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, PRETORIA

CASE NO: CC42/2023

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

29 February 2024 **PD.**
PHAHLANE **DATE**

In the matter between:

THE STATE

and

MURENDENI MUNWODZI TSHEPO MOLOBETSI **ACCUSED**

JUDGMENT

PHAHLANE, J

[1] The accused was charged with one count Murder read with the provisions of section 51(2) of the Criminal Law Amendment Act 105 of 1997 ("the Act") in that on or about the 15th to 16th of June 2022, and at or near Mamelodi East, in the Regional Division of Gauteng, the accused did and unlawfully and intentionally kill N[...] S[...], a female person.

[2] The State alleges that the accused and the deceased were in a love relationship and that on the morning of 15 June 2022, the deceased went to the accused's place after she had received a call from the accused asking her to visit him and while there, an argument ensued between the two after the accused had received a call from his other girlfriend. The State contends that when the deceased wanted to leave, the accused stopped her from leaving and assaulted her with fists and strangled her, and thereafter locked her inside the shack and fled to Soshanguve. It is further alleged that the deceased's lifeless body was discovered the following day by her mother inside the shack where the accused had left her.

[3] The accused who is legally represented pleaded guilty in terms of section 112(2) of the Criminal Procedure Act 51 of 1977 ("the CPA") and made a statement which was read into the record. The section provides as follows:

> *"If an accused or his legal adviser hands a written statement by the accused into court, in which the accused sets out the facts which he admits and on which he has pleaded guilty, the court may, in lieu of questioning the accused under subsection (1)(b), convict the accused on the strength of such statement and sentence him as provided in the said subsection if the court is satisfied that the accused is guilty of the offence to which he has pleaded guilty:* ***Provided*** *that the court may in its*

discretion put any question to the accused in order to clarify any matter raised in the statement".

[4] The accused's section 112 statement is a confirmation of the averments made by the State and it explains how the offence was committed. The State accepted the plea, however, it could be gleaned from the statement that the accused did not admit all the elements of the offence. The express word "intention" is missing from the statement of the accused and accordingly, the court followed the procedure set out in subsection (1)(b)[1] and questioned the accused in order to satisfy itself that the accused intended to plead guilty, and to ascertain whether the accused admits all the elements of the offence to which he has pleaded guilty to. In ***DPP: Gauteng v Hamisi***[2] the court stated that: "the written plea is aimed at ensuring that the court is provided with an adequate factual basis to make a determination on whether the admissions made by an accused support the plea of guilty tendered".

[5] The contents of the statement will not be repeated herein as it forms part of the record, safe for the following paragraphs which I find to be relevant:

---

[1] Section 112(1)(b) provides that:

"(1) Where an accused at a summary trial in any court pleads guilty to the offence charged, or to an offence of which he may be convicted on the charge and the prosecutor accepts that plea-

(b) the presiding judge, regional magistrate or magistrate shall, if he or she is of the opinion that the offence merits punishment of imprisonment or any other form of detention without the option of a fine or of a fine exceeding the amount determined by the Minister from time to time by notice in the Gazette, or if requested thereto by the prosecutor, question the accused with reference to the alleged facts of the case in order to ascertain whether he or she admits the allegations in the charge to which he or she has pleaded guilty, and may, if satisfied that the accused is guilty of the offence to which he or she has pleaded guilty, convict the accused on his or her plea of guilty of that offence and impose any competent sentence.

[2] (895/17) [2018] ZASCA 61 at para [8] (21 May 2018)

"[8] ...I reacted angrily and punched her on the neck with a clinched fist and she fell to the floor and started screaming.

[9] Her screams gave me a freight as I began fearing that she would attract the unwanted attention of community members nearby and that they might attack me. ***I then grabbed her by the throat and throttled or chocked her until she lost strength, and her body went into shock and was trembling and kicking*****.**

[10] I then took my bag with clothes and locked the door from outside with a padlock and fled to Soshanguve leaving the deceased inside".

[6] Having questioned the accused, this court found that the accused did not admit that he had the necessary intention to commit the offence. I was of the view that the accused had a defence and accordingly recorded a plea of Not Guilty in terms of section 113 of the CPA[3]. It is trite that once a plea of guilty is altered to one of not guilty under section 113, any admissions already made and not affected by the section 113 ruling, shall stand as proof thereof. Accordingly, they are unaffected or unchanged by the conversion of the plea to one of not guilty. The court explained the procedure and the implication of section 113 of the CPA to the accused and the accused confirmed that he understands. Mr. Kgokane appearing for the accused submitted that the section 112 statement be admitted in terms of section 220 of the CPA, and the accused confirmed same. The statement was then admitted as exhibit A.

[3] Section 113 provides: **113 Correction of plea of guilty.**

(1) If the court at any stage of the proceedings under section 112(1)(a) or (b) or 112(2) and before sentence is passed is in doubt whether the accused is in law guilty of the offence to which he or she has pleaded guilty or if it is alleged or appears to the court that the accused does not admit an allegation in the charge or that the accused has incorrectly admitted any such allegation or that the accused has a valid defence to the charge or if the court is of the opinion for any other reason that the accused's plea of guilty should not stand, the court shall record a plea of not guilty and require the prosecutor to proceed with the prosecution: Provided that any allegation, other than an allegation referred to above, admitted by the accused up to the stage at which the court records a plea of not guilty, shall stand as proof in any court of such allegation.

[7] The accused made further formal admissions in terms of section 220 of the CPA, the effect of which was explained to the accused by the court. The section 220 admissions relate to the following:

1. The admissions themselves were marked as Exhibit B.

2. Exhibit C is the post-mortem examination report compiled by Dr Stefanie Claudia Ferraris after conducting a post-mortem on the body of the deceased on 17 June 2022 in which she recorded the cause of death as: **"UNCERTAINED AT AUTOPSY ALONE, MANUAL STRANGULATION MAY BE CONSIDERED".**

3. Exhibit C1 is a toxicology report explaining "the cause of death" compiled by Dr Stefanie Claudia Ferraris, and the accompanying affidavit was admitted as exhibit C2.

4. Exhibit D is the photo-album depicting the scene of crime and the body of the deceased.

5. Exhibit E is a confession statement made by the accused to Lieutenant Colonel Malinga.

[8] The correctness of the contents of the affidavits accompanying the reports and findings of the doctor who conducted the post-mortem examination were confirmed by the accused.

[9] The State called three (3) witnesses in support of its case and the accused elected to close his case without giving evidence.

[10] Ms. W[...] S[...], the mother of the deceased testified that the deceased received a telephone call from the accused on 15 June 2022 around 10:50, and explained that after the call, the deceased went out and she never returned home. Late in the afternoon around 15:00, she went to the accused's shack looking for the deceased.

The place was locked, and she went back home. The next day on the 16th of June around 9am, she went back to the accused's shack, and it was still locked. She peeped through the window and saw the deceased's hand, and she started screaming. Members of the community came to assist by breaking the shack of the accused and when the door was finally opened, she saw that the deceased was no longer alive and she was half naked.

10.1 The police were called to the scene and sergeant Masha, who is the investigating officer in this case was also present. She said she did not know of any relationship between the accused and the deceased, and was seeing the accused for the first time when he was arrested.

10.2 She testified that the deceased was 24 years old at the time of her death and had two children aged one-year-six months, and six months old, and the accused is not the father of the children. She stated that the deceased was not working but was training at a certain institution to be a cleaner and a security, and her certificates were delivered to her after the graduation ceremony held at the institution after the deceased's death. There was no cross-examination of this witness.

[11] Mr Mashigo Masha also took the witness stand. He is the investigating officer of this case with thirteen years in the South African Police Services and is stationed at Mamelodi East police station as a detective. He testified that he attended the crime scene on 16 June 2022 and was informed that the accused took the cell phone belonging to the deceased, and that he also had his own cell phone with him. He then activated what is referred to as "find my phone" in order to locate the whereabouts of the accused. On the 17th of June, he went to Soshanguve looking for the accused and he found him in the company of other people. Because he did not know the accused, he called him by his name and the accused and the people around all kept quiet. He then decided to call the accused's cell phone number and when the phone rang, the accused ran away. He gave chase but could not catch up with him.

[12] He explained that subsequent thereafter while at the police station, he received a call from an informant who told him that the accused had been apprehended by members of the community. He proceeded there and arrested the accused and informed him of his constitutional rights and took him to the police station where he detained him. It was around December 2022 when he finally managed to arrest the accused. He testified that the accused was co-operating with the police and told them that he wanted to make a statement because he does not sleep at night and wanted to have peace - and thus he finally made a confession statement before colonel Malinga which the court referred to above, and was admitted as exhibit E.

[13] Under cross-examination, he stated that he does not remember if he had been given the documentation relating to the cell phone of the deceased and was only provided with the cell phone number. It was put to him that the accused denied ever taking the cell phone belonging to the deceased and he refuted that.

[14] Dr Stefanie Claudia Ferraris was the last witness to give evidence in support of the State's case. She has been working as a forensic pathologist registrar at Forensic Pathologist Services in Pretoria since August 2019. She holds an MBChB degree qualification which she obtained from the University of Pretoria in 2015. She also obtained diplomas in Primary Emergency Care and Forensic Pathology from the College of Medicine South Africa in 2018 and 2020 respectively, and her expertise are not in dispute. As indicated *supra*, she conducted a post-mortem examination on the body of the deceased.

14.1 In explaining the cause of death as noted in the medico-legal post-mortem examination report, she stated that the reason for such a conclusion is that asphyxial death, meaning lack of oxygen, is very difficult to diagnose upon examination because it is a physiological arrangement where lack of oxygen cannot be tested. However, she found findings particularly in the neck of the deceased which suggested that there was pressure on the neck, and these

includes scratches or abrasions to the neck; bruises or contusions; and abrasions both internally and externally.

14.2 She explained that asphyxial deaths are a diagnosis of exclusion, meaning that when conducting an examination, she must exclude every other potential cause of death before she could be able to make a diagnosis, and that is why she took tissue samples for histology, and blood samples for toxicological analysis. At the time of conducting the post-mortem examination, she did not have the toxicology report. She testified that she used the microscope to see if there could have been another reason why the deceased have passed away (put differently, what else could have killed the deceased). She further testified that after receiving the toxicology results, and considering the histology tissue slides which she examined, the death of the deceased was consistent with manual strangulation, **asphyxia death**.

14.3 Responding to the question of how long it would take for a person who has been strangled to die, she stated that that depends on variables which include the degree of force applied to the neck; the location of where that force was applied; and whether the force was continuous, for example, whether the grip was relaxed and increased again. In this regard, she stated that it normally takes about three to five minutes for a person to die if the brain cells do not receive oxygen. She said there were multiple haemorrhages and multiple bruises and abrasions onto the neck of the deceased, which implies that the force to the neck was not applied once, but multiple times in multiple different places. She also found injuries to the upper arm and both legs of the deceased.

[15] The following injuries are noted on the post-mortem report to which exhibit C1 is attached:

- *Several fresh external injuries on the neck.*

- *Numerous abrasions and contusions of varying shapes, sizes and orientations, grouped over the anterior aspect of the left side of the neck, above the level of the thyroid cartilage. Some abrasions are linear in shape and have the macroscopic appearance of scratch abrasions. The largest abrasion measures 2.3cm x 0.4cm.*
- *There is an irregular shaped contusion measuring 1cm x 0.5 cm on the inner aspect of the left upper arm. There is an irregular shaped abrasion that measures 3.5cm x 1.8 cm on the anterior aspect of the left lower leg. On the inner aspect of the right lower leg, there are six small abrasions that occur in series to form an obliquely orientated linear scratch abrasions measuring 3cm x 0.3 cm.*

[16] There was no cross-examination of this witness.

[17] It is common course that the accused elected not to testify and closed his case without challenging the evidence of the State. The right to a fair trial in terms of section 35(3)(h) of the Constitution[4] include the right to be presumed innocent, to remain silent, and not to testify during the proceedings. The presumption of innocence both at common law and as a constitutional right, place a burden on the State to prove the guilt of an accused person beyond a reasonable doubt and it applies to those elements of the State's case that must be established to justify punishment. This is the fundamental principle of our law in a criminal trial which rest on the State throughout the trial by establishing a *prima facie* case against the accused. Once a *prima facie* case is established, the evidential burden will shift to the accused to adduce evidence to escape conviction. However, even if the accused does not adduce evidence, he will not be convicted if the court is satisfied that the State has not proved guilt beyond a reasonable doubt[5].

[18] There is a principle in our law that where the accused does not challenge any allegations proffered against him by the State, or any evidence given by a witness, such

[4] Act 108 of 1996
[5] Principles of Evidence, PJ Schwikkard et al, Fourth Edition, at page 602.

will be accepted by the court as the truth or as a fact which the State has proven beyond a reasonable doubt against the accused. Accordingly, the court is entitled to find that the State has proved a fact beyond a reasonable doubt if a *prima facie* case has been established and the accused fails to gainsay it. The Constitutional Court in ***S v Boesak***[6] stated that:

> *"The right to remain silent has application at different stages of a criminal prosecution. An arrested person is entitled to remain silent and may not be compelled to make any confession or admission that could be used in evidence against that person. It arises again at the trial stage when an accused has the right to be presumed innocent, to remain silent, and not to testify during the proceedings. The fact that an accused person is under no obligation to testify does not mean that there are no consequences attaching to a decision to remain silent during the trial. If there is evidence calling for an answer, and an accused person chooses to remain silent in the face of such evidence, a court may well be entitled to conclude that the evidence is sufficient in the absence of an explanation to prove the guilt of the accused. Whether such a conclusion is justified will depend on the weight of the evidence".*

[19] Not only did the accused exercise his rights to remain silent and not testify during the proceedings as stipulated in section 35(3)(h) of the Constitution, but he made admissions in terms of section 220 of the CPA which includes *inter alia*, a confession statement made to Lieutenant Colonel Malinga admitted as exhibit E. Section 220 provides that formal admissions are "sufficient proof" of the facts they cover[7].

[6] S v Boesak (CCT25/00) [2000] ZACC 25; 2001 (1) BCLR 36; 2001(1) SA 912 at para 24 (1 December 2000).

[7] Section 220 provides that: "An accused or his or her legal adviser or the prosecutor may in criminal proceedings admit any fact placed in issue at such proceedings and any such admission shall be sufficient proof of such fact".

[20] Mr Kgokane correctly pointed out that Exhibit E was taken down by a high-ranking police official and that "it is undeniable that the death of the deceased falls squally in the hands of the accused when one has regard to exhibit A and E taken together". It is noteworthy that when exhibit E was handed in as an exhibit, the accused's counsel specifically stated that the statement is a confession. This much was conceded by counsel when he submitted that the statement be admitted in terms of section 220 of the CPA. The accused confirmed the contents of exhibit E and raised no objection to its admission.

[21] It was submitted on behalf of the accused that exhibit A is a mirror image of exhibit E and as such, the court should interpret and give meaning to exhibit E in order to understand what the accused was trying to say, and thereafter draw the only inference that may be drawn under the given circumstances. Consequently, in doing so, the court should determine whether exhibit E contains all the essential elements relevant to the offence of murder and whether it satisfies the requirements of a confession. Accordingly, determine whether exhibit E is a confession or an admission. This is despite what has been noted in the preceding paragraph. It was also submitted that the evidence of Dr Ferraris did not advance the State's case as regards the intention of the accused.

[22] There is no definition of "confession" in the statute. However, courts define confession as an unequivocal admission of guilt, equivalent to a plea of guilty in a court of law[8]. It is common cause that Lieutenant Colonel Malinga is a commissioned officer, and a peace officer referred to in section 334 of the CPA who is authorized to take a confession as provided for in section 217(1)(a) of the CPA. I have perused exhibit E to determine if all the requirements of a confession have been met and I am satisfied that the statement meets the requirements. It follows that when exhibit E was admitted into the record by the accused and his counsel in terms of section 220 of the CPA, both

[8] R v Becker 1929 AD 167 at 171; S v Molimi 2008 (3) SA 608 (CC) at para 28.

appreciated that the requirements as laid down in section 217 of the CPA have been complied with[9].

[23] In terms of section 209 of the CPA, a conviction may follow on confession by the accused. The section provides that: "an accused may be convicted of any offence on the single evidence of a confession by such accused that he committed the offence in question, if such confession is confirmed in a material respect or, where the confession is not so confirmed, if the offence is proved by evidence, other than such confession, to have been actually committed".

[24] It is trite that the meaning to be given to particular words is influenced by the context in which they are used. It is therefore appropriate to deal first with the nature of the intention, if any, evidenced by the accused's statement admitted as exhibit A, as evaluated in the light of the evidence tendered by the State which includes exhibit E.

[25] Dr Ferraris' evidence is that the death of the deceased was consistent with manual strangulation, asphyxia death, due to lack of oxygen supply to the brain cells. She explained that the lack of oxygen to the brain was as a result of the pressure or force applied to her neck that was so severe that it caused multiple haemorrhages, bruises and abrasions onto the neck of the deceased because the force to the neck was applied continuously. The accused stated as follows in paragraphs three to five, and ten of Exhibit E:

> *"(3) …She told me that she is leaving, and I must not call her again. Then when she wanted to go out of the door, I blocked the door and requested her to relax and not to leave so that we can talked (sic) about the matter of the other girlfriend.*

[9] Evidence of any confession made by any person in relation to the commission of any offence shall, if such confession is proved to have been freely and voluntarily made by such person in his sound and sober senses and without having been unduly influenced thereto, be admissible in evidence against such person at criminal proceedings relating to such offence.

(4) *While she was forcing herself out of the door, I assaulted her with fists twice at her back head and she fell down inside the shack and I then immediately hold or grabbed her throat with both my hands while she was lying down. (sic)*

(5) ***I hold her until I could see her becoming unconscious. Her body becoming loose**. I then became afraid, leaving her still lying down on the floor. The door of the shack closed and I even packed my clothes into my bag and then closed the shack door. Without locking it, leaving her alone, still unconscious". (sic)*

And

(10) *I then proceeded to Soshanguve extension 4 to my friend known as Prince who is also from Njerere in Venda where I am originally coming from. On my arrival to Prince, **I told him that I have killed my girlfriend** and he advised me to go home at Venda because I will be arrested here".*

[26] Mr Sihlangu appearing for the State submitted that both exhibits exhibit A and E should be read together to show that the State has proved its case against the accused beyond a reasonable doubt. It was further submitted that given the circumstances of the case and the evidence of Dr Ferraris, the court should find that the accused had the intention to kill the deceased, and that if the court accepts the explanation of the accused in exhibit A as is, then the court should infer that the accused foresaw the possibility of causing the death of the deceased when he strangled her. Accordingly, that the form of intent applicable in this regard is *dolus eventualis*.

[27] It is apparent from the accused's description at paragraph 9 of exhibit A and paragraphs 4 and 5 of exhibit E, how he strangled the deceased. The words used by the accused in exhibit A and E read together, and the context in which they were used, gives a clear meaning to the form of intention of the accused when he was strangling

the deceased. In my view, a perusal of exhibit E, read in conjunction with exhibit A establishes an admission of the elements of murder and thus an unequivocal acknowledgment of guilt.

[28] The accused clearly explains how he strangled the deceased and his explanation in my view, is on par with the evidence of Dr Ferraris**.** Interestingly enough, despite having submitted that the evidence of Dr Ferraris did not advance the State's case as regards the intention of the accused, his counsel conceded that if one were to give meaning to the paragraphs specified *supra*, the actions of the accused are a confirmation of the explanation given by Dr Ferraris, having regard to paragraphs 4 and 5 of exhibit E, which **must** be taken into account by the court.

[29] Murder is defined as the unlawful and intentional killing or causing of the death of another human being. Paragraph 10 of Exhibit E contains a "fact" admitted by the accused that he killed the deceased. Paragraphs 4 and 5 on the other hand displays the accused's intention at the time he committed the act. Snyman[10] describes the concept of intention as follows: *"Intention means that a person commits an act while his will is directed towards the commission of the act or the causing of the result, in the knowledge of the existence of the circumstances mentioned in the definitional element of the relevant crime, and in the knowledge of the unlawfulness of the act*".

[30] Our courts have over the years stressed that a "holistic" approach is required by a trial court in the examination of evidence[11]. On a careful consideration and evaluation of the evidence before this court, the conclusion is inescapable that the accused had the requisite *mens rea* in the form of ***dolus directus*** because he was fully conscious of his actions when he strangled and killed the deceased.

[10] Snyman's Criminal Law, 2020, 7th Edition, at page 159.

[11] See: S v Mdlongwa 2010 (2) SACR 419 (SCA) at 11; S v Van der Meyden 1999 (1) SACR 447 (W); S v Chabalala 2003 (1) SACR 134 (SCA) at para 15; S v Trainor 2003 (1) SACR 35 (SCA) at 9.

[31] In my view, the only reasonable inference that can be drawn from all the evidence, the proven facts, and the circumstance of this case is that the accused had the **direct intention** to kill the deceased. Put differently, a consideration of the totality of the evidence before this court supports a finding that the accused had the direct intent to kill the deceased. Consequently, I find that the cumulative circumstance of this case leaves no room for doubt to conclude that accused had the intention to kill the deceased. The concept of *dolus directus* in this case means that the accused acted with the aim and object of bringing about an unlawful consequence, which was the killing of the deceased where the decision to do so was taken on the spur of the moment.

[32] In ***Director of Public Prosecutions, Gauteng v Pistorius***[12] the court stated that: "In the case of murder, a person acts with *dolus directus* if he or she committed the offence with the object and purpose of killing the deceased". The learned author Burchell, in the Principles of Criminal Law[13] describes *dolus directus* as the "intention in its ordinary grammatical sense known, where the accused's aim and object is to commit the unlawful conduct or cause the consequence, even though the chance of its resulting was small".

[33] The accused in this case, cowardly attacked a defenceless woman by striking her with two blows at the back of her head with his fists, and when she fell and became vulnerable, he grabbed her by the throat and strangled her using both his hands and made sure that even the last breath was out of her body. He then told his friend in no uncertain terms that he had killed the deceased. This shows, in my view, that the accused wanted to be very clear when explaining his actions so that there is no room for doubt about what he meant.

[34] Accordingly, I agree with the concession and submission made that - if one were to give meaning to the contents of exhibits A and E taken together, the actions of the

[12] (96/2015) [2015] ZASCA 204 at para 26 (3 December 2015).
[13] Fifth Edition at page 350.

accused are a confirmation of the medical evidence given by Dr Ferraris. Due to no countervailing medical evidence, this court accepts the evidence of Dr Ferraris that the cause of the death of the deceased is consistent with manual strangulation, which in any event is corroborated by the accused himself in exhibits A and E.

[35] In my view, the concept of *dolus eventualis* as indicated by the State as its alternative to the main submission, does not find application in the circumstances of this case when regard is had to the totality of the evidence, considering the fact that the accused elected not to challenge any evidence presented by the State such as exhibit E, which his counsel correctly submitted at the commencement of the proceedings that it is a confession made to a high-ranking officer, as well as exhibit C1.

[36] Having considered all the evidence before me, the arguments and the submissions made by both counsels, I am satisfied, and of the view that the State succeeded in proving its case against the accused beyond a reasonable doubt.

[37] In the circumstance, the following order is made:

1. The accused is found guilty of Murder as charged in terms of sections 51(2) of the Act.

PD. PHAHLANE
Judge of the High Court
Gauteng Division, Pretoria

For the State	: Adv. E.V. Shihlangu
Instructed by	: Deputy Director of Public Prosecutions, Pretoria
For the Accused	: Adv. J.L. Kgokane

Instructed by	: Legal Aid South Africa
	Pretoria Justice Centre
Heard on	: 29 January - 02 February 2024
Judgment Delivered	: 29 February 2024