

FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Appeal Number : A72/2012

In the appeal between:-

LUCKYBOY JOHN SEGOPOLO

Appellant

and

THE STATE

Respondent

CORAM: EBRAHIM, J, VAN ZYL, J *et* FISCHER, AJ

JUDGMENT BY: VAN ZYL J

DELIVERED ON: 24 October 2013

[1] This is a full bench appeal against the conviction and sentence of the appellant.

[2] The appellant was charged with murder in that it was alleged that he unlawfully and intentionally killed I.N, a [...] year old (“the deceased”) between 30 April 2011 and 2 May 2011. In

the Court *a quo* the appellant was accused number 1 of two accused persons. The case was however withdrawn against accused number 2 at the commencement of the hearing.

- [3] The appellant pleaded not guilty and his legal representative in the Court *a quo*, Mr Nel, who is also representing the appellant in the appeal, indicated on behalf of the appellant that the appellant denies any involvement in the alleged commission of the crime. The appellant was however convicted on the said charge and sentenced to twenty-one years imprisonment. It was further ordered that the appellant is not to be released on bail until he has served at least two thirds of his sentence. The Court *a quo* granted the appellant leave to appeal against both his conviction and the imposed sentence.

AD SENTENCE:

- [4] In the circumstances of this appeal, I consider it apposite to first deal with the issue of sentence.
- [5] Me Ferreira, on behalf of the State, filed a notice of intention

to apply for an increased sentence simultaneously with her heads of argument. A notice of his intention to oppose the application for an increased sentence was then filed on behalf of the appellant, as well as supplementary heads of argument on the issue of sentence. One of the points raised in the supplementary heads of argument by Mr Nel is that the practice whereby the Director of Public Prosecutions can apply for an increase in sentence by means of the filing of such a notice should not be allowed as it is inconsistent with the constitution of the Republic of South Africa in that it infringes upon the appellant's right to equality and his right to a fair trial.

[6] At the time of the hearing of the appeal this very issue was pending before the Constitutional Court in that Mr Frank Nabolisa, the one appellant in the case of S v CWELE AND NABOLISA 2013 (1) SACR 478 (SCA), referred the issue to the Constitutional Court under Case Number 105/12.

[7] Because the aforesaid issue which was pending before the Constitutional Court is the same as one of the essential issues pertaining to the appeal against the sentence in the

current appeal, we made the following order on the day of the hearing of the appeal:

- “1. The appeal in respect of sentence is postponed until finalisation in the Constitutional Court of the issue relating to the constitutionality of the statutory provisions concerning an application for the increase of sentence at the instance of the Director of Public Prosecutions.
2. Upon such finalisation in the Constitutional Court, the Director of Public Prosecutions, Free State, is ordered to re-enrol the appeal in respect of sentence for hearing.
3. Judgment on the appeal against the merits of the conviction is reserved.”

[8] I will now deal with the appeal against the merits of the conviction.

AD CONVICTION:

[9] The notice of appeal filed on behalf of the appellant reflects

the following grounds of appeal against the conviction:

- “1. By accepting the evidence led by the state witness Captain Mojaki.
2. By admitting the evidence of the search and seizure of material at the home premises of the accused.
3. By finding that the accused lived alone on the premises.”

[10] Considering the grounds of appeal, I do not intend to refer to the evidence of all the witnesses. I am only going to deal with the evidence which is relevant to the consideration of the grounds of appeal. I do however deem it necessary to deal in quite some detail with the last mentioned evidence.

[11] I.N, the [.....] of the deceased, resided with the deceased in B[.....]. As the mother of the deceased had passed away and the father of the deceased was unknown, I.N. took care of the deceased. On the morning of Saturday, 30 April 2011, I.N. left their home to attend a meeting. The deceased was at home. When I.N. returned home that evening, the

deceased was not at home and I.N. was told by the other children that the deceased was at the home of a family friend. The next day I.N. went to the home of the family friend but did not find the deceased there. After searching for the deceased amongst all their relatives without success, I.N. went straight to the police to report the matter. She never saw the deceased again. The appellant was known to I.N., they normally greeted one another and they lived in close proximity to one another.

At a later stage she handed a denim skirt and a pair of shoes which belonged to the deceased and which had not been washed since the deceased wore them, to the police.

- [12] The [...] year old M.S. was good friends with the deceased, they lived in the same street and used to visit each other and play together. M.S. is the daughter of the appellant's cousin. Her evidence was presented with the assistance of an intermediary. The last day she saw the deceased, they were playing together in the street when the appellant came passing by and called them. He then requested M.S. to go and buy him cigarettes. At that stage they were all inside the

appellant's house. The appellant told M.S. that she had to go alone and that the deceased has to remain inside the house. She returned with the cigarettes and gave it to the appellant. The appellant and the deceased were still inside the house. The appellant then sent M.S. to her grandmother's house to fetch some food for him. He again indicated that the deceased should remain behind with him. On her return M.S. found the gate of the appellant's premises to be locked and she called out to the appellant, who came out of the house. She informed him that her grandmother did not have any food. The appellant then told her that the deceased had gone to look for her at her grandmother's place. She never saw the deceased again. When she heard on the following Monday that the deceased was still missing, she informed the sister of the deceased that the deceased had been at the appellant's place.

- [13] Constable Bongiwe Nkomonye testified that she and Warrant Officer Uys went to the appellant's house on 2 May 2011 as a result of a complaint regarding a missing girl, being the deceased. When they arrived at the appellant's house premises, the gate was locked and she jumped the gate.

She knocked at the front door, announced that she is a police officer, but there was no answer. She went to the kitchen door and also knocked there without getting any response. She returned to the front door, saw that it was not locked and kicked the door to gain entry. Although she testified during her evidence in chief that the appellant came to the door and opened the door when she kicked the door, she readily conceded during cross-examination that she cannot clearly recall exactly how it happened, but it might be as was stated in her statement, being that she kicked the door open and found the appellant in his bed. The appellant denied having any knowledge of the missing girl and he denied that there had been any girls at his place. He also stated that he was staying alone. Constable Nkomonye then asked his permission to search the premises since he was the last person who had been seen with the missing girl, to which the appellant agreed. They did not find anything during the search but informed the appellant that they were still arresting him because according to the information they had he was the last person who had been seen with the said girl.

[14] Captain Baseka Mojaki, who is stationed at the Provincial Detective Psychology Motivation Crime Unit, received a phone call on Monday, 2 May 2011, regarding a missing girl in B[.....]. Captain Mojaki drove to B[.....] and met with Captain Matasane. He, together with Captain Matasane and other police officers, went to the police cells where the appellant was held. He introduced himself and stated the purpose of his visit. Captain Mojaki then explained the appellant's constitutional rights, including his right to remain silent, should he say anything it can be used against him in Court and also his right to legal representation. The appellant indicated that he understood his rights. The appellant then told him that he, together with his friend Tshediso, had murdered the missing girl. The appellant explained that he strangled the deceased at his house, which house he described to have certain rooms at the back which were still in the process of being built. The appellant advised the Captain that his reason for killing the deceased was that a traditional doctor in Bloemfontein requested the fat of a female person for which he was prepared to pay R15 000-00. After he murdered the deceased, he took her body to the stadium where they tried to burn it in a steel basin. However,

when they put her body in the fire, the smell was so strong that they could not stand it. They decided not to continue with the burning of the body of the deceased and placed her remains in a bag, which was then taken by Tshediso. The appellant took the ashes inside the basin to a place in Mountainview and dumped the ashes there. The appellant also advised Captain Mojaki that some of the ashes will be found in the toilet at his house. The appellant indicated that he was prepared to point out where the incident took place and to repeat his statement to a Magistrate. They arranged to do it the following day as it was already late by the time the interview terminated. However, the next day when Captain Mojaki arrived at B[.....] the appellant indicated that he had a changed his mind about the pointing out and making a statement to a Magistrate, as he was scared of the community. He indicated that he will instead explain to Captain Mojaki where to go in order to find the respective scenes he described to Captain Mojaki. Captain Mojaki and other police officials then went to the stadium and found the remains of the ashes where the fire had been prepared. They then also went to the appellant's house. At the back of the house where some rooms were still under construction,

there was a toilet. Captain Mojaki found something inside the toilet which had not been flushed away, with some of the same substance on the rim of the toilet. In the yard amongst some trees he also found an item which looked like a jersey and an item resembling a bone. He told the other police officers that they should leave those items where they were found as the investigating officer, Warrant Officer Norman Orren, and a forensic team had already been called out to the scene. Whilst Captain Mojaki was still at the house of the deceased, some of the other police officers came across a dumping site near the house of the appellant where some body parts were also found. Captain Mojaki then also attended that scene.

During cross-examination the totality of the version of Captain Mojaki with regard to what the appellant had allegedly told him in connection with the crime and the appellant's alleged involvement, were denied on behalf of the appellant.

It is important to record that before Captain Moyaki testified about the contents of the aforesaid alleged confession, Mr

Nel was requested to indicate what the appellant's stance was regarding the admissibility of it, to which he replied as follows (record, p. 16, lines 6 -11):

M'lady, my instructions from accused are the following and that is that the specific version that this witness will put forward is not what he told this witness, so in actual fact he is disputing the contents of what was said. We are not going to dispute the aspect of whether it was voluntary or not, so there is not going to be a trial within a trial."

- [15] Sergeant Smit, attached to the Local Criminal Record Centre, was part of the forensic team who gathered evidence from the house premises of the appellant as well as from the dumping site. She was also responsible for photographing the scene, being the photographs contained in exhibit "A". She explained how they used the substance called Blue Star to detect blood at the scene, even where the blood was not visible to the naked eye or where the blood had been wiped clean. In this manner blood was found on the kitchen floor, on the table and tablecloth in the kitchen, on the sitting room floor, on the bedroom floor and on a doorstep. The witness explained that where the blue colour was visible over a huge

area on the kitchen floor as reflected in photo 20, it is an indication that an attempt was made to clean the surface.

In addition Sergeant Smit also gathered seven swabs for DNA analysis, which were marked "BIO A1" to "BIO A7". Four of these swabs were subjected to DNA testing, namely "BIO A1" which was taken from visible bloodspots found outside the backdoor, "BIO A3" which was taken from the kitchen floor where blood was suspected to be and where Blue Star was applied, "BIO A4" which was also taken from the kitchen floor where suspected blood was and "BIO A7" which was blood found above the handle of the toilet referred to earlier. Sergeant Smit also photographed a burned substance which was found on the rim of the same toilet as well as in the water of the toilet. She explained that at that stage there was no water available in Brandfort and that is probably the reason why the substance in the toilet could not be flushed away.

The dumping site, to which Captain Mojaki also referred in his evidence, was 297 metres away from the residence of the appellant. This witness also photographed and collected

human remains from the said dumping site which was found scattered all over the dumping site. This included several bones, a skull (with teeth) and part of a human vertebra. Parts of some of these bones were black in colour and seemed as though they had been burnt.

[16] Warrant Officer Whelan, attached to the Biology Unit of the Forensic Science Laboratory as a Forensic Analyst, testified that he was requested to establish the DNA profile of the deceased by means of the denim skirt of the deceased, exhibit "1", and the pair of shoes of the deceased, exhibit "2". He thereafter compared the said DNA profile of the epithelial cells on the denim skirt and the one shoe with the DNA profile of the vertebra, the tooth, and the swabs "BIO A1", "BIO A3", "BIO A4" and "BIO A7". There was a perfect DNA match and he concluded that the vertebra, the tooth and the blood on the swabs belonged to the deceased. His affidavit in terms of Section 212 of the Criminal Procedure Act, 51 of 1977, reflecting the aforesaid results, was handed in as exhibit "D".

[17] Warrant Officer Norman Orren, the investigating officer, met

with the appellant for the first time at the charge office after the appellant had been arrested. He was called to the respective scenes of the crime after the various pieces of evidence had been discovered and he visited the house of the appellant with Sergeant Smit. He testified that there were various reasons why they did not have a search warrant. In the first place Constable Nkomonye and Warrant Officer Uys advised him that the appellant had given them permission to search his house premises. Furthermore he was of the view that if he had applied for a search warrant, it would have been granted. Timing was also a factor, especially because that particular day, 2 May 2011, was a public holiday and he feared that exhibits could be destroyed or lost during the time it would take to apply for a warrant. In this regard he explained that the crime scene did not only consist of the inside of the locked house, but also of the outside surroundings of the premises.

During the cross-examination of Warrant Officer Orren, the appellant for the first time denied that he gave the police permission to enter and search his house. It was then put to Warrant Officer Orren that the said entry was unlawful and

that all processes that followed the unlawful entry were also unlawful and unconstitutional.

[18] The appellant made certain admissions in terms of Section 220 of the Criminal Procedure Act, 51 of 1977, which admissions are contained in exhibit “F” and which include the following:

“4. EXHIBITS AND DNA REPORT:

- 4.1 That the bio swabs marked “BIO A1”, “BIO A3”, “BIO A4” and “BIO A7”, referred to in paragraph 4 of exhibit “D”, were taken from the house of the accused. These bio swabs are reflected on photos 39, 44, 45 and 52 respectively.
- 4.2 That the vertebra and tooth as mentioned in paragraph 4 of exhibit “D” was found on the dumping site.
- 4.3 That the abovementioned exhibits as well as exhibit 1 and 2 were correctly sealed and sent.
- 5. The correctness and the conclusions of the report compiled by Warrant Officer A Massyn are not in

dispute and it is handed in as exhibit H.”

[19] During his evidence the appellant testified that his contact with the deceased and M.S. occurred on Friday, 29 April 2011, and not on Saturday, 30 April 2011. According to his evidence he sent the deceased to buy bread, whilst he sent M.S to her grandmother’s house to get him some food. The deceased returned with the bread, entered the house and put the bread on the table. She then asked his permission to pick oranges from a tree on his premises, to which he agreed. She then left and he closed the door. According to the appellant that was the last time he saw her. The only room she had been in was the sitting room. He reiterated that the gate to his premises was not locked when M.S. returned and that it was only held together with some wire. After M.S. informed him that the food at her grandmother’s has not yet been cooked, she then asked where the deceased was, to which the appellant replied that she had left. M.S. then also left his premises.

The appellant denied that he gave Sergeant Nkomonye and her colleagues permission to search the house. It should

however be mentioned that in his evidence in chief the appellant initially testified that he opened the door for Constable Nkomonye so that she could enter the sitting room, where after as a result of Mr Nel posing a further question to the appellant, he changed this version and testified that he was lying in his bed watching television when the police entered the house.

Regarding the involvement of Captain Mojaki, the appellant testified that when he was taken from the holding cells in the presence of Captain Mojaki, Captain Mojaki grabbed him at the back of his neck and pushed him against the wall. He also alleged that Captain Mojaki threatened to choke him if he did not tell the truth. The appellant denied having made the confession to Captain Mojaki. The appellant explained that when he was questioned by Captain Mojaki, he was under the impression that Captain Mojaki was referring to the fire which he and his colleague lit at the stadium to keep themselves warm when they were at work. That was, according to the appellant, the only fire he told Captain Mojaki about and which he offered to point out.

[20] I will now deal with the respective specific grounds of appeal:

1. **THE CREDIBILITY OF CAPTAIN MOYAKI:**

[21] The Court *a quo* made the following observations and findings in her judgment regarding his evidence, also in comparison to that of the appellant:

“[16]

Mr Nel, on behalf of the accused, specifically placed on record that the accused does not deny that the statement he made to Captain Moyaki was made freely and voluntarily, without any undue influence and while he was in his sound and sober senses. The only dispute was with regard to the content of the statement. In view of the fact that only credibility was in issue and not the voluntariness of the statement, Mr Nel advised that a trial-within-a-trial was not necessary to determine the admissibility of the statement. The requirements of Section 217 of the Criminal Procedure Act regarding confessions have therefore been met. Captain Moyaki testified that he met the accused for the first time while he was in custody after his arrest, and after the accused was warned of his constitutional rights, he elected to make the statement. It was never put to the Captain

that he at any stage assaulted or placed the accused under any duress to make the statement. The accused rose only during his evidence in chief that the Captain had assaulted and threatened him, which was in direct contradiction to the admission made on his behalf in respect of the voluntariness of the statement.

[17]

Captain Moyaki came across as a reliable witness who had no interest in, and nothing to gain by fabricating his evidence. If one contrasts this with what the accused in his evidence in chief alleges he said to the Captain as well as what was put to the Captain in this regard in cross-examination, it is difficult not to conclude that the accused is in fact the person that is fabricating his version. I therefore find no reason to disbelieve the evidence of Captain Moyaki and accordingly accept his evidence.”

[22] I cannot fault the aforesaid findings of the Court *a quo*. Captain Moyaki had no previous knowledge of the appellant or of the deceased. In fact, at the time when Captain Moyaki interviewed the appellant, the police was only investigating the disappearance of the deceased, not having had any knowledge that she has in fact been murdered. The contents of the confession were therefore the only means by

which Captain Moyaki could have known which scenes to visit and investigate. The said information could only have been obtained from the appellant. Further corroboration for the version of Captain Moyaki is also to be found in the relevant items and the blood that were found at the respective scenes, which items fit in with the explanation the appellant gave to Captain Moyaki regarding the murder of the deceased and the manner in which the body of the deceased had been mutilated.

- [23] There is consequently no basis upon which we can interfere with the credibility finding by the Court *a quo* regarding Captain Moyaki.

2. **THE SEARCH OF APPELLANT'S HOUSE AND THE SEIZURE OF ITEMS:**

- [24] On close scrutiny of the record, together with the arguments advanced by Mr Nel during the hearing of the appeal, it appears that this ground of appeal comprises three elements, namely:

1. The manner in which Constable Nkomonye gained entry to the house of the appellant.
2. The question whether the appellant granted permission to the police to search his house.
3. The question regarding the reasonable believe of the police that a search warrant would have been obtained if applied for, but that the delay in such obtaining would have defeated the object of the search.

I will now deal with each of the aforesaid elements.

A: Entry to the appellant`s house:

[25] In his heads of argument and during the hearing of the appeal Mr Nel submitted that the kicking open of the door of the house of the appellant by Constable Nkomonye, resulting in the alleged permission by the appellant that his house be searched, constituted a flagrant breach of the appellant's constitutional right to privacy, which should have led to the

exclusion of all evidence and items obtained as a consequence of such alleged permission.

[26] It was not canvassed with Constable Nkomonye that she in any manner infringed upon the appellant's right to privacy. It was only during the evidence of Warrant Officer Orren, who was the last state witness to testify, that the appellant for the first time instructed Mr Nel that he did not give the police permission to enter (and search) his house. In this regard Mr Nel put the following to Warrant Officer Orren (record, p. 130, lines 1 – 7):

“Lastly, I put it to you that upon my instructions that accused never gave anybody permission to enter or search this premises of his, the entry is unlawful which right of privacy couldn't be limited by anything for instance like urgency and therefore any process that flows from that unlawful entry and the search and seizure is unlawful and unconstitutional.”

[27] Mr Nel at that stage also placed it on record that he only received the aforesaid instructions that morning. Despite his aforesaid instructions, Mr Nel, however, indicated and submitted in response to questions posed to him by the

Court *a quo*, that it was not necessary for a trial-within-a-trial to establish the constitutionality of the manner in which the evidence were obtained. The Court *a quo* accepted his submission in this regard.

[28] The aforesaid issue pertaining to the manner in which Constable Nkomonye gained entry to the house and the possible effect thereof on the subsequent events, was not only raised at a very late stage of the trial, it was also not properly canvassed in the Court *a quo*. However, it seems that on the state's own version it should be accepted that Constable Nkomonye did in fact kick open the door.

[29] Although Constable Nkomonye testified that they searched the house after entering it, it is also evident from her evidence that they arrested the appellant despite having found nothing during the search. Because the said issue was not at all canvassed with this witness, no further clarity was obtained regarding this aspect. However, considering that they arrested the appellant without having found any evidence of the commission of the crime on the scene, the only reasonable inference in my view is that Constable

Nkomonye and Warrant Officer Uys in fact went to the appellant`s house to arrest him.

- [30] Section 48 of the Criminal Procedure Act, 51 of 1977 (the “Act”), determines as follows regarding the breaking open of premises for purpose of arrest:

“Any person who may lawfully arrest another in respect of any offence and who knows or reasonably suspects such other person to be on any premises, may, if he first audibly demands entry into such premises and notifies the purpose for which he seeks entry and fails to gain entry, break open, enter and search such premises for the purpose of affecting the arrest.”

- [31] Considering the evidence of Constable Nkomonye regarding her request that the appellant should open the door of his house and having advised him that they are members of the police, I am of the view that in terms of Section 48 of the Act, she was under the circumstances entitled to have kicked the door open without having infringed in an unacceptable manner upon the appellant`s right to privacy.

- [32] In addition to the aforesaid, it should be kept in mind that the

search which resulted in the seizure of the relevant items which were presented in evidence in Court, did not occur during the event when Constable Nkomonye kicked open the door. The events pertaining to the kicking of the door is therefore in my view in any event so far removed from the subsequent search that resulted in the seizure of the relevant items as evidence that it cannot be regarded to have had an impact on the appellant's right to a fair trial or otherwise to have been detrimental to the administration of justice.

B: Permission to search and seize – Section 22(a) of the Act:

[33] Section 22 (a) of the Act determines, *inter alia*, as follows:

“22 A police official may without a search warrant search any person or container or premises for the purpose of seizing any article referred to in section 20-

(a) if the person concerned consents to the search for and the seizure of the article in question....”

[34] At the onset of addressing this issue, I need to mention that in his argument during the appeal Mr Nel submitted that the

forceful manner in which Constable Nkomonye gained entry to the appellant's house actually resulted in or was the cause of the appellant giving his permission for the search and seizure. I however did not understand the appellant's case in the Court *a quo* to have been that he gave permission for the house to be searched as a result of the kicking open of the door. To the contrary, his eventual instructions were to the effect that he gave no such permission. The aforesaid contention of Mr Nel can therefore not hold water.

- [35] The question whether the appellant gave permission to Constable Nkomonye and Warrant Officer Uys to search his house is a mere factual issue which has to be determined on the evidence as a whole and based on the credibility of the respective witnesses, including the appellant. The Court *a quo* in her judgment referred to the fact that the alleged lack of permission by the appellant was only raised at a late stage of the trial during cross-examination of Warrant Officer Orren. She however did not make a specific factual finding as to whether the State had proved such permission or not. In the absence of the Court *a quo* having made a factual finding regarding the permission aspect, we are at liberty to

do so as Court of Appeal.

[36] The appellant did not dispute Constable Nkomonye's version that he gave her and Warrant Officer Uys permission to search his house. The appellant's denial of such permission was only raised almost at the end of the State's case during the cross examination of Warrant Officer Orren when Mr Nel specifically indicated that it was the first time he received such instructions. This issue was not canvassed with Sergeant Smit either. I therefore have to agree with the submission of Me Ferreira that it is evident that the appellant changed his version at that late stage of the trial. Contrary thereto, there is confirmation of the version of Constable Nkomonye in that Warrant Officer Orren testified that he had been informed on that same day on which the appellant was arrested that the appellant had given Constable Nkomonye and Warrant Officer Uys such permission.

[37] I am consequently satisfied that the State proved beyond reasonable doubt that the appellant in fact gave Constable Nkomonye and Warrant Officer Uys permission to search the house.

[38] With regard to the search of the appellant's house and premises and the seizure of items during such search by Warrant Officer Orren and Sergeant Smit, I deem it necessary to go a step back and refer to the evidence of Captain Moyaki. Initially the appellant was willing to point out the places where the murder and the mutilation of the body of the deceased took place, which included the house of the appellant. When the appellant changed his mind regarding this pointing out of the respective scenes because of his fear for the community, he told Captain Moyaki the following (record, p.19, lines 1 – 2):

“Then he refused and said to me I can go to those places where he explained to me what happened, I will find those things.”

This was after the appellant's constitutional rights had been fully explained to him.

[39] Therefore I am of the opinion that, in addition to the permission the appellant gave Constable Nkomonye that the

police may search his house, his “directions” and “instructions” to Captain Moyaki constituted implied consent and permission by the appellant that his house may be searched by the police.

[40] The seizure of the evidence found at the house of the appellant and the taking of the photographs were handled by members of a forensic team who was called to the scene by Captain Moyaki. This included Sergeant Smit, who was also accompanied by the investigating officer, Warrant Officer Orren. Although Mr Nel is correct in his submission that Sergeant Smit did not give any evidence regarding permission of the appellant to search his house, nor was she aware of any warrant, the fact is that Warrant Officer Orren, who accompanied Sergeant Smit, gave very specific evidence regarding such permission and also regarding the situation pertaining to a warrant (the last mentioned issue will be dealt with hereunder). I deem it necessary to refer to specific parts of his evidence as it appears on pages 124, line 7, to 125, line 17, of the record:

“And it is common cause that you did not have a warrant, a

seizure warrant, is that correct? Dit is korrek.

And according to you what was the reason for that, first of all?

..... Daar was verskeie redes, eerstens het die beskuldigde vir Adjutant Uys-hulle toestemming gegee om die huis te visenteer.

.....

You said 'Uys-hulle' so I am going to clarify that, Uys and who?

..... Konstabel Nkomonye.

....

And you as an investigation officer, even suppose, but it is apparently not the case, even although a person in these circumstances did not give you any permission to enter his premises, what would you do?Ek sal nog steeds voortgaan.

And for what reason would that be?Indien ek sou aansoek doen vir 'n visenteringslasbrief, sou dit in my opinie goedgekeur gewees het.

....

Just a minute, sorry, I am just trying to record this yes?

....Verder was die tydsduur ook 'n faktor gewees.

....

What about the time, what would happen?Bewysstukke kon vernietig gewees het of verlore geraak het in die tydperk wat ons

And then in cross examination on page 128, line 14, to page 129, line 14:

“And there was no person living there at that stage, so why couldn't you wait until you get a warrant before you enter into this house? ...Soos ek reeds getuig het die.... dit is nie net slegs die huis wat getref was nie, maar ook die erf. Dit was reeds gedoen gewees sonder 'n visenteringslasbrief.

....

Let us make sure, under what understanding did you enter this premises without a warrant, was it because you were under the impression that permission was obtained from the accused to another police officer or was it because it was on a public holiday and you were afraid that there might be tampered with

the evidence? Ek sal sê beide die redes, albei die redes.

We already dealt with the aspect of urgency, let us look at the aspect of permission. What was the information given to you regarding permission to enter 904?Die lede het my meegedeel dat hulle toestemming gehad het om die perseel te deursoek.

Sorry who informed you?Beide Adjudant Uys en Konstabel Nkomonye.

Let me just make sure that I understand you correctly, did Uys and Nkomonye inform you that they had permission to enter the premises?Te deursoek.”

- [41] Based on the totality of the evidence, I am satisfied that the State proved beyond reasonable doubt that the appellant also gave Captain Moyaki permission to search his house and to seize all evidence pertaining to the murder of the deceased which the police could find. This permission, in addition to the permission already granted to Constable Nkomonye, also covered the subsequent search for and seizure of items of Sergeant Smit and Warrant Officer Orren and other members of the police at the scene.

C: The absence of a search warrant – Section 22(b) of the Act:

[42] In terms of Section 22(b) of the Act a police official may without a search warrant search any person or container or premises for the purpose of seizing any article referred to in section 20 in the following circumstances:

- (b) if he on reasonable grounds believes-
 - (i) that a search warrant will be issued to him under paragraph (a) of section 21(1) if he applies for such warrant; and
 - (ii) that the delay in obtaining such warrant would defeat the object of the search.”

[43] With reference to the search of the appellant’s house and premises and the seizure of items during such search by Warrant Officer Orren and Sergeant Smit, Mr Nel submitted that they ignored the appellant’s constitutional rights. He contended that the search and the obtaining of evidence from the house premises of the appellant without a search warrant violated the appellant’s right to privacy as well as his right to a fair trial and that such evidence should therefore

have been excluded.

[44] Although Mr Nel is correct in his submission that Sergeant Smit conceded that she was not aware of any search warrant, I have already in paragraph 40, above, referred to the evidence of Warrant Officer Orren, who accompanied Sergeant Smit, in which he specifically testified regarding his believe pertaining to the obtaining of a search warrant under the circumstances.

[45] The Court *a quo* made the following finding with reference to Section 22(b) of the Act in favour of the State (record, p. 197, line 19, - p. 198, line 1):

“Given the circumstances of the matter and the information that came to Warrant Officer Orren’s knowledge at that time, I am satisfied that he would have obtained a search warrant if he was able to apply for one on that day, and that he was justified in entertaining the apprehension that evidence would have been lost or destroyed if he did not act swiftly in the matter.”

[46] There is no basis upon which the aforesaid finding can be faulted.

[47] In S v GUMEDE AND OTHERS 1998 (5) BCLR 530 (D) it was held that the provisions of Section 22(b) and 23(1) which authorise searches are, with reference to the Interim Constitution, not unconstitutional. To the extent that the provisions limit the right to privacy, such limitation is reasonable and justifiable in accordance with the limitations clause. The Constitution of the Republic of South Africa Act, 108 of 1996, contains a similar limitation clause in Section 36 and therefore I am of the view that the aforesaid judgment is *mutatis mutandis* applicable to the current constitution.

[48] In the premises I find that in addition to my finding in paragraph 41 above pertaining to the permission obtained from the appellant, the search of the appellant's house and the seizure of items and evidence in any event fell within the ambit of Section 22(b) of the Act and therefore the evidence was not unconstitutionally obtained.

4. **THE FINDING THAT THE APPELLANT LIVED ALONE**
ON THE PREMISES:

[49] The Court *a quo* made the following finding regarding this issue in her judgment (record, p. 198, lines 18 – 24):

“The accused was unable to satisfactorily explain the presence of the deceased’s DNA in his house and in the outside toilet. While it may be true that other people stayed with him from time to time, all the evidence points to his staying alone at that house at that time, and there is no evidence to suggest that any other person had access to his house during the period 30 April 2011 to 2 May 2011.”

[50] Captain Moyaki testified that from the investigation it was clear that the appellant resided alone. Constable Nkomonye also confirmed that the appellant was staying alone at the time. According to her evidence, she pertinently asked him with whom he was residing, to which he responded that he was staying alone. In response to certain questions posed to her by the Court *a quo*, she furthermore testified that she knew the appellant before the incident as the appellant was residing at house number 904 and she was at the time residing at house number 905. She testified that although one Pule previously used to reside there, he and the appellant had a fight and he had left the house some time

before the day of the incident.

[51] During his evidence the appellant initially testified that he was not staying alone, that his house had two bedrooms, one of which was his brother's (Tebogo). He also testified that both his brother and his uncle had keys to the house. However, in her evidence M.S. was adamant that the appellant stayed alone at his house and she denied that Tebogo stayed with the appellant whenever he was in B[...]. Eventually and in response to questions the Court *a quo* posed to him, the appellant confirmed that during the period of 29 April 2011 to 2 May 2011 nobody else stayed in his house except himself.

[52] The aforesaid finding of the of the Court *a quo* in this regard is therefore in accordance with the evidence judged in its totality and consequently this ground of appeal can also not succeed.

CONCLUSION:

[53] Considering the aforesaid findings regarding the grounds of

appeal, there is no basis upon which we can or should interfere with any of the findings of the Court *a quo*. We furthermore agree with the Court *a quo* that the State has proved the guilt of the accused on the charge of murder beyond reasonable doubt.

[54] The appeal against the conviction of the appellant is consequently dismissed.

C. VAN ZYL, J

I concur.

S. EBRAHIM, J

I concur.

P.U. FISCHER, AJ

On behalf of the Appellant:

Adv P.W. Nel
On instructions of:
Bloemfontein Justice Centre
BLOEMFONTEIN

On behalf of the Respondent:

Adv A.M. Ferreira
On Instructions of:
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