

**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE LOCAL DIVISION, PORT ELIZABETH)**

Case No: CC 25/2018

Date heard: 18 March 2019 – 25 March 2019

& 31 July 2019

Date delivered: 2 August 2019

NOT REPORTABLE

In the matter between:

THE STATE

And

XOLANI NYANGWA

Accused

JUDGMENT

Goosen J:

[1] On the morning of 1 October 2017 Sergeant *Matila* of the Motherwell Police Station received a report about the presence of a body in a partially constructed house in Mvokontshi Street. He went to the scene and found the naked body of a young woman. The lower portion of her torso and legs had been destroyed by fire. The body was still smouldering.

[2] Sergeant *Matila* summoned members of the Local Criminal Record Centre (LCRC) to conduct investigations of the scene. He then began to make enquiries regarding the identity of the deceased. He was able to do so and established that she had been in the company of a friend at Siyawa's Tavern the previous night. His further enquiries led him to the home of the accused, who was, at that stage, not a suspect. The accused confirmed to him that he had been in the company of the deceased at Siyawa's Tavern. When asked what clothing he had been wearing the accused produced a pair of blue jeans. Sergeant *Matila* observed what appeared to be bloodstains on the legs of the trousers. He then arrested the accused on suspicion of involvement in the murder of the deceased.

[3] The accused came before this court charged with kidnapping and murder. He pleaded not guilty to the charges and elected not to disclose the basis of his defence. The prosecution case against the accused was founded upon a body of circumstantial evidence. Several witnesses were called, the principal witnesses being the forensic experts who investigated the scene of the crime. The accused elected to present no evidence in his defence.

[4] It is appropriate to begin the assessment of the evidence presented by the state with the set of formal admissions made by the accused in terms of s 220 of the

Criminal Procedure Act¹. It was admitted that the deceased found at the scene was in her lifetime *SINOXOLO WENDY BEYI*. A post mortem examination was conducted on the body of the deceased on 2 October 2017 by Dr *Annemarie Mattheus*. The content of the report was admitted. Dr *Mattheus* determined that the cause of death was consistent with blunt force injuries to the head.

[5] It was also admitted that Dr *Mattheus* took a blood sample from the body of the deceased during the post-mortem for forensic analysis purposes. The accused admitted also that a bucal swab was taken from him for forensic analysis purposes. These forensic exhibits, it was admitted, were properly collected, sealed and the chain of custody kept intact until they were analysed by Warrant Officer *Igshaan Kenny* of the Forensic Science Laboratory. The accused also admitted the location of bloodstains and the collection of samples from the blue jeans seized at the time of his arrest.

[6] Warrant Officer *Van der Vyver* conducted an analysis of the crime scene. She prepared a sketch plan and detailed photo album of the scene. The photograph album contains photographs of the shack where the accused was arrested and of the accused following his arrest.

[7] In the course of investigating the crime scene Warrant Officer *Van der Vyver* collected numerous exhibits, in the form primarily of swabs of blood found on the scene which were dispatched for forensic analysis. It was admitted that all such exhibits were properly collected, sealed and kept intact until they were analysed by the Forensic Science Laboratory.

¹ Act No, 51 of 1977

[8] The crime scene consists of a partially constructed building. It has no windows or doors and no roof. The internal layout consists of three rooms. They are linked by an open passage-like area. There are two entrances to the building. One faces onto Mvokontshi Street. The other is to the side of the building. The side entrance is to the passage area. Immediately to the right of this entrance there is a small room. The passage extends into another room at the back of the structure and to the left opens into a larger room at the front of the structure.

[9] In order to facilitate understanding of the evidence I shall refer to the three rooms as B-room (the small room to the left of the side entrance); the A-room (the other room at the back of the structure) and the C-room (the larger room which has an entrance onto Mvokontshi Street). This designation corresponds with the nomenclature used to identify exhibits collected in each of the three parts of the building. The body of the deceased was found in room A.

[10] In dealing with the analysis of the evidence presented in respect of the crime scene I shall deal with that which was found by *Van der Vyver* and the resulting DNA forensic analysis conducted by Warrant Officer *Igshaan Kenny*. I have already indicated that the chain of custody was admitted. The evidence of *Igshaan Kenny* regarding the analysis of the exhibits for matching with DNA in the control samples collected from the deceased and the accused went unchallenged. It is accordingly necessary only to refer to the outcome of this analysis.

[11] Warrant Officer *Van der Vyver* recovered swabs from blood spots on both the left and right concrete doorposts at the side entrance to the building (exhibits B4 and B5). In room B she recovered two exhibits, a pink coloured K-way cap (exhibit B1) and two lengths of woven hair ("dreadlocks")(exhibit B2). The cap, it is not disputed,

belongs to the accused. It is apparent from the photographs of the deceased that she had braided hair in the form of dreadlocks. The photographs of the deceased's scalp area indicate a wound suggestive of the tearing of the dreadlocks (exhibit B2) from her scalp. The post mortem report records such an injury.

[12] The blood found at point B4 (on the right-hand side of the side entrance) was that of the deceased. That recovered from point B5 (left-hand side of the door) matched the DNA profile of the accused. Further blood spatter marks were noted in the passage area leading to room C, both on the floor and on the walls. One of these collected from the wall at B8 also matched the DNA profile of the accused.

[13] The investigation of room C pointed to this room as being the room in which the main attack on the deceased occurred. Warrant Officer *Van der Vyver* recovered several exhibits from this room and recorded the position of blood spatter on the walls and floor. She noted the presence of blood on a large concrete block which was lying amongst other rubble under the window opening at the front end of the room. There was blood spatter on that wall and several spatter marks on the adjacent wall.

[14] At a point on the wall nearest the passage she recovered two blood swabs (exhibit C1 and C2). These exhibits were found by *Kenny* to match the DNA profile of the accused. *Van der Vyver* recovered samples of the blood spatter against the adjacent wall (C9 and C11) which matched the DNA profile of the deceased. In the vicinity of these marks she recovered a blood swab (exhibit C5) on the side of a shoe. The blood on the shoe matched the DNA profile of the accused. In the corner of the room near the concrete block a broken watch was recovered. This was the deceased's watch. A swab of it was matched to her DNA profile.

[15] I will return to the analysis of the blood spatter which was conducted by Warrant Officer *Bekker* later in the judgment. For present purposes it is necessary only to record that swabs of blood recovered from spatter marks on the wall at C11 and in the corner at C 18 and 19 matched the DNA profile of the deceased.

[16] Swabs of the blood found on the concrete cinder block (exhibit C26) matched the DNA profile of the accused. A further swab (exhibit C26a) was found to contain a mixed sample of DNA into which could be read the DNA profile of both the deceased and the accused. The analysis of the concrete block undertaken by Warrant Officer *Bekker* indicated that the concrete block was used to inflict the head injury described by Dr *Mattheus* in her post mortem report and her evidence.

[17] As already indicated the deceased's body was found in room A. The lower portion of the body had been destroyed by fire. It is not necessary to describe the destruction which is fully set out in the post mortem report. The examination at the scene suggested that the deceased's body was covered with some insulation material which was then set alight.

[18] Of significance was the presence of blood spatter in the corner of this room and against the wall. The forensic exhibits recovered here (exhibits A 2, 7 and 8) matched the DNA profile of the deceased.

[19] Warrant Officer *Bekker* conducted a bloodstain pattern analysis of various exhibits. His qualifications were not placed in dispute. He has just under 20 years' experience as a crime scene investigator. He performs duties which include crime scene investigation; forensic fieldwork; bloodstain pattern analysis; crime scene

reconstruction and fingerprint and shoe print analysis. He has completed a multitude of courses which include level 1 and 2 courses in bloodstain pattern analysis and crime scene reconstruction.

[20] He explained that blood, as a fluid, reacts to internal and external forces. The combination of its viscosity and forces of gravity will result in a similar pattern forming on an object under similar conditions. The pattern is therefore reproducible. Analysis of the material on which the blood occurs and physical attributes of the pattern allows the investigator to infer what preceded the creation of the pattern.

[21] He gave several examples. A spurt of blood from an artery (i.e. under pressure) will create a different pattern to a droplet coming into contact with an object. So too a blood source which is in contact with an object will create a different saturation pattern. This is a contact/transfer stain. If there is a small volume of blood it will present as a swipe/smear. Such a transfer stain (where the blood source is in contact with the object) differs from an impact saturation stain. In the case of the latter, the moving blood (acting under a force) comes into contact with the material/object. In such instance, the blood itself is in free flight and impacts the material or object or surface. Its movement on the surface creates a discernable pattern indicating the direction of travel from the source.

[22] Finally, he explained that the type of material will affect the pattern. An absorbent material will result in irregular margins or edges whereas on a non-absorbent material the pattern /edges will be elliptical or circular and regular.

[23] Warrant Officer *Bekker* analysed the bloodstains found on the pair of jeans worn by the accused. It should be noted that the three bloodstains on the left leg of

the trousers (i.e. those on the hem of the left leg and on the shin area) were found to match the DNA profile of the deceased. The bloodstain on the right knee area was found to match the DNA profile of the accused.

[24] He stated that the bloodstain on the hem of the trouser leg was a transfer stain i.e. that the trouser leg was in contact with the source of the blood. The bloodstain on the shin of the trouser leg he described as an impact stain. He was able to analyse it for directionality and in his opinion the blood source was below the stain and in close proximity to the trousers when the blood impacted the trousers.

[25] These bloodstains suggested that the wearer was standing at or near the deceased when she was struck to cause the injury to her head. It was his opinion that the most likely source of the blood giving rise to the transfer stain was the head wound suffered by the deceased.

[26] Warrant Officer *Bekker* conducted further analysis of the bloodstains found on the wall near the corner of room C and in the proximity of the cinder block. He stated that the relatively small volume of blood on the cinder block indicates that the block was brought into contact with the blood source. The bloodstains noted were elliptical in shape and radiated outwards from a single point. It was his opinion that the cinder block was used as a weapon.

[27] The presence of impact saturation stains on the wall which were elliptical but irregularly shaped indicated that the blood was in free flight when it struck the wall. The pattern indicated that the main blood-shedding event was caused in that area. The presence of linear cast-off stains also indicated that an object on which there

was a large volume of blood was moved or swung rapidly and that in the process blood was flung off in free flight.

[28] Based on his analysis and taking into account all of the bloodstain patterns he concluded that the wearer of the jeans was standing at the body of the deceased when the cinder block was used to deliver one or more blows to the head of the deceased. In his view, this occurred in room C.

[29] This accounts for the objective evidence recovered from the crime scene. It establishes beyond any doubt that the accused was present at the scene (both in rooms B and A) when the assault upon the deceased occurred. It is common cause that, at the time of his arrest, the accused had a wound on the ring finger of his right hand. Although the accused asserted a version during cross-examination of the witnesses as to how this had occurred, he did not present any evidence in this regard. On the probabilities this wound is the source of the accused's blood which was found on the crime scene and on the trousers.

[30] Before turning to consider the other circumstantial evidence which bears on the matter, it is apposite to record that a consideration of all of the objective evidence gathered at the crime scene points to the following sequence of events:

[31] The deceased and perpetrator entered the building via the side entrance. The assault on the deceased commenced in room B. The tearing of the dreadlocks from the scalp of the deceased suggests a very violent struggle. The deceased was then taken to room C. The multiple injuries noted during the post mortem point to a sustained assault. At some point she is overpowered and finds herself on the ground. She is then struck on the head with the cinder block using considerable

force. The fractured skull is indicative as is the blood spatter pattern found. The deceased is then dragged to room A. This is suggested by the drag marks observed by Van der Vyver in room C. The presence of blood on the wall in room A suggests the assault continued. Her body is then set alight.

[32] The only question is whether the objective evidence recovered from the scene establishes that the accused was the person who perpetrated the assault upon the deceased. Before answering that question it is necessary to sketch a final piece of the picture painted by the evidence.

[33] This emerges from the evidence of two witnesses. The first was *Zintle Mabodi*. She said that at the time she was the accused's girlfriend. In the early hours of the morning of 1 October 2017 she was at Siyawa's Tavern. She was called outside by the accused. She noticed that he was wearing a red t-shirt. He was previously wearing a different t-shirt. She asked him why he had changed and he said his shirt was dirty. After speaking with him she went back into the tavern. She saw him outside again later. At that stage he was with the deceased whom she knew. She did not appreciate the manner in which he was holding the deceased. She asked him for the keys to his house. He refused. They then quarrelled. The accused apparently assaulted her. He then walked her to her parental home and left. She returned to the tavern later but the accused was not there. She then went home to sleep. She identified the pink K-way cap as belonging to the accused. She could not recall whether he was wearing the cap that evening.

[34] *Masibulele Mntuyendwa* also testified. She said that she was in a love relationship with the accused. She met him at a tavern on the night before he was arrested. He asked her to accompany him home. They travelled home in a car with

some of his friends. The accused was wearing a white top. They went to his house. He changed his top and put on a red t-shirt. He then left her at the house saying that he was going to Siyawa's Tavern.

[35] The accused returned home much later. According to her, they had sexual intercourse when he returned. She noticed that he had an injury on his hand which was not there before. Later they were awoken by the sound of the community members outside. The police then arrived at the house. She said that when asked about the injury to his finger he said he had injured it on a fence.

[36] The evidence of *Zintle Mabodi* places the accused in the company of the deceased at Siyawa's tavern in the early hours of the morning of 1 October 2017.

[37] I have already noted that the evidence of the state is circumstantial in nature. It is, however, uncontested. No evidence was presented by the accused. In *S v Musingadi and Others*² it was stated that:

We should perhaps remind ourselves at this stage that there is nothing wrong in principle with circumstantial evidence. On the contrary, it can sometimes be compelling. In the prelude to their discussion of *R v Blom* 1939 AD 188 and the rules of inferential reasoning, Zeffertt, Paizes and Skeen *The South African Law of Evidence* rightly say at 94:

'Circumstantial evidence is popularly supposed by laymen to be less cogent than direct evidence. This is, of course, not true as a general proposition. In some cases, as the courts have pointed out, circumstantial evidence may be the more convincing form of evidence. Circumstantial identification by a fingerprint will, for instance, tend to be more reliable than the direct evidence of a witness who identifies the accused as the person he or she saw. But obviously there are cases in which the inference will be less compelling and direct evidence more trustworthy. It is therefore impossible to lay down any general rule in this regard.

² 2005 (1) SACR 395 (SCA) at 402h – 403a

All one can do is to keep in mind the different sources of potential error that are presented by the two forms of evidence and attempt, as far as this is possible, to evaluate and guard against the dangers they raise.'

[38] The approach in assessing circumstantial evidence is to consider the evidence in its totality in determining whether the inference sought to be drawn is consistent with all the proven facts and whether the proved facts exclude every reasonable inference save that sought to be drawn.³

[39] In **S v Reddy**⁴ Zulman AJA quoted *Best on Evidence* as follows:

“The elements, or links, which compose a chain of presumptive proof, are certain moral and physical coincidences, which individually indicate the principal fact; and the probative force of the whole depends on the *number, weight, independence, and consistency* of those elementary circumstances.

A number of circumstances, each individually very slight, may so tally with and confirm each other as to leave no room for doubt of the fact which they tend to establish. . . . Not to speak of greater numbers, even two articles of circumstantial evidence, though each taken by itself weigh but as a feather, join them together, you will find them pressing on a delinquent with the weight of a mill-stone. . . .”

[40] This is indeed a case where the number, weight, independence and above all consistency of the facts established by the objective evidence weave a network of facts which allow for no other inference than that the accused perpetrated the violent assault upon the deceased and thereby caused her death. His DNA is found on the scene in several blood deposits. These appear in the rooms where the assault was commenced and where its deadly result occurred. The blood is on the floor and walls. His DNA is found on the object which, on all the probabilities, was used to

³ *S v Reddy and Others* 1996 (2) SACR 1 (A) at 8c-e

⁴ *Supra* at 8h-9a

inflict the deadly blow to the deceased's head. His cap is on the scene. His blood is on the deceased's shoe. Finally, blood is found on a pair of jeans he admits he wore. The position and nature of these bloodstains point to him standing over the deceased when the deadly blow was struck.

[41] No explanation has been offered by the accused. In my view, the only reasonable inference which is consistent with all the proven facts is that the accused carried out the assault upon the deceased and that in doing so he manifested a direct intention to kill the deceased. Mr *Bodlo*, representing the accused, conceded as much.

[42] As already stated the accused was charged with kidnapping and murder. Mr *Stander*, on behalf of the state, fairly and properly conceded that there is no basis upon which it may be inferred that the deceased was taken to the abandoned building against her will. He accordingly conceded that on the charge of kidnapping the accused must be acquitted.

[43] While conceding a conviction on the count of murder Mr *Bodlo* argued that the prosecution had not proved that the murder was premeditated or planned as alleged in the indictment. He submitted that the brutality of the assault does not, in itself, suggest that it must have been planned. Mr *Stander*, in arguing to the contrary, submitted that the court was entitled to take into account not only what occurred at the scene but also the accused's subsequent conduct. In this regard he submitted that the presence of blood at the entrance suggests that the assault commenced prior to entry into the building. He submitted further that the burning of the body and that the accused thereafter returned home to another woman suggests a degree of

planning. Finally, he submitted that the accused was aware of what the state case was but had failed to explain that the murder was not planned.

[44] In developing this argument in further submissions he submitted that a court may draw an inference relating to the nature of an accused's intention in committing an offence where knowledge of what transpired is particularly in the knowledge of the accused and he fails to testify. He referred to the unreported judgment of Jansen J in **S v Eddy Appolis** (delivered in 1997) where the learned judge held that the intention to kill may be inferred in such circumstances. While acknowledging that what is here sought goes further than the inference of intention drawn in that matter, Mr *Stander* submitted that the same principle applies.

[45] In this submission Mr *Stander* may well be correct. I need not, however, decide the issue. That is so because the overriding consideration is that the inference/inferences to be drawn must be consistent with all the proven facts.

[46] It is true that the accused gave no version. He did that knowing the consequences that may flow from his failure to testify. His failure to testify, however, means only that there is no evidence to gainsay the state case. It does not mean that an inference can be drawn that the murder was planned if there is no factual basis upon which such inference can be drawn. The objective facts in this matter do not, in my view, support an inference as being the only reasonable inference, that the accused proceeded to the building with the deceased having formulated a prior intention to kill and that what transpired there gave effect to that plan.

[47] As to the first submission, regarding the commencement of the assault before entry to the building, I am not persuaded that the presence of both the deceased and

accused's blood at the entrance necessarily means the assault started before entry. It is at least reasonably possible that the blood came to be deposited there after the assault had commenced inside the building, perhaps during the initial struggle.

[48] The accused's conduct after the event also does not, in my view, speak to prior planning. It certainly suggests extraordinary callousness. The attempt to destroy the body by setting it alight does not necessarily evidence prior intention to kill the deceased, it may equally reflect a calculated desire to get rid of evidence after the fact. It follows that I am not persuaded that the state has been able to establish beyond a reasonable doubt that the murder was premeditated.

[49] In the result I make the following order:

1. The accused is acquitted and discharged on count 1, kidnapping.
2. The accused is found guilty on count 2, murder.

G.G. GOOSEN

JUDGE OF THE HIGH COURT

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