

**IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE LOCAL DIVISION, MTHATHA**

CASE NO: CA&R123/2017

DATE HEARD: 17/08/2018

Further submissions received 7 & 8 November 2018

DATE DELIVERED: 27/11/2018

In the matter between

ZIZAMELE GCOBANI NYEMBEZI

APPELLANT

and

THE STATE

RESPONDENT

JUDGMENT

ROBERSON J:-

[1] The appellant was convicted in the Regional Court, sitting in Mount Frere, of three counts of murder, and sentenced to life imprisonment on all three counts. The victims were his estranged wife and two children, girls aged 14 years and two years respectively. It was alleged that the appellant had killed them by burning them to ashes in a closed room. The cause of death of each victim was given in the post mortem reports as “asphyxia caused by smoke inhalation due to flame burns (undetermined) also 4th degree burns”. This appeal lies against convictions and sentences. Leave to appeal was not necessary in view of the provisions of s 309 (1) (a) of the Criminal Procedure Act 51 of 1977 (the CPA).

[2] It was not in dispute that the house where the deceased died was the appellant’s mother’s home in Dotye and that the appellant’s wife was living there at

the time. The appellant lived elsewhere in the same area. The two children shared the same surname as the appellant's wife but Counsel were unable to confirm if they were her children or somebody else's children. They were not the appellant's children.

[3] The evidence led by the State implicating the appellant was circumstantial. According to the appellant's sister, she, her mother, and the appellant had attended a funeral on a Saturday. The appellant left for home on the following Monday and on Tuesday 7 May 2013 the appellant telephoned her telling her that there was a fire at their mother's home. When she enquired after the people in the house he said that there was blood there. The sister left for Dotye and on arrival there met the investigating officer who showed her items of clothing, blankets, and a hammer, all of which belonged to the appellant. Amongst the clothing items were a pair of boots and a shirt which the sister said were worn by the appellant at the funeral. Also among the items of clothing was a jersey.

[4] According to the police officer who was called to the scene early in the morning on 7 May 2013, there was blood outside the house. The hammer, which was found at the scene, had blood stains. The remains of the deceased were found in the house which had been burned. The investigating officer arrived at the scene and thereafter the appellant arrived. The appellant said that the electrical box had caused the damage to the house. When the investigating officer learned that the appellant was not on good terms with his wife, he asked the appellant if he could search his house and the appellant agreed. At the appellant's house they discovered a pair of boots which were wet. A sack containing clothing was found

under some bushes in front of the house. Some of the clothing contained blood stains. The appellant said that he had used the clothing when skinning hides from cattle. The accused was then informed of his rights and arrested. The boots were identified by a family member as having been worn by the appellant at the funeral. The appellant's sister identified the hammer as that of the appellant. A member of the Local Criminal Record Centre took the bloodstained clothing, namely a jersey, trousers and a shirt. The investigating officer arranged for material from the deceased's bodies to be taken by a doctor and for a blood sample to be taken from the appellant. He then sealed each sample and the hammer separately and put them in one bag which was sealed.

[5] Captain Masetla testified that he was employed at the Forensic Science Laboratory in Pretoria. He received a case file pertaining to the case from the administrative component of the biology section of the laboratory. A Captain Mpani had analysed the DNA results obtained from the samples but he had left the service. Masetla interpreted the results himself. His relevant findings were that the DNA of two of the deceased was found on the hammer and the DNA of one of the deceased was found on a jersey which was in a sealed evidence bag. No male DNA was found on the hammer. Masetla's affidavit in terms of s 212 (4), (6)(a), (6) (b) and (8) (a) of the CPA was admitted.

[6] The appellant denied that he had telephoned his sister and told her about the house being burned. He said that he had been called to the scene on 7 May 2013. There he was handcuffed by the investigating officer and taken to his home. Another officer said that he had found a closed bag containing clothes in the garden. The

clothes in the bag were the appellant's old clothes which he had thrown away, but had not put them in the bag. The police did not find them at the place where he had thrown them. They were a pair of trousers, shirts and a jersey. He knew nothing about the blood on the clothes. He acknowledged that he could have said it was from slaughtering a beast but he said so because he was in pain from being assaulted by the police. He denied that the hammer found at the scene was his. He agreed that he had suggested to the investigating officer that the fire might have been caused by the electrical box.

[7] In his judgment the magistrate did not place reliance on the blood of the victims on the hammer because it had been submitted on the appellant's behalf that it had not been proved that the hammer belonged to the appellant. I am in agreement with this approach. However the magistrate found that the appellant could not explain away the blood of one of the deceased on the jersey, which was admittedly his. He found the contention that someone else could have taken the jersey, committed the crimes and returned the jersey, to be preposterous. The magistrate found as a fact that some of the deceased had been assaulted with the hammer before the house was set alight. He further found that, because the DNA of two of the deceased (it should be one of the deceased) was found on the appellant's jersey, the appellant was responsible for the assault and the deaths. Although he did not say so expressly, the magistrate was clearly of the view that the appellant deliberately set the house on fire after assaulting at least two of the deceased with the hammer. I am in agreement with this inferential reasoning.

[8] That is however not the end of the matter. While the investigating officer was testifying, he was asked to produce the results of the DNA analysis. The appellant's attorney objected saying:

"I think there is a broken chain, because now he told us what he sent there, and I believe the results – in fact Your Worship, there will be a need for someone to tell us how did it go."

The magistrate then ruled that the production of the DNA results would be deferred.

[9] When Masetla testified, he was cross-examined at some length by the appellant's attorney. However his interpretation of the results was not challenged, nor was it suggested to him that the evidence kit containing the jersey had not been properly handled and might have been contaminated. When the appellant's attorney addressed the court on the convictions, she conceded that it had been proved that the blood of the deceased (it should have been one of the deceased) was found on the appellant's jersey. She however submitted that the inference that it was the appellant who committed the offences was not the only inference to be drawn.

[10] The appellant's heads of argument did not indicate any attack on the reliability of the DNA results. However when the appeal was argued before us, the appellant's counsel challenged the DNA results in respect of the appellant's jersey (the results pertaining to the hammer were expressly not disputed), pointing out that there was no evidence of how the jersey was sent to the laboratory and that therefore the chain of DNA evidence had not been proved. It is so that this evidence was lacking. The investigating officer said that the clothing had been taken away by the Local Criminal Record Centre members. None of them testified. While the appellant's attorney

made the concession she did with regard to the blood on the jersey, I am of the view that it is in the interests of justice that the appellant is entitled even at this late stage to raise this missing link in the chain of DNA evidence. One must remember that the appellant's attorney initially did object to the production of the DNA results on the basis that the chain of safe custody needed to be established. She just did not carry through with this objection and seemingly did not focus on the handling of the jersey prior to its receipt at the laboratory. She was not really in a position to make the concession which she made in argument because there was no evidence of the handling of the jersey prior to its receipt at the laboratory. This was the only evidence on which the magistrate relied to convict the appellant. Because of this missing link in the chain of DNA evidence the convictions and sentences should be set aside.

[11] However, and again, this is not the end of the matter.

Section 322 (3) of the CPA provides:

"Where a conviction and sentence are set aside by the court of appeal on the ground that a failure of justice has in fact resulted from the admission against the accused of evidence otherwise admissible but not properly placed before the trial court by reason of some defect in the proceedings, the court of appeal may remit the case to the trial court with instructions to deal with any matter, including the hearing of such evidence, in such manner as the court of appeal may think fit."

[12] In the matter of *Tshantsani v The State* [2016] ZAECHC 3 (16 February 2016) s 322 (3) was applied. The appellant in that matter had been convicted of housebreaking with intent to rape, and rape, on the basis that his DNA was detected on the young child complainant's panties. At the trial the appellant formally admitted the proper handling of the sexual assault kit until it reached the forensic science

laboratory in the Western Cape. He admitted that the kit had been properly sealed and was received at the laboratory still sealed, and that at the laboratory the seal was broken by Lieutenant Colonel Sharlene Otto for purposes of analysis. The appellant further admitted the contents of Otto's affidavit in terms of s 212 (4) of the CPA. However in her affidavit Otto did not state that she was the person who had broken the seal. She merely received the case file and interpreted the DNA results of the crime scene and reference samples. The point taken on appeal was that the court and counsel for the State and for the appellant had misconstrued Otto's affidavit with the result that there was a missing link in the DNA chain of evidence, namely that there was no proof that the process of extraction of the DNA at the laboratory, prior to analysis by Otto, had been performed by the relevant competent person. The evidence relating to DNA was therefore wrongly admitted.

[13] Pickering J, writing for the full court, took into account that the court and both counsel were all under the mistaken impression that Otto's evidence established the necessary chain of evidence in relation to the kit. Had the incorrect admission not been made, so the learned judge stated, the State would have been alerted to the *lacuna* in the chain of evidence. The matter was therefore remitted to the trial court in order that the requisite evidence, if available, could be adduced by the State.

[14] The circumstances of the present matter are somewhat different in that the appellant's attorney initially objected to the handing in of the DNA analysis, on the basis that the chain of DNA evidence had not been established. However when she cross-examined Masetla she did not raise the possibility that the kit containing the jersey had not been properly handled prior to its arrival at the laboratory and that

there may have been some contamination. Further, admittedly after both cases were closed, the attorney conceded that it had been proved that the blood of (one of) the deceased had been detected on the appellant's jersey.

[15] In my view the difference between the two cases does not prevent the implementation of s 322 (3) of the CPA. Had the chain of evidence been properly proved the evidence of the DNA analysis would have been admissible. Had the appellant's attorney raised with Masetla the proper handling of the kit from inception or the possibility of contamination, the State may well have been alerted to the missing link in the chain. Had the appellant's attorney not made the concession that she did when she addressed the court and had instead submitted that the chain of DNA evidence had not been established, the State may well have applied to re-open its case, which application may have been granted in the interests of justice, and in view of the tenor of the cross-examination of Masetla. A re-opening of the State case would not have been prejudicial to the appellant, who would have been given an opportunity to challenge any further evidence which was adduced by the State and to adduce evidence himself to counter such evidence.

[16] We asked for submissions from both counsel regarding a referral in terms of s 322 (3). On behalf of the appellant it was submitted that the chain of DNA evidence had been contested and the State elected nonetheless to close its case without adducing sufficient evidence in this respect. To remit the matter would, so it was submitted, amount to guiding the State in how to prosecute a case involving chain evidence and would be prejudicial to the appellant, who was entitled to a fair trial. It was further submitted that the problem with the evidence of the blood on the jersey

was not the only hurdle for the State in proving its case. The other hurdle was that the State had not proved the cause of the fire which caused the death of the deceased. In this regard I have already stated my agreement with the trial court's inferential reasoning. On behalf of the State it was submitted that s 322 (3) of the CPA was paramount. However the State did not deal with the fact that there was no evidence of the handling of the jersey prior to its receipt at the laboratory. It was merely submitted that the requirements of s 212 (4) of the CPA had been met. This submission begged the question of whether or not the matter should be remitted in terms of s 322 (3) of the CPA.

[17] In my view the circumstances of this case fall within the remit of s 322 (3). There was an initial objection to the effect that the chain of custody had not been established. However this challenge was seemingly not pursued when Masetla was cross-examined and eventually the concession was made in relation to the blood on the jersey. In my view the consequence is that the DNA evidence relating to the blood on the jersey was not properly placed before the court through a defect in the proceedings, which was a combination of the factors to which I have alluded. I do not think that a referral in these circumstances amounts to the court teaching the State how to prosecute a case. The circumstances warrant a remittal. As was said in *S v B* 2003 (1) SACR 52 (SCA) (I quote from the English headnote):

“ it was important to keep in mind that justice did not only require that an innocent person not be incorrectly convicted but also that a person who committed a crime was properly punished.”

[18] The following order will issue:

[18.1] The convictions and sentences on all three counts are set aside.

[18.2] The case is remitted to the trial court in order for it to hear such evidence as may be adduced by the State and/or the defence with regard to the handling of the evidence kit containing the jersey of the appellant from the time the jersey was collected by the Local Criminal Record Centre until the analysis was performed by Captain Masetla.

J M ROBERSON
JUDGE OF THE HIGH COURT

MLOMZALE AJ

I agree

N MLOMZALE
JUDGE OF THE HIGH COURT (ACTING)

Appearances:

For the Appellant: Adv S Njisane, Legal Aid South Africa, Mthatha

For the Respondent: Adv D Trietsch, Director of Public Prosecutions, Mthatha