

Reportable:	YES / NO
Circulate to Judges:	YES / NO
Circulate to Magistrates:	YES / NO

IN THE HIGH COURT OF SOUTH AFRICA (Northern Cape High Court, Kimberley)

Case No: K/S35/01
Heard: 04/06/2012
Delivered: 08/06/2012

In the matter between:

KENNETH KHOZA

Appellant

v

THE STATE

Respondent

Coram: Kgomo JP; Lacock J et Williams J

JUDGMENT: FULL BENCH

KGOMO JP

1] The appellant was on 04 December 2001, in the Gariep Circuit Court held at Upington, convicted by now retired Van der Walt J of the murder of Katrina Springbok, a 31 year old woman, who met her death during the early hours of Sunday 21 January 2001. He was sentenced to 20 years imprisonment and now appeals against his conviction only, with leave of this Court (Bosielo AJP on 27 September 2007).

2] The basis upon which Bosielo AJP granted leave to appeal is

recorded as follows:

"Mr Mashuga, appearing on behalf of the respondent, conceded that the quality of the evidence that was tendered against the accused is such that there is a reasonable likelihood that another court might come to a different finding. If I understood him correctly, he submitted that there is a reasonable likelihood that another court might accept the appellant's explanation that the deceased's bloodstains came onto his trousers at the time when she bled from the nose, could be reasonably possibly true. This was the argument that was also presented by Mr Cloete on behalf of the appellant. Having had the opportunity of perusing the record of the proceedings in the court a quo and listening to the various submissions made by the respective counsel in this matter, and in particular the concession made by the state in this regard, I am of the view that there is a reasonable likelihood that another court faced with the same facts might arrive at a different finding. And it is for that reason that I hereby grant the appellant leave to appeal against his conviction to the Full bench of this division."

- 3] Before us Mr P Nagel of Legal Aid South Africa (Kimberley) confined himself, out of choice, to the Heads of argument prepared by Adv P J Cloete. He essentially canvassed the narrow issue couched in para 2 (above). Perhaps correctly so, in that the other aspects are peripheral and are either conceded or deemed to be conceded, anyway.
- 4] Central to our decision in this appeal is not merely how the appellant's light-coloured T-shirt, his pair of dark trousers and shoes became stained with the deceased's blood but how it was established what clothing and shoes he wore on the fateful morning. Establishing these circumstances is pivotal in that not only did the appellant vehemently deny wearing them but when requested by

the investigating officer, InspStefanus Van Rooi, to hand over the clothes he wore the Saturday night/Sunday morning of the incident he initially produced a light-coloured pair of trousers but his wife contradicted him and only then was the bloodstainedtrousers retrieved from a linen basket. The bloodstained shoes were unearthed from a maizemeal-bin during a subsequent search of the premises. The bloodstained light-coloured T-shirt disappeared for good. The reason will emanate later.

5] On Saturday night 20 January 2001 between 23h00 and midnight the deceased, described as a decent employed lady, and three of her girlfriends visited a tavern called The-Place-To-Be, co-owned by the appellant and Thabo Moncholomi, who testified for the state. The women braaied meat supplied by the deceased and had a good time. After 03h00 the Sunday morning (21/01/2001) when the deceased was unable to secure transport or a lift home she ventured the journey on foot through a treacherous area along or through a graveyard. This was, literally, a fatal mistake.

6] Joyce Ngubane and her male companion, Tom Kura Khetsekile, a soldier, were from the veryThe-Place-To-Be on their way home. The route took them past the same cemetery. She heard screams followed by two gunshots. She hurriedly summoned the police from a public phone which, fortunately, was closeby. As she joined her companion, who apparently kept surveillance, she heard a third gunshot and almost contemporaneously saw a man, the shooter, wearing a light-coloured top and dark pants running towards them. On spotting them he beat a hasty retreat. It was around 03h20.

7] Joyce knew the appellant before the incident. Due to the poor visibility and the fact that the shooter-fugitive was not in close

proximity for a reliable identification she was unable to confirm that it was the appellant or to exclude him. However, the visibility was good enough for her to identify the deceased whom she knew before. When she and Tom reached the deceased she was already dead.

8] It is common cause that Moncholomi was the manager and the appellant was in charge of the security aspects of their joint-venture. Moncholomi testified that around 03h20 he delivered some patrons at their homes with his motor vehicle. Shortly after his return he noticed the appellant arriving at the tavern on foot from the direction of the graveyard. The appellant, whilst outside the tavern, called Moncholomi out but the latter beckoned him to enter, which he did.

9] Moncholomi made the following observations. The appellant looked flustered and dishevelled. He suspected something untoward. Appellant wore a whitish T-shirt and dark pants. The T-shirt was crumpled and creased on the chest area as if someone had grabbed him. It had bloodstains. Moncholomi asked appellant whether he had been in a fight. The appellant denied it and said he chased after two men who wanted to break into a vehicle. Moncholomi attended to a matter that required his attention. When he re-joined the appellant he noticed that he had rolled up his T-shirt and hooked it behind his head. As I understand the evidence this would have left the appellant barechested (unless he wore a vest). Moncholomi says he gained the impression that the appellant was hiding the bloodstains.

10] A while later the appellant informed Moncholomi that after the would-be car-thieves had outrun him he traversed the cemetery and came across the deceased who had sustained stabwounds. He said he saw a soldier fleeing the scene.

11]What is broadly in common, but not quite corroboration at this stage of the judgment, in the evidence of Joyce and Moncholomi is the light-coloured top that the shooter-fugitive wore, the dark pants, the time of the occurrence of the murder and the general location from where the appellant came. Joyce testified that there were strugglemarks on the ground where the deceased's body lay sprawled and Moncholomi described the appellant's appearance and clothes as that of a person who had been wrestling. It has to be mentioned that Joyce and the appellant saw each other earlier at The-Place-To-Be. This is common cause, but Joyce can't remember what clothes the appellant had on.

12]In his plea-explanation the appellant proffered the following through his legal representative (translated):

"The accused will also not dispute the DNA-evidence [results] of the blood emanating from the deceased found on his trousers and shoes. However, he will testify that earlier during the evening there was an occasion during which the deceased suffered a nosebleed and this is what explains the manner in which her blood was splattered (spatsels) on the accused's clothing."

Note here that nothing is said in the plea-explanation concerning the bloodstains on the whitish T-shirt that Moncholomi testified about after this explanation.

13]None of the people at the nightclub saw or was made aware that the deceased had a nosebleed, except the appellant. Joyce was not asked, whether in-chief or in cross-examination, about the nosebleed. Moncholomi disputed it. The court a quo makes the following valid observation (translated):

"What is, in my view, destructive of the appellant's version is the evidence of Oupa who, according to the accused, stood against a wall nearby and should have seen the nosebleed. However, Oupa

testified that he observed nothing of the sort. The deceased's companions that evening Ms Joodt, Ms Springbok and Ms Saaiman, some of whom vouched for the fact that they never separated [from each other and the deceased], disclaim the nosebleed occurrence. If the deceased suffered such affliction, particularly if it was as heavy a nosebleed as the accused portends, one would have expected that if her friends did not see it the deceased would have made them aware of it."

14]In my view the deceased, as human nature dictates, would have turned to her friends for assistance. The trial court's rejection of the appellant's evidence on this aspect cannot be faulted. I find it unnecessary to deal with how improbable it would have been for the appellant's clothing to have been blood-besmirched in the manner demonstrated and described by him. The court a quo, imbued in the trial, observed this and came to its conclusions. I defer to that, moreso as there does not seem to be any demonstrable misdirection by the Court in this respect.

15]Insp VanRooi testified that on Tuesday,22 January 2001, he visited the appellant at his home and, after all the legal formalities were ostensibly complied with, asked him for the clothes he had on the previous night (common parlance for PM to AM). I ignore for the moment Van Rooi's version on the appellant's shenanigans and focus on the appellant's verbatim version (translated though):

"Defence: *Did you invite only Van Rooi[into the house] or both?*

---Both.

Court: *Yes. --- When he [Van Rooi]entered he asked for my blue jeans. I produced my blue jeans. When I did so my wife said: No, that is not the trousers you had on.*

Defence: *Did you speak Afrikaans? --- Yes, we spoke Afrikaans. She then produced this pair of trousers.*

Court: Who produced the pants? --- My wife.

Defence: My Lord, for the record he refers to Exhibit 1. --- He [Van Rooi] asked whether these are the clothes you wore the night in question? I said yes.

Court: Yes. --- He then asked where the T-shirt (skipper) was that I was wearing. Things were mixed up. I went to look for the T-shirt.

Court: Do you talk about the T-shirt? --- Yes. The T-shirt with the spots (kolle).

Court: Did he ask for the T-shirt with spots? --- No, he only asked for the T-shirt that I had been wearing.

Court: Yes. --- I found the T-shirt. It was green. He then said he did not want that T-shirt, he is looking for the white T-shirt.

Defence: Yes. --- I told him that it [the green T-shirt] was the one I had on. He then asked for the shoes I was wearing. I then produced the shoes. They were dark-brown shoes."

16] Under cross-examination the following transpired:

"State: Sir, the first time that you became aware of the blood [on the trousersExh 1] is when the investigating officer approached you? --- Precisely.

State: During the course of the evening you did not see the blood? --- No, I did not notice anything."

Later – Still under cross-examination.

"State: He [Van Rooi] asked for your clothing and on your pants he discovered blood? --- Yes.

State: Did he ask where the blood came from? --- Yes.

State: What did you tell him? --- I told him that there was a fight. When I returned from the fight I became involved with the deceased. She had a nosebleed. This

may explain the presence of the blood.

State: *Why would Insp Van Rooi tell the court that your explanation was that you had sexual intercourse with your girlfriend, but she experienced her menstruation cycle? --- No, I never said anything like that.*

State: *Van Rooi agrees with you concerning your explanation about a fight. Why would he suddenly differ with you concerning the girlfriend. --- I don't know."*

17]The following emanated from the questions by the court:

"Court: *But when you noticed the bloodstains on your pants, you now know that the deceased lies dead, did it not strike you immediate that the blood must emanate from the deceased's nosebleed that evening? --- That is why I did not get rid of the pants or washed it. I did nothing to it.*

Court: *What do you say? --- It did not cross my mind that I was involved with the deceased, otherwise I would have gotten rid of the trousers.*

Court : *Would you have disposed of it? --- Yes."*

18]From what was elicited, fairly, from the appellant's own mouth as reflected above it leaves no doubt in my mind that the only reason why he retained his bloodstained pants was because he was unaware of the bloodstains thereon. It took his wife, he says, to produce the stained pants he tried to conceal. This was also Van Rooi's version for the state before appellant testified. Van Rooi also testified that he retrieved the appellant's bloodstained dark-brown shoes from a maize meal-bin on a subsequent visit. They were evidently concealed. Is it any wonder then that the appellant made the bloodstained white T-shirt disappear?

In this respect as well I am satisfied that the trial court's conclusions are correct.

19]Based on the foregoing discussion there is only one reasonable and irresistible inference to be drawn on how the appellant's clothes and shoes were contaminated with the deceased blood: he was in contact with or in touching distance of the deceased at the scene of the murder. This conclusion accords with the cardinal Rules of Logic propounded in **R v Blom** 1939 AD at 202 – 203; and **S v Reddy** 1996(2) SACR 1 (A) at 8c – 9e.

20]It is convenient at this stage to deal briefly with the injuries sustained by the deceased as recorded by Dr Jurgen Kotze Eksteen who performed the post-mortem on the deceased's body and also testified in court. I advert only to the chief findings and the cause of death as recorded in the report which were formally admitted by the appellant:

"(iv) dat die vernaamstelykskouingsbevindings in verband met hierdieliggaam die volgende was:

I 1. Die liggaam van 'n kleurling vet en sterkvrou met lang swart hare.

2. 'nKoëlingangwond in die laeragerterkop net bokant die nek, en dwarsdeur die laerbrein basis en uitgangwond is regswaar die koëlgevind is net onder die vel.

3. Die skedel en skedelbasis en oë is volsandgrond.

II Viersteekgate is gevind in die linker mamma (bors).

1. In die linker mamma weefsel 8cm diep en 2cm lank. 2. en 3. Twee steekgatedeur die medialelaerborsweefsel en tussen die 4de en 5de ribbesdeur tot dwarsdeur die hart se onderpunt 2½ cm van onderaf.

4. 'n Steekwond in die vouonder die linker bors2cm lank en 13cm diepdeur die laerborsholte en die diafragma tot net

in die bo-buikholtewonde 2. en 3. Is altwee 14cm diep .

III Linker borsholte en hartsak is gevul met bloed.

IV. Twee stukkie vel is oppervlakkig afgesny in linker handpalm en duim.

(v) dat, as gevolg van my waarnemingswaarvan `n lyshieronder volgek besluit het: -

(a) dat die dood 3,141 voor my ondersoek plaasgevind het, en

(b) dat die oorsaak van die dood

1. `n Steekwond met bloedverlies dwars deur die hart.

2. Waarskynlik daarna `n koëlskietgat dwars deur die skedel en brein van agternavoor"

21] On all probabilities this is where and partly how the appellant came in contact with the deceased's blood. Importantly, both the stab-wounds and the gunshot wound were fatal. The injuries on the palm of the hand and thumb are defensive wounds. The deceased in all probability grabbed the appellant by his white T-shirt with the bloodied hand. Photo 3 and 4 of Exhibit "B", the photo album, depicts the struggle marks on the ground. Those aspects of the evidence is what makes Moncholomi's evidence more understandable and credible. This is what Moncholomi observed in the tavern.

22] The knife or sharp instrument with which the deceased was stabbed has not been found. However, the firearm from which the fatal wound was fired, back-to-front, through the deceased's head was traced to the safe of The-Place-To-Be, the nightclub and joint-venture conducted by the appellant and Moncholomi. Moncholomi states that the firearm belongs to a patron who lodged it with them

for safekeeping several weeks prior to the incident but never fetched it. He says that the appellant took possession of the weapon a few days before the murder and only returned it a day or so after the murder when he prevailed upon him. The appellant was reluctant to restore it. When he finally did, it was oily and not properly assembled. Any gunpowder residue would have been removed or destroyed.

23]The appellant denies that he handled the firearm at any stage. He says, on the contrary, he only became aware thereof after the death of the deceased when the police confiscated it. The trial court correctly rejected appellant's testimony on this aspect because the appellant's own witness, Mr Jack Daniels, an employee at The-Place-To-Be corroborates Moncholomi's evidence that the appellant had handled the firearm regularly before the incident.

24]A spent cartridge which was found on the crime-scene was ballistically proven to have been fired from the firearm, Exhibit 2, which was jointly kept by the appellant and Moncholomi. There is a dispute on how the police discovered that this firearm was the murder weapon. Moncholomi says that Van Rooi phoned him after he gleaned some information from the appellant concerning the firearm. Van Rooi says it was Moncholomi who initiated the subject. If Moncholomi broached the subject first there would be nothing untoward or suspicious about him (Moncholomi) having regard to his earlier evidence relating to the appellant's conduct, his besmirched clothes and his previous possession of the firearm.

25]The trial court has approached Moncholomi's evidence with caution and only accepted it where corroboration existed or where factors were present reducing the risk of a wrong conviction. Joyce corroborated Moncholomi's evidence concerning the shooter with

the white top. The firearm which Joyce heard discharged and a spent cartridge fired from it was linked to the appellant. The appellant was in contact or close contact with the deceased when and where she was murdered in the cemetery. I cannot fault the court a quo's reasoning that the accused's "false explanation on how the blood landed on his pants is a factor that weighs heavily against him and which also serves as corroboration for his involvement in the murder."

26]Even if it could be suspected that Moncholomi was involved in the murder, the evidence does not justify such suspicion, it must be added, such a factor could merely be indicative that the two were complicit in the murder. No benefit would redound to the appellant.

27]I am satisfied that the state proved its case beyond a reasonable doubt. The appellant's counsel could not persuade us to any misdirection or material misdirection by the trial court. Those findings must therefore be accepted to be correct and have to remain undisturbed. The court's assessment is in line with the salutary approach adopted by the Supreme Court of Appeal in **S v Chabalala** 2003(1) SACR 134 (SCA) at 139i – 140b (para 15) whereat **Heher AJA** states:

*"[15] The trial court's approach to the case was, however, holistic and in this it was undoubtedly right: S v Van Aswegen**2001 (2) SACR 97 (SCA)**. The correct approach is to weigh up all the elements which point towards the guilt of the accused against all those which are indicative of his innocence, taking proper account of inherent strengths and weaknesses, probabilities and improbabilities on both sides and, having done so, to decide whether the balance weighs so heavily in favour of the State as to exclude any reasonable doubt about the accused's guilt. The result may prove that one scrap of evidence or one defect in the case for*

either party (such as the failure to call a material witness concerning an identity parade) was decisive but that can only be an ex post facto determination and a trial court (and counsel) should avoid the temptation to latch on to one (apparently) obvious aspect without assessing it in the context of the full picture presented in evidence. Once that approach is applied to the evidence in the present matter the solution becomes clear.”

28]It concerns us deeply that it took 10 years and six months since the appellant’s conviction on 04 December 2001 to reach this stage. Leave to appeal was granted on 27 September 2007. The appeal was set down for hearing in August 2010. Portions of the record were reconstructed consequent upon the order of the panel of judges before whom the appeal was placed. This is an unsatisfactory state of affairs. All that need to be said at this stage is that there is, as it turns out, no prejudice to the appellant in that his appeal has failed.

29]I feel constrained to make the following observation. The deceased was murdered in cold blood. This was a murder accompanied by aggravating circumstances. The appellant has a previous conviction of murder for which he was sentenced to 12 years imprisonment. I cannot fathom how he escaped the ultimate sentence – Life Imprisonment. We could not increase the sentence on Notice to the Appellant as he did not appeal his sentence. The state, by not appealing the sentence, failed the family of the deceased and society in general. See **S v Matyityi** 2011(1) SACR 40 (SCA) at 50(a) – 54(b) paras 18 – 24.

30]In the result the appeal must fail. The following order is made:

The appeal is dismissed.

F DIALE KGOMO

JUDGE-PRESIDENT

Northern Cape High Court, Kimberley

I concur

H J LACOCK

JUDGE

Northern Cape High Court, Kimberley

I concur

C C WILLIAMS

JUDGE

Northern Cape High Court, Kimberley

On behalf of the Appellant:

Instructed by:

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Legal Aid South Africa

On behalf of the First Respondents:

Instructed by:

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