



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

CASE NO.: A200/2021

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

..... 18 April 2023
SIGNATURE DATE

In the matter between:

LUNGA GUMEDE

APPELLANT

and

THE STATE

RESPONDENT

This judgment was handed down electronically by circulation to the parties' representatives by email. The date and time of hand-down is deemed to be 18 April 2023.

JUDGMENT

N V KHUMALO J (with SARDIWALA J and HOLLAND MUTER AJ concurring)

Introduction

[1] The Appellant, was on 11 November 2019 convicted for the murder of Ms Tinyiko Ngobeni (“the deceased”) in the form of *dolus eventualis*. On 10 March 2020 he was sentenced to 22 years imprisonment. The charge proffered against him was that of premeditated or planned murder read with the provisions of s 51 (1) of the Criminal Law Amendment Act 105 of 1997 (the Amendment Act)..

[2] The Appellant is with leave of the Supreme Court of Appeal, appealing against his conviction. He denies that he is liable for the death of the deceased. In the trial court *a quo*, he pleaded not guilty to the charge and was legally represented through out the proceedings.

[3] The salient facts are that on 19 November 2016, the deceased’s body, was found at a remote and secluded spot in Katlehong. She has been missing for a couple of days. The deceased was in a relationship with the Appellant at the time and expectant with their child. They met through social media site early that year. The last time the deceased was seen alive was on 13 November 2023 when she left her parental home with the Appellant, who was supposedly taking her back to the Vaal University of Technology (“the Vaal”), where she was a student and a resident at the time. The deceased had earlier on that day attended church and was later fetched by the Appellant who then offered to take her back to her residence at the Vaal. After spending some time together the Appellant took the deceased to her parents’ house to fetch her bags and they left for the Vaal. It was the last time the deceased was seen alive until the discovery of her body a couple of days later. A search by the police of the area in the vicinity of the spot where the Appellant’s vehicle was tracked to have been stationery on the day he left with the deceased, led to the finding of her

body. A postmortem conducted found the cause of death to be manual strangulation.

[4] The court a quo convicted the Appellant of her murder reliant on the testimony of the deceased's father, in relation to the Appellant's conduct following the disappearance of the deceased and of the police officers who were involved in the investigation. The court also relied on the supporting documentary evidence that was admitted into evidence which it found to collaborate the suspicion of the deceased's father and the police officers. Consequently, the court found the State to have proven the Appellant's guilt beyond reasonable doubt and the version of the Appellant's not reasonably possibly true.

[5] The Appellant is appealing against his conviction on the following grounds, that the State:

[5.1] failed to disprove the version of the Appellant, seeing that the Appellant carries no onus; (the state failed to prove the guilt of the accused (its case) beyond a reasonable doubt).

[5.2] based its entire case on two circumstantial facts:

[5.2.1] that the Appellant was the last known person to be seen with the deceased,

[5.2.2] that the Appellant lied, first in the version he provided to the deceased's parents and then to the police. Arguing that the

inferences drawn are not consistent with the proven facts nor do they exclude all other reasonable inferences to be drawn. (There are no other inferences to be drawn)

[5.3] relied entirely on the documents (J, J2, J3 and J4) provided by the Appellant. In essence the Appellant alleges the court to have erred in:

[5.3.1] relying on Mr Van Rooyens evidence .

[5.3.2] finding the motive to the murder to be the deceased's unwanted pregnancy.

[6] The issue that arises in this appeal is whether the *court a quo* misdirected itself when it reached its finding that the version of the Appellant of what really transpired after he took the deceased from her home, could not be reasonably possibly true, and also that the only inference that can be drawn from all the evidence, albeit it being circumstantial, is that the Appellant is the person who murdered the deceased. The evidence therefore, even if its only for the purpose of clarity, it concisely needs to be revisited, in order to justly and holistically deal with the grounds of appeal raised by the Appellant.

The Evidence

The state's version

[7] On behalf of the state, the deceased's father, Mr Ngobeni ("Ngobeni") testified on the common cause facts that on 13 November 2016 he saw the

deceased and the Appellant off. He was supposed to take the deceased back to her residence at the Vaal when the deceased informed him that the Appellant offered to do so. After they left he never heard from the deceased, which was unusual to him. His attempts later that day to get hold of the deceased on her cell phone failed. On the following day 14 November 2016, he looked for the cellphone numbers of the Appellant as the last person to be seen with her and phoned him to find out about the deceased's whereabouts. Appellant told him that he left the deceased at a taxi rank near a robot at the intersection of Phola and Eden Park, where the deceased boarded a taxi to the Vaal. The reason he proffered was that he received a work related call and had to rush to work. Ngobeni told the Appellant that, it could not be true as there were no taxis on that road. When he questioned the Appellant further, the Appellant hung up on him. Ngobeni's search at the taxi ranks and Technikon were of no avail. Appellant later acknowledged that it was indeed a lie. The next day on 15 November 2016 when there was still no trace of the deceased, Ngobeni reported the deceased's disappearance to the police at the Katlehong Police Station. Constable Madupye was assigned to the case. Ngobeni provided Madupye with the Plaintiff's details. Madupye made an appointment to meet with the Appellant the next day at the police station. Ngobeni and the deceased's mother arranged and met with the Appellant at Nandos on that day. The Appellant asked them not to bring the police.

[8] Ngobeni spoke about the Appellant's demeanour during the meeting, when they asked him questions about what happened to the deceased and their relationship. The Appellant told them of the deceased's pregnancy and his unhappiness about it, speaking of the deceased in the past tense saying "he

loved her". He told them that he wanted the deceased to abort the child, and had promised to buy her a house if she does and of the deceased's unwillingness to do so. He was sorry it had to end this way. He spoke about his deceased father and his fear of being disowned from inheriting from his father's will by his mother.

[9] The Appellant, then contrary to what he said earlier, told them that the reason he couldn't take the deceased to the Vaal was because he received a call from his caretaker to collect money from him at East Rand. He therefore left the deceased near the Palm Ridge Magistrate Court Road where she boarded a taxi to the Vaal. He then again told them that it was because he received a call from his sister to come home quickly for a family meeting and had actually left the deceased on the Heidelberg Road, which is a third place he mentioned different from the first two. The Appellant refused when they asked him to take them to the spot where he dropped the deceased. He said he was scared because he does not live in the location. According to Ngobeni that was strange since the Appellant was used to fetching the deceased from the location. The Appellant told them that he informed his mother on 13 November 2016 that the deceased was missing and his mother was not prepared to assist. She advised the Appellant not to say anything but to engage the services of a lawyer. The Appellant's mother subsequently called and told Ngobeni that the Appellant did not kill the deceased. At the time, he was not aware that his daughter was dead and still regarded her as just missing. According to Ngobeni all he wanted from the family was their assistance in trying to find the deceased. He did not believe the Appellant and had come to the conclusion that the reason he was lying was because he killed the deceased.

[10] On 19 November 2016, he was contacted and asked by Madupye to come and identify a body found by the investigating team hidden at a secluded place. He identified the deceased and her clothing that was found around there. He also confirmed to the police officers that the deceased was in possession of two phones when she left home. Ngobeni disputed making the statement that was commissioned by Ngwenya and that the signature thereon was his. He denied knowing a person called Thulani Shibango or mentioning this person to Ngwenya. Following a trial within a trial the statement was declared inadmissible. Ngwenya confirmed to have commissioned the statement in the absence of Ngobeni. She also could not deny that Ngobeni had not informed her of Thulani Shibango.

[11] Ngobeni's evidence was corroborated by Mrs Ngobeni later in her testimony. Mrs Ngobeni confirmed that they met the Appellant for the first time on 31 July 2016 when the deceased introduced him as a friend. They were meeting him for the second time at Nandos in Bruma Lake. Ngobeni testified of a very close relationship she had with her deceased daughter. According to Mrs Ngobeni the deceased was distraught on 13 November 2016 when she informed her (Mrs Ngobeni) that she was pregnant with Appellant's child, who did not want a child. She denied of ever having any knowledge before of the deceased having had a boyfriend or hearing of the name Thulani Shibango.

[12] According to Madubye, who was at the time a Constable attached to the missing persons Unit at Katlehong Police Station, after the report of the missing person by Ngobeni on 15th December 2016, he called the Appellant and made an appointment to meet with him at Katlehong police station on 16

November 2016. The Appellant arrived at the station accompanied by his attorney, Mr Strauss and submitted to him an unsigned statement. The statement was admitted in evidence marked as exhibit "J". On 18 November 2016 the Appellant and Strauss submitted another statement in a form of an affidavit, that is "J1." They wanted to replace the statement they submitted on 16 November 2016, with the J1 Affidavit together with a Trip Log and a Google Map (that is "J2" and "J3"). The statements were discrepant in that the Appellant had alleged to have left the deceased at different locations from the ones that were mentioned to the deceased's father and in his initial statement. On the "J" statement the Appellant alleged to have left the deceased at the corner of Provincial and Peterson Road as he had got a message to meet with Mr Sambo who was arriving on the day, coming back from his home. On the J1 statement the Appellant alleged to have dropped the deceased at a different place. His reason being that he was rushing as he had to meet Sambo, but also not to have had petrol. He mentioned to have encountered an accident at the intersection on the R59 highway and alleged that to have led to the two having sex in the nearby bushes.

[13] On 19 November 2016, Madubye together with the other police officers, left the police station to go and search the area that was marked by the Appellant on J3, without Strauss he was running late. They met up with Van Rooyen from the K9 dog unit. The search led to Madubye discovering the body of the deceased a few meters from the area marked A on J3, which is where the Appellant's vehicle was stationary for nearly an hour on 13 November 2016. Sergeant Sithole took over the scene following the discovery. Ngobeni was called to come and identify the body. Madubye advised Strauss who was at Katlehong Police Station to meet him at the Kliprivier Police Station where

he arrested the Appellant. He detained the Appellant in the police van and later took him to the police station. Madubye disputed the version put to him that after the arrest the Appellant was driven in a double cab bakkie back to the area where the body of the deceased was found. Strauss however did go to look at the scene. Madubye said he became suspicious of the Appellant on the first day they met because the Appellant looked scared, he did not smile, had a frown and his mouth and lips were dry.

[14] The photographer's affidavit and photos of the scene were accepted in terms of s 220 of the Act.

[15] Sergeant Sithole, a crime investigation officer for 12 years at the time of the incident, joined and assisted with the missing person enquiry that was opened after the deceased was reported missing by her father at the request of Madubye. The Appellant had by then already met with Madubye as a suspect on 16 November 2016 accompanied by Mr Strauss his lawyer. Sithole reckoned Madubye wanted a more experienced person to handle the case as he suspected that there was more than what meets the eye. She testified that on 18 November 2016 she joined a meeting that was held with the Appellant and Strauss. Strauss gave Madubye an affidavit signed by the Appellant referred to as J1 to which J2 and J3 was attached. Sithole read J1 to the Appellant and impressed on the Appellant if he was aware that the statement could be self incriminating and can be used as evidence against him. Strauss then asked to withdraw exhibit J the first unsigned statement that Appellant submitted. They refused and informed Strauss that both statements will be used for the purpose of investigation. They asked the Appellant that since the J1 statement was very detailed and precise if he managed to take the

registration number of the Quantum taxi with three male passengers that the deceased got into and the Appellant indicated that he did not. Sithole went through the J1 statement with the Appellant who confirmed the content until where it says they stopped at a certain area where they had sex. The Google map attached to J1 was marked as Exhibit J3. Appellant was asked to explain this place in detail and point it out on J3 as she was familiar with the area in Kliprivier (Point A). Also the place where he dropped the deceased off to get a taxi to go to the Vaal (Point B). She asked the Appellant to explain again and again as it did not make sense that the Appellant could have had sex in that area and then drop the deceased who was going to the Vaal further away in an area that is now in Joburg on the other side of the R59. According to her, taxis in that direction go to Eikenhof and Southgate, further it was also a Sunday, which would make it an awkward place to get a taxi. The Appellant insisted that it is where he dropped the deceased and that he did not take down the registration number.

[16] Going through the Appellant's first statement, she was concerned that the Appellant had indicated that he left the deceased's house and the direction he was going was not far from the deceased's house near Phola Park. She expected the Appellant, when he realised that he had no money and had told the deceased that he had to meet Sambo at Eastgate, to have done a u-turn and taken the deceased back home. It was a few minutes after he left her home and could not understand why he would put her in a taxi. The Appellant also alleged to have pulled over and tried to wave down the taxis when a third taxi, a white old taxi not a Quantum said it was going to the Vaal. He pulled the deceased's bags from the car and gave her a kiss and a hug. The deceased got

into the taxi that had three males. He, after the deceased had boarded the taxi, went straight at the robot and drove to the R59 highway.

[17] Sithole pointed out that on J1, the Appellant's version which was different was that he drove down Khumalo Street, turned into Yende and into Rivett Carnett Street then Peterson Road and then Jackson Road into Vereeniging. This was a different area from the first statement. He further said when they reached the R59 intersection they saw an accident and decided to stop not far from there at a secluded place and have sex in the car next to Perde Road for about an hour. He again referred to not having money for petrol and having to meet Sambo to which the deceased agreed to catch a taxi. They drove further up the road till the intersection before the onramp to the highway. It is the second place where he alleges to have dropped the deceased to catch a taxi which is the other side of Kliprivier and a Johannesburg area, the other side of Southgate, Eikenhof and towards Southgate. After seeing her off he drove towards Johannesburg, no longer straight to the robots. On statement J he never mentioned reaching Eastgate. The J2 logbook shows that from point of drop off he drove to Sandton. All that together with the sudden allegation of stopping and having sex raised suspicion to Sithole. According to Sithole she discussed all these concerns with the Appellant in the presence of Strauss. The Appellant kept on saying he did not do anything wrong. She agreed with Strauss and the Appellant to visit the scene the next day on 19 November 2016, meeting at 7h00.

[18] The next day Strauss and the Appellant were late. At 7h30 Sithole proceeded with Madubye to the Kliprivier police station where they met up with Warrant Officer Van Rooyen from K9 dog unit who was going to assist to

find a lead in the matter. The three of them started searching the area for a lead, joined by Warrant officer Nzimande from legal services and Colonel Botha. She described the area to be an open field with a stream and a bridge on the other side. There is a road that crosses the bridge and the stream under the bridge with a bush nearby. They proceeded to walk from the main road down to the field and the bush. They passed point A and they were going to point B when they heard Madubye shouting that he is seeing something like a body of a person. They quickly walked to the spot which is about 50 meters from where the Appellant said he parked his car to have sex with the deceased and found a body of an african female. They found some clothing and checked if it matched the description that was given when the deceased was reported missing. Madubye phoned the deceased's father. Assistance was requested from Kliprivier detectives as the area was already a Kliprivier demarcation.

[19] The area was cordoned. Ngobeni arrived and assisted with the identification of the body. He confirmed through checking the teeth, underwear and the hairstyle that it was his daughter. Madubye informed Ngobeni that Strauss called that they are already at Kliprivier. The experts started arriving. Madubye left to go and meet with Strauss and Appellant at Kliprivier Police Station. They decided to open a murder case. Strauss on hearing that they have found the deceased requested to come to the scene. He arrived at the scene and after seeing the deceased he informed the police that he was withdrawing as the attorney of record for the Appellant. They handed everything to Madubye who then arrested the Appellant. The scene was handed over to the Kliprivier detectives.

[20] Ngobeni was assisted in identifying the body of the deceased by Constable Jiyane an expert from LCRC who was handling the scene. Sithole said the condition of the body was traumatic to watch. Sithole confirmed that at the inspection in loco, the road mentioned by the Appellant in paragraph 6 of J1, the R61, Vereeniging road could not be found. They searched on Google and only Petersen and Provincial Streets could be found. Yende and Rivett Carnette Streets were the direction mentioned in terms of J1. The roads were at the end opposite of each other. The Google Map of that area had been admitted as exhibit J4.

[21] Sithole later met the Appellant at Kliprivier police station. The Appellant was taken to his home by Madupye, Nzimande and herself to go and conduct a search for anything that might link the Appellant who was their only suspect at the time. Nothing was found. Sithole's evidence was very detailed. She confirmed that the police went to the Appellant's house a day after the deceased's body was found, that is seven days after she had gone missing. She was cross-examined by the defence on how the police officer could have handled the crime scene including measuring the distance between the spot where they found the body of the deceased and the things they found in the vicinity which included old broken computer pieces.

[22] Dr Schutte, the medical examiner testified on the advanced state of decomposition of the body of the deceased when it was found and the cause of the deceased's death, confirming strangulation. The time of death was estimated by him to have been 7 or 9 days prior to date of discovery. He confirmed that the deceased was 8 to 10 weeks pregnant at the time of death. Further that no samples were extracted or obtained for DNA analysis or

exclusionary purposes. He denied that he was requested to do so by the police or Sithole and confirmed that it was still possible to obtain the samples even when the body was in an advanced state of decomposition, for purposes of excluding or confirming the presence of the deceased at another scene.

[23] A Tracker employee, Ms Pretorius testified on the Trip log marked exhibit G which was that of the vehicle of the Appellant, Tracker's registered client. She confirmed the movements of the Appellant's vehicle on 13 November 2023 as detailed therein. Her evidence was undisputed. She, on the working of the system, indicated that the recording updates every three minutes unless there are significant changes such as the ignition being on or off. A stop would be recorded if it is longer than three minutes. Ordinary traffic stops or yield signs were not reflected to avoid long reports. The fluctuations in speed also not recorded unless there is a significant change in speed. She confirmed that there was no communication between the unit in the Appellant's vehicle and their system between 17:38 on 13 November 2016 and 06:52 on 14 November 2016 and that the entries in the column reflecting real time communication was earlier than the times reflected in the column stating the communication time back to the office, but could not explain the reason thereof.

[24] Van Rooyen, a technician from tracker, led evidence to clarify the technical and operational workings of the tracker system that Pretorius, who was not a technician, could not testify about. Van Rooyen took the court through the technical and operational workings of a tracker system. She confirmed Pretorius's narration that unless the stopping of the vehicle coincided with the sending of a signal to the satellite or the stop was longer than

three minutes the stop will not be reflected on the trip log. She testified on the interpretation of the GPS and sim card that is Exhibit "G," explaining that the system has two main components to wit, a cellular phone module that sends messages to the back office via GPRS and a GPS module that receives the position data from the satellites. The GPS receiver will only be on when the vehicle's ignition is on. According to the recordings on the tracker, there is no evidence of the Appellant's car having stopped between 16:35 to 16: 38 on 13 November 2016. At the time it was travelling from Perdekop Road near point B to a point on the R59 Sybrand van Niekerk Highway. The average speed the car was travelling on was 73 km per hour. He determined the distance to be about 4 km, which was a mechanical calculation without taking any factors into consideration such as road conditions, terrain or traffic density. The car also never stopped along the road after coming out of the bushes. It is however shown to have driven to different locations sometimes at high speed coming out of the bushes. The car is depicted driving at 120 km/h on the R59 highway and to have stopped at Marlboro Garage at Marlboro Gardens. It then travelled at a speed between 80 and 120 and stopped at Halfway Gardens and to have moved from there travelling at a speed of between 60 and 120 km until Botswana Street in Tembisa. It ended up in an outlying street in Clayville which is still Tembisa.

He was asked on the photos that were taken by the Appellant and his brother specifically exhibit "G" which depicts an empty Quantum or Combi.

[25] Mr Pillay an MTN employee confirmed in respect of Exhibit H1, which is the detailed billing of the cellular phone number that was used by the Appellant that it indicates that the number was not in use on 13 November 2016 until 15 November 2016. He indicated that when he compared Exhibit H1

and Exhibit H5 which is another cellular phone number 0813857686 that belongs to the Appellant, he saw the same IMEI number, 355025068585690 which means the same handset was used with two different cell numbers and two different networks. An IMEI number is the physical serial number on the handset. In respect of the two numbers that belonged to the deceased, the first number 0810392288 was switched off on 13 November 2016 and the second one 0710286303 was on until 09:12 on that day whereafter it was switched off for the rest of the day. He pointed out that it is possible for a person to have a phone that is registered in terms of the Regulation of Interception of Communications and Provision of Communication-Related Information Act 70 of 2002 (“RICA”) in another person’s name due to the fact that there is a backlog on updating the RICA information.

[26] Ms Ngwenya, one of the investigating officers testified to have received this case for investigation on 19 November 2016, taking over the crime scene from Sergeant Sithole. Present also at the scene was Madubye, Warrant Officer Nzimande and the brother of the Accused. She met the Appellant later at the police station following the Appellant’s arrest by Madubye. The Appellant had brought a backpack with his passport, cellular phone which had an extra sim card in its pouch cover and his identity document. She detained and booked him in. She then booked him out for verification of his residential address. She was accompanied by Sithole, Madubye and Nzimande. When they arrived at Appellant’s home they also searched for incriminating evidence and could not find any. She denied that the Appellant was assaulted by any of the officers. She confirmed that whilst they were in the car, the Appellant was being questioned by all the officers but none of them assaulted him.

[27] Regarding access to the Appellant's phone she testified that they obtained a court order that compelled the Appellant to open his cellphone which the Appellant does by using his thumb print. She also indicated how she got hold of the detailed tracker report of the Appellant's vehicle which the Appellant and his attorneys were reluctant to provide her with. They were provided with a one page report and had to write several emails to different tracker companies trying to find the one the Appellant's vehicle was registered with in order to get a detailed Trip Log. She also testified about the fact that she received the cellular phone statements from MTN. One of the phones used by the deceased was registered in the name of Thulani Moses Shibango. She tried in vain to trace this person. She could not trace the house number at the location. However whilst she was taking down Ngobeni's statement he told her that Shibango was the deceased's previous boyfriend.

[28] She confirmed to have been at the mortuary on 21 December 2016 and to have requested Dr Schutte to do a nail scraping on the deceased's body but due to its bad decomposition Dr Schutte indicated that as a result it was not possible to do the tests. She requested the Local Criminal Record Centre ("the LCRC") to investigate the vehicle and to take samples for DNA analysis. It was put to her that Dr Schutte had denied being asked for nail scraping or DNA.

[29] In respect of a specific drop off point shown on J1 by the Appellant, she disputed it, stating that even though she does not use taxis she is familiar with the area which is very quiet and does not have a route for taxis to the Vaal. There is a taxi rank near the police station but it is for taxis going to the East Rand. The people from the nearby squatter camps frequently ask for a lift from

the police to be dropped next to the police station to board the taxis. She confirmed that there is a wedding venue and a golf course where the gravel road ends. She was not clear on whether taxis travel on that road. She however confirmed to know the place very well where the Appellant alleged to have dropped the deceased as she travels on that road two to three times a day. She was adamant that there were no taxis there. An inspection in loco conducted by the court a quo is said to have indicated Point A in J3 where the deceased is alleged to have been dropped to be near a derelict structure of an informal roadside shop some distance after the turn off at the T-junction of the R550 on which the Appellant drove when he and the deceased went to point B and allegedly had sex.

The defence's version

[30] According to the Appellant's testimony in chief, he met the deceased on social media at the beginning of 2016. Their friendship later evolved into a romantic relationship. They were seeing each other two or three times a week. At the beginning of October the deceased told him she was pregnant. At the time the Applicant was helping with a family business whilst the deceased was studying with plans to open a science school. A child was not in the planning and the deceased was confused as to whether she wanted the child or not. The Appellant had researched the issue of an abortion on Google and raised it with the deceased a week before the 13th November 2016. He accompanied the deceased to a facility for an abortion. It could not happen as they missed the cut off number after waiting for a long time. They tried the Johannesburg General Hospital, however after consultation the deceased came out and told the Appellant it could not be done. She could not go through with it. According

to the Appellant he was not angry but frustrated as to what needed to happen then. At the time he was appointed at Primedia since September 2016 and was under pressure to secure a contract.

[31] The following week on 12 November 2016, the deceased called him and they had a pleasant conversation. On 13 November 2016 he saw 3 missed calls from the deceased and returned her call by a WhatsApp call. The deceased wanted to meet with him after church. They met at 11h00, had a chicken licken lunch at the Germiston lake sitting in the car and chatting. He was assured by the deceased that all was well. He felt secured as he had got the Standard Bank contract for R2 Million. There was therefore clarity reached about the pregnancy. At the deceased's request he left with the deceased from her home on 13 November 2016 between 15h15-15h30 with her tog bags in the back seat supposedly taking her back to her residence at the Vaal Technikon. He alleged to have instead got out of the tarred road at some point and driven on a gravel road to a remote area which he alleges he was directed to by the deceased as they were feeling frisky. They had sex at the spot which he indicated on Exhibit K. They were done at about 16h30. Whilst they were still parked there they observed a taxi on the R55 that had stopped on the side of the road, waited a few minutes and drove off. It felt to him like they were being watched. As it was late and he had received a call/message to collect money from Sambo, he got the deceased into a taxi that was to take her to the Technikon. He was not familiar with the place. The deceased suggested to him that she can get a taxi at the hospital. He drove fast as his understanding was that he was taking her to the hospital. They saw two stationary taxis after Phola Park on the corner of Point A on J3. On enquiry, they were told that the taxis were not going to the Vaal. An older model Toyota taxi known as a Zola

Budd came from behind and pulled up on his side of the window. He asked the driver if it was going to the Vaal. The driver confirmed. It pulled in front of them and he assisted the deceased to get her bags out of the car and loaded that into the taxi. He gave the deceased a hug and a kiss, and got back into his car. He never saw the deceased again. He drove onto the highway towards Eastgate. He tried to call Sambo several times on a WhatsApp call as he, did not have airtime. He could not get Sambo and decided to go home. On his way home he stopped at three convenient stores at different filling stations to get bread and milk before arriving home at 18h00.

[32] The next morning he went to work and did not find it strange that the deceased has not contacted him as they sometimes went for days without talking to each other. After 21h00 that day he realised that he missed a call from a number he did not recognise. He called back the number and it was the deceased's mother who informed him that they have not been able to get hold of the deceased since the previous day. He informed the deceased's mother (Mrs Ngobeni) that he did not take the deceased to the Technikon but dropped her off to take a taxi. She asked him to inform her as soon as he hears from the deceased. The Appellant said he was a bit worried but thought that maybe the deceased had a battery problem or might be studying. On 15 November 2016 he received a call from a man who was very aggressive and threatening. The man identified himself as the deceased's uncle. The caller wanted to know where the deceased was and told the Appellant that with the connections the caller had in the police, the Appellant will spend the rest of his life in jail. The Appellant alleged to have informed his family about the call who advised him not to continue communicating with the deceased's family but to wait to speak to the police. He then got a call from Madubye who was very hostile to him

and wanted to meet with him on that very day. They agreed to meet the next day. Mr Ngobeni at the same time also spoke to him. Ngobeni wanted to meet with him on that day in Katlehong. He refused and they agreed to meet at Nandos Bruma Lake instead, despite his sister discouraging him from doing so. He felt he had nothing to hide. He however lied to the deceased's parents and told them that he dropped the deceased at the robots in Phola Park. His excuse was that he felt uncomfortable to tell them that he had sex with their daughter. He denied crying during the meeting or saying that "mommy, I am sorry it had to end this way."

[33] He returned to work after the meeting with Ngobeni and drafted the statement admitted as exhibit J. He thereafter met with his attorney Mr Strauss. Subsequent to that meeting with Strauss he then drafted exhibit J1. He informed the police when they met again at their second meeting on 18 November 2016, about the differences between the two statements and the reasons why they differed. The Appellant wanted them to see that he was trying to assist by being open and frank. He agreed to take the police the next day to the area shown on J3. The next day whilst they were waiting at the police station Madubye and Sithole arrived in a bakkie. Madubye informed them that they have found the body of the deceased and arrested the Appellant. He was taken to the scene whilst Sithole was crying asking the Appellant why he would do such a thing. Later the Appellant was taken to the police station and booked into a holding cell. He was on the same day booked out by the three, Madubye, Sithole and Ngwenya and taken to his home. They searched the house but could not find anything. Madubye took a pair of trousers and a shirt from the laundry room. The Appellant alleged to have been assaulted by Nzimande in the car whilst Madubye and Sithole were out at

a convenient store. The assault stopped when Sithole came back to the car. He was taken back to the cells. In closing the Appellant indicated that on 7 April 2019, he and his twin brother made a video simulating the Appellant's movements on 13 November 2016.

[34] Under cross examination, the Appellant alleged to have called Sambo to find out where he was, using the deceased's phone. According to him he put that in his signed statement but he could not show the court where he had said that in the statement. He also said he needed to meet Sambo as he did not have money for petrol for during the week which he also did not mention in his statements and contradictory to his evidence in chief. He also alleged to have forgotten in his statement to mention the SMS and WhatsApp messages from his sister that reminded him about the rent. He alleged to actually get R500 from the rental amount for petrol which he did not have at the time, as a result he had to drive home slowly to preserve petrol and by the time he got home it was past 17h20. He did not then mention meeting Sambo because when he tried on WhatsApp or to message Sambo he was unsuccessful, so the preserving of petrol was foremost in his mind at the time. He was then shown on Exhibit G his speed at the time after he alleged to have dropped the deceased at the taxis that he drove at 120 km/h and then at 133 km/h. The Appellant is also shown to have driven to different locations sometimes at high speed coming out of the bushes. He also never stopped along the road after coming out of the bushes. He is depicted driving at 120 km/h on the R59 highway and to have stopped at Marlboro Garage at Marlboro Gardens. He then travelled at a speed between 80 and 120km/h and stopped at Halfway Gardens, moving from there travelling at a speed of between 60 and 120 km until Botswana Street in Tembisa. He ended up in an outlying street in

Clayville which is still Tembisa. The Appellant confirmed that in his statement he had actually stated that when they reached R59 highway they saw that there was an accident so they decided to stop not far from there at a secluded place and have sex, which was contradictory to his evidence in chief.

[35] The Appellant confirmed Ms Ngobeni's assertion that the deceased pregnancy was a bone of contention between them as the Appellant wanted the deceased to abort the pregnancy and she resisted. He indicated how much stress that caused him and explained the number of times he tried to get her to abort. He alleged that at the time of her disappearance he had however accepted that she can have the baby. The deceased had assured him that the child will be taken care of as things will improve between them. The first time he knew about the pregnancy was the beginning of October 2016. The attempts to abort happened in the first week of November 2016. He took her to hospitals, but it never happened. He said he was dissatisfied although not angry. He did not want the baby for financial reasons. He was about to start with his family a family business. The deceased had her own plans relating to opening a school that he was helping her with. At his job at Prime Media where he started in September 2016, he had just secured a contract with Standard Bank valued at R2 Million. The target he had to meet was R400 000.

[36] He got the news a week following the 1st week of November 2016 after they failed to do the abortion, that the Standard Bank deal had succeeded, the bank would be joining the programme for the amount of R2 Million. When he was asked why it was the deceased that phoned him to come as everything was ok, not him seeing that he is the one who had now changed his mind. He said the deceased called him 4 times on Saturday and he missed the calls, so

he never spoke to her. He only called her on Sunday and the deceased informed him that she had chest pains and asked him to come through to her. It was put to him that his evidence in chief was that the deceased phoned him on a Saturday being in a jovial mood. He disputed that and insisted that he called the deceased on Sunday and went to see her. They went through everything and also on how things were going well that week. He was concerned about her health and told her he will be there for her. When the deceased told him how her family was going to be there for her and her schooling which was not going to be affected he then told her his side of the story. He said they were in a great space and that is why they spent so much time together. He was again reminded that he told the court that they spoke on Saturday on WhatsApp and also earlier on, on the phone. Appellant's Counsel confirmed that the Appellant previous testimony was indeed that they had a WhatsApp call on a Saturday, however Appellant persisted in his denial.

[37] The Appellant denied having murdered the deceased. He confirmed lying about the drop off points to Ngobeni and said when he initially lied to Ngobeni he was not aware that the deceased has gone missing. He thought she was fine and did not want to say anything about the sex. But when he realised the seriousness he then decided to tell the truth. He was asked about his text conversation to his sister when she asked him how it went with the meeting with the police and had answered that "scary" and that "they do not have anything yet," "they were speculating." He said he was trying to tell her that the police don't know what is happening with the deceased. They were looking at options of what could have happened. He was then referred to his message of the 18th November 2016 at 3:08 PM to his sister telling her that "Joe believes if they find the body tomorrow that they will arrest me. He says

he should be there but he also says he needs payment again.” “I tried , I mean sorry, tried calling ma and she is not available. He was asked why he was talking about “the body” when they were still looking for a missing person and why Strauss believed they will find the body. He said when they were discussing with Strauss and his family, asking themselves what if the Appellant put the deceased in one of those taxis and it did not take her where she was supposed to go, being one of those taxis that who during that year in 2016 were known for the abductions, rape and some murder. What if she turns out dead in the area what would happen with him. He was asked why Vaal was not an option where the deceased’s body might be found as he put her in a taxi to there. He said Ngobeni had told him that she had not arrived at Vaal which told him that where he dropped her and where she ended up might be the possibilities. He agreed to even with that knowledge not to have told her father that when he was frantically looking for his daughter.

[38] He was referred to a message he got on 17 November 2016 at 14:55 PM from a person called Alister Adams that he should take the statement to his mother who must read it and sleep on it. He indicated that his mother did not read the statement and Adams is the person who referred him to Strauss. Strauss had told Adams that he wanted to meet with the Appellant after work so Adams was aware that he was going to meet with Strauss to discuss his statement, and advised him to take the statement to his mother to read and sleep on it. They had also discussed the statement as a family. On the same day at 15h13, his sister sent him a message that “ I know its hard dude but we are here for you”. His sister further said **“Your statement is solid. Your tracker agrees with the statement, you will be ok.”** He says his sister said that because she was aware that the drop off location was now different. His family

had asked him if his tracker agrees with the statement. He was encouraged to be honest, his statement now agreeing with the tracker, saying to him he will be ok. He confirmed to the court his statement that after having had sex with the deceased, he dropped her off to catch a taxi not at the Katlehong taxi rank where she wanted to go, but in a taxi with three men and he never called her to find out if she made it or travelled well, on that day or ever. He said that is the way their relationship was. Also the deceased was an independent woman, older than him and had never once stressed about whether she was okay or not until she says so. He was not concerned, even after hearing that she might be missing. He was shown on the detailed trip log book exhibit "G" a place near where deceased's body was found as the place where he burnt the deceased's clothes. He disputed that. On the court's questions he was asked as to when did he become aware of the women that were being killed and in that area. He said in 2017 in the Johannesburg South and Soweto area. He was reminded that he said they discussed it with the family after the deceased was missing. He then said he knew about it from the news in 2016 already before the deceased disappeared.

[39] He was asked why his sim card was not on his phone on the date of deceased's disappearance. He said because he was trying to reach Sambo so they took out the deceased's sim card and put it on his phone because the batteries on both deceased's phones were flat. On the issue of Sambo he indicated that he collected the money on 14 November 2016, which is the next day on Monday evening and told his sister to have deposited it on Tuesday 15th November 2016. He confirmed to have visited the three garages on the day but did not buy fuel instead bought milk and bread. He said he got his fuel money from Sambo that is why he had to collect the rental from him.

[40] The Appellant's twin brother evidence was just confirmation of the area they covered simulating what might have happened on the day, trying to retrace the alleged steps of the Appellant. Not much turns on that evidence.

Legal framework

[41] It is trite that the court can only convict the Appellant if his guilt has been proven beyond reasonable doubt. The onus rests upon the State in a criminal case to prove the guilt of the accused beyond reasonable doubt – however not beyond all shadow of doubt; see *S v Ntsele*¹ .

[42] In *Miller v. Minister of Pensions*² as was put by Denning R (as he was then) on proof beyond reasonable doubt that:

"It need not reach certainty, but it must carry a high degree of probability. Proof beyond a reasonable doubt does not mean proof beyond a shadow of doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour, which can be dismissed with the sentence 'of course it's possible but not in the least probable' the case is proved beyond a reasonable doubt."

[43] On appeal, the court considers the trial court's finding of fact inclusive of credibility findings from the point of view that unless any misdirection can be identified it is accepted that the trial court's conclusions are correct; see *S v*

¹ 1998 (2) SACR 178

² [1947] 2 All E.R. 372 at 373

*Dlumayo*³, and *Mhlumbi and Others v S*⁴. In *S v Manyane and Others*⁵, the court held that:

“This court’s powers to interference on appeal with the findings of fact of a trial court are limited. In the absence of demonstrable and material misdirection by the trial court, its findings of fact are presumed to be correct and will only be disregarded if the recorded evidence shows them to be clearly wrong.”

[44] Consequently even in the instance where the trial court has erred in relation to the burden of proof, its credibility findings are still important in so far as they are not affected by the misdirection⁶. If the appeal court is in doubt on the finding of fact by the court a quo, the latter's decision remains.

[45] In instances where the court is dealing with circumstantial evidence, as in the present matter, it is not expected to consider every fragment of evidence individually. It is the cumulative impression, which 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. Courts being warned to guard against the tendency to focus too intensely on separate and individual components of evidence and viewing each component in isolation. See *S v Ntsele supra*.

[46] While there is no burden to prove every piece of evidence on a standard of “beyond a reasonable doubt”, in order to convict, on a circumstantial case, a court must be satisfied beyond a reasonable doubt that the only rational

³ 1948 (2) SACR 677 A 696-699

⁴ 1991 (1) SACR 235 (A) 247 (g)

⁵ 2008 (1) SACR 543 (SCA)

⁶ See *S v Tshoko* 1988 (1) SA 139 (A) 142F-143A

inference that can be drawn from the circumstantial evidence is one of guilt as it was clearly outlined by Zulman AJA in *S v Reddy and Others*⁷ who held that:

“In assessing circumstantial evidence one needs to be careful not to approach such evidence upon a piece-meal basis and to subject each individual piece of evidence to a consideration of whether it excludes the reasonable possibility that the explanation given by an accused is true. The evidence needs to be considered in its totality. It is only then that one can apply the oft quoted dictum in *Rex v Blom* 1939 AD 188 at 202-203 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."

[47] If they do not exclude other reasonable inferences, then there must be a doubt whether the inference sought to be drawn is correct. In *Reddy supra* , the court also referred to the matter of *Davis AJA in R v De Villiers*⁸ where the dicta is said to be well put in the following remarks:-

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

⁷ 1996 (2) SACR 1 (A) at par 16

⁸ 1944 AD 493 at 508/509

as a whole is beyond reasonable doubt inconsistent with such innocence."

[48] The court a quo being alive to what the standard of proof entails and the requirements of a holistic rather than piecemeal consideration of evidence approach, with reference to the dictum in *S v Hadebe and Others*⁹ and other authorities, weighed the evidence as presented by the state's witnesses and concluded that even though the court might have regarded the evidence of Mr Ngobeni to have been a little bit stretched due to his belief that the Appellant had killed his daughter, his belief was not unfounded as indeed the Appellant had lied to Ngobeni at a critical time when it was obvious that the deceased is indeed missing or probably in danger. The Appellant did not show any concern. Ngobeni's suspicious sentiment did also reside with the other witnesses that the Appellant was not telling the truth and hiding something.

[49] The Appellant's lies and inconsistencies that stirred the suspicion of guilt to be harboured by Ngobeni was indeed corroborated by the police officers who testified to the Appellant's persisted trajectory, misleading them in the statements he made regarding getting the deceased into a taxi and on the exact place where that happened. The Appellant also continued to lie to Ngobeni about the reason why he did not take the deceased to the Vaal. Madupye also observed that the Appellant was sweating, panicking and unsettled. The evidence of him lying being uncontroverted, it is under those circumstances that the court accepted the evidence of Mr Ngobeni.

[50] The court also accepted the evidence by Madupye, who was found to be truthful therefore a credible witness. Likewise that of Ngwenya and Sithole,

⁹ 1998 (1) SACR 422 (SCA) at 4266

the other two police officers who were involved in the investigation. Sithole made it clear that the Appellant indeed continued to lie about the place where he allegedly stopped to get the deceased a taxi in the written statements that Appellant provided to the police officers. The statements were not only misleading but contradictory to each other as well. Sithole asked the Appellant about that and he failed to give an explanation. In the statements the Appellant also gave a different reason why he deviated from going where they were going when they left the deceased's home. Ngwenya on the other hand confirmed that indeed the places that the Appellant indicated did not even have taxis operating there. According to Sithole, in terms of proximity of the deceased's home to the place where they were when the Appellant allegedly decided not to take the deceased to the Vaal, the decision to take her to the taxis did not make sense. All this discrepancy was not denied by the defence. The evidence of the officers was therefore correctly accepted by the court who had found it to be credible and in support of Ngobeni's evidence that the Appellant is complaining about on appeal.

[51] Furthermore in the case of Ngwenya and Ngobeni, their evidence that the Appellant could not have stopped where he ultimately alleged to have left the deceased was also corroborated by the evidence of the tracker report that indicated that the Appellant did not or could not have stopped there for the duration he alleges to have done so. His car was instead depicted to have come out of the bushes where the body of the deceased was found and got onto the main road without stopping. The attempt by the defence to present a report the Appellant compiled with his twin brother simulating what the Appellant alleged to have happened could not be admitted as a valid challenge of the tracker's technical report. The defence ultimately tried to argue showing that

he could have stopped and got the deceased into a taxi under or in three minutes which then would not have been recorded on the tracker system. The recorded speed by which the Appellant was driving leaving the gravel road to join the main road discounted that possibility. The evidence by the state witnesses therefore mutually corroborative and solidly disproved the version of the Appellant, indicating that indeed the appellant lied about having stopped and got the deceased into a taxi to the Vaal. The spot in the bush where the Appellant's car was stationary was confirmed on the tracker system and common cause. The complaint that Van Rooyen not an expert does not nullify what is depicted in the report. It is also common cause that the body of the deceased was found +- 50 meters from where the Appellant's vehicle was stationary. All of this evidence uncontroverted, the trial court's finding on the state's witnesses' credibility therefore defensible.

[52] On the other hand the Appellant displayed a propensity to lie and give an explanation when he is called out, which is a disturbing factor. The Appellant had in his grounds of appeal contended that the court a quo misdirected itself when it found his version not reasonably possible. The Appellant had admitted to having lied consistently to Ngobeni and in his statements that he later submitted to the police. He further in his testimony contradicted himself in certain material aspects. The struggle that the court would have had considering that he was inconsistent and sometimes contradictory would be with regard to the exact version to consider.

[53] The Appellant was not only untruthful about getting the deceased into a taxi instead of taking her to the Vaal but also about the reasons for having allegedly done so. The reasons he mentioned were inconsistent and his evidence in that regard constantly shifting. He mentioned that after they have

left the deceased's residence to go to the Vaal, whilst they were in the bushes he received a message from his sister reminding him to collect money from Sambo and also to have made a call to one Sambo. Yet it was proven that his phone was not operative for the whole day since in the morning. In explanation he alleges to have used the deceased's sim card to make the call to Sambo. In addition, although Sambo was the main reason (other than the call about work and from his sister about a family meeting he alleged to the deceased's father to have received) that made him change the plan to go to the Vaal, he never went to Sambo. He mentioned an issue of not having enough petrol and of part of the rental money accounting for his petrol, to explain that incongruence. His car tracker report however depicted him driving towards Sandton, stopping at three different petrol stations and finally coming out of Botswana Street in Tembisa. He ended up in an outlying street in Clayville which is still Tembisa. He nevertheless did not pour petrol at any of the three petrol stations but testified to have stopped to buy bread and milk having received a message to do so from his mother. That would not require him to drive to three petrol stations and away from his home which is inconsistent with his allegations of not having petrol.

[54] In addition, he had pointed out on the Google Map the area where they stopped to have sex that was marked Point A and where he allegedly dropped the deceased as point B. Sithole had testified that he asked the Appellant in the 18 November 2016 interview, to explain again and again in detail and point out on Google Map the areas where they stopped as she was familiar with the area in Kliprivier Point (A), and to her it did not make sense that he could have had sex in that area and then drop the deceased who was going to the Vaal further away in an area that is now in Joburg on the other side of the R59.

During his testimony he unashamedly attempted to dissociate himself from the marked Points, notwithstanding that at the inspection in loco he pointed out the same areas that corresponded with the marked points on the Map. He had previously told Ngobeni of three different places where he had dropped the deceased.

[55] It was as well strange that after the police officers informed the Appellant and Strauss that they will be searching the area the next day, extending the invitation to them to join the search, the Appellant and his sister spoke about Strauss expecting the officers to “find the body.” If the Appellant did not know what happened to the deceased, it is strange that his legal representative expected the search of the area to lead to the deceased body being found. What would have informed that expectation and of the arrest of the Appellant, can only be because they were aware that the deceased was no longer alive and of her body being in that area. It was also expected that the Appellant would then need the presence of Strauss. The mentioned discussion followed another discussion the Appellant had with his sister after the Appellant’s first interview with the police when the Appellant told his sister that the police “did not have anything yet” and “were speculating,” and her assurance that he had a solid statement. At the time of the impending search, it then became obvious, as per their discussion, that the police were going to find the body of the deceased, which was indeed found. He actually even prepared for that eventuality when it has not been ascertained as to what has happened to her. It therefore cannot be a question of coincidence, it is too far off. He later when asked about that gave a narration that actually at the time there were stories about women that get raped and killed after being picked up by the taxis. But how did he know that if she is killed under those

circumstances she would be found back at or near the place where they were parked on that day in the bushes.

[56] The Appellant's stated reason for expecting the deceased to be found dead clashes with his lack of alarm on her disappearance and his consistent evasiveness about where he allegedly dropped her off, when Ngobeni who due to grave concern was looking for the deceased. The Appellants conduct towards Ngobeni was out of sink with what he alleged to have known about women being killed and the seriousness that generally pervades the disappearance of a person, and not any person but his girlfriend who was carrying his child. It was also important for Appellant to note that the concern was raised by her very close relatives, people who know her very well informing him that it was unlike the deceased not to call them at all when arriving at her residence or soon thereafter. The Appellant never called the deceased even then or at all. He refused to go and show the parents where he dropped her since he mentioned three different places. He subsequently persisted with his lies in statement J and J1 that he thereafter submitted to the police, the content of which he also controverted during the trial. He unconvincingly tried to justify not calling or checking on the deceased by alleging that they used to speak only twice or thrice in three months. Further by mentioning that she was a big girl, older than him so she could look after herself. His evidence in that regard which he made up as he went along was just totally unsound seeing that he was the last person to be seen with the deceased. The fact that he thereafter informed his sister that the police don't have anything but just speculating, does not make any other sense except indicate that he knew what happened to the deceased and did not want the

attention to be directed to him. He consequently, to that end, continued to perpetuate lies.

[57] It is common cause that the Appellant was not happy with the deceased's decision to continue with the pregnancy. It is how he felt a week before she went missing when she refused to continue with the abortion. In his evidence in chief he alleged that the deceased phoned him a week after on Saturday 12 November 2016, to tell him that everything was okay as the parents will assist to look after the child. As a result they were happy and had a good conversation leading to their getting together the next day. However he had already testified that the deceased had in fact told him the previous week when she refused to proceed with the abortion that its okay, the parents will assist. The Appellant subsequently under cross examination denied speaking to the deceased that Saturday but alleged to have spoken to her only the next day on 13 November 2016 which is when the deceased told him the good news and he also told her his news. When he was made aware of the discrepancy, which was also confirmed by his legal representative that he said he spoke to the deceased on Saturday, he insisted that the deceased only phoned him on Sunday and told him that she was sick. He alleged to have gone to see her for that reason not because of the good news. Further, to have only told the deceased of his good news on Sunday after she has told him of her good news. The Appellant again could just not get his story right and made it up as he went along, rendering his version totally unreliable.

[58] The complain about lack of investigation by the police was just an attempt to divert the attention from the Appellant which has always been his intention, to confuse. He had thought by making the false allegations about

having left the deceased in a taxi that had three men of which he did not bother to take the number plates, the police will be delayed and sent on a wild goose chase, that being apparent from the conversation the Appellant had with his sister about the police after the interview that “they do not have anything yet, they were speculating.” He did not anticipate that even after making false statements about the different places he got the deceased a taxi they will focus their attention on him and his movements. The intention with the mentioning as well of the alleged ex boyfriend of the deceased was to divert the investigation. In *S v Ntsele*¹⁰, the SCA instructively stated that:

“One has to bear in mind that the cardinal rule is whether on a conspectus of the evidence as a whole, it was established beyond a reasonable doubt that the commission of the offences were committed by the accused. It is unacceptable that any possibility, no matter how far-fetched, should be elevated to a defence in law, as there is a veiled suggestion for which no foundation was laid that the evidence may have been contaminated or that the wrong items were examined.

[59] Now looking at the series of facts on the material aspects albeit circumstantial they point to only one possibility, which is that the Appellant is the person that murdered the deceased. He had exclusive access to the deceased, the opportunity and motive. The discrepant evidence and alibi of the Appellant in his attempt to confuse and conceal his involvement in the disappearance and murder of the deceased does not impact on the only inference that can be drawn from the series of facts. The court a quo was correct in its decision not to place any probative value on the Appellant’s

¹⁰ at para 22

version. The inference which the court drew from the conspectus of the evidence as a whole, that the Appellant is responsible for the death of the deceased was consistent with all the proved or common cause facts, proving the Appellant's guilt beyond reasonable doubt. The Appellant's guilt was the only reasonable conclusion available on the totality of the evidence. The conviction should consequently stand and the appeal should fail.

[60] Under the circumstance, the following order is made:

1. The Appeal is dismissed.

I agree,

N V KHUMALO J
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

I agree

SARDIWALLA J
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

HOLLAND- MUTER A J
ACTING JUDGE OF THE HIGH
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