied the entire version as was put to him by accused 1.
- [54] Asked whether he had a good relationship with accused 1, Brandon said that he did not like her as she did not look after her children and used drugs.
- [55] During cross-examination on behalf of accused 2, Brandon said that in his presence, accused 2 did not refuse for accused 1 to bath the child neither did he refuse for accused 1 to accompany them to the clinic. Brandon said that at all times even when they boarded the vehicle, accused 1 was busy with her nails.
- [56] Brandon had no comment to the version of accused 2 that he bathed the child because she had soiled herself and that the child cried because the water was

cold. Brandon confirmed that he did not see accused 2 drown the child but he heard bubbling sounds coming from the bathroom.

[57] **SIBUSISO (SIMON) MKHWANAZI** (“Simon”) testified under oath that he knows accused 1 for a period of 5 months as the girlfriend of accused 2. He has known accused 2 since 2017, from the rehabilitation centre at Brenton Park.

[58] On Tuesday, 10 May 2022, accused 2 came to fetch him and Brandon to clean his father’s yard. On that day, Simon’s mother and sister came outside and saw the burn marks on CR’s mouth. CR was seated in the back of the vehicle, holding a face cloth against her mouth. Simon’s mother advised accused 1 to take the child to the hospital, which was just around the corner.

[59] When Simon enquired about the burn marks, accused 1 said that the child fell from the stairs. He said that he digested it but thought it to be a sloppy, made-up story, looking at the angle of the stairs. Simon said that the injury looked like the child was burnt with a warm pipe that was placed on her mouth judging from the size of the drug-pipe. He said that the pipe is the one that is used to smoke Crystal-Meth,⁸ made of glass. He said that he has seen similar burns before, which happens when the pipe is pressed against the skin and it makes a water-bubble (blaas).

[60] Simon said that after Brandon, CR, and accused 2 left, he and accused 1 used crystal-meth, which he snorted and she smoked, using the pipe.

[61] Accused 2, Brandon, and CR returned in the early morning hours and they offloaded the stuff. They had bread and chicken for supper and Simon and accused 2 wanted to smoke a “dagga-zol”, when CR came and Simon told accused 2 that they cannot smoke in front of the child. When accused 2 took the child to the bedroom where accused 1 was, she swore at accused 2, asking why was he was bringing the child to her.

⁸ Crystal Methamphetamine.

- [62] In the early morning hours CR came, saying that she was hungry. Brandon gave her some milk. Around 06h30, CR came back again saying she was hungry and Brandon gave her something to drink.
- [63] They played music and Brandon made soft porridge, tea and biscuits. Accused 1 came from the bedroom, stood at the kitchen door and smoked a cigarette. By then accused 2 was pouring the water in the bathtub for the child. Brandon came to him and told him that the child was making funny sounds in the bathroom. Simon did nothing and Brandon came back saying that this has been going on for long, referring to the child who was crying. He could hear the child crying but did not know why. Simon then went to accused 1 and told accused 1 to go and wash the child, he asked her four (4) times but she did not listen. Simon could not see accused 2 bathing the child but he could hear, as the bathroom door was open. He said accused 1 went to sit in the sun, smoking a cigarette.
- [64] The child was still in the bathroom crying, and then it all went quiet. Accused 2 then came running from the bathroom, with the child in his hands, naked. Accused 1 was still outside, basking in the sun. The child was totally still and accused 2 went to fetch a blanket. He did CPR⁹ and some water came from her mouth.
- [65] Accused 1 came and said to Simon, "do you see what he (accused 2) is doing to my child". Simon told her that she did not want to listen, when he told her to take the child from accused 2. Accused 1 went and sat in the sun again. Accused 2 was still trying to resuscitate the child. Simon told accused 2 to take the child to the hospital but accused 1 was not interested. Brandon wrapped the child in a blanket, jumped into the vehicle and they drove to the hospital.
- [66] Simon kept reprimanding accused 1 for not listening and when Brandon phoned, accused 1 said that she cannot believe what they are saying. Simon took the phone and Brandon told him that the child had passed on.

⁹ Cardiopulmonary resuscitation.

- [67] Simon said that he knows JR as another child of accused 1 and that he is a petit little boy. He knows JR because JR would be in the car, with accused 1 and accused 2, driving to different (drug) houses. **Every time he saw JR, the boy would be wearing shorts and a vest, without shoes, when it was cold.** Simon regularly noticed marks on JR's body, a blue eye, blue marks on his face, arms and back. When Simon enquired about the marks, accused 1 and 2 would say that it is boxing marks and that is how accused 2 and JR played. Simon said that this explanation did not sit well with him because it made no sense how a big man can box such a small child. Simon also saw JR having a swollen eye and again, accused 1 said that accused 2 and JR were boxing. JR also had blue marks on his back and the back of the thighs, which was visible when JR sat down. To the mind of Simon, it appeared as if the child was kicked.
- [68] Simon said that JR was mostly with them when they bought drugs and that it was accused 1 who took them to these drug houses. Simon said that JR would be present now and then when they smoked. When asked why CR was not staying with her grandparents, **Simon said that he overheard accused 2 asking when CR is going home, accused 1 said that they must wait for her injuries to subside and then they can take her home.** This, he overheard on the same night that he and Brandon were fetched, because accused 1 and 2 were busy arguing.
- [69] Simon said that he did not see what was happening in the bathroom, but it sounded like someone was being hurt. He said that CR could not speak properly because of the injury to her mouth, and she would mumble.
- [70] During cross-examination on behalf of accused 1, the version of accused 1 was put, which was denied by Simon.
- [71] During cross-examination on behalf of accused 2, Simon confirmed that he smoked drugs with accused 1 and 2, the day prior the incident. Simon further confirmed that he never went inside the bathroom and neither did he witness

any drowning. When it was put that accused 2 cared for CR, though she was not his biological child, Simon responded that if he and Brandon did not push for the child to be taken to hospital, then that would never have happened.

[72] **MOZAMMIL REHMAN** (“Dr. Rehman”) affirmed that he is employed at Netcare Linksfield Hospital since April 2022. He is a medical practitioner in the emergency department. He obtained his MBCHB degree from Wits University in 2018, Diploma in Primary Emergency care from the College of Medicine in S.A in April 2023. He has five (5) years’ experience and confirms that he completed Exhibit C when he examined J[...] R[...] on 20 April 2022.

[73] He confirmed his findings, as per page 4, which he read into the record. He said that all the injuries were visible on examination.

- [a] 3cm...the injury is ± 1 month old, caused by a blunt object like a bottle;
- [b] 1cm...the injury is ± 2 months old, caused by a sharp object;
- [c] 1cm...the injury is ± 2 months old, caused by a hard object;
- [d] 4cm...the injury is less than a month old, caused by a hard or blunt object;
- [e] 1cm...the injury is 2-3 weeks old, caused by a thin and flexible object like a belt or sjambok;
- [f] 4cm...the injury is ± 1 month old, caused by a hard blunt object;
- [g] 1cm...the injury is ± 1 week old, caused by a rough surface;
- [h] 3cm...the injury is similar to those sustained at [d] and [f], all on the right side of the body;
- [i] 6cm...the injury is ± 1 month old, caused by a hard object, thus both left and right side area of buttocks had bruising;
- [j] Multiple small bruising ± 3 weeks old, caused as a result of the injuries or running without protective covering (shoes);
- [k] 3cm...the injury is fresh $\pm 1-2$ days old, caused by a hard blunt object;
- [l] Multiple bruises over knuckles caused when being hit with a hard object like a ruler or belt or when fighting with someone;
- [m] Multiple healed scars...the injury is older than 1 week caused by a blunt object.

[74] In his conclusion, Dr. Rehman is of the opinion that looking at the pattern and amount of injuries, it is clear that it has been ongoing over a long period. He said that children do not inflict such large scale and area of injuries over the body on themselves because they will avoid activities which will cause these injuries. It is therefore possible to extrapolate that the child did not cause the injuries that occurred over a couple of months, though not lethal. Dr. Rehman said that head injuries have the potential to cause significant harm and disability, especially if left untreated.

[75] **C[...]** **R[...]** (“C[...]”) testified under oath that accused 1 is the mother of her three (3) grandchildren, CJR, JR and CR (“deceased”).

C[...] is only aware that the birth of CJR was registered. She said that CJR has stayed with her from the age of 1-year and 6 months and that her son, B[...]**R[...]**, is the biological father of the children. CJR resides with her. When JR was born, accused 1 became involved with Michael, a man from Mpumalanga, and C[...] **and B[...]** tried getting custody of the children.

[76] Thereafter, accused 1, B[...] **and the children** moved in with C[...]**' parents,** R[...] **and B[...],** 75 and 78 respectively. B[...] **worked for short periods and** accused 1 never worked. When accused 1 fell pregnant with CR on [...] October 2019, C[...] **was not happy because** accused 1 and B[...] **could not provide for their children and then** B[...] **went to prison on 5 April 2021. Accused 1, JR, and CR, then stayed with her (accused 1) grandmother at [...]** Street.

[77] In June 2021, accused 1 started a relationship with accused 2 and they moved in together at his workplace. R[...] **took CR in who was 9 months old at the time. In the beginning, accused 1 and 2 fetched CJR and CR regularly, then only every second weekend. Accused 1 always had excuses such as the petrol being too expensive and C[...]** hardly saw JR.

[78] In April 2022, accused 1 and 2 fetched the children for the weekend and the children had to be returned on 3 April 2022. Only CJR was returned, not JR or

CR. Accused 1 asked to keep CR another week or so and it was so arranged with R[...], who was still contacted to provide for CR's nappies.

[79] Over the Easter weekend, CJR was fetched from C[...] by accused 2. They had to return CJR the Sunday evening, as it was school on Tuesday. Instead, CJR was returned the Monday evening, after 21h00. CJR was very sleepy, her body was limp, and C[...] had to put her to bed. CJR went to school that Tuesday and that afternoon, the school said that CJR is presenting with behavioural problems. After that weekend CJR returned from accused 1 and 2, she had a different mannerism; she was bombastic and had tantrums. C[...] threatened not to send CJR to accused 1 and 2 again and informed accused 1 about what the school reported about CJR's behavioural problems.

[80] C[...] saw JR on 21 April 2022. He had wounds to his head and buttocks. C[...] was informed of JR's abuse on 20 April 2022. She however said nothing to JR because she first wanted to get CR back as C[...] did not know where accused 1 stayed. Accused 1 kept having excuses as to why she is not bringing CR back home. When C[...] asked to speak to CR, accused 1 would say that CR is sleeping.

[81] Again, on 9 May 2022, C[...] contacted accused 1 enquiring when CR will be coming home. C[...] kept calling and sending WhatsApp messages to accused 1, unsuccessfully. C[...] eventually phoned accused 2, and he said they were busy moving and they got home late. Accused 2 said that they are moving to Witbank and that he did not know that they were supposed to bring CR home.

[82] On 10 May 2022, C[...] again tried contacting accused 1 and 2 but both their phones were off. Later that evening, accused 1 sent a WhatsApp message wanting to know if she could ask C[...] something. When C[...] enquired what is wrong, she never received a response. The morning of 11 May 2022, C[...] received a message from accused 1 saying not to worry. Later C[...] sent another WhatsApp message because she was concerned. Around 19h00 that evening C[...] received the news about CR's passing.

- [83] On 12 May 2022, accused 1 sent a WhatsApp message to say that she is very sorry.
- [84] C[...] confirmed that Exhibit "N" is the WhatsApp communications between her and accused 1. She said that she did not tamper with the messages and it is a true reflection of the communication.
- [85] C[...] proceeded to read the WhatsApp messages into the record.
- [86] C[...] confirmed that Exhibit "P" is a true reflection of WhatsApp messages between herself and the contact number of accused 2. C[...] proceeded to read the WhatsApp messages into the record.
- [87] C[...] said that when they requested to see JR in December 2021, the child had injuries on his leg. JR said that accused 2 had "bliksem" him. Accused 1 explained that JR helped accused 2 to fit a tow bar and it fell on his face, causing the bruises to his face and a scar to his left eye.
- [88] C[...] said that when CR went to visit accused 1 and 2 on 2 April 2022, she was free of any injuries. C[...] confirmed the injuries as depicted on JR as per Exhibits 1 and 2, respectively.
- [89] During cross-examination on behalf of accused 2, C[...] confirmed that accused 1 never communicated to her that accused 2 is preventing her from sending the children to C[...], or that accused 2 is threatening or abusing the children.
- [90] **R[...]** **R[...]** ("R[...]") testified under oath that she is the great grandmother of the mentioned children. She said that CR resided with her and her husband because CR seemed neglected, dirty and eating dry bread, whilst in the care of accused 1. CR stayed with them from August 2020. R[...] described her relationship with accused 1 as having difficulties because accused 1 told

many lies about the children. At that time, JR was still residing with accused 1 and 2 and R[...] did not see him often.

[91] On 2 April 2022, accused 1 fetched CR and she had no injuries. R[...] kept asking when is she returning CR and accused 1 kept making excuses. R[...] saw CR one night during April after 22h00 in the evening when accused 1 asked for nappies and clothes for CR. CR was wrapped in a blanket and R[...] only saw her face.

[92] R[...] said that accused 1 always had excuses for why she is not bringing CR home. She would ask for a video call or a photo of CR and there will be excuses that CR must first bath or she is sleeping.

[93] R[...] said that they never expected the death of CR to happen as she (R[...]) would never have allowed CR to go to accused 1, had she known this would happen. They are all devastated and she thinks her husband died of a broken heart because they all loved CR so much.

[94] R[...] confirmed that Exhibit Q, is a true reflection of the WhatsApp communication between her and accused 1. R[...] confirmed Exhibit 3 (1), as a photo taken in her lounge; (2), (3) and (4) were photos taken the same time, (February – March 2022).

[95] **CHANELLE BRUMMER** (“Chanelle”) testified under oath that she met CR when she visited Diana and H[...]’s place. H[...] is the brother of accused 2. Chanelle has never met accused 1.

[96] She said that on 18 to 19 April 2022, she saw CR wearing shorts, a short sleeve top, no nappy and no shoes. **Chanelle said that this stood out to her because it was so cold.** CR had a swollen upper lip and one side of her face was dark blue. **On 19 April, the child told Diana that her “cookie” is burning.**

- [97] When Chanelle enquired what is going on, Diana told her that accused 1 and 2 said that the child fell. CR also said that her inner thighs were burning and Chanelle told Diana to call accused 1 that Chanelle will take CR. Accused 1 responded that Chanelle can take CR as they want to take her other children too.
- [98] Chanelle took CR to her house, wiped her down, applied ointment to her face and thighs and dressed her warmly. That night CR slept through, and the next morning Chanelle took photos of the bruising to the side of CR's face and of her swollen lip.
- [99] Chanelle confirmed Exhibit 4 as depicting CR wearing her daughter's clothes and the injuries to her face and lip. **Chanelle said that she emailed the information to child-line, who said that they would send someone.**
- [100] **DIANA ELS** ("Diana") testified under oath that she knows accused 1 through accused 2. She was in a relationship with H[...], the brother of accused 2. She has known accused 2 for 10 years and was aware that accused 1 had children.
- [101] She has known JR for a few months and she had noticed a bluish bruise on his cheek and forehead and blisters on his mouth. She cannot recall the date, when she noticed the injuries. When she enquired about it, accused 1 and 2 told her that JR plays rough and JR said that he fell. To her it appeared as if he could have fallen from the stairs where they stayed, which was dangerous. However, the blisters did not look as if JR fell. The second time she saw injuries on JR, he had a ±5cm cut to the side of his head. JR said he fell and accused 1 and 2 said that JR fell against the welding machine.
- [102] In respect of CR, Diana said that on 19 April 2022, H[...] went missing and accused 1 and 2 offered to drive around to look for H[...]. They left CR with Diana. At that stage, she was not taking note if CR had injuries because H[...] was missing. She confirms that CR spent three (3) days between herself and Chanelle. She asked Chanelle for help with nappies and clothes because

Chanelle had a child of the same age. Accused 1 and 2 left CR with nothing. Diana said that accused 1 was called in her presence but she did not notice anything because of the state that she was in, with H[...] being missing.

[103] Diana confirmed that she applied ointment but said that CR never told her anything that was wrong with her private parts.

[104] **JANINE DALGLEISH** (“Janine”) testified under oath that she is the chairperson of the CPF¹⁰ in Klopper Park and that the family of accused 1 requesting her help in alleging that accused 1 was being locked up on the property of [...]straat, by accused 2.

[105] When she visited the said property, she found the house empty but got the contact number of accused 2 from the neighbours. When Janine enquired from accused 1 whether she was held against her will, accused 1 said “no” and that her family is constantly stirring, interfering and making up stories. On 9 May 2022, Janine again attended at Klopper Park, again accused 1 just laughed it off when Janine said that her family said that accused 2 is abusive towards her. Janine said that she (Janine) can assist with a protection order but accused 1 said that accused 2 is a good man and that he has never physically harmed her or the children and that “*sy sal hom moer voor hy haar kan moer*”. Janine said that accused 1 declined all the resources that was offered.

[106] Janine returned to the property on 10 May 2022 when an unfamiliar man came outside to enquire what she wanted. Accused 1 then came out and said that everything was fine.

[107] On 12 May 2022, she went to the family of accused 1 and found accused 1 present. Accused 1 appeared to be upset and told her family that she did not want to go and identify the body of CR as it had injuries and that accused 2 had burned the child with a crack pipe on the mouth, under her arms, and

¹⁰ Community Protection Forum.

feet. He also burned the child with Crystal Meth. Janine said that she was traumatised and had to leave after what she heard.

[108] During cross-examination on behalf of accused 2, he denied ever burning the child with a Crystal Meth pipe.

[109] **MPIKITI BEN THAILE** (“Thaile”) testified under oath that he is a Sergeant with the SAPS,¹¹ with 20 years’ experience and stationed at the FCS unit, in Vereeniging. He confirmed that during April 2022, he received a complaint of child abuse.

[110] He recognised Exhibit 3 as photos similar to the ones shown to him, but he never opened a case docket as the incident did not happen within his jurisdiction.

[111] **LESEDI BRILLIANT MOTSHEGOA** (“Lesedi”) testified under oath that she is a constable within the SAPS, with 4 years’ experience. She was the initial investigator and received the docket on 13 May 2022. By that time accused 2 was arrested, and she did not regard accused 1 as a suspect. She obtained a (witness) statement from accused 1 on 14 to 15 May 2022 at Bedfordview Police Station. Lesedi said that accused 1 gave different versions on these respective days. She said that accused 1 said that she wanted to write her own statement, as she was not in the mood to talk. She did so freely and voluntarily.

[112] Lesedi said that accused 1 said that accused 2 did not want her to be with CR and that she does not know the reason why but she suspects that it is because accused 2 had lost his job. Accused 1 said that accused 2 was moody and was shouting at everybody and when CR soiled herself, he grabbed her to the bathroom and bathed her in cold water.

[113] Lesedi said that Exhibit R was the statement written by accused 1 in her own handwriting. The statement was not commissioned because it still had to be

¹¹ South African Police Service.

translated. Lesedi said that she did not add anything to the said statement and stated that accused 1 append her signature in her presence.

[114] According to accused 1, when accused 2 bathed the child in cold water, she was screaming and crying for her. After a few minutes, there was no noise, just silence. Accused 2 then came from the bathroom holding the child in a towel. He took her to the room and kneeled down. Accused 1 came and stood in the passage to watch what accused 2 was doing to the child and accused 1 told accused 2 to leave the child as she will dress the child, but accused 2 pushed her away. Accused 1 got up and pushed him back. Accused 2 left and she went to CR and saw that the child was stiff and blue in colour. She called the child by name, but there was no response. CR was still breathing but made no movements.

[115] Lesedi said that there is a statement filed in the docket obtained on 11 May 2022. She said that the versions in the two statements did not correspond and accused 1 said that accused 2 had tied her up.

[116] On 19 May 2022, accused 1 went to show them around the house and pointed out a hole, which she said was dug by Brandon and Simon, on the instruction of accused 2, for her to be buried alive. Lesedi said that photo 9 depicts the rope used to tie her up and photos 39 and 40 are of the hole, which was closed up after the incident, allegedly by Brandon and Simon.

[117] Lesedi said that she obtained statements from Brandon and Simon who intimated that accused 1 did not care about the child, instead she was doing her nails. Lesedi said that she found no other evidence to corroborate the version of accused 1 in this regard neither did accused 1 open an assault case against accused 2.

[118] **Lesedi said that accused 1 later informed her that accused 2 burnt CR with a drug pipe and that accused 2 must answer for it.**

[119] **C[...]** **B[...]** (“C[...]”) testified under oath that accused 1 is her sister and that they are very close. Initially she had a good relationship with accused 2 but then she heard of the abuse of JR. She had a close relationship with JR and she used to see him often. On 19 April 2022, she was on her way to the shop with her grandmother when accused 1 sent her a message to meet her halfway. She saw accused 1 and JR coming down the road. Accused 2 was driving a Maroon Jetta and called accused 1 over but they walked home and left accused 2 behind.

[120] At the house, accused 1 left with accused 2 and an unknown man, leaving JR with C[...]. C[...] for a short visit. When it became late, C[...] contacted the cell phone number of accused 1 but could not get through. She then went to bed with JR but as he was lying uncomfortable, she lifted his pants, and saw a blue mark. She pulled down his pants and saw his whole bum was blue. She went to show her uncle and grandmother and tried to contact accused 1 and 2, again without success.

[121] The next morning her mother saw a cut on JR’s head. C[...] and K[...] took JR to the hospital for an examination and accused 1 never informed C[...] of any of the injuries on JR.

[122] C[...] confirmed that photos 3(2), (3) and (4) depicts the injuries that she saw. Before leaving for hospital, C[...] again sent a message to the phone of accused 2. Accused 1 responded that they are on their way but when C[...] responded that they must meet her at the police station, she received a reply stating that they do not have petrol.

[123] **ANNERIE DU PLESSIS** (“Annerie”) testified under oath that she is the CEO of the Purple Foundation, an organisation that gives support to the survivors of sexual violence. She first met accused 1 when she came to the police station on 18 May 2022 because she was requested to do so. Annerie assisted in setting up the appointment as the investigating officer was Afrikaans speaking.

- [124] Accused 1 discussed many things in her presence and said that she wanted to show where the incident happened at [...] Street [...]. Annerie said that accused 1 gave the information freely and voluntarily.
- [125] On 19 May 2022, they went to the house at [...] Street, where accused 1 pointed out certain things, as per Exhibit "M" to Annerie. Of importance is the grimy condition the house was in.
- [126] **RUDOLF VAN DER HEEVER** ("Rudolf") testified under oath that he is in a relationship with the aunt of accused 1. He knows accused 2 who stayed two streets behind him. He never had any problems with accused 1 and 2 but on occasion had seen injuries on JR, which was cause for concern.
- [127] Rudolf saw an injury to JR's face and was informed that a tow bar fell on his face. He said that JR had a blue eye and a swollen face. He did not believe the story because if accused 2, as a big man, and JR, as a small child, had to lie under the vehicle, why would the tow bar injure JR, and not accused 2? Rudolf also observed a cut above JR's eye and JR said that accused 2 cut him with a knife above his eye.
- [128] Rudolf again saw accused 1 on 11 May 2022 when she explained that CR was in the bathroom when she slipped on a green sponge and hit her head.
- [129] **MDUDUZI NXUMALO** ("Nxumalo") testified under oath that he is a sergeant within the SAPS stationed at Bedfordview, with 17 years' experience. On 11 May 2022, he was on duty at the CSC, and wrote down Exhibit "S" in his own handwriting. He said that he was not the investigating officer and bears no knowledge of the case. The information on the statement he wrote down was narrated by the deponent. The witness read the statement after it was taken down and the witness was satisfied with it. The deponent initialled the bottom of page 1 and signed on the last page. Nxumalo read the statement into the record.

[130] **JR** (“JR”) testified that he is the boy as depicted on Exhibit “1”. He said that he was hurt on his eye by Uncle S[...] with the back part of a knife. He did not bleed but he cried. He said that he was assaulted for being sweet. JR said that S[...] stayed with his mom and used a plank to hit him on the buttocks. He said that his mother was asleep when he was assaulted on his eye but when she woke up, she enquired what happened to his eye.

[131] JR explained that on photo 3 (1), Uncle Stefa[...]n burned him with a smoke pipe. He said that you put a cigarette inside the pipe, then smoke it. He described the pipe as a magical pipe and that Uncle S[...] smoked from it. He said that when he was burned, it was sore and he cried. His mother, R[...] was asleep, but when she woke up, she enquired who burned him, he told his mother, and she assaulted Uncle S[...] and gave JR a plaster.

[132] On photo 3 (2), JR explained that he was assaulted by Uncle S[...] with a plank. He said that it was painful and he cried the whole time “ouch ouch ouch”. His mother was asleep at the time. When she heard him cry, she woke up and put him to bed. Uncle S[...] however woke him up and said that he must go sleep outside and eat dog-food. JR said that he went outside but he did not eat the dog food. He said that Uncle S[...] assaulted him with the plank for melting his (toy) blocks.

[133] JR said that photo 3 (4) depicts his head where Uncle S[...] assaulted him with a grinder. He said that the grinder was on and placed against his head. He said that the grinder made a “zzzzzzz” sound and it was bleeding and sore. He said that his mother was asleep because she was tired. He said that she did not see the cut on his head because his hair was not cut (short).

[134] JR described drugs or dwelms as a Zol. He said that he has seen his father (B[...]) and Uncle S[...] use drugs. They would go to the drug shop when he watched movies at his Ouma R[...]’s flat.

[135] JR said that the drugs were made out of a pill and they swallow it with water. He said that a Zol is a newspaper that you grind something into and you roll it,

then you light it up and smoke it like a cigarette. He said that he was present and watched when Uncle S[...] smoked a Zol.

[136] **JR said that he never grabbed CR by the neck.** He said that Uncle S[...] grabbed CR by the neck because she was sweet. JR demonstrated that Uncle S[...] grabbed CR by the neck, in a throttle or strangle motion. He said that his mother was asleep and that she was tired.

[137] JR said that Uncle S[...] made him smoke drugs, that was “yuck”, and the drugs looked like ash. He said that the drugs made him feel stupid and his mother was asleep when he was made to smoke the drugs. When she woke up, he told her what happened and she told Uncle S[...] that he is stupid. He was made to smoke drugs more than once and C[...] was watching when he was made to smoke the drugs.

[138] During cross-examination on behalf of accused 1, JR said that his mother did not hurt him.

[139] No cross-examination on behalf of accused 2.

[140] **CJR (“CJR”)** testified that her mother’s name is R[...] and that she (her mother) stayed with S[...]. C[...] said that she does not like S[...] because he smacked CR and JR with his hand because they were naughty. She said that he smacked them many times on their buttocks, when her mother was in the bathroom.

[141] CJR said that she was hurt on her “flower” by Uncle S[...]. She uses her flower to pee with and Uncle S[...] used his finger. CJR used the girl AD¹² doll in order to describe her flower. She lifted the doll’s dress, pulled down the panty, and pointed at the vagina. Again, by using the girl AD, CJR showed the Court how she was hurt on her vagina, by pulling down the underwear and inserting her finger inside the vagina, making fondling movements.

¹² Anatomically detailed.

[142] CJR said that she felt angry when Uncle S[...] hurt her flower (vagina) as her vagina was hurting. She said that Uncle S[...] also placed his finger on top of her flower when he touched it. She said that she was naked when he touched her flower as she was inside the bath, waiting for her mother to bring hot water for her to bath in. She said that her mother was outside and looked through the window when Uncle S[...] touched her flower. Her mother said “stop looking at C[...], you stupid”. Her mother then came back into the bathroom and slapped Uncle S[...] on the head because he was not supposed to be in the bathroom when she was taking a bath. She told her mother what Uncle S[...] did but she does not know what her mother said.

[143] CJR said that she knows what a secret is and that no one asked her to keep a secret. She said that she knows what drugs are and that you smoke it like a pipe, like cigarettes, or drink it like medicine. CJR described the pipe was made out of glass and that Uncle S[...] and her mother smoked the pipe.

[144] CJR said that she knows that they buy the drugs from the drug shop. She said that no one touched her whilst at the shop and Uncle S[...] was the only person who touched her flower. She said that CR would cry when visiting her mother because Uncle S[...] would hit her with his hand. Her mother would be in the bathroom when Uncle S[...] smacked CR outside or hit JR.

[145] CJR said that she knows Aunty Karen and that she told Aunty Karen that Uncle S[...] touched her flower. She said that her mother looks after them but that she does not like Uncle S[...] at all.

[146] No cross-examination on behalf of accused 1.

[147] No cross-examination on behalf of accused 2.

[148] **EMEFA ABRA APATU** (Dr. Apatu”) testified under oath that she obtained the degree MBChB from the University of Pretoria, in 2005. She also obtained a diploma in Forensic Medicine from the College of Forensic Medicine of South Africa and a fellowship from the College of Forensic Pathologists, in 2016.

She obtained her Masters of Medicine in Forensics from the University of Pretoria, in 2022.

[149] She started her career in pathology in 2011 until present and has conducted more than 2000 post mortem examinations. It is not in dispute that she conducted a post-mortem examination on Body bearing number DR 1356/2022 and is attached to Forensic Pathology, Germiston.

[150] Dr. Apatu confirmed the photos depicted in Exhibit "H", the skeletal report marked Exhibit "E", and the Histology report, as correct.

[151] She commenced to read the content of the report into the record as from page 4, under the heading "General". She proceeded to deal with each external injury as depicted in numeric order, as from number 1 to 49:

[a] The reddish bruise was caused by damage to the soft tissue, causing the blood to leak into the tissue. As the skin on the scalp is relatively thin, not a great amount of force was needed to cause the bruise. The injury, as depicted on the skeletal drawing, is visible on photo "H2". The bruise was a day or so old and surrounded the wound. It is possible that the wound was self-inflicted, if the child had struck herself in that region. Dr. Apatu could not say the possible causes of the wound.

[b] This wound is more recent, within the last few hours prior to death and force had to be applied regularly over the surface. Something could have impacted against her, leaving an abrasion, which is layers of skin that is rubbed off.

[c] The wound depicts as something rubbing over that region or the child being rubbed against something, causing a cluster of injuries over the nose area. These abrasions were recent, a few hours to a day prior death. The abrasions were visible whilst the deceased was alive and there is no indication that this abrasion was treated with anything.

[d] This wound was reddish-brown in colour, showing how fresh or recent the injury was sustained, ±hours to a day, before death. A friction force around the mouth caused this injury. This wound was visible whilst the deceased was alive and it does not appear that any treatment was

applied to the wound. No injury was detected inside the mouth. The object that caused the injury, surrounded the mouth.

- [e] This injury is visible on photo "H13". It is a recent abrasion, hours to a day prior death. The wound is visible and was caused by a friction or rubbing force. The reddish-blue colour is caused by the damage to the blood vessels surrounding the abrasion. With any injury, some kind of force has to be applied. The difference in colour changes is due to the haemoglobin changes in the cells, which carries the oxygen. The wound was already healing, even if the surrounding abrasion was recent.
- [f] Photo "H13", the age of the bruise was recent, hours or a day before death. The bruise was caused by something that impacted on the cheek or the cheek impacting against something. Wounds 5 and 6 on same side of body, were possibly caused by multiple impacts and the size of object used. This wound was visible to the naked eye.
- [g] Photo "H21". The colour change to green shows the pigment breaking down, "biliverdin". This is an older stage or further stage of healing, age of wound 1 to 2 days prior death. It is possible that wounds 5, 6 and 7 occurred on the same instance and it could be multiple impacts. The wound was visible to the naked eye.
- [h] The abrasion was surrounded by the bruise and any item with enough force to leave an abrasion, could also have left the surrounding bruise. Wound is visible on photo "H11" and wound age 1 to 2 days prior death. Wound was visible to the naked eye but it did not bleed. Haemoglobin loses oxygen causing the blue colour. Healing has already started.
- [i] The wound is visible on photo "H23" and is recent, 1 to 2 days prior death, it was caused by an object that caused friction or compression force. Wound maybe not visible because of hair.
- [j] The wound was recent, 1 to 2 days' prior death. The wound is visible on photo "H23" and the purple-red colour is indicative of the breakdown of haemoglobin.
- [k] The wound is visible on photo "H21" and age of wound is 1 to 2 days prior death.
- [l] The wound is visible on photo "H21" caused by an object causing friction or compression force.

- [m] The wound is caused by any object causing friction or compressive force, thus a rubbing or a pressing of the skin. This wound can include falling, looking at where wound is situated. The wound did not bleed and was 1 to 2 old, prior death. Photo "H23" depicting wound placements at 9,10,11,12 and 13 at the back of the head, can be due to head being struck multiple times; the impact could have happened during the same incident.
- [n] Photo "H26" shows the abrasion and it was caused when the neck brushed against an object or an object brushed against the neck. The wound is 1 to 2 days old and would be visible if the neck is stretched.
- [o] The wound is visible on photo "H14" and the bruise was caused hours or a day prior death. Something impacted or struck against the arm.
- [p] The wound is partially visible on photo "H14" and the age of wound is recent hours to a day prior death. Multiple bruises, more than 3, are visible.
- [q] The wound is visible on photo "H5" and multiple bruises, more than 3. Age of wound hours to 1-day prior death. Multiple impacts by some object.
- [r] The wound is visible on photo "H5", multiple bruises, caused when struck by something or against something. Age of wound is hours to a day prior death.
- [s] The wounds depicted on photo "H5" are recent, hours to 1 day before death. Caused by force being applied over multiple areas, being struck by something. The different placement of injuries at 16, 17, 18 and 19 is consistent with being struck by something or against something, multiple times. Depending how the child fell (or landed), it is possible that an impact or fall caused some of the injuries but not all of them. These bruises were visible to the naked eye.
- [t] These bruises were recent, hours to 1 day prior death. The bruises are visible on photo "H5", caused by being struck with or against something. The wound is visible if that part of body is left uncovered.
- [u] Wound is visible on photo "H5" and the lesion is caused to the skin or pathology of skin, area of skin appearing not to be part of the normal skin colour. Possibly caused by an abrasion, which is a rubbing force.

- [v] Wound already started to heal, caused by any impact or force applied to the body. Age of wound is 1 to 2 days before death occurred. Wounds 20, 21, 22 are multiple impacts, possibly sustained in same incident.
- [w] Wound is visible on photo "H4" depicting multiple bruises, 1 to 2 days prior death.
- [x] Wound depicted on photo "H27" 1 to 2 days prior death. Appears to be scratch marks caused by rubbing over the skin in a superficial or glancing manner.
- [y] Wound visible on photo "H27". Scratch marks, something going over the skin in a superficial manner like a rubbing force. Age of wound is 1 to 2 days prior death and the wound was visible to the naked eye. Dr Apatu conceded that strangulation is a possibility in respect of wounds 14, 24 and 25 because of the scratch marks on the neck, but it could also be caused by nails. It could not refer to choke marks as choking refers to an injury to the airways, therefore something inside the mouth. Therefore, one speaks of throttling where manual strangulation is applied. One can expect bruises with throttling and the scratches imply that the victim could have used her nails to try and get the thing from her neck. According to Dr. Apatu the wounds at numbers 14, 24 and 25 are not consistent with a four (4) year old strangling the deceased, 25 days prior to death.
- [z] This wound consists of multiple bruising and some of the bruises are visible on photo "H8". The age of these bruises are a few hours to 1 day prior death. As with the other bruises mentioned prior, it could also have been caused by being gripped. These bruises were caused by multiple impacts and were visible to the eye.
- [aa] This wound is over the wrist and in the process of healing, as it is not a fresh bruise. Age of wound is a day or two prior death. This wound is depicted on photo "H14" and the oval shape of the wound was caused by an object similar in shape or form. If there is evidence that this wound was caused by a smoke pipe (crystal meth), then it will depend on the manner, the pipe was applied to the wrist. Dr Apatu said that she is not familiar with a vape pipe and can therefore not comment in that regard.

- [bb] This wound is visible on photo "H15" and the reddish colour implies that it was a few hours to a day old, prior death. Three bruises suggest multiple impacts involved and these bruises were visible to the naked eye.
- [cc] This wound is visible on photo "H15" and it was partially healed, similar as with wound 27. The age of the wound is a day prior death and this wound was visible.
- [dd] This wound is an abrasion, caused by a friction force or pressure, with a pattern abrasion giving an idea of the type of object used. This wound is recent, 1 to 2 days prior death and it was visible.
- [ee] This abrasion wound was caused by something running over the heel or the foot dragging over something with a rough surface. Age of wound is 1 to 2 days prior death. Wound visible if no shoe is worn.
- [ff] This abrasion wound is 1 to 2 days old, prior death. Was caused by the foot rubbing against something or something rubbing against the foot. Wounds 30, 31 and 32 could have been sustained more or less at the same time. Placement of wounds, indicative of more than one application of force. Wearing new shoes could possibly have caused the wounds but not number 30, because of where it was situated.
- [gg] This wound is visible on photo "H7" and this was a recent abrasion, 1 to 2 days before death. Caused by the elbow hitting something or something hitting against the elbow. The wound was visible.
- [hh] This wound is visible on photo "H7" and is recent, 1 to 2 days prior death. Caused by something striking that part of the arm or the arm striking against something. Looking at the placement of wounds 33 and 34, these wounds were caused by different impacts. This wound was visible.
- [ii] This wound is visible on photo "H7" and the bruise is recent, hours to 1 day prior death. It was caused by something striking the arm or the arm striking against something or being grabbed.
- [jj] This wound had multiple bruising caused by being struck with something or gripped in that area. The bruises were visible hours to a day prior death.

- [kk] Some of these wounds are visible on photo "H4", due to the underwear obscuring it. Multiple bruises are recent, hours to a day prior death. Caused by impact to that area or being gripped in that area.
- [ll] This wound is visible on photo "H5" and "H6". Age of wound is recent, hours to 1 day prior death. Caused by multiple impacts or being gripped in that area. The bruises were visible.
- [mm] This wound is visible on photos "H6" and "H5". It is three or more bruises, caused by multiple impacts or being gripped in that area. Age is hours to a day prior death. Visible unless clothed.
- [nn] This wound is partially visible on photo "H6" and age is hours to 1 day prior death. Bruise similarly caused, as like others that are visible, except if clothed.
- [oo] This wound was a needle puncture mark. It will suggest that a tip of a needle was inserted in that region. Age of wound is 1 day prior death.
- [pp] This wound appears partially on photo "H6". It depicts three or more bruises, hours to 1 day prior death. Caused by being gripped in that region or something hitting the foot in that region. Caused by multiple impacts.
- [qq] Wound visible on photo "H9". Age is hours or a day prior death. Caused by an impact against that region or being gripped in that region. Three or more bruises are caused by multiple impacts. If that part of body is exposed then the wound is visible.
- [rr] Three or more bruises over buttocks. Bruise is hours to a day old prior death. Caused by multiple impacts.
- [ss] This wound is visible on photo "H9". Wound is recent, hours to a day prior death. Caused by impact or grabbing. If that area is unclothed, the wound is visible.
- [tt] Wound is recent. Hours or a day prior death. Bruise is visible if unclothed.
- [uu] This wound is partially represented on photo "H10". Three or more abrasions, 1 day prior death. Caused by something scratching over the leg or the leg brushing against a rough surface. It can be caused by something, if it is attached to a plank, but the plank itself is a wide object

unless the wound was caused by the edges of the plank. Three or more abrasions caused by multiple impacts. Wound visible if not clothed.

[vv] One bruise, 2 to 3 days old, prior death. Caused by impact, something striking the foot or grip.

[ww] Wound visible on photo "H8". Three or more bruises, hours to a day old, prior death. Wound visible if left unclothed.

Head and Neck

Section V

[152] Dr. Apatu read section V into the record. She said that deep scalp haemorrhages refers to where the blood vessels are damaged. The scalp has five layers and when blood vessels are damaged, the blood leaks out of the damaged area. This bleeding can be caused by multiple impacts to the scalp. The placement of the haemorrhaging suggests different impacts to those different areas. As the bone is lying directly underneath the scalp, not a lot of impact or force is needed, as oppose to other areas of the body which is fat-protected. A moderate amount of force is needed, not a slight bump, either. The head was struck by a blunt object or the head struck against a blunt object.

[153] The circular shape of the haemorrhage could be indicative of the object that struck the head or indicative of the angle of the object. These multiple haemorrhaging's are not fatal, it's only indicative of the impacts to head. The fatal injury was the subarachnoid haemorrhaging.

Section VI

[154] The subarachnoid haemorrhage is due to damage to the vessels, travelling between the surface of the brain and the tough membrane around the brain. With vascular oedema, the vessel is full of blood, in this case the brain was swollen, caused by an injury.

Section VII

[155] This is a black eye in simple terms, in respect of both eyes. It is visible on photo "H2". It was caused by direct trauma like a blow with a fist or the blood from the haemorrhaging could track down, into the soft eye tissue.

[156] Dr Apatu read the conclusion on exhibit "V" into the record:

- [a] This can be caused by raised pressure inside the head, caused by blunt force injury.
- [b] This was fresh bleeding between the nerve and the surroundings, attributed to an increased pressure inside the skull or in the case where a child is shaken, it can cause pressure in the head cavity or where CPR was performed, these types of haemorrhaging can thus occur. The deep scalp injuries were caused by blunt force trauma.
- [c] Healed inflammation of the muscle.
- [d] Chronic conjunctivitis. The inflammation was not recent to that areas.

Section VIII

[157] In the mouth, tongue and pharynx, no injury.

Section IX

[158] An organ of the body is removed. There was no evidence of pressure applied to the neck. Strangulation does not seem a likelihood. The scratch marks around neck could have been caused by fingernails, if a soft material like a scarf was used.

Chest

Section XI

[159] Haemolytic staining is a process or feature of decomposition.

Section XII

[160] No clots in lungs detected.

Histology Report: Exhibit "G"

Lungs

[161] A small amount of fluid was found. Dr Apatu conceded that it is possible that when CPR was administered and water was expelled through the mouth.

Genital organs

[162] No injuries found externally or internally and the hymen did not appear to be ruptured. Dr Apatu said that she is not an expert in the field and therefore cannot say whether the genitalia as on photo "H18", is normal or not.

Brain

[163] There was bleeding into the cortex. This is in keeping with blunt force impact to the head. The intraparenchymal haemorrhage in the scalp appeared to be relatively fresh. The deceased died quickly after the injury was sustained, not necessarily immediately, but also not after a prolonged time. Immediately could denote within minutes to 24 hours after the injury was sustained.

[164] Consistent with blunt force head injury denotes that the head was struck causing injury, which led to death, but Dr Apatu cannot say how many impacts. She does not think that a fall from the stairs as per M5 could have caused the head injury because the steps does not appear to be steep enough to cause such severe injury.

[165] The injuries to the bum can be indicative of being beaten or gripped and the injury to mouth could possibly have been caused by a Crystal Meth pipe. As death was not immediate, the deceased could have displayed signs of altered level of consciousness, irritableness, lethargy or loss of consciousness. She intimated that the child's life could have been saved, if medical treatment was sourced earlier or sooner.

[166] Dr. Apatu testified that the injuries sustained by the deceased as per the Post Mortem report are not normal because a 2-year-old child, even if they are not fully co-ordinated because of their muscles still developing, are not expected

to sustain bruises to this extent. This is suggestive of non-accidental injuries, sustained by impact.

[167] During cross-examination on behalf of accused 1, Dr Apatu said that it is difficult to quantify the force needed to sustain the head injuries. In that period of 24 hours, as the child did not die immediately, the swelling of the brain would lead to physiological disturbances. The brain stem is irritated, which impacts on the vital functions and if the brain swells or expands beyond what is normal, it directly impacts other body functions.

[168] During cross-examination of accused 2, Dr Apatu said that CPR refers to both breathing for the victim and compression of the heart. Giving mouth to mouth is giving the victim artificial breaths, which cannot cause death, to her knowledge.

[169] **CAPTAIN KARIN BOTHA** (“Captain Botha”) testified under oath that she is a captain with the SAPS, stationed at FCS, based at Germiston, with 9 years’ experience. She is a registered social worker and obtained her Masters in Social work in 2011. She confirms that her *Curriculum Vitae* appears as from page 3 on Exhibit “T”. She was tasked to conduct a forensic assessment in this matter. Neither of the accused were known to her prior nor was she involved in the investigations in this matter. She assessed both JR and CJR and the background to the matter was not known at the time of conducting the interviews. Captain Botha makes use of the Comprehensive Model and NICHD method as per page 5, of Exhibit “T”.

[170] Captain Botha had 6 sessions each with the children and CJR made a disclosure during the fourth session. She said that disclosure can be accidental or on purpose and in the case of CJR, she made an accidental disclosure. She said that CJR did not have deliberate intent to disclose the sexual abuse. She said that when children disclose, various aspects play a role, such as:

[a] Relationship to perpetrator;

[b] Were any threats made;

- [c] Any outside influences;
- [d] Support from non-offender parent;
- [e] Any form of intimidation;
- [f] What will the appraisal be after disclosure; and
- [g] Process of grooming.

[171] Captain Botha said that the disclosure by CJR was unexpected when she said that “men have secrets with panties”. She then made the statement that “men can take off children’s panties”. When Captain Botha explored further, CJR said that Uncle S[...] took down her panty and did ugly things to her flower. She said that Uncle S[...] has an ugly secret with her and that she will never get used to him. CJR also disclosed that other people touched her flower.

[172] When informed that CJR did not testify about other people touching her flower, Captain Botha said that disclosure can be difficult for children because the supportive parent has a protective roll to play and when abuse happens, the child will try and protect the significant parent. CJR further disclosed to Captain Botha that her mother knows that other people touched her flower but that she did nothing.

[173] Captain Botha said that it often happens that a child will not testify about the disclosure made, but that one must look at the loss of the relationship (mother-child) and any threats made.

[174] With purposeful disclosure, the child will, with deliberate intent, tell the significant parent about the sexual abuse. With that type of disclosure, there is a trust relationship with the significant parent.

[175] JR on the other hand, from the get-go, wanted to disclose throughout the process. Captain Botha said that the Court should not make a negative finding in respect of CJR not having fully disclosed. She said that new environments, the cognitive stages of development are all factors to be considered and not testifying in court does not mean that the disclosure was not a true reflection of what transpired.

[176] During cross-examination on behalf of accused 1, Captain Botha concedes that CJR is more mature now than at the time of the disclosure, which was 20 July 2022. Captain Botha however qualified her response, saying that trauma can suppress these events (sexual abuse). She said that when trauma is suppressed then one does not have to deal with it but it does not mean that her initial statement (disclosure) was not true. Captain Botha said that despite sitting with an intermediary, to CJR, it is a new face and the environment she has to testify under, is not the same as when she made the disclosure after having built rapport (trust), which she (Captain Botha) has done with CJR.

[177] That concluded the evidence for the state.

[178] The state conceded a discharge in terms of section 174 of the CPA, in that no evidence was led with regards to counts 1 and 2, in respect of both accused.

[179] The application for a discharge of accused 1 and 2 in respect of counts 1 and 2 was granted.

[180] This Court is mindful that it is trite that “no evidence” does not mean that there is literally no evidence, but rather that there is a lack of evidence on which a reasonable court, acting carefully, would convict the accused.¹³ Whether or not a discharge should be granted at this stage is a decision that falls in the ambit of the trial court’s discretion. This discretionary power is one that must be, self-evidently, judicially exercised.¹⁴

[181] If, in the opinion of the trial court, there is evidence upon which the accused might reasonably be convicted, its duty is straightforward and the accused may not be discharged and the trial must continue to its end.

[182] The state’s opposition to the application for discharge in respect of the remainder of the counts are premised on the following:

¹³ *S v Lubaxa* 2001 (2) SACR 703 (SCA).

¹⁴ *S v Dewani* [2014] ZAWCHC 188 at para 8.

- [a] The evidence of the complainants stands unchallenged.
- [b] Accused 1 had a legal duty to act.
- [c] The failure on the part of accused 1 to report and protect the complainants, constitutes a common purpose.
- [d] In respect of accused 2, the slightest form of penetration, will suffice.

[183] In order for a court to arrive at a decision whether or not the state adduced evidence upon which a reasonable court may convict, it must have regard to the cogency of the evidence adduced.¹⁵ It must be noted that relevant evidence can only be ignored if it is of such a poor quality that no reasonable person could possibly accept it.

[184] Evidently, a person ought not to be prosecuted in the absence of a minimum of evidence upon which he might be convicted, merely in the expectation that at some stage he might incriminate himself.¹⁶ “It ought to follow that if a prosecution is not to be commenced without that minimum of evidence, so too should it cease when the evidence finally falls below that threshold.”¹⁷

[185] Indeed, the failure to report a crime, does not per se constitute an offence, unless as correctly argued by the state, the law confers such a legal duty upon you.

[186] With reference to the case of *Nooredien en Andere*, it is the considered view of this Court that the court does not look at the failure to report the offence/s in isolation, but also the surrounding circumstances of the conduct of accused 1, which to my mind, constitutes an association with the crime.

¹⁵ *S v Mpetha* 1983 (1) PH H99 (CPD) at page 265 “Before credibility can play a role at all it is a very high degree of untrustworthiness that has to be shown”.

¹⁶ That is recognised by the common law principle that there should be ‘reasonable and probable’ cause to believe that the accused is guilty of an offence before a prosecution is initiated (*Beckenstrater v Rottcher and Theunissen* 1955 (1) SA 129 (A) at 135C-E), and the constitutional protection afforded to dignity and personal freedom (s 10 and s 12) seems to reinforce it.

¹⁷ *Lubaxa*, n 13 above at para 19.

[187] Further, with regards to the unchallenged evidence of both complainants, with reference to the case of *Boesak*,¹⁸ it concisely summarises the view of this court, in this regard:

“...[I]t is clear law that a cross-examiner should put his defence on each and every aspect which he wishes to place in issue, explicitly and unambiguously, to the witness implicating his client. A criminal trial is not a game of catch-as-catch-can, nor should it be turned into a forensic ambush.

.... The institution of cross-examination not only constitutes a right, it also imposes certain obligations. As a general rule it is essential, when it is intended to suggest that a witness is not speaking the truth on a particular point, to direct the witness's attention to the fact by questions put in cross examination showing that the imputation is intended to be made and to afford the witness an opportunity, while still in the witness box, of giving any explanation open to the witness and of defending his or her character, if a point in dispute is left unchallenged in cross examination, the party calling the witness is entitled to assume that the unchallenged witness's testimony is accepted as correct”.

[188] The Constitutional Court¹⁹ also reaffirmed that the right to remain silent does not mean that there are no consequences attached to an election to remain silent in the face of evidence calling for an answer. The court may be entitled to conclude that the evidence is sufficient to prove guilt beyond a reasonable doubt.

Ruling

[189] It is the view of this Court that a *prima facie* case was made out against both accused, regarding the remainder of the charges, in that there is sufficient evidence that calls for an answer.

[190] Section 174²⁰ application in respect of the remainder of the charges is refused.

¹⁸ 2000 (1) SACR 633 (SCA) at para 50-1.

¹⁹ *Boesak v The State* 2001 (1) SA 912.

²⁰ CPA 51 of 1977.

[191] R[...] B[...] (“Accused 1”) testified under oath that she is aged 23 and accused 2 was her boyfriend at the time of CR’s death, on 11 May 2022. They have been in a relationship for almost a year and they resided together at [...] street, Klopper Park.

[192] Accused 1 confirms that she is the biological mother of JR, CJR and CR. She also confirms that when CJR visited them over weekends, accused 2 would have contact with her and JR, who at that time, resided with them. On 18 April 2022, she took JR to her sister’s because she was tired of the abuse. If accused 2 arrived home from work and JR’s toys were lying around then he would fight with JR. Accused 2 would also fight with JR if he did not want to sleep or shower, with accused 2.

[193] Accused 2 would scream at JR, using vulgar language and sometimes hit him with different objects like a wooden plank or fibreglass pipes. Accused 1 would try to intervene but accused 2 would tell her that she does not know how to discipline her children. Accused 1 has seen JR being hit by accused 2 at least four (4) times. **She did not report the assaults because she was scared and could not contact anyone because her phone was cloned to that of accused 2.** After CR’s death, accused 1 did make a report to the Germiston Children’s Court but she cannot recall when.

[194] Accused 1 said that she has never seen anyone using a grinder to cut JR on the head. She has not assaulted JR with a wooden plank but she saw accused 2 doing that and when she enquired why, he told her that she did know how to discipline her children. Accused 1 said that she did not assault JR with a fist, neither did she see anyone else doing that. She has also not seen JR being forced to smoke a drug pipe or being burnt with it.

[195] With regards to CJR, accused 1 said that she did not see anyone penetrate CJR’s vagina. Accused 1 cannot remember being told by CJR that her flower was touched. She said that CJR stayed with her grandparents as she did so from a young age.

- [196] When asked about the 49 injuries as testified to by the pathologist, accused 1 said that it was caused by accused 2. She said that she specifically recalls the injury to CR's mouth. Whenever CR cried for her, accused 2 would hit CR in the mouth. She also recalls the day of CR's death, accused 2 took her to the bath and she fell. There are no other injuries that accused 1 can recall.
- [197] On 11 May 2022, she woke up that morning. CR also woke up and came to her. Accused 2 was still asleep on the couch in the sitting room. CR cried, saying that she is hungry. Accused 1 still had some chicken in the room that she wanted to feed CR but she could not chew, due to the injury to her mouth. She went to see if there is still Mgevu and milk but CR kept crying because she wanted to be picked up.
- [198] By then accused 2 woke up and wanted to know why CR was crying and why accused 1 was not taking care of her. Accused 1 told accused 2 that it is not her fault that CR could not eat because he is the one who kept hitting her on the mouth. Accused 2 got up from the couch and picked CR up. Accused 1 asked for the child but accused 2 said that she does not know how to look after CR. Accused 2 insisted that he will make porridge on the fire, outside. He took CR outside with him and refused for her to come to accused 1.
- [199] Accused 1 was seated on the stairs outside, whilst CR kept on crying because she was scared to be with accused 2. She asked him to give CR to her whilst he made the fire, but he refused and told her to go and clean the house. When the porridge was cooked, they went inside the house and he put CR on top of the kitchen cupboard. When accused 1 tried to pick her up, accused 2 told her to leave the child alone. He poured the porridge and milk into a bottle for CR to drink from it. They went to sit in the bedroom and CR wanted to go and pee. She asked accused 1 to take her but accused 2 said that he will take her but before CR reached the toilet, she wet herself. Accused 1 asked the neighbour via WhatsApp for hot water to bath CR and she waited for the neighbour who was at the shops.

[200] Before the neighbour could come with the hot water, accused 2 decided to bath CR in cold water despite knowing that accused 1 asked the neighbour to bring hot water. Accused 1 wanted to bath CR, but accused 2 did not let her. Accused 1 went to Simon in the kitchen and requested him to speak to accused 2, to give the child to her. Simon told her that it is her child and she must tell accused 2 to give the child to her.

[201] Whilst accused 1 was busy getting CR's clothes ready, accused 2 took CR to the bathroom and proceeded to bath her in cold water. Accused 1 went to the bathroom and asked him to leave CR alone, but he told her to get out. He started bathing her with the cold water and CR stood in the bath, shivering, whilst accused 2 kept pouring cold water over her. CR kept crying and accused 1 kept asking accused 2 to give her the child. He then pushed her from the bathroom and shut the door in her face. Accused 1 again went to ask Simon for help; that is when she heard CR falling in the bath.

[202] As Simon went to the bathroom, accused 2 came from the bathroom, holding CR, who was crying. Simon told him to give the child to accused 1 but accused 2 did not respond. Accused 2 went straight to the bedroom and accused 1 followed. He placed CR on the brown mat and when accused 1 asked him to give her the child to dry, he refused. Accused 1 went to fetch CR's underwear and a long trousers. CR was still lying in the towel on the mat. Accused 2 was drying CR and when he lifted her arms, accused 1 saw burn marks. When accused 1 enquired about it, accused 2 said that he does not know. He then continued to dry her and when he dried her toes, CR's body went stiff. Her body was strange and went blue. Accused 2 walked to the sitting room with CR then back to the bedroom. Simon told him to give CR to accused 1 as she will know what to do as the mother but accused 2 responded that he knows what to do because this is not the first time CR has done this.

[203] Accused 2 was back in the bedroom with CR and placed a blanket around her body because he said that she was cold. CR was not responding. Accused 2 refused to give the child to her and he placed CR over his shoulder, rubbing her back. Accused 2 placed CR on top of the couch and did mouth to mouth.

A little water came from her mouth but even then, did she did not respond. Accused 2 then took CR in the blankets and requested Brandon to drive with him and accompany him to the clinic.

[204] Accused 1 stayed behind with Simon and later that afternoon, Brandon called to say that CR did not make it. At the police station, detective Jordaan spoke with accused 2 for a long time and accused 2 said that he accidentally killed CR.

[205] Accused 1 said that it was a lie when the 2 witnesses said that she was only concerned about herself, doing her nails. She said that she does not know why their version is different to hers. Accused 1 said that a lady by the name of K[...] told her to mention in her statement that she was tied to a chair.

[206] Accused 1 said that on the day of the incident she had noticed the injuries to CR but that CR was with accused 2, the day prior the incident. Accused 1 said that accused 2 did not want CR to be in Klopper Park, because of the proximity of accused 1's family. Accused 1 said that she only saw CR the next morning, as they arrived home late. She said that CR cried about her mouth and foot being sore and when accused 1 enquired what happened to CR, accused 2 said that CR is a child and that she will get hurt when she plays. Accused 1 said that she noticed the injury to CR's forehead two days prior her death and she applied ointment to it.

[207] Accused 1 said that she did not do anything to hurt her children.

[208] During cross examination on behalf of accused 2, accused 1 conceded that K[...] told her to lie to the police and that she also lied to Constable Lesedi because she was confused, emotional and wanted to avoid being arrested. When asked why she did not mention using drugs on the day prior to CR's death, accused 1 responded that she only used drugs on 9 May and not 10 or 11 May. Accused 1 said that she did not give the children back to their grandparents because there was always a story from accused 2, like the car having problems or no money for petrol. When it was put that the picture

painted by Chanelle was that her children were neglected, accused 1 had no answer.

[209] **Accused 1 conceded that Janine met with her at least two times in the absence** of accused 2, and that she was president of the community police forum. Accused 1 conceded that she told Janine that none of her children were being threatened by accused 2 and confirmed that she said that if accused 2 wanted to assault her, she would “moer” him.

[210] Accused 1 further confirmed that she and CR were present when Simon and Brandon were fetched. She confirmed that their parents asked about the injury to CR’s mouth. Accused 1 said that on the day when CR was taken by Chanelle, she and accused 2 went to fetch his brother from Crystal Park. It was put to her that there is no evidence that accused 2 did not want to let go of the children and it is her drug use that was the cause of all this. Accused 1 had no response.

[211] During cross-examination by the state, accused 1 said that the birth of JR was only registered after the death of CR because she and B[...] (father of the children) had ups and downs because of their drug use. She used Cat²¹ and Crystal-Meth.²² Cat was a drug you sniff through the nose and Crystal-Meth, which looked like bath salts, can be sniffed, inject or smoked. Accused 1 said that she used a glass pipe with a ball at the end to smoke Crystal-Meth. Accused 1 said that she continued to use Crystal-Meth after the death of CR.

[212] Accused 2 would wrap a zol and she would take a few puffs. He also smoked Crystal-Meth but she has not seen him inject himself with it. Accused 1 said that they never used drugs in front of the children. When asked why CJR’s evidence in this regard was never challenged, accused 1 said that she does not have an answer. When asked how CJR knew that accused 1 smoked drugs using a lighter to light it and then smoke it from the hole (opening), if the accused never used drugs in her presence, accused 1 said that there was one

²¹ Methcathinone.

²² Crystal Methamphetamine.

time that they walked in on them but that they would not smoke in front of the children. When asked how possible it was for CJR as a 6-year-old to perfectly describe how to use a pipe, from one incident. Accused 1 maintained that CJR only saw them once. With regards to JR, accused 1 said that she only drank and smoke cigarettes in his presence. It was put to accused 1 that it is strange that JR, as a 4-year-old, would know how to roll a zol. Accused 1 said that JR did not see that from her. It was further put to accused 1 that Simon, as a self-confessed drug user, said that on regular occasions, JR was with them when they moved around to buy and smoke at drug houses. Accused 1 conceded that JR was with but he was not present when they smoked drugs. Accused 1 said that they only went to the house of Vishalin, where they smoked drugs.

[213] When it was put to accused 1 that CJR said that she (accused 1) observed accused 2 touching her flower. Accused 1 said that she was not aware of that because it would be impossible for her to look through the bathroom window because they stayed in a container. She said that CJR's evidence was not challenged because she did not want to traumatise her any further. Accused 1 said that CJR only told her that her flower is burning. This she said a few months prior to the death of CR and the girls knew that accused 2 was not allowed in the bathroom with them. Accused 1 said that there was an incident when accused 2 was in the bathroom with CJR, when she (accused 1) was brushing her teeth. On another occasion, accused 2 was in the bathroom whilst CJR was in the shower. Accused 1 then smacked him against the head, asking him what is he doing there because he was not supposed to be in the bathroom when CJR was in the shower.

[214] When asked what happened to CJR over the Easter weekend when she visited them. Accused 1 said that she can recall C[...] sending her a message to inform that she would not be sending CJR again because CJR is difficult and at school, they complained about her behaviour. When asked what could have contributed towards this behaviour change of CJR, accused 1 said that she does not know. Accused 1 said that she was not with when accused 2 took CJR home at 7h30 but only dropped her off after 22h00. Accused 1 said

that when she enquired from accused 2 what happened, he said that he had car trouble.

[215] Accused 1 said that she gave J[...] to her sister on 19 April 2022 whilst CR was with Diana. They did not plan to leave CR there without food, nappies or clothes. When asked what happened to CR's face on Exhibit 4, accused 1 said that she does not know. She said that they were at the house in Walkerville and she was busy washing the dishes. She then heard CR crying outside and when she enquired what happened, accused 2 said that CR fell from the trampoline. This happened between the 12 to 16 April 2022. When asked why she did not return CR to R[...] and C[...], accused 1 said she does not know. Accused 1 said that accused 2 started abusing CR around the time accused 1 started to pick up problems at work and was later suspended. CR was used to being with accused 1 during the day and according to her, accused 2 became jealous and complained that accused 1 did not have time for him.

[216] When the abuse started in the beginning, accused 2 would hit CR on her bum and upper legs with his hands or a slipper. He would also hit CR on the mouth with an open hand. When accused 1 wanted to give CR back to her grandparents, accused 2 refused because of the injury to her mouth.

[217] Accused 1 confirmed that she had access to a phone but she never called 10111 and she does not know why she did not report accused 2. When asked why she is shifting everything onto accused 2, accused 1 said that she did not report the abuse to the police but she did ask for help from Vishalin.

[218] When asked why, when knowing of the injuries to CR's body, did she lie to Janine when she said that accused 2 was a caring and loving father who does not even raise his voice at the children. Further, that it is evident that she (accused 1) was not looking for protection for her children. Accused 1 had nothing to say.

[219] When asked about JR's blue eye on Exhibit 1, accused 1 said that she was busy outside with washing, when JR said a piece of wood fell on his eye. When it was put to accused 1 that Simon testified that he would see blue marks and bruises on JR's body and when he enquired, he was told that accused 2 and JR were boxing. Accused 1 conceded but said that she took JR away when she had the chance, it was however too late with CR.

[220] Accused 1 said that she took the photo of the blue marks to JR's bum as per Exhibit 5 and that JR was scared to tell her what happened however accused 2 told her that JR got injured in the yard. She said that accused 2 started injuring JR behind her back but she did not report this to anyone because she was scared that if accused 2 was to find out, he would take it out on the child.

[221] Accused 1 said that accused 2 never assaulted her. She said that JR told her that he was burnt on the mouth with hot water, but she did not believe him. When she asked accused 2, he would say that JR is a boy and he plays rough. She did not believe accused 2 either and she told this to Rudolf (Seun), Cecelia and Vishalin. Accused 1 conceded that this version was never put to Rudolf. Accused 1 conceded that she had the ability to contact people and does not have a reason why she did not do so. Accused 1 said that she once saw accused 2 hit JR with a plank, and agreed that these injuries are extreme. She does not know why she never alerted the police.

[222] Accused 1 said that she cannot remember JR telling her that he was burned with a crystal meth pipe. She does not know what caused the injury as depicted on Exhibit 3 (photo 4). When she enquired, JR told her that he fell in the workshop, whilst accused 2 was busy packing his tools. Accused 1 said that she did not go to Bedfordview Police Station when her sister opened a criminal case because she accompanied accused 2, who was trying to find his brother.

[223] When it was put to accused 1 that the reason she never took CR home was due to the severity of her injuries, accused 1 conceded. Accused 1 said that the injury to CR's mouth was caused when she fell from the trampoline. When

asked what caused the injury to CR's neck, accused 1 initially said that she did not see it but later changed her version when she was confronted with her statement, Exhibit N, where she said that JR grabbed his sister by the neck. Accused 1 conceded that despite JR being a very busy child, he did not deserve to be punished in that manner. Accused 1 said that despite her mentioning on page 10 of her statement that she gave JJR a hiding, she never hit him.

[224] Further, that the reason why she did not take CR home or allow CR to make a video call with C[...] was also due to the extent of her injuries and she knew that C[...] would report her to the police. Accused 1 said that she has no answer and she does not know why she did not return CR, despite being begged to do so by R[...] and C[...].

[225] Accused 1 said that she is speculating that CR fell in the bath because she heard a loud bang, and that accused 2 was the only person in the bathroom with CR. When asked why she did not deem it necessary to get CR to a hospital when she saw that CR could not eat and was crying in pain. Accused 1 said that she had medication.

[226] Accused 1 said that on 11 May 2022, she noticed the prominent injury to CR's mouth when she woke up that morning. Accused 1 said that accused 2 would slap CR on the mouth with the back of his hand to the extent that it would bleed. She however does not know what caused the swelling to CR's mouth but conceded that she had a duty to protect CR and could not say why she failed to alert the police.

[227] Accused 1 conceded that she told Janine and other on 12 May 2022, **that accused 2 burnt CR with a pipe but she did not see this**. Accused 1 conceded that some of the injuries as depicted by the PM report were visible but denies the version of Simon and Brandon that she (accused 1) had a no care attitude on the day of CR's death. Accused 1 does not know what caused the multiple injuries to the back of CR's head neither does she know what caused the needle puncture between CR's toes.

- [228] Accused 1 conceded that she made no effort to go and boil water on the fire, when she heard CR crying, whilst being bathed in cold water. When asked why she never informed officer Jordaan that accused 2 was violent towards CR and abused JR, accused 1 said that she does not know.
- [229] Accused 1 said that K[...] told her what to write in her statement, Exhibit S. When asked why she initially said that accused 2 never assaulted her, which is contradictory to her statement marked R1, in that accused 2 grabbed her by the neck and choked her so badly that she developed an asthma attack. Accused 1 said that it does not matter which version the Court chooses to believe.
- [230] When asked why she cannot remember where she was on 9 May, accused 1 said that she was on drugs that day but did not smoke in CR's presence, who was in her care. Accused 1 confirmed that despite accused 2 having kicked her in the ribs, she told Janine that accused 2 was the best father to the children. Accused 1 insisted that her version of events is true despite having no response when asked why she failed to mention that she saw accused 2 choking CR.
- [231] It was put to accused 1 that the reason why she (accused 1) did not dispute CR's evidence, is because she saw accused 2 hurting her (CJR's) flower, that she allowed accused 2 to rape CJR, using his finger. Accused 1 said that she was not aware of it.
- [232] Accused 1 was asked what changed when she allowed accused 2 to bath CR on the day she died, when she (accused 1) was so opposed to him being in the bathroom with the girls. Accused 1 said that accused 2 refused to give CR to her on that day. It was put to her that she in fact wanted nothing to do with CR on that day, as testified by Brandon and Simon.

- [233] Accused 1 does not know why it was never put to Brandon that the majority of injuries to CR's body were sustained whilst CR was in his company and that of accused 2.
- [234] Accused 1 said that accused 2 worked and she relied on him for her drug supply. She conceded that she used drugs over weekends when CJR, JR and CR were in her care and that she did not act like a mother.
- [235] Accused 1 conceded that she did not protect CR from the abuse or seek medical attention, knowing that CR was in pain.
- [236] **CORNELIUS STEFANUS VAN NIEKERK** ("accused 2") testified under oath that he started a romantic relationship with accused 1 on 13 June 2021. He has known her since she was in primary school as he was friends with her late uncle. He was employed as a mechanic and workshop assistant at Canterbury Transport. He and accused 1 initially stayed at his place of employment, where they did drugs together. They tried not doing drugs in front of the children but there were times when they would walk in on them.
- [237] Accused 2 said that he always agreed for the children to visit them and his relationship with the children was normal. Accused 2 conceded that JR had visible injuries and that he once gave JR a hiding when he broke a mirror, which belonged to his late mother. Accused 2 said that he had his own work stress and would hit JR with a plank on the left buttocks. Accused 2 denied using a grinder on any of the children.
- [238] Accused 2 conceded doing drugs on 11 May 2022, in the presence of Simon and Brandon. He said that accused 1 was not really taking care of CR and he never denied accused 1 access to CR on that day. Accused 2 said that he was called by accused 1 to take care of CR, who soiled herself.
- [239] He poured water into the tub, removed CR's clothes and placed her in the bath tub to rinse her off. The water was cold and CR was not standing still.

Accused 2 screamed at her to stand still when he left to fetch the towel. He then heard a sound like someone falling in the bathroom. A “doef” sound.

[240] CR came running from the bathroom and accused 2 screamed at her to go back. Accused 2 then wrapped her in the towel and took her to the bedroom. He placed her on the floor and CR started to make funny sounds, therefore he turned her around and smacked her on the buttocks, so she may inhale deeply.

[241] Accused 2 was screaming at accused 1 to look for help on Google because he thought that CR had swallowed water. He tried to warm CR's body by rubbing her but she kept making gurgling noises. Accused 2 did CPR and water came from her mouth.

[242] Accused 2 asked accused 1 to drive with him to the clinic but she refused. He then asked Brandon to accompany him but at the examination room, they were told that CR was late.

[243] Accused 2 said that on the night when he and Brandon were loading the furniture onto the trailer, CR, came under his feet and she fell on the stairs. He shouted her to go and sit still in the car. He did not see where she injured herself because it was already late at night.

[244] Accused 2 denied doing anything to CJR as accused 1 usually bathed the girls. He said that he and accused 1 had a routine of doing drugs from the morning when they woke up, even before they lit a cigarette, they would smoke Crystal Meth. Accused 2 denied being abusive towards the children and he cannot say who caused the injuries to the children.

[245] During cross-examination on behalf of accused 1, accused 2 said that he was not comfortable to bath CR on the day in question and conceded that he was irritated but not angry. Accused 2 said that he was disgusted to go and clean a child who soiled herself but he does not know why he did not tell accused 1 that it was not his duty.

- [246] Accused 2 conceded that accused 1 did not instruct him to hit JR with a plank and that he acted on his own because he was angry. He confirms that he saw the injuries to CR's body when he bathed her. When asked to explain how water ended up in CR's lungs, accused 2 said that he used a container to pour water over CR's head, and down her back, to get rid of the poo.
- [247] During cross-examination by the state, accused 2 said that he lost his job in mid-April 2022 because of his drug use. He and accused 1 used crystal-meth and dagga every day. Drugs gave him an energy boost and he did not sleep. Accused 2 cannot recall if drugs affected his memory but it did make him aggressive if he did not smoke. On the morning of 11 May 2022, he took drugs after 5h00 that morning and by 11h00, he craved drugs again. He functioned normal when he was on drugs because he was used to it.
- [248] Accused 2 said that he has no reason why the evidence of CJR was never challenged but said that the window was too high to see through. When asked what happened to JR's eye in Exhibit 1, accused 2 said that he cannot recall the day but he came home from work and as he stormed back out, he slammed the door. JR was lying on the couch and the shelve fell onto his eye. Accused 2 said that he did not inform his counsel of this version. Accused 2 does not have an answer as to why JR's version was never challenged. When asked why he told Simon that he boxed with JR, accused 2 said that he does not have an answer. He said that there was a time when they played rough and JR would jump on him when he was trying to lie down. He would then retaliate by elbowing JR. Accused 2 agreed that this was not normal.
- [249] Accused 2 said that he does not know how JR sustained the injury under his lip but conceded that JR's version was never challenged. He said that he did not keep his drug-pipe lying around and he does not know who caused the injuries to JR as depicted on Exhibit 3(2) and 3 (3). It was put to accused 2 that JR's version about being hit for melting his blocks was never challenged.

- [250] When asked what caused the injury as depicted on Exhibit 3(4), accused 2 said that one night when they arrived home, he threw a broom at the dogs, to chase them out but did not see JR behind him. The broom struck him on the head. He saw blood coming from the wound and he cleaned the wound and applied ointment. He does not know why the version of accused 1 who said that JR got hurt in the workshop, was never challenged.
- [251] When asked if breaking a mirror accidentally warrants a beating as depicted in Exhibit 5, accused 2 said "no". It was put to accused 2 that according to accused 1, he said that JR got hurt in the yard. Accused 2 conceded that the injury depicted abuse but said that accused 1 was present and he never prevented her from reporting the incident.
- [252] Accused 2 said that the only injuries he noticed on the body of the deceased on 11 May 2022, was an injury to her mouth and chest. He does not know how she sustained the injury to her mouth and denied the version of accused 1, who said that he caused it.
- [253] When asked why he said that the injury looked like a burn mark, when he told Simon and Brandon that CR fell from the stairs. Accused 2 responded that when the wound did not heal like a normal wound, he then realized that it was a burn mark.
- [254] It was put to accused 2 to that this reasoning does not make sense and that this burn mark was in fact caused by him using a Crystal Meth pipe. Accused 2 conceded that despite the wound to the mouth being quite excessive, he did not seek medical attention.
- [255] Accused 2 said that he cannot remember seeing any of the multiple injuries as depicted on Exhibit H when he gave the deceased a bath, except for bruises to her chest area. It was put to accused 2 that strangely, the diagram on Exhibit F depicts the entire body of the deceased being covered in bruises and abrasions, and the only portion that had no injuries was the chest area, contradicting his version. Accused 2 had no response.

[256] When accused 2 was asked why his version that the deceased fell from the stairs when she came under his feet was never put to either Brandon or Dr. Apathu. Accused 2 said that he does not have an answer. It was put to accused 2 that according to accused 1, he (accused 2) said that the deceased cannot be returned home until her wounds have healed and that he similarly said this to Simon. Accused 2 said that he cannot remember that.

[257] Accused 2 conceded the version of Brandon and Simon that the deceased was screaming, but according to him, it was because he poured her with cold water. When asked why he insisted on bathing the deceased with cold water, when she was clearly in distress. Accused 2 said that he does not have an answer. It was put to accused 2 that his evidence demonstrates that he is busy amending his version as he proceeds.

[258] Accused 2 denied that he caused the injuries to the deceased's body as per Exhibit F. He further denied that he caused the multiple blows to the deceased's head, or that he and accused 1 are responsible for the ultimate death of the deceased. Accused 2 does not know who caused the multiple injuries to the body of JR as depicted on the J88, except for the laceration to JR's head, which was caused when he (accused 2) threw the broom at the dogs.

[259] When it was put to accused 2 that the doctor said that JR was subjected to long-standing physical abuse, accused 2 had no answer. It was put to accused 2, that strikingly, both JR and CR were in his care and that of accused 1 when they sustained these multiple injuries. Accused 2 had nothing to say.

[260] That concluded the evidence for the defence.

[261] A careful conspectus of the evidence demonstrates that the following aspects of evidence are not in dispute:

- [a] CJR, JR and CR (deceased) were the biological minor children of accused 1.
- [b] Accused 1 and 2 were in a romantic relationship from June 2021 until 11 May 2022.
- [c] J[...] resided with both accused, until 19 April 2022, when accused 1 handed him to her sister, C[...].
- [d] Despite not being the biological father of the said minors, accused 2 had parental responsibilities and rights in respect of them.
- [e] Both accused used drugs during the period of their involvement and a glass drug pipe was used to smoke Crystal Meth, amongst others.
- [f] During the period June 2021 to April 2022, various witnesses reported having observed J[...] having multiple injuries, ranging from bruises on the eye, buttocks, upper thighs and back. Also, a cut above the eye and swollen eyes.
- [g] During March 2022, JR had heavily bruised buttocks, which was depicted in a photograph taken by accused 1 (Exhibit 5).
- [h] On 19 April 2022, accused 1 handed JR to her sister C[...], with multiple injuries as depicted in Exhibit 3, photos 2, 3 and 4.
- [i] On 20 April 2022, Dr. Rehman examined JR at Linksfield Hospital and found multiple injuries, which he correctly noted on the J88 medico-legal report. (Exhibit C). These injuries were in different stages of healing and found on multiple areas of the body of JR. Dr. Rehman concluded that this was consistent with long standing physical abuse.
- [j] From 19 to 20 April 2022, Chanelle was taking care of the deceased. She found the deceased at the home of Diana with no nappies, underwear or shoes. She took the deceased home where she cared for her. On the morning of 20 April 2022, she noticed that the deceased face had multiple bruises and that her lip was swollen. She took a photo of the injuries she observed on the deceased (Exhibit 4).
- [k] On Wednesday, 11 May 2022, accused 2 and Brandon arrived at the Wannenburg Clinic with the deceased wrapped in blankets. The deceased face was bluish in colour and she had no pulse. She was declared dead on arrival.

- [l] The body of the deceased was covered in multiple injuries. Externally she had in excess of 49 injuries. Internally, she had deep scalp haemorrhages with underlying intracranial haemorrhage, as depicted in the post mortem report.

Issues in Dispute In Respect Of:

[262] Counts 3 to 4

- [a] Whether CJR was raped and or sexually assaulted since June 2021 until April 2022; and
- [b] Whether accused 2 raped and or sexually assaulted her.
- [c] Whether accused 1 was aware that accused 2 raped and sexually assaulted C[...].
- [d] Whether accused 1 protected CJR from the rape and sexual assault.

[263] Counts 5 to 6

- [a] The circumstances under which JR sustained the multiple injuries as depicted on Exhibit C; Exhibit 1; Exhibit 2; Exhibit 3; photos 1; 2; 3; and 4; and Exhibit 5.
- [b] Who inflicted these injuries?
- [c] Whether these injuries on JR were as a result of abuse or deliberate neglect on the part of either or both the accused.
- [d] Whether accused 1 and/or accused 2 were aware of the assault and abuse of JR.
- [e] Whether accused 1 and/or accused 2 protected JR from the assault and abuse.

[264] Counts 7 to 8

- [a] The circumstances under which the deceased sustained the various injuries that resulted in her sustaining blunt force head injury which ultimately led to her death.
- [b] Who inflicted those injuries on the deceased?
- [c] Whether the fatal injuries were as a result of abuse or deliberate neglect on the part of either or both of the accused.

- [d] Whether accused 1 and/or accused 2 were aware of the assault and abuse of the deceased.
- [e] Whether accused 1 and/ or 2 protected the deceased from the assault and abuse.

Evaluation

[265] In *S v Shackell*²³ the court stated:

“...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.”

[266] In *State v Hadebe and Others*²⁴ the Court enunciated the correct approach for evaluating evidence with reference to *Moshephi and Others v R*²⁵ 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

²³ 2001 (2) SACR 185 (SCA) at para 30.

²⁴ 1998 (1) SACR 422 SCA at 426E-H.

²⁵ 1980 – 1984 LAC 57.

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.”

[267] 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. See *S v Jaffer*²⁶ 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 story, still less does it have to believe it in all its details. It is sufficient if the court thinks that there is a reasonable possibility that it might be substantially true.”

[268] Nelson Mandela said:

“There can be no keener revelation of a society’s soul than the way in which it treats its children.”

[269] Children are the most vulnerable members of society and is it our shared responsibility as parents, families, communities, courts and government to ensure that all children are safe from harm and grow up in nurturing environments.

[270] Children’s rights are entrenched in section 28 of the Bill of Rights in the Constitution of South Africa. When it comes to any matter affecting a child’s well-being, the Constitution states that the best interests of a child are of paramount importance.

[271] Every child has the right to:

- [a] a name and a nationality from birth;
- [b] family care or parental care;
- [c] basic nutrition, shelter, basic health care services and social services;
- [d] be protected from maltreatment, neglect, abuse or degradation;

²⁶ 1988 (2) SA 84 (C).

- [e] the right to human dignity (section 10);
- [f] the right to equal protection under the law (section 9(3));
- [g] the right to be free from all forms of violence from either public or private sources (section 12(1)(c));
- [h] the right not be treated or punished in a cruel, inhuman or degrading way (section 12(1)(e));
- [i] the right of children to be protected from maltreatment, neglect, abuse or degradation (section 28(1)(d));
- [j] the right to and the constitutional principle that a child's best interests are of paramount importance in every matter concerning the child (section 28(2)).

[272] Accused 2 intimated that his relationship with the children of accused 1 was normal. However, far from it and in stark contradiction thereto, the various exhibits depict graphic and shocking injuries, as sustained by the various children. It is difficult to imagine the suffering they had to endure. It is said that a picture is worth a thousand words, but for CJR, JR and CR, this outright violence came at the hands of the people they trusted most.

[273] Violence against children takes many forms and in some parts of the world, violent discipline is socially accepted and common. In the case of *Freedom of Religion South Africa v Minister of Justice and Constitutional Development and Others*,²⁷ the court examined section 12(1)(c) of the Constitution, which guarantees people's right to be free from all forms of violence from either public or private sources, and highlighted the fact that there was a history of widespread and institutionalised violence in South Africa, which section 12 of the Constitution aimed at reducing and ultimately eradicating. Turning to section 10 of the Constitution on the right to human dignity, that court found that there was a sense of shame that comes with the administration of chastisement, to whatever degree.

[274] Nevertheless, the most devastating types of violence are often hidden from public view and perpetrators go to great lengths to conceal their acts, leaving

²⁷ 2020 (1) SA 1 (CC).

children – especially those who lack the capacity to report or even understand their experience – vulnerable to further exposure and abuse.

[275] Accused 1 and 2 made no secret and were rather candid with this Court about their drug habits. They conceded openly that they used drugs together and despite the denial of accused 1, accused 2 acknowledged that there were times when the children would walk in on them doing drugs. Simon testified that when they visited the drug-houses, JR went with them most of the time and it was accused 1 who would direct them to these drug houses. Brandon made no secret of the feelings he harboured for accused 1, stating that he dislikes her because she uses drugs and does not look after her children. In fact, the image portrayed of accused 1 by Brandon, Simon, C[...], and R[...], is that of a self-absorbed person with a no-care attitude about the wellbeing of her children.

[276] Accused 1 was unemployed and she testified that she was dependant on accused 2 for her drug supply. The evidence shows that Accused 2 had lost his job because of his drug-use in mid-April 2022. Around this time, 19 April 2022, accused 1 gave JR to her sister because she grew tired of the abuse on JR but was too late concerning CR.

[277] Even on the morning of CR's death, accused 2 took drugs after 5h00 that morning and by 11h00, he craved drugs again. He said that they smoked drugs every day and if he did not smoke, it would make him aggressive.

[278] As stated above, the accused were clearly economical with the truth when they said that the children maybe one or twice walked in on them doing drugs. CJR could, with ease and clarity, describe how accused 1 and 2 bought drugs at a drug shop; that the Crystal-Meth pipe was made of glass and that you light the glass pipe like a cigarette and smoked it. Likewise, JR, in a rather casual manner explained that he was present when Uncle S[...] smoked a zol and that a zol is made from newspaper, inside which something is crushed, then you light it like a cigarette and smoke it.

[279] This vast knowledge on the part of CJR and JR was undoubtedly not gained from accidentally walking in on accused 1 and 2 doing drugs. According to JR, accused 2 had given him drugs to smoke and it was “yuck” and made him feel stupid. The only inference to be drawn, consistent with all the unchallenged and proved facts, is that the children were exposed to an environment of drug usage over a prolonged period of time.

[280] This Court is mindful that children should grow up in the care and under the responsibility of parents or caregivers in an atmosphere of affection and of moral and material security. It is now against this tragic background that this matter stands to be decided.

Applicable Law

[281] Jones L in the case of *S v Dyira*²⁸ stated that:

“In our law it is possible for an accused person to be convicted on the single evidence of a competent witness (s 208 of the Criminal Procedure Act 51 of 1977). The requirement in such a case is, as always, proof of guilt beyond a reasonable doubt, and, to assist the courts in determining whether the onus is discharged, they have developed a rule of practice that requires the evidence of a single witness to be approached with special caution (*R v Mokoena* 1956 (3) SA 81 (A) at 85,86). This means that the courts must be alive to the danger of relying on the evidence of only one witness, because it cannot be checked against other evidence. Similarly, the courts have developed a cautionary rule which is to be applied to the evidence of small children. (*R v Mandla* 1951 (3) SA 158 (A) at 162E-163E). The courts should be aware of the danger of accepting the evidence of a little child because of the potential unreliability or untrustworthiness, as a result of lack of judgment, immaturity, inexperience, imaginativeness, susceptibility to influence and suggestion, and the beguiling capacity of a child to convince itself of the truth of a statement which may not be true or entirely true, particularly where the allegation is of a sexual misconduct, which is normally beyond the experience of small children who cannot be expected to have an understanding of the physical, social and moral implications of sexual activity (*S v Viveiros* [2000] 2 All SA 86 (SCA) para 2). Here, more than

²⁸ 2010 (1) SACR 78 (ECG) at para 6.

one cautionary rule applies to the complainant as a witness. She is both a single witness and a child witness. In such a case the court must have proper regard to the danger of an uncritical acceptance of the evidence of both a single witness and a child witness (*Schmidt Law of Evidence* 4-7).”

[282] Furthermore, in *S v Jackson*,²⁹ the court held³⁰ that the cautionary rule in sexual assault cases is based on an irrational and outdated perception. It unjustly stereotypes complainants in sexual assault cases as particularly unreliable. It went on to say the following at 476E-G:

“In our system of law, the burden is on the State to prove the guilt of an accused beyond reasonable doubt – no more and no less. The evidence in a particular case may call for a cautionary approach, but that is a far cry from the application of a general cautionary rule.”

[283] In this regard Section 60 of SORMA provides that, “... a court may not treat the evidence of a complainant in criminal proceedings involving the alleged commission of a sexual offence pending before that court, with caution, on account of the nature of the offence.”

[284] In the present case, this Court is cautious and mindful that JR and CJR are both single, child-witnesses in relation to the respective counts. So too is this Court cognisant that once a judicial officer has anxiously scrutinised the evidence of a single witness, she should not be swayed by fanciful and unrealistic fears.

[285] This Court heeds what was held in *Modiga v The State*,³¹ at para 32:

“I am mindful of the salutary warning expressed in *S v Snyman* 1968 (2) SA 582 (A) at 585G that even when dealing with the evidence of a single witness, courts should never allow the exercise of caution to displace the exercise of common sense.”

Counts 3 to 4:

²⁹ [1998] ZASCA 13; 1998 (1) SACR 470 (SCA).

³⁰ At 476E-F.

³¹ [2015] ZASCA 94.

[286] This Court is mindful that “[r]ape is a topic that abounds with myths and misconceptions ... For many rape victims the process of investigation and prosecution is almost as traumatic as the rape itself.”³²

[287] The state argued that the evidence of CJR, as a single witness, in respect of these counts, was left unchallenged and no version was presented during the state’s case to gainsay it.

[288] It is common cause that when accused 1 and 2 started a relationship in June 2021, they moved in together at the workplace of accused 2. At that stage, JR was staying with them; CR, from the age of 9 months, was staying with her great-grandparents; and CJR was staying with her grandmother.

[289] Initially, accused 1 and 2 would regularly fetch CJR and CR to stay over, but that soon started to dwindle. CJR testified about an incident when she was naked inside the bathroom and accused 2 hurt her flower (vagina). By demonstrating how accused 2 hurt her flower, she pulled down the underwear of the AD³³ doll and inserted her finger inside the vagina, making fondling movements. Subsequently (a week later) she said that accused 2 touched her flower by placing his finger on top of it.

[290] The state argued that the evidence of CJR, as to what was done to her flower, was never disputed by either accused 1 or 2. Concerning the absence of injuries on CJR, the state submits that CJR was only examined on 29 June 2022 and that the conclusion of absence of genital injuries, does not exclude penetration.

[291] It is the contention of the state that what is noteworthy in this regard is the sensory elements, as described by CJR. The state argued that CJR was able to demonstrate the movements that led her to experience pain. Even though medically, the penetration was not sufficient to cause injury, as per the J88. The state argued that the slightest penetration into the genitalia of a person is

³² *Stephen Bryan de Beer v S* (case number 121/04) (delivered on 12 November 2004) (unreported judgment of the SCA) at para 18.

³³ Anatomically Detailed.

sufficient for the element of penetration to be proved. Penetration therefore, as the argument goes, need not be beyond a certain part or point of the genitalia.

[292] It is settled law that there is no onus on the accused to prove his innocence, and the question remains whether the state proved the offences charged beyond a reasonable doubt. Indeed, neither accused 1 or 2 proffered a version during cross-examination in challenging the allegations against them. In fact, to this extent, counsel for accused 2 submits that accused 2 **should** be convicted of sexual assault.

[293] It is standard practice for a party to put to each opposing witness so much of his or her own case or defence as concerns that witness. The purpose of cross-examination is to elicit from the opposing witness facts which are beneficial to the case of the cross-examiner and to put the opposing and contradictory version to the witness.³⁴

[294] There are, said Claasen J, three important reasons for putting such a defence to the State witnesses:³⁵ First, it would enable the court to see and hear the reaction of the witnesses when they were told that the accused, whom they had identified as the perpetrator, was in fact elsewhere and could not have committed the crime. Second, it puts the court on its guard on the question of identification and to ensure that the identificatory evidence is treated with the requisite caution. And third, it allows the prosecution an opportunity to investigate the facts for the purpose of its cross-examination of the accused.

[295] However so too is this Court mindful of the case of *S v Mavinini*,³⁶ where Cameron JA (as he then was) said that the requirement that a witness must be confronted with damaging imputations was not a formal or a technical one but rather, a precept of fairness. As such, it had to be applied with caution in criminal trials. If, despite the absence of a challenge, doubt arises about the

³⁴ See *S v Fortuin* 2008 (1) SACR 511 (C) at para 13.

³⁵ *S v Mafu and Others* 2008 (2) SACR 653 (W) at paras 12-3.

³⁶ 2009 (1) SACR 523 (SCA).

plausibility of incriminating evidence, the accused should benefit from that doubt.

[296] In evaluating the evidence of CJR, the Court is cognisant of the evidence of Captain Botha, which places the evidence of CJR in context.

[297] She testified that she conducted a forensic assessment with CJR and had six (6) sessions in total. She testified that on the fourth session, CJR made a disclosure which was accidental, meaning that the disclosure was not with deliberate intent. Captain Botha said that children, who accidentally disclose, might not have the intent to ever disclose the sexual abuse. She said that various aspects play a role such as: the child's relationship to the perpetrator; whether any threats were made; outside influences; support from the offender parent; any form of intimidation; what will the appraisal be after the disclosure; and the process of grooming etc.

[298] Captain Botha said that in the case of CJR, she (CJR) disclosed that "men have secrets with panties and they can take off children's panties". CJR then told Captain Botha that S[...] (accused 2) took off her panties and did ugly things with her flower. CJR disclosed that S[...] hurt her flower and that he has an ugly secret with her. CJR ended off her disclosure by saying that she will never get used to him, referring to accused 2.

[299] Of importance and significant is the fact that CJR was consistent in her disclosure that it was accused 2 who hurt her flower. Captain Botha explained that it often happens that children will suppress and not testify about incidents because the child will try to protect the significant parent. A purposeful or deliberate disclosure will mostly happen when there is a trust relationship with the significant parent. Captain Botha stated that the fact that a child does not fully disclose something today does not mean that the initial disclosure was not a true reflection of what transpired.

[300] This Court is mindful that not only has CJR, like her other siblings, been exposed to drug-abuse by the significant parent, but they have also been

exposed to and endured physical and emotional harm, in keeping with long standing abuse, as alluded to by Dr. Rehman. The consequence of growing up and being exposed to a toxic environment of this nature, is that the child wants to protect and save the significant parent and thinks that they are betraying their parent, which in turn impacts the disclosure, as evident in the present case.

[301] The question which the Court must ask itself is whether CJR's evidence is trustworthy, in light of the totality of the evidence. "Trustworthiness depends on factors such as the child's power of observation, his power of recollection, and his power of narration on the specific matter testified".³⁷ A child is not an inherently unreliable witness.

[302] In each case, the capacity of the particular child is to be investigated. His capacity of observation will depend on whether he appears intelligent enough to observe. Whether he has the capacity of recollection will depend again on whether he has sufficient years of discretion to remember what occurs, while the capacity of narration or communication raises the question whether the child has the capacity to understand the questions put, and frame and express intelligent answers. It is well known that children often have a vivid memory of an unusual or exciting incident.³⁸

[303] This Court takes heed of the case of *S v M*,³⁹ where it was stated that the correct approach was not to apply a general cautionary rule, but to look at the evidence as a whole and the reliability of what had been placed before the court.

[304] CJR impressed this Court as an intelligent child, who reflected a general ability to process information and gave a coherent and reliable account of what transpired. The account of her flower being hurt by accused 2, having used his finger, has been consistently given to Captain Botha and again in court.

³⁷ *Woji v Santam Insurance Co Ltd* 1981 (1) SA 1020 (A) at 1021E-F.

³⁸ *Woji* id at 1029A.

³⁹ 1999 (2) SACR 548 (A) at 549.

[305] CJR was able to give the same details of the core elements of the offence, when he inserted his finger into her vagina, and when he touched her vagina. CJR was able to give context when she said that she was naked inside the bathroom, waiting for her mother to bring her hot water to bath. CJR said that her mother (accused 1) observed through the window what accused 2 did to her flower. Accused 1 then told accused 2 to stop looking at her (CJR), and called him stupid. Thereafter accused 1 came inside and smacked accused 2 against the head because he was not supposed to be in the bathroom when she (CJR) was taking a bath. In the view of this Court, this is the sort of vivid memory a child has of an unusual incident, as referenced in the case of *Woji* (supra). Accused 1 corroborates the version of CJR in that there was an incident where CJR was in the bathroom and accused 1 had gone to fetch clothes for CJR. When she returned, accused 1 found accused 2 at the washing basin and she smacked him because he knew that he was not supposed to be in the bathroom. Accused 1 predictably, could not recall CJR telling her that accused 2 touched her flower.

[306] C[...] testified that CJR was fetched over the Easter weekend and had to return home by Sunday evening. Instead, CJR was brought home on Monday evening, after 21h00, by accused 2. Around 17:27 that evening, C[...] enquired from accused 1 whether they were on their way with CJR (Exhibit N, 18 April 2022). Again, at 20:22 C[...] enquired where accused 2 was with CJR. At 20:41, C[...] messaged to say that they should have been there by now. Eventually when CJR is brought home, her body is limp. The question that begs an answer is what happened to CJR during this time whilst alone in the company of accused 2 for hours? Ironically, the next day, the school reported that CJR presented with behavioural problems. C[...] specifically recalls that after CJR returned that weekend, her mannerisms changed drastically, she was bombastic and had tantrums. What could possibly have affected CJR in such a manner that both C[...] and the school were taken aback by her behaviour?

[307] In the absence of any challenge proffered to the version as given by CJR, either by accused 1 or 2, and being mindful that CJR is a single child witness, who was consistent in her account and whose version was partially corroborated by accused 1, this Court does find her evidence to be clear and satisfactory in all material aspects.

[308] The state further argued that accused 1, by not protecting CJR against accused 2 and by not reporting what accused 2 did to CJR, aided and abetted accused 2 to commit the offences and counts 3 and 4 are to be read with sections 55 of SORMA, which includes aiding and abetting another person to commit a sexual offence.

[309] Section 55 of Act 32 of 2007 provides:

“Attempt, conspiracy, incitement or inducing another person to commit sexual offence. — Any person who—

- (a) attempts;
- (b) conspires with any other person; or
- (c) aids, abets, induces, incites, instigates, instructs, commands, counsels or procures another person,

to commit a sexual offence in terms of this Act, is guilty of an offence and may be liable on conviction to the punishment to which a person convicted of actually committing that offence would be liable.”

[310] On her own version, accused 1 confirmed at least two separate incidents when accused 2 was in the bathroom with CJR. Once when accused 1 went to brush her teeth, and again when CJR was busy showering. On the second occasion, accused 1 had gone to fetch clothes for CJR and when she returned, she found accused 2 using the basin. She then smacked accused 2 against the head asking him why is he inside the bathroom when he knew he was not supposed to be there. Accused 1 denied that she saw accused 2 touch CJR’s vagina and could not recall CJR informing her that accused 2 touched her flower. Ironically, she could only recall CJR telling her that her flower is burning.

[311] The evidence demonstrates that accused 1 did nothing to stop the ongoing physical and emotional abuse of her children. The evidence clearly shows how accused 1 fabricated stories to protect accused 2, like telling Janine that accused 2 was a caring and loving father, knowing it to be false. Accused 1, being aware of the abusive nature of accused 2, was therefore complicit in what was happening to her own children. Everything accused 1 did was to aid, abet and assist accused 2 to cover up his crimes because she derived a benefit from their toxic relationship. This is a prime example of child exploitation for gratification or benefit (drugs).

[312] CJR was consistent in her disclosure that accused 2 hurt her flower. The evidence has demonstrated that accused 1 is a deceitful fabricator, who despite having access to a phone, did not report accused 2 to the authorities. She is someone who will go to great lengths to evade justice, that included staging a scene to demonstrate that she was held against her will by accused 2. By not protecting CJR against accused 2, by not reporting what accused 2 did to CJR, accused 1 knowingly approved the commission of these crimes and the failure on the part of accused 1 to safeguard CJR assisted accused 2 and encouraged him to commit these offences. Accused 1 undoubtedly aided and abetted accused 2 in the commissioning of the offences.

Counts 5 and 7

The Children's Act 38 of 2005

[313] Section 18 of the Children's Act, which pertains to parental responsibilities and rights, provides that:

“(2) The parental responsibilities and rights that a person may have in respect of a child, include the responsibility and the right—

(a) to care for the child;

...

- (4) Whenever more than one person has guardianship of a child, each one of them is competent, subject to subsection (5), any other law or any order of a competent court to the contrary, to exercise independently and without the consent of the other any right or responsibility arising from such guardianship.”

[314] Section 305(3) and (4) of the Act creates a criminal offence, in that:

“(3) A parent, guardian, other person who has parental responsibilities and rights in respect of a child, care-giver or person who has no parental responsibilities 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 care-giver or other person—

(a) abuses or deliberately neglects the child; or

....

(4) A person who is legally liable to maintain a child is guilty of an offence if that person, while able to do so, fails to provide the child with adequate food, clothing, lodging and medical assistance.”

[315] Section 1 of the Act defines “Abuse” as:

“...in relation to a child, means any form of harm or ill-treatment deliberately inflicted on a child, and includes—

(a) assaulting a child or inflicting any other form of deliberate injury to a child;

(b) sexually abusing a child or allowing a child to be sexually abused;

...

(e) exposing or subjecting a child to behaviour that may harm the child psychologically or emotionally;”

[316] Section 1 of the Act defines “Neglect” as:

“...in relation to a child, means a failure in the exercise of parental responsibilities to provide for the child’s basic physical, intellectual, emotional or social needs;”

- [317] It is disconcerting that preying on the weak and innocent has become a common trend in our society and violence against children remains rampant. Despite a plethora of laws that protect children, the sickening trend of child abuse continues unabated.
- [318] The photos depicted in Exhibit M explicitly illustrate an environment where CJR, JR and CR, were deprived of the necessities that would enable them to thrive. It also clearly depicts a failure on the part of accused 1 and 2, to provide the children with adequate food, clothing, lodging and medical assistance.
- [319] The maltreatment and neglect of the children was undoubtedly exacerbated by longstanding physical and emotional abuse. Ironically, both Simon and Chanelle testified about independent incidents when they observed JR and CR being dressed in meagre clothing when it was so cold outside. The photos depicted in Exhibit M detail the appalling and filthy conditions these children lived in.
- [320] Accused 1 conceded during cross-examination that she deliberately lied to the police to evade arrest. Janine testified that when she spoke to accused 1, she said that her family was constantly interfering and making up stories. Again, on 9 May 2022, Janine attended at the property and expressly asked accused 1 whether she can assist her with a protection order as there was an allegation that accused 2 was being abusive. Again, accused 1 comes to the defense of accused 2 and said that accused 2 is a good man and that he has never physically harmed her or the children.
- [321] This lie was outrageous in light of the fact that accused 1 already handed JR to her sister because she (accused 1) could not stand the abuse of JR any longer. Again, on 9 May 2022, accused 1 sang the praises of accused 2 when she told Janine that accused 2 was a good man. Again, on 10 May 2022, accused 1 informed Janine that everything was fine.

[322] The state correctly argued that accused 1 was aware of the abuse on JR and CR and had multiple opportunities to either report or to ask for assistance.

[323] On 19 April 2022, CR was left with Diana. Chanelle testified that when she saw CR, it was upsetting to her. So much so that she insisted Diana call accused 1 immediately. CR was wearing no nappy and no shoes. CR's face and lip was swollen. Most probably testament to the times when accused 2 smacked CR on the mouth until it bled.

[324] For weeks on end, both R[...] and C[...] begged accused 1 to bring CR home. This is borne out by the numerous WhatsApp messages which pleas fell on deaf ears. They said that accused 1 kept coming up with excuses, even refusing for them to do a video call with CR.

[325] The evidence demonstrates that this was done in an attempt by accused 1 and 2 to hide the onslaught of injuries that CR had sustained whilst in their care. In the circumstances, the conclusion becomes inescapable that not only was accused 1 aware of the ongoing abuse, she evidently did nothing to prevent or stop it. The evidence strongly suggests that her complicity was incentivised and probably motivated by the fact that accused 2 was the one who supported her drug habit.

[326] The silence on the part of accused 1 in failing to report the ongoing abuse, on her own version, despite the obvious interventions from her family and Janine, amongst others, speaks volumes of her willingness to allow her children to be subjected to ongoing abuse in order for her to derive a benefit. By not reporting the actions of accused 2 to the relevant authorities, accused 1 actively associated herself and made herself complicit by not disassociating herself from the conduct and actions of accused 2.

Count 6:

[327] Similarly, the state argued that the evidence of JR, as a single child witness, in respect of these counts, was left unchallenged, and no version was presented during the state's case to gainsay it.

[328] It is common cause that by the time, accused 1 handed JR over to her sister C[...], he presented with multiple injuries sustained to the body, consistent with long standing physical abuse. The injuries were so concerning, that C[...] not only sought medical attention but she also reported the matter to the police.

[329] The plethora of possible reasons for these injuries as alluded to by accused 1 and 2, weighed against the totality of evidence, stands to be rejected as inherently false. Accused 1, on her own version, grew tired of the abuse on JR which prompted her to hand over the child to her sister. According to accused 1, accused 2 would tell her that she did not know how to discipline her children. Accused 1 had seen JR being hit by accused 2 but was scared to report it. During cross-examination these feeble excuses were exposed to be nothing but a web of lies in an attempt to mislead this Court.

[330] Accused 1 never saw JR being cut with a grinder; being punched with a fist; being forced to smoke a drug pipe; or being burnt with it. She only saw accused 2 hitting JR with a wooden plank because he said that she does not know how to discipline her children.

[331] JR said that when he was hit with the plank by Uncle S[...] he cried “ouch ouch ouch”. He was told to sleep outside and eat dog food. When he was cut with the grinder on the head, it made a “zzzzzzz” sound and his head was bleeding and it was sore. In relation to these instances, JR undoubtedly has a vivid memory of these unusual incidents, as referenced in the case of *Woji* (supra).

[332] JR said that it was sore when accused 2 burned him with the drug pipe and the drugs accused 2 made him smoke looked like ash and was “yuck”. This happened more than once and he told accused 1 what happened.

[333] The range of versions as presented by accused 2 as to how JR sustained these injuries is an afterthought. The explanation that the injury to JR’s eye

was sustained when a wall-shelf fell onto his eye is a fabrication. It is more probable that the injury to the eye was sustained as a result of JR being boxed by accused 2. During cross-examination, accused 2 said that there was a time when they would play rough and he (accused 2) would retaliate not in a normal way. The version of accused 2 that the cut to the head was sustained when he threw a broom at the dogs and accidentally struck JR is a fabrication. The reason advanced by accused 2 for beating JR, as depicted in Exhibit 5, for breaking a mirror not only contradicts the version of accused 1, but is a fabrication. Accused 2 also conceded that the injury, as depicted in Exhibit 5, is abuse.

*Attempted Murder*⁴⁰

[334] The elements of the crime of attempted murder are (i) an attempt; (ii) to kill another person unlawfully (*actus reus*); (iii) with the intent to kill and with an appreciation that the killing will be unlawful (*mens rea*). The state of mind required for attempted murder is the same as for murder. The difference lies in the *actus reus*. As is well known, intent to murder includes a state of mind in which the accused foresaw the possibility of death and was reckless as to whether death ensued, i.e. *dolus eventualis* (see *S v Combrink*).⁴¹ The same state of mind suffices for attempt to murder (*S v Huebsch*;⁴² *S v Nango*;⁴³ *Snyman Criminal Law* 6th Ed at 294).

[335] Dr Rehman concluded, as per Exhibit D, that the injuries of JR, are at different stages of healing. The multiple areas of the body are in keeping with the history of long-standing physical abuse. JR testified that he was assaulted

⁴⁰ In *S v Ndlovu* 1984 (3) SA 23 (A), Joubert JA, at page 261-27B said the following:

“Die bestanddele van poging tot moord wat *per se* ’n misdad is, is wederregtelikheid, opset en ’n pogingshandeling. Die strafbedreiging is gerig teen die wederregtelike opsetlike bedreiging van die lewe van ’n mens. Die beskermde regsbelang is die lewe van ’n mens. ’n Geykte voorbeeld van voltooid poging tot moord is waar A sy vuurwapen op B rig met die bedoeling om hom te dood, en die skoot afvuur wat B mis of verwond sodat B die wederregtelike aanslag op sy lewe oorleef. A het alles van sy kant gedoen om B te vermoor maar die moord is onvoltooid. Die opset om die slagoffer te vermoor kan afgelei word uit die pogingshandeling asook ander aanvaarbare bewysmateriaal. Die wederregtelikheid van die pogingshandeling is geleë in die bedreiging van ’n regsbelang, naamlik die lewe van ’n mens”.

⁴¹ 2012 (1) SACR 93 (SCA) at para 17.

⁴² 1953 (2) SA 561 (A) at 567D-568A.

⁴³ 1990 (2) SACR 450 (A) at 457B-F.

with hands, a wooden plank, grinder, and a warm drug pipe. This was confirmed by accused 1 who said that JJR was assaulted with different objects, even a fibreglass pipe. The Court may deduce intent from the conduct of the accused and circumstances surrounding the offence, including the nature of weapons used or the nature of injury, such as the use of an electric grinder to the head, in circumstances where there is no justification.

[336] In order to support a conviction for attempted murder, it is sufficient if there is an appreciation that there is some risk to life involved in the action contemplated, coupled with recklessness as to whether or not the risk is fulfilled in death. It is the view of this Court that the evidence proves that accused 2, in the least, foresaw the possibility that his action constituted a risk to the life of JR.

[337] This Court, having carefully considered the evidence as a whole, borne out and corroborated by the medical evidence, finds the evidence of JR clear and satisfactory in all material aspects and am I satisfied that the truth was told.

[338] The state correctly argued that both accused 1 and 2 had a duty to protect JR, as persons who had the parental responsibilities as per section 305(3)(a) of the CA during the period June 2021 until April 2022. Both accused had a duty to care for JR in terms of section 18 of the CA during the period of June 2021 until April 2022.

[339] This Court agrees with the reasoning by the state that even if accused 1 did not inflict the injuries as per count 5 to 6, in light of her knowledge of the ongoing abusive relationship and accused 1's legal obligation towards JR, she is responsible for their infliction.

[340] This Court was referred to the following case law in this regard:

The remarks of Melunsky AJA, in *S v Williams and Others*⁴⁴ at 194B are worth repeating:

⁴⁴ 1998 (2) SACR 191(SCA).

“But where the duty is placed upon a person in terms which suggest active conduct the further question that has to be considered is whether liability should be imposed for failing to act. This depends on considerations of policy or, as it is called, the legal convictions of the community”

[341] In addition, hereto, Melunsky AJA, in *S v Williams and Others* (supra), in confirming the conviction of a policeman as accessory after the fact to murder who failed to report the crime, held at 201:

“Although the third appellant played no part in the death of the deceased, he knew about the crime and the identity of the perpetrators. It is self-evident that he intended to assist the perpetrators by not reporting the crime.”

[342] The state argued that accused 1, different to *S v Williams and Others*, was aware of the ongoing abuse and assault of JR, as per count 5 to 6 but failed to act.

[343] Further, the remarks of Jones J in *S v Ben 'n Ander*,⁴⁵ are applicable:

“Onder hierdie omstandighede is sy, volgens ons oordeel, skuldig op aanranding met die opset om ernstig te beseer...toe die noodlottige aanranding plaasgevind het, al het sy nie persoonlik die aanrandings gepleeg nie, sy het dit toegelaat al het sy geweet dat dit gebeur het en dat dit in die toekoms waarskynlik weer gaan gebeur en al het sy 'n plig gehad het om dit te voorkom en ook die vermoë om dit te voorkom”

[344] Being guided by the aforementioned case law, this Court finds that, despite the evidence establishing beyond a reasonable doubt that accused 2 inflicted the injuries on JR, accused 1, in light of her knowledge of the ongoing abuse and her legal obligation to JR, is responsible for their infliction.⁴⁶

Count 8

⁴⁵ 1994 (2) SACR 237 (E) at 248D-F.

⁴⁶ *S v Pretorius* SS69/2019 (unreported judgment of the Gauteng Local Division dated 27 March 2020 at para 69.

[345] The state correctly submits that it presented no direct evidence in respect of this count and relies exclusively on circumstantial evidence.

This Court, in *S v Reddy and Others*⁴⁷ at 8C-D warned against this, where it stated as follows:

“In assessing circumstantial evidence one needs to be careful not to approach such evidence upon a piece-meal basis and to subject each individual piece of evidence to a consideration of whether it excludes the reasonable possibility that the explanation given by an accused is true. The evidence needs to be considered in its totality. It is only then that one can apply the oft-quoted dictum in *Rex v Blom*,⁴⁸ 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’.”

[346] The sentiments expressed by the court in *S v Ntsele*⁴⁹ are relevant, where it held that the onus rests upon the State in criminal proceedings to prove the guilt of the accused beyond a reasonable doubt, not beyond all shadow of a doubt. The court in *Ntsele* further held that when dealing with circumstantial evidence, as in the present matter, the court was not required to consider every fragment individually. It was the cumulative impression, with all the pieces of evidence made collectively, that had to be considered to determine whether the accused’s guilt had been established beyond a reasonable doubt. The applicant’s challenge to the evidence was in a piecemeal fashion. Courts are warned to guard against the tendency to focus too intensely on separate and individual components of evidence and view each component in isolation.

[347] It is commonplace that neither accused 1 or 2 put a version to Dr. Apathu as to how, on their version, the deceased sustained the multiple injuries as depicted in Exhibits “F” and “H”. From the evidence of Dr. Apathu, it can be surmised that the majority of the 49 wounds, as depicted, were recent, some as recent as within a few hours prior death. Dr. Apathu opined that a large

⁴⁷ 1996 (2) SACR 1 (A).

⁴⁸ 1939 AD 188 at 202-203.

⁴⁹ 1998 (2) SACR 178 (SCA).

number of these injuries were visible to the naked eye and was caused by the application of enough force to leave an abrasion or bruise.

[348] The words that kept on emerging from her evidence were “impact, force, being struck with or against something, multiple times, multiple impacts, grabbed, gripped”, to mention but a few.

[349] The cause of death was found to be consistent with blunt force head injury. Dr. Apathu testified that there was bleeding into the cortex and that this is in keeping with blunt force impact to the head. She further concluded that the injuries, as sustained by the deceased, as per the Post Mortem Report, is not normal for a two (2) year old despite the fact that a child of that age is still developing muscles and is not fully co-ordinated. She said that you would not expect bruises to this extent and that it is suggestive of non-accidental injuries, thus injuries sustained by impact.

[350] It is common cause that the deceased was with accused 2 and Brandon from around 19h00 on 10 May 2022 until the early morning hours of 11 May 2022. Accused 1 testified that when she last bathed the deceased on 9 May, most of the injuries, as depicted on the Post Mortem Report, were not there. The version of accused 2 was that he and Brandon were loading furniture the night before the death of CR, when she came under his feet and fell from the stairs. Notably, when the state, in cross-examination, asked Dr. Apathu whether the deceased could have sustained the injuries to the head when she fell from the stairs, as depicted on M5, Dr. Apathu said that the steps depicted do not appear steep enough. At this juncture, accused 2 did not draw the attention of his counsel to the fact that the stairs he was referring to are not the stairs as depicted in M5. This version is not put to Brandon, who was evidently present when the deceased fell from the stairs. The fact that this pivotal aspect was left unchallenged, entitles this Court to assume that the unchallenged evidence of Brandon, in this regard, is to be accepted as correct.

[351] This Court therefore does not find it surprising that Brandon himself never mentioned anything to the effect that the deceased fell from any stairs on the

night in question, obviously, because it simply did not happen. The version of accused 2 in this regard is not only improbable, but stands to be rejected as inherently false.

[352] Accused 2 said that on the morning of CR's death, he was called by accused 1 to come and take care of CR, who had soiled herself. He was irritated and placed CR in the tub. He poured cold water over her body to rinse her off and she started screaming, as she was not standing still. When he left to fetch a towel, he heard a "doef" sound, like someone falling in the bathroom. CR came running from the bathroom and he screamed at her to go back. Accused 2 then wrapped the towel around her and took her to the bedroom, when CR started making funny sounds. According to accused 1, the body of CR went stiff and blue in colour. Simon testified that CR was unresponsive and CPR was administered.

[353] The state argued that in light of the multiple false versions given by both accused 1 and 2, it is submitted that both accused were either directly involved in the infliction of the various wounds on the deceased or became aware prior to the infliction thereof and/or prior to the deceased's death, that such injuries were being and or had been inflicted by the other.

[354] This Court pauses to mention that Dr. Apathu clearly sketched the timeframe wherein these blunt force head injuries were caused. She testified that it is difficult to quantify the force that was needed to sustain the fatal injuries to the head but that the deceased died "quickly" after the injury was sustained, but not necessarily immediately. She qualified her testimony by saying that the deceased died **within 24 hours after the injury was sustained**. She said that the injury was consistent with blunt force injury, denoting that the head was struck. Within the 24 hours prior to death, the brain swelled or expanded beyond what is normal and directly impacted other body functions, causing death.

[355] In assessing the circumstantial evidence, the Court must not approach such evidence in a piecemeal fashion and 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.

[356] Dr Apathu testified that the deceased did not die immediately. The bleeding into the brain, which caused the brain to swell beyond the norm, ultimately leading to physiological disturbances, happened within that 24-hour window. The 24-hour window clearly sets out the chronology or sequence from the time the blow/s were administered, causing bleeding into the brain, causing swelling, which led to a disturbance or slowdown of physiological functions, and ultimately death.

[357] The fact that CR's body went stiff and blue in colour and she was unresponsive, all coincides with the evidence of Dr. Apathu, who testified that as death was not immediate, there would be altered levels of consciousness and lethargy, evidently because the swelling of the brain was directly impacting body functions.

[358] JR testified that he was burnt with the drug pipe on the mouth by accused 2 and when he told accused 1, she proceeded to assault accused 2. It is therefore highly improbable that accused 1 would not know how CR sustained the outrageous burn wound to the mouth.

[359] It is also common cause that both Simon and Brandon observed the burn marks to the mouth of the deceased on 10 May 2022. According to Simon, he saw those burn marks before, which looked similar to being burnt with a warm drug pipe, which has a round ball at the end. Simon said that he did not believe the sloppy story he was told about the deceased falling from the stairs.

[360] It is further common cause that due to the gravity of the injury to CR's mouth, she was unable to eat solid food. This Court finds it extremely telling that accused 1 would go to such extremes to fabricate stories to cover for accused 2 when concerned people enquired about the injuries JR and CJR sustained respectively. The injury to CR's mouth cannot be described as anything other

than grotesque. Accused 1 was complicit in the actions of accused 2 hence she never sought medical attention when clearly, the injuries sustained called for drastic intervention. Accused 1 rather deemed it fit for CR to drink milk-porridge from a bottle than taking CR to a nearby hospital. The same reason why she did not take CR home or allowed her to video call with R[...] and C[...], was the same reason she did not seek medical attention for her children, which was to hide the onslaught of injuries inflicted and to benefit by looking the other way. I am mindful that the drawing of inferences must occur within the factual matrix.

[361] In light of the false versions given by the accused, the inescapable conclusion to be drawn is that both accused were:

- [a] Either directly involved in the infliction of the various wounds of the deceased or;
- [b] Aware, prior to the infliction thereof and/or prior to the deceased death, that such injuries were being and/or had been inflicted by the other.⁵⁰

[362] The inference sought to be drawn by this Court, consistent with the proven facts, which excludes every reasonable inference from them save the one sought to be drawn, is that the deceased sustained the fatal head injuries within the 24 hours prior her death whilst she was in the care of both accused. However, it is more likely that the fatal blows were inflicted by accused 2, probably between the time that they left around 19h00 on the night of 10 May and returned home in the early morning hours of 11 May 2022, when considered in light of the false version that CR fell from the stairs.

[363] The twofold test in respect of *dolus eventualis*, as set out by Brand JA, in *S v Humphreys*⁵¹ should be borne in mind:

“... [T]he test for *dolus eventualis* is twofold:

- a) Did the appellant subjectively foresee the possibility of the death of his passengers ensuing from his conduct; and

⁵⁰ *S v Pretorius* SS69/2019 (Unreported judgment of Gauteng Local Division dated 27 March 2020).

⁵¹ 2015 (1) SA 491 (SCA) at paras 12,13 and 17.

b) Did he reconcile himself with that possibility?

...

...subjective foresight can be proven by inference. Moreover, common sense dictates that the process of inferential reasoning may start out from the premise that, in accordance with common human experience, the possibility of the consequence that ensued would have been obvious to any person of normal intelligence.”

While discussing reconciliation with the possibility:

“The true enquiry under the rubric is whether the appellant took the consequences that he foresaw into the bargain; whether it can be inferred that it was immaterial to him whether these consequences would flow from his actions.”

[364] The remarks of Jones J, in *S v Ben 'n Ander*, supra, at 241D-e, ring true when inferences are sought to be drawn in the present case.

“Die enigste redelike afleiding uit die aard van die beserings, die veelvuldigheid daarvan, die erns daarvan, en die verskillende ouderdomme daarvan is dat D oor 'n aansienlike tydperk stelselmatig en gewelddadig aangerand is. Beskuldige nr 2 ontken hierdie bewerings. Maar as sy ontkenning as vals verwerp word en as die getuienis van die staat se getuies as waar bo redelike twyfel aanvaar word, is die enigste redelike afleiding dat beskuldige nr 2 vir D mishandel en aangerand het oor die tydperk van einde Mei of begin Junie 1991 to Augustus 1991. Bowendien was beskuldige nr 2 die enigste persoon by die huis to D bewusteloos geraak het. In die afwesigheid van 'n redelike moontlike verduideliking, is die enigste afleiding dat beskuldig nr 2 hom aangerand het en sodoende die noodlottige kopbeserings toegedien het.”

[365] In *Thebus*, the Constitutional Court reiterated the principle of common purpose and explained what the “requisite *mens rea*” entails if the prosecution relies on this doctrine. The Court stated:

“If the prosecution relies on common purpose, it must prove beyond a reasonable doubt that each accused had the requisite *mens rea* concerning the unlawful outcome at the time the offence was committed. That means that he or she must have intended that criminal result or must have foreseen the possibility

of the criminal result ensuing and nonetheless actively associated himself or herself reckless as to whether the result was to ensue.”⁵²

[366] Finally, in *Dewnath* it was held:

“The most critical requirement of active association is to curb too wide a liability. Current jurisprudence, premised on a proper application of *S v Mgedezi & Others*, makes it clear that (i) there must be a close proximity in fact between the conduct considered to be active association and the result; and (ii) such active association must be significant and not a limited participation removed from the actual execution of the crime.”⁵³

[367] The only reasonable inferences to be drawn herein are:

- [a] That both accused had a legal duty to protect the deceased.
- [b] The deceased had been subjected, as in the case of JR, to longstanding physical abuse.
- [c] Both accused had the opportunity to cause the injuries.
- [d] Both accused, albeit inferentially, were aware of the continued abuse and assaults.
- [e] According to Dr. Apathu the extent of the injuries is suggestive of non-accidental injuries, which was sustained by impact.
- [f] Both accused persons therefore failed to comply with their legal duty, by intentionally assaulting and/or deliberately neglecting and/or failing to act in protecting the deceased from such ongoing abuse.
- [g] Accused 1, regardless of whether she perpetrated any of the assaults, allowed for it to happen, when she was aware that it happened and that it will most probably happen again, yet she did nothing.
- [h] The blunt force head injury suffered by the deceased was as a result of multiple impacts to the head suffered at the hands of the accused, more likely at the hands of accused 2, within the 24 hours prior to her death.
- [i] In the absence of any reasonable explanation, the aforementioned injuries were intentionally inflicted by the accused, as part of an ongoing abusive pattern.

⁵² *Thebus and Another v S* 2003 (6) SA 505 (CC) at para 49.

⁵³ *Dewnath v S* [2014] ZASCA 57 at para 15.

[368] In *S v Kubeka*,⁵⁴ 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.”

[369] Both accused came across as pathological fabricators, and their respective versions were infested with untruths and falsehoods. This Court is however mindful of the passage in *S v Kelly*.⁵⁵

“In any event, as counsel conceded in a homely metaphor, demeanour is, at best, a tricky horse to ride.”

[370] In the present case, the Court is mindful that there is direct (*prima facie*) evidence implicating the accused in the commission of the offences, yet no version was put forward to gainsay it, *ipso facto* strengthening the state’s case and thereby lessening reason for doubting the credibility and reliability of the state’s case.

[371] Further, in conclusion, in *Dyira (supra)* the court laid down guidelines for how the evidence of a child witness, who is a single witness, must be approached. In applying the said guidelines:

- [a] This Court cognisant of the need for caution in general and with reference to the particular circumstances of the case;
- [b] This Court examined the evidence in order to satisfy itself that the evidence given by CJR and JR is clear and substantially satisfactory in all material respects;
- [c] This Court is mindful that although corroboration is not a prerequisite for conviction, a court will sometimes, in appropriate circumstances, seek corroboration which implicates the accused before it will convict beyond a reasonable doubt;
- [d] Failing corroboration, a court will look for some features in the evidence which gives the implication by a single child witness enough hallmark of trustworthiness to reduce substantially the risk of a wrong reliance upon

⁵⁴ 1982 (1) SA 534 (W) at 537 F-H.

⁵⁵ 1980 (3) SA 301 (A) at 308B-C.

her evidence. Corroboration was found in the medical evidence and the independent evidence of the various state witnesses.

[372] This Court, having considered the evidence, and having observed the child witnesses, is satisfied that their evidence was clear and satisfactory; and that their merit as witnesses was far superior to that of the defence. Their evidence has intrinsic worth, even if evaluated with caution. The probabilities of this case favours the version of the state.

[373] Taking into account the entire conspectus of the evidence, this Court is satisfied that the state has 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 as false beyond a reasonable doubt.

[374] This Court accordingly finds the accused guilty as follows:

ACCUSED 1

Count 3: **RAPE (AID AND ABET):** Contravention of section 3 read with sections 1, 2, 50, 55, 56(1), 56A, 57, 58, 59, 60, and 61 of SORMA 32 of 2007, as amended. Further, read with sections 94, 256 and 261 of the CPA 51 of 1977. Further read with section 51(1) and Part 1 of Schedule 2 of the CLAA 105 of 1997, as amended. Further, read with section 120 of the CA 38 of 2005.

Count 4: **SEXUAL ASSAULT
(AID AND ABET)**

Contravention of section 5(1) read with sections 1, 2, 50, 55, 56(1), 56A, 57, 58, 59, 60, and 61 of SORMA 32 of 2007, as amended. Further, read

with sections 94, 256, 261 and 270 of CPA 51 of 1977. Further, read with section 120 of the CA 38 of 2005.

Count 5: **CHILD ABUSE**

Contravention of section 305(3)(a), read with sections 1 and 18(2), 305(6), 305(7) and 305(8) of the CA 38 of 2005.

Count 6: **ATTEMPTED MURDER**

Read with section 51(2) of the CLAA 105 of 1997 and further read with section 257 of the CPA 51 of 1977. **(Proven form of intention: Dolus eventualis)**

Count 7: **CHILD ABUSE**

Contravention of section 305(3)(a), read with sections 1 and 18(2), 305(6), 305(7) and 305(8) of the CA 38 of 2005.

Count 8: **MURDER**

Read with section 51(1) of the CLAA 105 of 1997. **(Proven form of intention: Dolus eventualis)**

ACCUSED 2

Count 3: **RAPE**

Contravention of section 3 read with sections 1, 2, 50, 55, 56(1), 56A, 57, 58, 59, 60, and 61 of SORMA 32 of 2007, as amended. Further, read with sections 94, 256 and 261 of the CPA 51 of 1977. Further read with section 51(1) and Part 1 of Schedule 2 of the CLAA 105 of 1997, as amended. Further, read with section

120 of the CA 38 of 2005.

Count 4: **SEXUAL ASSAULT**

Contravention of section 5(1) read with sections 1, 2, 50, 55, 56(1), 56A, 57, 58, 59, 60, and 61 of SORMA 32 of 2007, as amended. Further, read with sections 94, 256, 261 and 270 of the CPA 51 of 1977. Further, read with section 120 of the CA 38 of 2005.

Count 5: **CHILD ABUSE**

Contravention of section 305(3)(a), read with sections 1 and 18(2), 305(6), 305(7) and 305(8) of the CA 38 of 2005.

Count 6: **ATTEMPTED MURDER**

Read with section 51(2) of the CLAA 105 of 1997 and further read with section 257 of the CPA 51 of 1977. **(Proven form of intention: Dolus directus)**

Count 7: **CHILD ABUSE**

Contravention of section 305(3)(a), read with sections 1 and 18(2), 305(6), 305(7) and 305(8) of the CA 38 of 2005.

Count 8: **MURDER**

Read with section 51(1) of the CLAA 105 of 1997. Further, read with the provisions of sections 92, 256, 257 and 258 of the CPA 51 of 1977. **(Proven form of intention: Dolus directus)**

APPEARANCES:

For the State: Adv. Williams
Instructed by: The Director of Public Prosecutions,
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For accused 1: Adv. Lerm
For accused 2: Adv. Dingiswayo

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