

IN THE NORTH GAUTENG HIGH COURT, PRETORIA
(REPUBLIC OF SOUTH AFRICA)

CASE NO.: A383/2008
DATE:

5/2/2011

In the matter between:	DELETE WHICHEVER IS NOT APPLICABLE	
LENNERT FOURIE	(1) REPORTABLE: YES/NO.	APPELLANT
	(2) OF INTEREST TO OTHER JUDGES: YES/NO.	
	(3) REVISED.	
And	21-01-2011.	<i>L. Webster</i>
	DATE	SIGNATURE
THE STATE		RESPONDENT

JUDGMENT

WEBSTER J

1. The appellant was convicted by Ismail AJ, sitting with two assessors, of the murder of his live-in lover committed on or about 9th April, 2005, in Pretoria. He was sentenced to 15 years imprisonment. He appeals against both the conviction and sentence, leave to do so having been granted by the court *a quo*.
2. The appeal is based on factual findings made by the trial court. A court of appeal is only entitled to interfere with a trial court's findings on fact if it is satisfied that the trial court misdirected itself on the facts or the credibility of witnesses (*R v Dlumayo* 1948(2) SA 677 (A))
3. There was no direct evidence led at the trial. The state sought various inferences to be made from such evidence. It is now trite that in the case of circumstantial evidence the circumstantial

evidence must pass muster the "...two cardinal rules of logic" as laid down in *R v Blom 1939 AD 188*, at 202-3 by Watermeyer JA, viz, that "(1) *the inference sought to be drawn must be consistent with all the proved facts. If it is not, then the inference cannot be drawn;* (2) *the proved facts should be such that they exclude every reasonable inference from them save the one sought to be drawn if they do not exclude other reasonable inferences, then there must be a doubt whether the inference sought to be drawn is correct*".

4. The basis of the appellant's defence as set out in his amplification of his plea of not guilty, in terms of section 115 of the Criminal Procedure Act 51 of 1977 was that there had been misunderstandings between himself and the deceased on the 7th and 10th April, 2005, during which he had struck her with an open hand but denied that the deceased could have sustained any injuries that could have caused her death. In the course of his evidence the appellant testified that on the afternoon of the 9th April, 2005, the deceased had left the room they occupied and had allegedly been attacked by an unknown male in the drive way on the premises: she had apparently suffered a cut above her eye. Later during the course of that weekend she had fallen twice and could have sustained the fatal injuries during such falls.
5. The post-mortem examination on the body of the deceased was performed by Dr Blumenthal, a pathologist. The deceased's body was also photographed. The chief findings by Dr. Blumenthal are that the cause of death was "sub-acute right sided subdural haematoma due to blunt force trauma", suggestive of the use of an instrument. He dismissed any suggestion that the fatal injury could have been caused accidentally.

6. The trial court found that it could not find "...with any degree of certainty that the evidence presented by the state did not prove the accused was responsible for those injuries which caused the deceased's death". It convicted him, however, on the basis that there had been a duty and obligation on the appellant to take the deceased to hospital for medical attention and that his failure to do so displayed a total disregard on his part whether the injuries inflicted by him or a third party could have been fatal. He reconciled himself with the possible consequences of his acts as well as the acts of a third party and for that reason we are of the view that the State proved its case beyond reasonable doubt.
7. It was submitted on behalf of the appellant, on the merits, that the finding of an attack by an unknown person on the deceased was correct. It was submitted, however, that the court erred in finding that the appellant was under a legal obligation to have taken the deceased to hospital. It was submitted further that the trial court had erred in finding that the appellant ought to have realized that the deceased needed medical attention and then convicting him of murder, which required subjective foresight.
8. It was submitted further that the charge sheet had been materially defective and that the appellant had been prejudiced by the lack of "...an averment that there was a legal duty on the appellant to have taken the deceased to hospital".
9. With regard to the sentence it was submitted that the failure to apprise the appellant of the provisions of "minimum sentencing legislation at the onset of the trial" had rendered the trial in that respect substantially unfair and constituted a substantial and compelling reason why the prescribed sentence ought not to have been imposed".

10. It was submitted by Miss Mnguni, for the State, that it was her respectful view that the trial court had misdirected itself in accepting that the deceased had been attacked by an unknown assailant who may have inflicted the fatal injuries. It was submitted that the trial court should have found that the injuries that resulted in the deceased's death were inflicted by the appellant and further that the appellant foresaw that the injuries would cause her death and reconciled himself with that consequence and did not take the deceased for medical intervention and treatment.
11. With regard to the sentence Miss Mnguni submitted that the sentence is an appropriate one and should be confirmed. In the light of the mutual challenge of the trial court's findings on fact it is necessary to test the submissions made by the respective counsel and, if necessary, to re-visit the evidence.
12. The evidence is that the appellant started assaulting the deceased whilst they were on their way to their home after the appellant's dog had escaped and had been run over and died when the bakkie the couple were travelling in stopped at a robot and the deceased opened the door to fetch the appellant's cigarettes from the rear of the bakkie. The assault on the deceased in this regard is set out in the appellant's statement that was handed into court and accepted in evidence. According to the statement (Exhibit "E"), the appellant admitted that:
 - (i) He slapped the deceased twice in the bakkie, in exasperation;
 - (ii) When they reached home he again gave her "... 'n paar klappe" after she had poured herself some wine;

- (iii) After she had gone out of the house to obtain the odometer reading on the bakkie he heard her screaming outside. He ran out and found her lying on the driveway. He observed a small cut above her left eye. He tried to lift her up. She would not co-operate to enable him to help lift her up. He then "...toe gee ek haar weer 'n klap. Toe se sy sy wil fokol van my hê – ek moet haar uitlos. Toe klap ek haar weer."
- (iv) Whilst he was dragging her from where he had picked her up in the driveway she fell because she would not co-operate as he was trying to open the gate. He took her into the house and placed her in the bed. She tried to get up from the bed but fell over a stool. He told her to listen to him. Her response was "Jy het fokol vir my te se. Toe haal my koppie uit. Toe gee ek haar 'n paar klappe."
- (v) Later he left to buy cigarettes. On the way to the café he realized he did not have money on him. He returned home. The deceased came out of the kitchen with short pants with the front thereof open and her panty visible. He swore at her. The deceased's response was she could walk as she liked as no one could see it. He slapped her. She made no effort to close the front of her shorts. He slapped her again.
- (vi) The following day, the Sunday, on their return from the café the deceased repeated that she could walk around dressed as she liked as no one would see her. He

slapped her again. In his evidence when testifying he added that he struck her with his right hand between her legs. On the Monday he offered to take her to hospital. Her response was that she was feeling "alright". He insisted that he was taking her to the doctor. She swore at him. He then slapped her hard. He also slapped her with the left hand on her face. On Tuesday morning he discovered that she was dead.

13. Three witnesses testified on behalf of the state, viz, LINA MAHLANGU, sergeant Diale and Hendrina Jansen van Rensburg, the deceased's daughter. Mahlangu's evidence is that she worked on the premises adjacent to where the deceased lived. On the day in question she heard a long painful scream for help emanating from the premises where the deceased lived. She saw the deceased lying down on the driveway. She also saw the appellant standing closer to the garage gates. She makes no mention in her evidence of the appellant assisting the deceased and neither was this put to her.
14. Sergeant Diale testified that on 9 April, 2005, he was on patrol duty when he received a complaint of assault at 757 Meyer Street and within a minute of this call he received a complaint of housebreaking in progress at the same address. He proceeded there. He found the appellant and another old man in the house. The appellant made a report to him that somebody had hurt his wife. They went into a room and found the deceased asleep. They then went outside to the gardener's room as the appellant suspected that it was the gardener who had assaulted his wife. They went outside and found the gardener's room locked. They returned to the house and found the deceased awake. The deceased's left eye was swollen and had a little cut. He wanted to

arrange for the deceased to be removed to hospital but the appellant informed him that he had an army medical aid kit and would "...try to neutralize" her and that he could take her to hospital later. On Diale's request the appellant took Diale outside and pointed out a spot with fresh blood stains on the ground. He also asked the appellant about the case of housebreaking and the appellant said, "... he will open a case maybe after he comes back from the hospital... [after]... taking his wife there". Before they left he again offered to take the deceased to hospital but the appellant was adamant he would take her and proceeded to a car and started it. He testified that neither the assault nor the housebreaking case was ever opened at the police station.

15. Sergeant Diale confirmed under cross-examination that when they went back into the bedroom the deceased had been awake and she told them that she was attacked outside the house by a black male who could still be on the premises.

16. The evidence of Hendrina Jansen van Rensburg is that she was telephoned by the deceased, her mother, on 10 April, 2005. The deceased informed the witness that she had been assaulted the previous night. The excerpt of the evidence in this regard reads as follows:

"U sê u ma het u geskakel? --- Ja, sy het my geskakel.

Ja? --- Toe het sy vir my gesê sy is die vorige aand, die Saterdagand, aangerand.

Ja? --- Ek het vir haar gevra deur wie is sy aangerand. Sy het my nie geantwoord nie, toe vra ek haar weer was dit Lenard Fourie gewees.

Ja? --- Toe sê sy vir ... (voltooid). Ekskuus, ek het vir haar gevra was dit Lenard Fourie gewees, toe het sy begin huil toe sê sy vir my ja sy wens sy kan doodgaan.

Sy het begin huil en toe sê sy...(tussenbei) --- Sy wens sy kan doodgaan.

Sy wens sy kan doodgaan. Ja? --- Ek het haar gevra was dit Lenard gewees en staan hy daar naby. Sy het net in n huilende stem gese ja

MS MNGUNI: Yes, proceed? --- Ek het haar gevra of kan ek haar hospitaal toe neem. Sy het gesê nee sy gaan die Maandagoggend hospitaal toe. Ek het haar gevra sy moet my laat weet hoe dit gegaan het en wat sê hulle."

(Page 37 line 15 to page 38 line 5 of the record)

17. She testified further that the next day the following telephone her, between 12h00 and 13h00. The evidence reads as follows:

"And then thereafter did you have any conversation with your mother after the 11th? --- No".

(Page 38 lines 17 and 18)

Cross examined on the ambiguity in the deceased's response during the telephone conversation of the 10th, the evidence reads as follows:

So sy het eintlik vir u geskakel en vir verduidelik dat sy aangerand is? --- Ja

Het sy ooit vir u vertel gedurende die gesprek dat sy deur 'n swart man aangerand was? --- Nee, glad nie.

En as gevolg van hierdie vraag wat u vir haar gevra het, ek verstaan dit is dubbelsinning...(tussenbei) --- Ja.

Ek weet nie wat die antwoord "ja" in vergelyking is nie, is die antwoord "ja" dat die beskuldigde langs haar gestaan het of is die antwoord "ja" dit is die beskuldigde wat haar aangerand het, maar u vraag aan haar was duidelik gewees? --- Dit was duidelik.

Is dit Lennard? --- Ja.

Dit was u vraag gewees? --- Ja.

En toe antwoord sy...(tussenbei) --- Nee, die ... (tussenbei)

Daar was a stilte gewees? --- Die eerste keer wat ek haar gevra het het sy net vir my gesê sy wens sy kan doodgaan.

Ja, dit versaan ek, maar ek praat ... (tussenbei) --- En die tweede keer het sy net gesê "ja".

Ek praat nou spesifiek omtrent wat u vir u moeder gevra het, wat het u vir u moeder gevra? --- Ek het vir haar gevra is dit Lennard wat haar aangerand het en staan hy langs haar en sy het net daarop ja geantwoord. Sy het nie gesê ja dit is hy of nie dit...(tussenbei)

Maar daar was nooit 'n antwoord gewees, nee dit is nie Lennard nie dit is iemand anders, 'n derde persoon byvoorbeeld nie? --- Nee, glad nie, glad niks van so 'n gesprek nie.

(Page 40 line 3 to page 41 line 1 of the record)

18. The evidence of Dr. Blumenthal was that there was extensive bruising on the thighs, genital area and the abdomen. In his view such injuries would have been caused by a continuous application of blunt force and not two smacks or blows. The photograph shows a purplish – black area around the pubic area and the lower abdomen. There were lacerations and bruising on the upper and lower eyelids of both eyes, the lower lip, the neck, forehead, cheeks, the lower back, both hands and the left temporal area just above the left ear. It is significant that according to Dr. Blumenthal the fatal injuries could not have been inflicted with an instrument.
19. The appellant testified in his defence essentially as set out in his statement – exhibit "E". He emphasized that the deceased notwithstanding his entreaties to take her to hospital had steadfastly refused and begged him not to take her to the hospital from the Saturday until Monday because of her experience in the past at the hospital when she had almost lost her life.

20. It is convenient to re-state the well-known test on the onus in a criminal trial, namely that the onus rests entirely on the State to prove the guilt of an accused beyond reasonable doubt - this is now trite. There is no onus on an accused. If his version is reasonably possibly true, he is entitled to his acquittal. That too is now trite.

21. In evaluation of the evidence the court must have regard to the evidence in its entirety, it must not weigh the evidence of the state and the defence independently of each other (S v van Der Meyden 1999(1) SACR 447 at 448 (e) to (j)):

"The onus of proof in a criminal case is discharged by the State if the evidence establishes the guilt of the accused beyond reasonable doubt. The corollary is that he is entitled to be acquitted if it is reasonably possible that he might be innocent (see, for example, R v Difford 1937 AD 370 at 373 and 383). These are not separate and independent tests, but the expression of the same test when viewed from opposite perspectives. In order to convict, the evidence must establish the guilt of the accused beyond reasonable doubt, which will be so only if there is at the same time no reasonable possibility that an innocent explanation which has been put forward might be true. The two are inseparable, each being the logical corollary of the other.

In whichever form the test is expressed, it must be satisfied upon a consideration of all the evidence. A court does not look at the evidence implicating the accused in isolation in order to determine whether there is proof beyond reasonable doubt, and so too does it not look at the exculpatory evidence in isolation in order to determine whether it is reasonably possible that it might be true. In R v Hlongwane 1959 (3) SA 337 (A), after pointing out that an accused must be acquitted if an alibi might reasonably be true, Holmes AJA said the following at 340H-341B, which applies equally to any other defence which might present itself:

'But it is important to bear in mind that in applying this test, the alibi does not have to be considered in isolation The correct approach is to consider the alibi in the light of the totality of the evidence in the case, and the Court's impressions of the witnesses.'

22. It is my understanding of the judgment of the court *a quo* that it accepted the evidence of all the state witnesses. The only bit of evidence that was found to be ambiguous was whether in answering in the affirmative to the question whether it was the appellant who had assaulted the deceased and whether he was present as the deceased was speaking over the phone. (I shall revert to this later in the judgment). The trial court as set out earlier in this judgment was prepared to and in fact did give the appellant the benefit of the doubt with regard to the alleged attack of the deceased in the driveway. I shall deal with these issues *seriatim*.
23. There can be no doubt on a reading of the evidence that the deceased telephoned her daughter on the Saturday evening. It is common cause that the deceased had been assaulted that afternoon. It cannot be doubted that the daughter would have enquired from the deceased as to who her assailant had been – that was a natural and instinctive question to ask. The fact that the deceased broke down crying and saying that she wanted to die instead of stating who the culprit or culprits who had assaulted her were is significant, particularly when regard is had to the cause of the fatal injuries and the equally serious internal haemorrhaging caused by blunt force on the deceased's lower abdomen and her head. If indeed somebody other than the appellant had assaulted her on these parts of the body it appears inherently improbable that when asked if the appellant had assaulted her the deceased would

not have readily disclosed this to her daughter but would have broken down and cried.

24. Secondly, it is strange that not knowing how the deceased had been injured and with what weapon, if any, the appellant would not have been alarmed at the deceased's inability to get up and walk back into the house, let alone being unable to co-operate with the appellant when he tried, to lift her up and take her into the house.
25. The deceased's leaving the house has strange features about it. Firstly, the appellant found it necessary to enquire about the odometer reading on the bakkie he was using. That information was of no use at that stage. Instead it would have been only necessary to provide it to his employer on the Monday. His own reason for dissuading her from going to do this despite his protestations is strange: as he himself said he had told her "...sy moet dit los, ons kan dit Sondag kry". Various questions arise, viz.:
 - (i) Why did she go outside then; and
 - (ii) What had the unknown black male or gardener who allegedly attacked the deceased been doing in the driveway and why did he attack her?
26. The appellant himself found this strange. He says at the bottom of exhibit "E" at page 226 of the record *"Ek vra vir haar wat is fout. Sy sê iemand het haar geslaan en oor die binne-heining gesprong. Mevrou, wat ek nie kon sien gebeur het nie, want ons het twee baie groot honde en hulle is aggressief"*.
27. To add to the foregoing mystery when Lena Mahlangu looked into the premises she saw the appellant already there on the driveway

close to the deceased. It appears unlikely that having heard a scream of pain Ms. Mahlangu would not have reacted immediately and perhaps have seen or heard footsteps of a person fleeing from the premises next door. Further, when she saw the appellant in the driveway he was just standing there doing nothing: this was never contested.

28. From the evidence of Diale it is clear that two telephone calls were made from the premises of the deceased and the appellant. Their sequence is significant. The first, as mentioned earlier in this judgment was of an assault and the second was of a "housebreaking in progress". That an assault took place on the premises is common cause: the victim was the deceased. The appellant not only informed Diale about the assault on his wife but even went on to state that he suspected the gardener of having been the assailant hence the visit to the gardener's room. Despite this suspicion the appellant never found it necessary to lay a complaint with the police at any stage, even after the deceased's death. I find that conduct inexplicably strange more so as the suspected gardener had allegedly threatened to kill the appellant's dog some time before this incident.
29. The next strange conduct on the part of the appellant in the meeting with sergeant Diale was his refusal to let Diale telephone for an ambulance. Nothing in the appellant's evidence suggests that the deceased's inability to get up and walk from the driveway could have been attributed to any cause save the assault on her. Why then did the appellant:
 - (i) tell Diale he would "... try to neutralise..." the deceased not knowing the nature and extent of the injuries sustained in that assault;

- (ii) decline Diale's offer to telephone for an ambulance;
- (iii) having convinced or persuaded Diale that he would take the deceased to hospital, going to the extent of starting his vehicle he did not do so despite the deceased's protestations;
- (iv) mislead the deceased into believing that his vehicle needed jumper leads in order to start it because of a flat battery when in fact he had started the vehicle in Diale's presence without the use of any jumper leads;
- (v) never laid a charge against the wife's attacker particularly as he had reason (whatever it might have been) to suspect the gardener as the culprit?
- (vi) Why he would have accepted the deceased's purported refusal to be taken to hospital knowing as he did, that he had been assaulting the deceased during that weekend in addition to the injuries sustained in the driveway which totally incapacitated her?
- (vii) How the deceased, once inside the house, was able to move about without the assistance from the appellant when she had just been totally helpless and unable to walk even when assisted, once she got inside the house?

30. The next strange conduct on the part of the appellant is that almost throughout that weekend he spoke rationally, gently and with some concern to the deceased. Yet, his reactions when the deceased said or did anything that did not accord with his views, perceptions or likes and dislikes he reacted with intensified aggression never hesitating to beat up the deceased. These beatings extended from Saturday to Monday despite the full knowledge that the deceased must have sustained some serious injury or injuries, as pointed out above.

31. I come to the issue of the mysterious black assailant. It is so that the deceased mentioned such a person to Diale. The question is "why". Two probabilities immediately lend themselves to this question. The first is that it may be "possible", I use this word advisedly in preference to the word "probable" because there might have been such an intruder. The second is that there was no intruder at all.
32. The evidence is quite clear that the deceased was attacked in the driveway. The appellant and Lena Mahlangu both confirm this. Diale corroborates this. At the time of the attack two men were present on the premises, i.e. the appellant and the landlord. In addition, as the appellant testified there were two ferocious big dogs on the premises. There was no physical break in. The appellant was not even interested in explaining to Diale about the break-in and he never reported it. As against that there is the appellant's strange violence and clear abuse of the deceased before and after the alleged assault by the black male.
33. The reaction of Hendrina Jansen van Rensburg upon hearing the report by the deceased that she has been attacked was to ask the deceased who her attacker was. The deceased's response was, in my view, not consistent with having been attacked by an unknown person who ran away. It appears most reasonable to expect that had that been so the deceased would not have hesitated in saying so. Her bursting into tears appears consistent with the victim of abuse by a known person. Further, the failure by deceased to deny that it was not the appellant who had assaulted her is significant given the appellant's unfailing violent reaction whenever he felt affronted by even the most insignificant conduct on the part of the deceased. It is against this backdrop that the intruder's alleged presence must be considered.

34. According to the evidence of Diale and the appellant the deceased was asleep when Diale arrived. On their return to the room however, she was awake. Was her response that she was assaulted by the unknown black person the truth? There is something very odd about this. Never at any stage did the deceased say that the culprit or suspect was the gardener. Yet the appellant led Diale to the gardener's room to look for him there because the deceased had presumably said that the culprit could still be on the premises. Was the deceased concealing the identity of her assailant to Diale? When regard is had to the various instances when the appellant beat up and abused the deceased the reason for the mysterious unknown black assailant lends itself as an understandable attempt at self-protection and preservation from what could, on the probabilities of this case, have been the reason for another assault or beating had the appellant been identified as the assailant and the law taken its course against him. If the deceased could have been beaten up for the impulsive reaction by a pet and through no fault on her part that answer is more likely to have been motivated by self-preservation. This proposition appears most likely, consistent with breaking down in tears and expressing a desire to die rather than disclose the identity of her assailant when the appellant was present or in the immediate vicinity.
35. Lastly, it appears improbable that save for the fatal blows all other injuries were accepted by the appellant as having been caused by him.
36. The evidence of the appellant that the deceased fell onto a fan, or over a chair, or onto the floor are inconsistent with the alleged attack by an unknown black assailant. All these were clearly fabrications by the appellant. In my view they were desperate

ploys to explain vainly the injuries that caused the deceased's death. It is my considered view, in the circumstances, that the deceased died as a result of the injuries inflicted on her by the appellant and nobody else.

37. Just as the trial court found, it is my considered view that the appellant did not have the direct intention to kill. The blunt force blows, especially those to the head, however, were inflicted with such force that the attacker knew that they would result in death. He acted recklessly and persistently having reconciled himself with the knowledge that death would result from such blows.
38. It is my considered view that the trial court erred in its assessment, and evaluation of the evidence and its conclusion that the fatal injuries may have been caused by an unknown person. The version of the appellant is so highly improbable that it cannot be reasonably possibly true. There can be only one inference from the facts and that is that the appellant is the person who inflicted all the injuries on the deceased. The proper verdict is guilty of murder, with intent being *dolus eventualis*.
39. With regard to the sentence I concur with the submission of State counsel, Ms. Mnguni. The appellant acted with such barbarity, beating a defenceless woman repeatedly and continuously despite her inability to get up and return to their room. He deliberately misled the police into believing that he was taking the victim to hospital. Instead, he kept her at home for two more days. This conduct is unpardonable. It shows gross cruelty, a shameless persistence at attempting to mislead the court and a total unmitigated lack of remorse. In my view the sentence is appropriate. Any reduction in the sentence imposed by the trial court would certainly amount to a misdirection by this court and

"...amount to an undue relegation of the retributive and deterrent elements in sentencing". (S v Nel 2007 (2) SACR 481 (SCA) at 486).

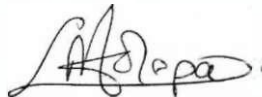
40. The appeal is accordingly dismissed and the sentence confirmed.



G. WEBSTER

JUDGE IN THE HIGH COURT

I agree.



L. M. MOLOPA

JUDGE IN THE HIGH COURT

I agree.



N. B. TUCHTEN

JUDGE IN THE HIGH COURT