



**IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN**

Reportable:	YES/NO
Of Interest to other Judges:	YES/NO
Circulate to Magistrates:	YES/NO

FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Case No. : A17/16

In the matter between:-

KOOS LETSHABO TOGO

First Appellant

and

THE STATE

Respondent

CORAM: MOLOI, ADJP et MHLAMBI, AJ

HEARD ON: 30 MAY 2016

DELIVERED ON: 02 JUNE 2016

MOLOI, ADJP

- [1] The appellant was granted leave to appeal his conviction on a charge of murder and the sentence of fifteen (15)

years imposed by the trial court. The general grounds of appeal against the conviction were that the trial court erred in finding that the State had proved its case beyond a reasonable doubt; that it erred in drawing an inference from the circumstantial evidence that the appellant stabbed and killed the deceased; that it erred in finding that the state proved the claim of evidence regarding the DNA evidence and that it erred in making an adverse finding when the appellant exercised his right not to testify during the trial.

- [2] The facts of the case are that on 14 October 2012 at 22h37 the police were called to a scene of a fight at B-hostel, Thabong Welkom. Warrant Officer Van der Merwe and constable Mbongo rushed to the scene. On arrival they noticed the appellant and another being chased by the members of the community. The appellant was jumping fences but he and his co-accused were caught and taken back to the scene where the deceased was found lying on the ground. The deceased had multiple stab wounds to his face, head, chest and left wrist. He later succumbed to these wounds.

- [3] The appellant was wearing white tekkies on which there was blood. Near the deceased there were rocks lying around as well as a knife and its broken handle as well as a stick. Warrant Officer Nortjie, an official police photographer was called to the scene. He took photographs of the scene and also removed the appellant's tekkies, the broken knife and stick. He later compiled a photo album which was used in evidence in court. The people at the scene refused to tell the police what happened.
- [4] During the trial Nortjie gave details of the markings he used on an exhibit bag in which the exhibits were placed and later handed in to Alida Elizabeth Van Niekerk who was in charge of safekeeping of exhibits. Nortjie also took a sample of blood from the deceased's face. The exhibits were later sent for analysis at the police laboratory in Pretoria by Van Niekerk. No person tampered with the exhibits while in her custody. She put all the exhibits in an exhibit bag and kept it safe until it was sent to Pretoria for analysis. Babalo Jeremiah Sekhonyane, employed by Forensic Pathology Services of the Department of Health in Welkom conveyed the body of the deceased and later prepared it for autopsy.

He allocated a death register number after the body was duly identified. He handed a blood sample he received from Dr Van Heusden who performed the autopsy on the deceased to Sgt Nel having the same death register number he allocated. Sgt Nel placed all the exhibits in an exhibit bag. A section 212 (4) statement of Warrant Officer Haig Tebatso Sedibe was handed in. He analysed the exhibits and found the blood sample marked FSE 704794, 10D4AA771EB and WDR608/2012, the last being the number allocated by Sekhonyane matched the blood found on the appellant's tekkie. The appellant did not testify.

- [5] In argument before us emphasis was placed on lack of proof of what was eventually analysed by W/O Sedibe at the laboratory. According to Adv Kruger on behalf of the appellant there was no evidence that Dr Van Heusden, who performed the autopsy on the body of the deceased gave a blood sample taken from the deceased's body to and that sample is that was placed in the evidence bag by Van Niekerk where-after the bag was sent to the laboratory for analysis. The respondent, through Adv Ferreira, on the other hand, contended that Sekhonyane was with Dr Van Heusden

when the autopsy was performed and he was given the sample and that sample was marked with his death register number being WDR608/2012 and he gave the sample to Sgt Nel who, in turn, handed it over to W/O Nortjie on 23 October 2012 and placed it in evidence bag marked PA300158690 O. Sekhonyane's evidence was unchallenged and there was consequently no need to call Dr Van Heusden. Moreover, when the evidence bag reached the laboratory Sedibe analysed the tekkie marked FSE704794 and compared it with the blood sample marked among other things WDR608/2012 and CAS 244/10/2012, all of which was uncontroverted. The fact that Sgt Nel said he gave the sample to Nortjie on 23 October 2012 whereas Van Niekerk said she gave it to Nortjie on 24 October 2012 is of no consequence. According to the respondent the crucial issue is whether the analyst came into possession of the sample and analysed it: S v Boyce 1990 (1) SACR 13 (T).

- [6] The second point argued before us was whether on the circumstantial evidence placed on record, the court could accept it as proof beyond a reasonable doubt that the appellant is the one that stabbed the deceased which led to

his death. The issue become circumstantial in that there is no direct evidence of the actual stabbing. The people that were at the scene refused to tell what happened least of all testify about it. The sum-total of what transpired is that there was a fight near B-hostel is Thabong Welkom. When the police arrived at the scene, they found the crowd pursuing the appellant and another person. The appellant was jumping over the fences but was caught within 60 metres of the scene and taken back to the scene. At the scene it was realised the appellant's one tekkie had blood on it. The tekkie was taken for analysis and the blood on it matched that blood sample taken from the deceased. The appellant, when searched, nothing was found in his possession. A broken knife was found lying next to the appellant. The cause of death was noted as *"Hemo-pneumothorax(R) en Pneumothorax (L) as gevolg van steekwonde (R) long en (L) Longholte Vermoedelik veroorsaak deur selfde plat skerp voorwerp."* It was conceded that the body of the deceased suffered no further injuries from the scene until the autopsy was held. The appellant tried to run away though it was suggested on his behalf during the trial that he and his co-accused ran away as they saw people chasing another person. We do not

have evidence of this. The question is whether the facts above, justify the inference as the only inference to be drawn, that the appellant is the person who stabbed the deceased: R v Blom 1939 AD 188.

- [7] The answer to the above question would seem clear when we deal with the third ground of appeal, namely that the trial court erred in making an adverse finding arising from the appellant's failure to testify. Section 35(3)(h) of the Constitution of South Africa Act 108 of 1996 provides for the accused person's rights to fair trial "*to be presumed innocent, to remain silent and not to testify during the proceedings.*" Whilst it is true that inferences may be drawn against the accused where he fails to testify – Mukona v The State (97/15) [2015] ZASCA 128 delivered on 28/9/2015 and S v Boesak 2001 (1) SA 912 (CC) at 923 E-F this can only be done where the state has at least established a *prima facie* case against the appellant Osman + Another Attorney-General Transvaal 1998(4) SA 1224 (CC) para 22. In this case all the evidence we have is that the appellant and another were fleeing the scene where the deceased was lying down after being brutally assaulted, there were rocks

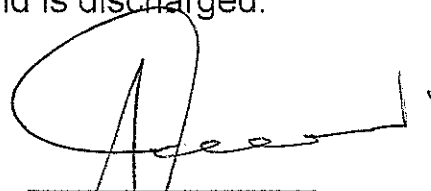
and a stick near his body and a broken knife was under his body and, importantly, the deceased's blood was found on the appellant's tekkie. The cause of death was haemorrhage of the lungs caused by stabbing with a flat object. The knife was taken from the scene and no evidence was adduced whether it was also sent for analysis nor whether the appellant's finger and/or handprints were found on it. Evidence, on the contrary, is that when the appellant was searched after arrest, nothing was found in his possession.

- [8] It would seem the only evidence on the basis of which the appellant was convicted was the deceased's blood that matched the blood on the appellant's tekkie. The appellant was clearly at the scene and so were many other people. One need not speculate how the blood got onto his tekkie as the actual cause of death was stabbing with a sharp flat object and not kicking with a tekkie. See Thembani Bamba v The State (20089/14) [2014] ZASCA 219 (11 December 2014). It will be farfetched to infer the appellant's guilt out of the set of facts placed before us and the appellant's silence cannot prove that he killed the deceased. The appeal must succeed.

[9] In the premises one need not deal with the question of sentence.

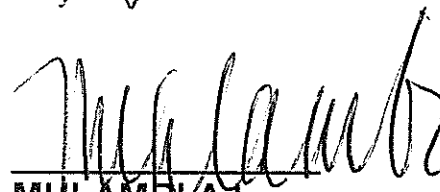
[10] The following order is made.

1. The appeal succeeds
2. The conviction on a charge of murder is set aside
3. The appellant is found not guilty and is discharged.



MOLOI, ADJP

I concur



MHLAMBI, AJ

On behalf of the appellant:

Adv Kruger
Instructed by:
Bloemfontein Justice Centre
BLOEMFONTEIN

On behalf of the respondent:

Adv Ferreira
Instructed by:
The DPP
BLOEMFONTEIN