

Reportable:	YES / NO
Circulate to Judges:	YES / NO
Circulate to Magistrates:	YES / NO
Circulate to Regional Magistrates:	YES / NO



**IN THE GARIEP LOCAL CIRCUIT DIVISION OF THE HIGH  
COURT  
HELD AT UPINGTON**

**Case No:** K/S 26/2022  
**Heard on:** 13/03/2023-17/03/2023  
14/08/2023-18/08/2023  
**Delivered on:** 30/10/2023

In the matter between:

**THE STATE**

and

**THYS MONDZINGER**

Accused

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**JUDGMENT**

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**MAMOSEBO J**

[1] The accused was arraigned on three counts: Count 1: Contravention of section 17(a) read with sections 1, 6, and 7 of the Domestic Violence Act, 116 of 1998 in that it is alleged that he unlawfully and intentionally

assaulted Teresa Petunia Rooi and swore at her on 23 March 2022; Count 2 – Murder read with s 51(1) of the Criminal Law Amendment Act 105 of 1997 (CLAA) as amended where the State alleged that he unlawfully and intentionally killed Teresa Petunia Rooi and Count 3 – Murder read with s 51(1) of the Criminal Law Amendment Act 105 of 1997 (CLAA) as amended where the State alleged that he unlawfully and intentionally killed an unborn female foetus approximately 34 weeks old who was viable for life outside her mother, Teresa Petunia Rooi. The deceased, Ms Petunia Rooi, features in all these charges.

- [2] The accused pleaded not guilty in terms of s 115 of the Criminal Procedure Act, 51 of 1977 (CPA) and did not tender any plea explanation but exercised his right to remain silent. His legal representative, Adv. JP Moeti, confirmed that the plea is in accordance with his instructions. The offences in counts 2 and 3 attract life imprisonment in terms of s 51(1) of the CLAA which was explained to the accused.
- [3] The State submitted the following documents in substantiation of its case, which evidence was admitted by consent:
- 3.1 Affidavit, Photographs, Sketch plan, Key to Photographs at an open field where the body was discovered: Kenhardt CAS 07/05/2022 Murder compiled by W/O Simonne Sheriff attached to the Kakamas Local Criminal Record Centre (LCRC), marked Exh “A”;
  - 3.2 Notes compiled by Capt JH Van Wyk on the pointing out of the scene, marked Exh “B”;
  - 3.3 Affidavit, Photographs, Sketch plan, Key to Photographs of the crime scene: Kenhardt CAS 07/05/2022 Murder compiled by

- W/O Randall van der Byl attached to the Kakamas Local Criminal Record Centre (LCRC), marked Exh “C”;
- 3.4 Interim Protection Order issued against Mr Thys Mondzinger in Kenhardt dated 15 September 2021; a warrant of arrest dated 07 October 2021 marked Exh “D”;
- 3.5 Final Protection Order dated 07 October 2021 marked Exh “E”;
- 3.6 Court notes confirming that the respondent, Thys Mondzinger, was properly summonsed and that the Magistrate granted a final order, marked Exh “F”;
- 3.7 The medico-legal post-mortem examination report compiled by Dr Adin Don Surtie, marked Exh “G”; and
- 3.8 The affidavit compiled in terms of s 212(7) of the CPA compiled by the Forensic Pathology Officer, Keabaka Benjamin Mokgweetsi, who received the body DR148/2022 and conveyed it to the mortuary, marked Exh “H”.

## **THE EVIDENCE IN RESPECT OF COUNT 2: MURDER**

- [4] Pivotal in this trial is Count 2, the murder of the deceased, Ms Teresa Petunia Rooi, at the hands of the accused, Mr Thys Mondzinger, on 04 May 2022. Emanating from the evidence of Dr Adin Don Surtie, a Chief Forensic Medical Officer in forensic pathology, who conducted the medico-legal autopsy (or post-mortem examination) on the deceased on 30 May 2022 (Death Register 148/22, Upington Medical Laboratory), it is common cause or at least not in dispute that the deceased was murdered. The only issue for determination is who the perpetrator or perpetrators was/were. This conclusion is based on the doctor’s evidence and findings that follow.
- [5] Dr Surtie recorded that the history emanates from an alleged assault that occurred the previous night with body found the next afternoon. The

injuries are fully described in the report under points (c) to (nn). He described the injuries as follows:

- (c) 11mm incision left lateral neck 60mm above sternal notch and 75mm from midline with  $\pm$  70mm inferior medial tract entering chest with transection of subclavian vein and almost full transection of subclavian artery. 1250ml blood left chest. Collapsed left lung.
- (d) 14mm incision right anterior chest below nipple with  $\pm$  80mm tract to abdominal wall. Tract entering chest through 4th intercostal space.
- (e) 18mm incision left lateral upper arm with  $\pm$  35mm medial tract onto bone.
- (f) 12mm incision left lateral lower back 110mm from midline and 330mm below spinous process of 7th cervical vertebra with  $\pm$  8mm inferior tract. 15mm scratch inferior and lateral to incision.
- (g) 15mm incision left back 50mm from midline and 220mm below spinous process of 7th cervical vertebra with  $\pm$  70mm inferior medial tract.
- (h) 15mm incision left back 125mm from midline and 70mm below spinous process of 7th cervical vertebra with  $\pm$  20mm medial tract.
- (i) 17mm incision with abrasion right upper back with  $\pm$  30mm inferior medial tract.
- (j) 14mm incision right posterior lower arm with  $\pm$  25mm superior medial tract. The doctor added that the injuries from (c) to (j) were stab wounds.
- (k) 20 x 5mm abrasion with red bruise and superficial skin incision right anterior upper chest.
- (l) 4mm superficial skin incision right anterior upper arm.

- (m) 10mm superficial skin incision left anterior upper chest. The doctor explained that the injuries under (k), (l) and (m) are also caused by a sharp object.
- (n) 3 x 2mm skin puncture. (small prick wound)
- (o) Swelling, multiple red bruises and multiple abrasions essentially over whole face. The doctor explained that this injury resulted from a blunt force trauma.
- (p) Abrasions outer lips and bruised inner lips.
- (q) 25mm laceration superior right lip
- (r) Superficial lacerations both left eyelids.
- (s) 10 x 5mm abrasion inferior anterior chin
- (t) 5 x 7mm abrasion anterior neck.
- (u) 4 x 2mm abrasion anterior neck
- (v) 40 x 20mm area of abrasions lower anterior neck.
- (w) 65 x 40mm area abrasions from left lateral lower neck across clavicle.
- (x) 20 x 5mm abrasion left anterior upper chest.
- (y) 30 x 5mm abrasion left anterior chest.
- (z) 80 x 50mm area of small abrasions right anterior elbow area.
- (aa) 15 x 50mm abrasion right anterior lower abdomen.
- (bb) 60 x 40mm area of abrasions left axilla an anterior upper arm.
- (cc) 10 x 5mm abrasion left anterior lateral chest.
- (dd) 15 x 8mm abrasion right medial ankle.
- (ee) Small abrasions right lateral lower leg.
- (ff) 45mm scratch left medial lower leg.
- (gg) Small abrasions left medial lower arm and elbow.
- (hh) 50 x 75mm area of abrasions right lateral upper arm.
- (ii) 50 x 20mm area of abrasions and red bruising right lateral elbow and lower arm.
- (jj) 60 x 60mm area of small abrasions right superior shoulder.

- (kk) 50mm and 20mm scratches left posterior knee
- (ll) 50 x 15mm area of abrasions right posterior knee.
- (mm) 50 x 30mm area of abrasions right upper back and shoulder.
- (nn) Pale liver and kidneys.

[6] Dr Surtie recorded the chief autopsy findings of a pregnant body 148/22 with female baby with weight of 2160g and length of 44cm and estimated gestation of  $\pm$  34 weeks with dark brown amniotic fluid present. Normally, the amniotic fluid is clear or yellowish. He is uncertain what caused it to be brown but opined that logically it may be due to the decomposition of the body. Dr Surtie recorded that the cause of death was unnatural: consistent with stab left neck injury (c) resulting in severe blood loss, left haemothorax (blood in left chest) and collapsed left lung. This wound was from the neck down to the chest. Although the other incisions contributed to the death through blood loss, injury under (c) was severe enough to cause death without other incisions present. The doctor further recorded that throttling and or strangulation possibly occurred during the incident as suggested by the neck injuries (s) to (v) as well as multi-coloured (blue, green, red, white) 'doek' around neck. Throttling and/or strangulation did not cause the death but could have contributed to death.

[7] Dr Surtie explained that the incision at (c) caused massive bleeding because it injured the large artery and large vein and entered the chest cavity taking 1250 ml of blood into the left chest cavity resultantly causing the lung to collapse. Although the doctor could not comment on the amount of force applied, he was certain that a sharp object, consistent with a knife was used as the injury was not a minor or ordinary prick. The tract was deep. The doctor further explained that a person with a collapsed lung would have difficulty breathing and would

take a few minutes to die. The doctor's comment was sought regarding the accused's allegation that the deceased was hit on the head with a stone. He said he did not find any injury on the deceased's scalp or skull.

[8] The State called 12 witnesses. Capt Bakang Lawrence Kgwadi, is the Station Commander of Kanoneiland Police Station with 18 years' experience. At the time of the incident he was a Section Commander and held the rank of Warrant Officer at Kenhardt Police Station. On 05 May 2022 he reported for duty at 07:00 in the morning. His office was facing the police cells and detainees could see him when entering or leaving his office and vice versa. His normal knock off-time was from 15:45 but on that day he knocked off at around 19:00. On his way to his motor vehicle, which was parked in front of the cells, one of the detainees summoned him to the cells and told him in Afrikaans "*W/O Thys wil met jou praat*", meaning Thys wants to speak to you. Thys was detained in the first cell while the informant and another detainee occupied the second cell. It was not necessary for Capt Kgwadi to move from where he stood because the doors to the two cells were next to each other.

[9] The accused reported to him that he was prepared to accompany the police to the place where he had left Petunia after stabbing her. Kgwadi immediately cautioned the accused about his right to remain silent and that if he is still willing to accompany the police he would have to summon Captain Johannes Hermanus Van Wyk as the only commissioned officer at Kenhardt police station to step in, which he did. Van Wyk arrived shortly thereafter. Cst Biko booked the accused out of the cells. Van Wyk explained the constitutional rights to the accused who still persisted with his wish to do the pointing out. Van Wyk,

Kgwadi, and the accused used a single cab Ford Ranger driven by Kgwadi. The accused sat in the middle while Van Wyk sat on the left. W/O Simonne Sheriff, attached to the Local Criminal Record Centre (LCRC), followed them in a separate vehicle.

- [10] The accused directed them to an open veld behind Kenhardt Primary School which is still in the residential area. The veld is depicted on photos 1 and 2 of Exh A. The grass on the scene was conspicuously tall and, as explained by Kgwadi, the body would not be visible from the gravel road. A search was required.
- [11] At the scene the accused, using the hand gesture, said: *There is Petunia and she is dead*". Kgwadi immediately brought the vehicle to a halt. The accused started to cry. Kgwadi was able to identify the seemingly lifeless and blood-stained body as Petunia's. The accused was not coerced or promised anything in exchange for divulging the information but did so of his own volition. W/O Sheriff took photographs of the scene and compiled the photo album afterwards. After the pointing out Van Wyk issued an instruction that the accused be locked up at the back of the van, which was done.
- [12] Van Wyk, now retired with 39 years of service, confirmed the evidence of Capt Kgwadi relating to him. He formally introduced himself to the accused and also showed him his appointment certificate. Van Wyk then conducted an interview with the accused and contemporaneously completed the interview form where the accused's responses were recorded. The signatures of both the interviewer and interviewee were attached and the time and venue where the interview was conducted were reflected. Upon completion of the interview, the accused, Kgwadi and himself drove to the crime scene where the pointing out occurred, as



explained. Van Wyk stated that after the pointing out he handed over the scene to the investigating officer, Sgt Hendriks.

[13] Mr Andries de Vis, an unsophisticated witness whose schooling ended at Standard 2, was involved in a love-relationship with the deceased but it was terminated four months before her tragic and untimely death. On 04 May 2022 he collected and sold wood for a pittance of R30.00. He went to the local abattoir to buy offal which he did not get. On his way back, he saw the deceased at her neighbour's residence. She joined him in the street. She reported to him that she had quarrelled with her boyfriend, Jockie, whose real name is Thys. It concerned his demand that she withdraw the domestic violence case she had brought against him. She had R10.00 in her possession but wanted to spend R5.00 on cigarettes so she enquired from him if he had R5.00 so that they can jointly buy "valsbier" (homebrewed beer) sold at R3.00 a litre.

[14] De Vis and the deceased first went to Linda Louw's house but they did not find any beer. They proceeded to another location known as Millenium Square to a house called "Indraai". On their way opposite Boeta Myburg's home where there is a ditch, they saw two people approaching from their opposite direction. It was the accused in the company of Gaikikolela. Upon recognising the accused the deceased became frightened. Without saying anything she retreated, slipped and fell on her back into this ditch. The accused walked past De Vis and went straight to the deceased. The accused's companion, Gaikikolela, kept on walking. The accused put both his hands in the pockets of his jacket and produced a knife with which he started to stab the deceased indiscriminately several times. De Vis just saw his hand moving up and down delivering the stabbing blows. De Vis cannot recount the number of blows. Although he could not specify the type of knife he could tell it was a folding (clasp) knife.

- [15] As the accused was stabbing her, she screamed for help. De Vis picked up a stone and threw it at the accused but it missed him. De Vis saw two minor girls near the incident. It is at that stage that De Vis left the scene rushing to the deceased's brother's place to report the incident, but he was not home. He returned to the scene. Upon his arrival it was deserted. He then went home.
- [16] De Vis was aware that the deceased was pregnant by the accused and although the news saddened him, he accepted the situation. He and the deceased continued to relate as friends. De Vis denied attacking either the accused or the deceased during that incident. He further denied that the one stone that he had aimed and thrown at but which had missed the accused, had struck the deceased on her head as claimed by the accused. It was further put by counsel that the accused's action was in self-defence and not retaliatory, but this was denied by De Vis.
- [17] Mr Bernardo Dawid Mondzinger is the accused's brother. His evidence is that the accused and the deceased arrived at his home on 04 May 2022 in the afternoon between 13:00 and 14:00. He had just returned from work on the farm. He gave them money to buy nappies and food. They left together and did not return. The following morning, on 05 May 2022, the deceased's daughter arrived at his home and enquired after the whereabouts of both the deceased and the accused. She informed him that it was the rumours flying around that the accused had stabbed her mother that had brought her there. He denied any knowledge of the rumours.
- [18] After the deceased's daughter's departure, the police arrived at his home to investigate the rumours. They enquired as to the whereabouts of the

accused and the deceased. Just after the police left the accused arrived in the company of a certain Mr Vincent Opperman. The accused, unsolicited and freely, informed him that he had had a bad fight with the deceased the previous night and that he had stabbed her with a knife. Bernardo says he was shocked and had burst into tears. After he composed himself he relayed the message to the accused that the police were looking for him. The accused asked for cigarettes before going to the police and the three of them walked to the shop and bought cigarettes. As fate would have it the police arrived and apprehended the brothers for questioning on the deceased's whereabouts. The accused denied having any knowledge. It is then that Bernardo told them what the accused had confessed to him. They were both taken to the police station and initially locked in one cell but were later separated. He denied the suggestion that he had misunderstood the accused's report to him. He maintained that he understood his brother well when he implicated himself.

- [19] Mr Rufus Mohammed was at his residence on 04 May 2022 when his mother sent him to the tuckshop after 21:00. The tuckshop closes at 22:00. On the way he saw his friend, the accused, and the deceased in a ditch where residents would dump their garbage. He had recognised their voices before reaching their exact location. He then noticed the deceased lying on her back whilst the accused was stabbing her. He screamed at the accused asking him what he was doing. He saw the up and down stabbing thrusts. The accused was armed with a knife. The attack was unrelenting. Before proceeding to the tuckshop he saw the accused lifting the deceased from the ground and he heard her telling him that she could not walk. As the accused carried her out of the ditch he said: "*My skat let us go*". She kept insisting that she could not walk. On his return from the tuckshop they had disappeared. At one point he

saw Mr David Johnson and Mr Andries de Vis screaming at the accused to stop what he was doing. What matters, despite the accused denying his friendship with Mohammed, is that they knew each other well. He witnessed De Vis throwing a missile at the accused which did not find its mark. He disputes the allegation by the accused that it was De Vis who had stabbed the deceased.

[20] Mr Johnson Davids was walking home on the evening of 04 May 2022 when he saw what appeared to be two people wrestling in the ditch. On approaching he recognised the two persons as the accused and the deceased. The latter was lying on her back on the ground and flailing her hands and kicking out with both legs. The accused's one hand moved up and down in a stabbing movement. The deceased saw Davids and recognised him and pleaded: "*Hopela please help me*". Hopela is his nickname. Davids produced his knife and demanded to know from the accused what he was doing killing that woman. The accused then hid his knife and lifted the deceased saying to her: "*Let us leave my skat*". She was weak and could not walk unassisted. He saw Mohammed after speaking to the accused. He did not see De Vis. He told the two girls who had witnessed the incident to report it to their parents so that they can contact the police. He then left and went home. He denies that anyone but the accused had stabbed the deceased.

[21] Sgt Elanza Leslie-Anne Losper, a Social Crime Co-Ordinator at Kenhardt Police Station, also testified. She was on duty on 05 May 2022 and in the company of Cst Biko and Sgt Kaiser. Sgt Kaiser received a complaint from the daughter of the deceased who had reported her mother missing under disturbing circumstances. After making the report she went to school. Whilst driving around to investigate they saw the accused, his brother, Bernardo Mondzinger and

Vincent Opperman at Hillside. Sgt Kaiser enquired from the accused where the deceased was. He denied knowledge of her whereabouts claiming that he had last seen her the previous night. The accused's brother, Bernardo, broke down in tears. Sgt Losper asked him why he was crying and Bernardo explained that when the accused had come to his home, he had informed him that the deceased was no longer alive. Losper asked Bernardo to accompany them to the police station and he agreed.

[22] According to Losper the accused was calm when he was asked about the whereabouts of the deceased, and he remained so even after his brother had recounted his confession. In cross-examination it was put to Losper that she had slapped the accused across the face and had witnessed him being pepper-sprayed by her colleagues. According to her, after the Mondzinger brothers were taken to the police station, she and Kaiser, who had been the driver throughout, left for the hospital in pursuit of any information regarding the whereabouts of the deceased. Cst Biko effected the arrest after explaining the accused's rights to him.

[23] Anna-line Catherine van der Westhuizen, whose nickname is "Gaikikolela", who was in the company of the accused on 04 May 2022 near Millenium Square, testified that she had known the accused for several years. That afternoon she saw the accused and the deceased at "Indraai" in Millenium Square enjoying "valsbier" together and she watched them leave shortly thereafter. The accused later returned alone. She asked him where Petunia was. He responded that he had taken her home. Gaikikolela was drinking beer. The accused bought himself one litre of "valsbier" and sat drinking next to her. They later left together and came across the deceased and Andries de Vis approaching them from the opposite direction. She says the deceased and De Vis were just

walking and did not witness any wrestling or scuffle between them. The accused confronted the deceased and asked her why she was out when he had left her at home. She then heard the deceased screaming “*ouch my stomach*”. Gaikikolela continued walking towards her home. According to Gaikikolela the accused was not drunk.

[24] Ms Karen Majiedt is 19 years old and still a scholar. The evening of 04 May 2022 she and Lesley were preparing potjiekos outside Pamela Skei’s residence when she heard Hopela screaming from across the ditch that Thys must not stab Petunia like that. She hurried to the scene and witnessed Thys stabbing Petunia with an okapi knife. She recognised Thys because he regularly walks past her home to or from the tavern. She also knows Petunia because she is her friend’s mother. She explained that during the stabbing Petunia was lying on her back while Thys was stooped over her. Thys then helped Petunia to her feet. Majiedt asked Thys why he had stabbed Petunia but he denied stabbing her. He pocketed the knife after folding its blade.

[25] Petunia was unable to walk, seemed to be dizzy and was staggering. Majiedt then ran to Juliana, Petunia’s daughter, and reported to her. At Juliana’s request the two friends returned to the scene but the accused and the deceased were no longer there. They then went to the accused’s home and called out to the accused and deceased but there was no response. They then went to file a missing person’s report at the police station. A policeman known as “Baragi” accompanied them to every tavern in the area in search of the couple but to no avail. He then drove them to their respective homes.

**COUNT 1: CONTRAVENTION OF SECTION 17(a) READ WITH SECTIONS 1, 6, and 7 OF THE DOMESTIC VIOLENCE ACT, 116 of 1998**

[26] Mr Caseley Aiello Marlon Frederiks has been employed by the National Prosecuting Authority (NPA) as a District Court Prosecutor since 07 May 2021. He was stationed at Kenhardt Magistrates Court and was on duty on 04 May 2022 when he encountered the deceased, Ms Petunia Rooi, who was in the company of the accused. She had, on a prior occasion, laid charges against the accused for the contravention of the Domestic Violence Act. She attended court that day to withdraw the charge because the accused was recently employed or about to be employed. Frederiks excused the accused from the room while he consulted with her and explained the procedure and repercussions. He told her that he did not regard her reason for withdrawal as valid. According to the Directives by the office of the Director Public Prosecutions (DPP) he had no authority to withdraw the charge but had to postpone the matter and refer the file to the Senior Public Prosecutor (SPP) in Upington. She appeared anxious. It is only after the prosecutor mentioned a second option of involving the office of the Family and Marriage of South Africa (FAMSA), who would then make recommendations to be considered by the SPP in Upington, that she reluctantly accepted the second option. Mr Moeti, counsel for the accused, did not cross-examine this witness.

[27] Mr Arrie Sass's testimony was adduced in respect of Count 1 of domestic violence and a contravention of the Domestic Violence Act. He is 64 years old and can neither read nor write. Mr Sass knows the accused from Swartkop where they resided before moving to Kenhardt. He had known him for two to three years prior to the deceased's death.

On 23 March 2022 he was walking home when he heard what sounded like the accused's voice, swearing. He could, however, not make out what was said. There was a woman, whom he thinks was the deceased, Petunia, facing the accused. They were inside a premises. He says the accused slapped her. He observed the movement of the hand and the sound of a slap with an open hand. He does not remember what time it was but it was in the evening and starting to get dark. He was about 5 metres away from them.

**The State closed its case.**

[28] The accused, Mr Thys Mondzinger, elected to testify. According to him, he was summoned to the Domestic Violence Court on the morning of 04 May 2022 where he found the deceased. She had gone there to withdraw the charges against him. He was requested to wait outside and the deceased entered the chambers where the domestic violence proceedings are conducted. He was later invited in. The man in charge informed him of the purpose of the visit and then released him. He left there in the belief that the charges against him were withdrawn. He and the deceased then went to visit his brother, Bernardo. There were no qualms between them.

[29] According to accused he was walking alone from work on 04 May 2022. When he reached a certain corner, he saw Gaikikolela approaching from a different direction, looking back and shouting. At that stage the deceased and De Vis were approaching him from yet another direction. He noticed that they were wrestling and that the deceased was screaming "*moenie Minger, moenie Minger*" (loosely translated: "Minger don't, Minger don't"). He recognised the voice as the deceased's. He says Minger is Andries de Vis' nickname. He saw the deceased fall into a



ditch. He then walked past De Vis towards the deceased who was still lying on her back. He enquired from her what was happening. At that stage De Vis was also in the ditch with them about a metre away. He asked De Vis what he was doing to the pregnant woman.

[30] Accused says he tried to lift the deceased from the ditch. De Vis hurled stones at them and one of the stones struck the deceased on her head. Despite having managed to lift the deceased, De Vis continued to pelt them with stones. He saw Karen Majiedt in the company of another minor. Karen asked him what was happening. He advised Karen to go home and to report the incident to her parents and to further request them to report to the police. De Vis charged towards him with a knife. He fled into Oom Saul's yard from where he stood observing. He did not see De Vis anymore. He went home but could not sleep. He neither returned to the scene to establish what had happened to the deceased nor did he report the incident to the police either. He denies stabbing the deceased.

[31] The following morning before going to work he went past his brother Bernardo's house to ask for his mother's telephone number. He intended to first report for work to ask for the day off; thereafter to establish the whereabouts of the deceased and only then to report to the police. As he, Bernardo and Opperman were walking in the street they were accosted by the police in a police van driven by Sgt Losper and accompanied by Sgt Kaiser. Losper informed him that he is wanted at the police station and that Bernardo can come with. He was locked up in the back of the van while Bernardo sat with the police in the driving cabin. When they arrived at the police station he asked Losper what was going on. Without responding she slapped him on the mouth. He posed the same question to Kaiser who, also without responding, sprayed him

with pepper spray. He was booked in a police cell while Bernardo remained with the police. Before he left the police station he was told to remove his blue overalls which he wore over his tracksuit pants. He could, however, not identify the clothing items as contained in the police sealing pack depicted at photos 17 and 18 of Exh “A” when shown to him.

[32] He was later booked out of the cell. He travelled with Capt Van Wyk to the veld where the deceased’s body was found. He denies that Capt Kgwadi was the driver of the van when they drove to the veld. He is adamant that his rights were not explained to him before the pointing out and denies being with Capt Van Wyk in Office No 3 where the State maintains his rights were explained and where a form which he had signed was completed. In the veld he was instructed by Capt Van Wyk to point towards the deceased’s body while W/O Sheriff took photos. Thereafter they returned to the police station where he was further detained. He appeared in Court for the first time on 06 May 2022.

The accused closed his case without calling any witnesses to testify on his behalf.

## **THE EVIDENCE IN RESPECT OF COUNT 1**

[33] The relationship between the accused and the deceased was riddled with abuse and physical violence. The protection order confirms this assertion. To substantiate the contravention of this count, the State not only submitted Exhibits “D” and “E” but also called the district court prosecutor, Mr Caseley Aiello Marlon Frederiks of Kenhardt Magistrates Court, and Mr Arrie Sass to testify. An interim protection order was issued as per exh “D”. The accused was afforded an

opportunity to show cause on 07 October 2021 why the interim order should not be made final. The Magistrate's notes on 07 October 2021 show that the Court was satisfied whereafter the interim order was confirmed. The following are specified as actions that the accused should refrain from committing in 3.1.2.1 of the interim order: "*om aansoeker te vloek, skel, aanrand en/of dreig met aanranding nie*". (Loosely translated, the accused was prohibited from insulting, scolding, assaulting and/or threaten to assault the complainant).

- [34] It cannot be gainsaid that the accused was prohibited from committing any of the specified actions on the deceased. The evidence of Mr Frederiks is clear in that the accused and the deceased had approached his office solely to have the protection order withdrawn against him. One must bear in mind that the prosecutor's comments were that he had excused the accused from the room to fully explain the repercussions to the deceased. This explanation kept the order against the accused alive.
- [35] The allegation levelled by the State against the accused pertains specifically to an assault that took place on 23 March 2022 in Kenhardt, where the State alleges that he had assaulted the deceased by slapping her in the face and swearing at her. In this regard there is only one witness, Mr Arrie Sass. He claims to have been walking to his home when he heard the swearing and the assault taking place. He says "*It sounded like Thys' voice*" that was swearing. He could not make out what he was saying whilst swearing. He further said "*There was somebody standing in front of him I think it was Petunia*". He continued walking without ascertaining who these people were. Sass's evidence was poor and unsatisfactory. The evidence of Mr Sass is not of much assistance because the identification leaves much to be desired. The evidence of the prosecutor and the protection order merely shows that

the accused had a propensity for violence and abuse towards the deceased but does not do much to advance the State case.

**The State has failed to make out a case of a contravention of section 17(a) read with sections 1, 6, and 7 of the Domestic Violence Act and it follows that on this Count the accused stands to be acquitted.**

### **THE EVIDENCE IN RESPECT OF COUNT 3: THE FOETUS**

[36] Count 3: Murder read with s 51(1) of the Criminal Law Amendment Act 105 of 1997 (CLAA) as amended. In this count the State alleges that the accused intentionally and unlawfully killed an unborn female foetus about thirty-four (34) weeks into gestation who was viable for life outside the womb of her mother, Teresa Petunia Rooi, now deceased. It is common cause that the deceased was pregnant when she was attacked and her unborn baby died as a result thereof. Here, the State relies heavily on the evidence of Dr Surtie to establish the offence of murder against the foetus to stand.

[37] Dr Surtie did not perform any autopsy on the foetus because it was still intrauterine and there was no reason to dissect its body, notwithstanding that it was viable for life outside the womb. However, it was not eligible for registration of birth. Notwithstanding that the baby had a strong likelihood of surviving had it been removed timeously from the mother's body, the doctor opined that had it been born it would have been eligible to be registered for birth but certainly not under the circumstances. He explained foetal viability as the ability of a human foetus to survive outside the uterus.

[38] Froneman J, sitting with two assessors in *S v Mashumpa* 2008 (1) SACR 126 (E) had the opportunity to consider the vexing legal question whether the killing of an unborn child in the mother's womb constitutes a separate crime of murder. Considering that murder consists of the unlawful and intentional killing of another person, the person killed must be alive. Froneman J found that the killing of an unborn child does not amount to murder.

[39] The Constitutional Court, per Nkabinde J, in *S v Masiya* 2007 (8) BCLR 827 (CC) at paras 30 to 33 clarified the role to be played by the High Courts in developing the criminal law. First, the development of the common law of crimes must be done incrementally and cautiously in accordance with the dictates of the Constitution. Secondly, the development should not have a retrospective effect because that would offend against the principle of legality. At para 33 the learned Judge enunciated:

*“[33] The question of development of the common law was comprehensively discussed by Ackermann and Goldstone JJ in Carmichele in which the duty of Courts that is derived from ss 7, 8(1), 39(2) and 173 of the Constitution was stressed. The Court sounded a reminder to Judges when developing the common law to 'be mindful of the fact that the major engine for law reform should be the Legislature and not the Judiciary.' The Court repeated with approval the remarks of Iacobucci J in R v Salituro:*

*'Judges can and should adapt the common law to reflect the changing social, moral and economic fabric of the country. Judges should not be quick to perpetuate rules whose social foundation has long since disappeared. Nonetheless there are significant constraints on the power of the Judiciary to change the law. ...In a constitutional democracy such as ours it is the Legislature and not the courts which has the major responsibility for law reform. ...The Judiciary should confine itself to those incremental changes which are*

*necessary to keep the common law in step with the dynamic and evolving fabric of our society.'*

*The Court, however, said that 'courts must remain vigilant and should not hesitate to ensure that the common law is developed to reflect the spirit, purport and objects of the Bill of Rights . . . whether or not the parties in any particular case request the Court to develop the common law under s 39(2)'. Where there is deviation from the spirit, purport and objects of the Bill of Rights, courts are obliged to develop the common law by removing the deviation."*

[40] Relying on the Masiya judgment and the definition of murder as it stands, I can therefore not find the accused guilty of murdering the unborn baby on 04 May 2022 as it would offend against the principle of legality. As pointed out by Froneman J in Mashumpa at para 63:

*"The wonder of pregnancy lies not in the separateness of the mother and the child in her womb, but in their unique togetherness during that period. An assault by an outsider on one is at the same time an assault on both, in their togetherness."*

The assault on the baby will play a more significant role in the sentencing phase as an aggravating factor because the act of killing the foetus forms part of the offence committed against the mother. Parliament has had ample opportunity to consider creating a statutory crime in the South African legislative regime to cater pertinently for unborn babies but has hitherto not. The moral convictions of society demand that a statutory offence of feticide (the killing of a foetus) should be created for the direct legal protection of the unborn baby, not to be confused with legal abortion.

**It therefore follows that the accused stands to be acquitted on count 3 of murdering the unborn baby.**

[41] It is clear to me that the witnesses who testified on behalf of the State witnessed the assault on the deceased independently and from different vantage points hence their account of the version of events captures the different stages of the assault, particularly at the ditch. The golden thread in their evidence is the consistency and corroboration that emerges when one considers their overall evidence. The Supreme Court of Appeal cautions on the correct approach to be adopted when analysing evidence and enunciated in *S v Chabalala* 2003 (1) SACR 134 (SCA) at para 15 by Heher AJA:

*“The correct approach is to weigh up all the elements which point towards the guilt of the accused against all those which are indicative of his innocence, taking proper account of inherent strengths and weaknesses, probabilities and improbabilities on both sides and, having done so, to decide whether the balance weighs so heavily in favour of the State as to exclude any reasonable doubt about the accused's guilt.”*

[42] The evidence of the state witnesses is clear, simple and straightforward in respect of the murder of Ms Teresa Petunia Rooi. Most of them are eyewitnesses in respect of the assault. They all knew the accused and the deceased very well. Their evidence stretches over a considerable time of the day, the afternoon and evening. Identity is not an issue as some were in the company of the accused. Some even spoke to him and he to them. He also places himself on the scene and therefore does not raise any alibi. There can be no suggestion that the witnesses implicated him falsely. As I said they approached from different vantage points. On the crucial aspect, the stabbing, they more than corroborated each other. The overwhelming evidence is that the accused had stabbed the deceased relentlessly and indiscriminately. This is consistent with the evidence of Dr Surtie.

[43] The accused's brother, Bernardo, testified that he had confessed to killing the deceased. When he falsely denied any involvement in the

disappearance of the deceased, Bernardo, someone near and dear to him, overcome by grief, contradicted him in the presence of Sgt Losper and her colleagues. Further, although the prisoner who blew the whistle on the accused that he was prepared to cooperate in the investigation did not testify, the evidence of Capt Bakang Kgwadi and Capt Johannes van Wyk is credible that the accused had indeed volunteered to do the pointing out. He does not accuse them of coercing him.

[44] Notwithstanding this mountain of evidence which clearly weighs down the accused like a millstone he bears no *onus* to prove his innocence. The trite principle is that such *onus* rests upon the shoulders of the State to prove his guilt beyond a reasonable doubt. If his evidence is reasonably possibly true he must be accorded the benefit of the doubt, and be found not guilty and discharged.

44.1 He lied when he denied confessing to his brother and accused his brother of misunderstanding him. There was nothing to be misunderstood;

44.2 He falsely accused Andries de Vis of striking the deceased on the head with the missile. Dr Surtie contradicted the assertion and stated that the deceased did not sustain a head injury. She died of blood-loss resulting from multiple stab-wounds, hastened by asphyxiation.

44.3 The accused had a motive to kill the deceased: jealousy. He saw her in the company of her ex-lover. He told her “*Did I not leave you at home just now?*”

44.4 He placed himself on the scene but denied that he hurt the deceased in any manner.



[45] I reject the evidence of the accused not only as not remotely possibly true but also as blatantly false.

[46] In the premises the accused stands to be convicted of the murder of Ms Rooi read with s 51(1) of the CLAA with *dolus directus* as the form of intent.

[47] The following verdicts are returned:

**On Count 1:** The contravention of section 17(a), read with sections 1,6 and 7 of the Domestic Violence Act, 116 of 1998, the accused is found not guilty and is discharged.

**On Count 2: Murder**, read with section 51(1) of Act 105 of 1997 as amended of killing Teresa Petunia Rooi, the accused is found **guilty** of murder with the form of intent being *dolus directus* (direct intent).

**On count 3: Murder**, read with section 51(1) of Act 105 of 1997 as amended of killing an unborn female foetus, approximately 34 weeks old, the accused is found **not guilty** and discharged.

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**MAMOSEBO J**  
**JUDGE OF THE HIGH COURT**  
**NORTHERN CAPE DIVISION**

For the State  
Instructed by:

Adv MA Engelbrecht  
The Director Public Prosecutions

For the Accused:  
Instructed by:

Mr JP Moeti  
Legal Aid South Africa (*judicare*)