

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



**IN THE HIGH COURT OF SOUTH AFRICA
NORTH WEST DIVISION – MAHIKENG**

CASE NO: CA 35/2018

REGIONAL COURT CASE NO: RC4/186/16

In the matter between:

THADISILE TSHAKA

FIRST APPELLANT

SBUSISO NTAPO

SECOND APPELLANT

and

THE STATE

RESPONDENT

Coram: Petersen J, Williams AJ

Date Heard: 30 November 2023

The judgment was handed down electronically by circulation to the parties' representatives via email. The date and time for hand-down is deemed to be **28 March 2024** at 10h00am.

ORDER

On appeal from: The Regional Court Klerksdorp, North West Regional Division, (Regional Magistrate Melodi sitting as court of first instance):

The appeal against conviction by both appellants is dismissed.

JUDGMENT



WILLIAMS AJ

Introduction

- [1] The appellants stood trial in the Regional Court, Klerksdorp on charges of murder read with section 51(2) of the Criminal Law Amendment Act 105 of 1997 ('the CLAA').
- [2] The State alleged that the appellants between 19 and 20 January 2014 at or near Jouberton killed Elias Oupanyana Kaudi ("the deceased"). On 20 January 2014, the body of the deceased was discovered in a veld not far from his house. The cause of death was established at post-mortem as being excessive blood loss from an incision to the left cubital vessels. The cause of death of the deceased, the findings in the post-mortem report and the photo album was not disputed and admitted as evidence. At the close of the case for the prosecution, the appellants applied for their discharge in terms of section 174 of the Criminal Procedure Act 51 of 1977 ('the CPA'). The application was dismissed. On 09 February 2018 the appellants were found guilty as charged and sentenced to eighteen years (18) imprisonment.
- [3] This appeal is against conviction only.

The grounds of appeal

[4] The grounds of appeal are set out as follows in the Notice of Appeal:

- “4.1 The learned Magistrate erred in finding that the evidence relating to the murder that was largely of circumstantial nature and that can be ascribed to a single witness, was sufficient to link the appellants to the crime;
- 4.2 The learned Magistrate failed to give consideration or proper consideration or weight to the fact that the version of the appellants could be reasonably true;
- 4.3 The learned Magistrate failed to give consideration or proper consideration or weight to the fact that the alleged murder weapon bear no traces of deceased’s DNA;
- 4.4 The learned Magistrate failed to give proper consideration to the fact that the so called angry mob could have been responsible and/or attacked and injured the deceased instead of the appellants.
- 4.5 The learned Magistrate erred in finding that the mere fact that the appellants were seen leaving with the deceased and without carrying any weapon that could injure the deceased inferring that this was sufficient evidence to find that they were the perpetrators that injured the deceased causing injuries that led to his death.”

The evidence for the state

[5] The stated relied on the *viva voce* evidence of four witnesses Ezekiel Mkota Mokgatla (“Mokgatla”); Snaza Ntapo (“Ntapo”); Monica Naquataza (“Naquataza”) and Annah Madumo Kgatsa (“Kgatsa”).

[6] Mokgatla testified that he knew the deceased as they were co-employees. He knew the first appellant by sight only and did not know

his name. On 19 January 2014 at around 19h00pm the deceased came to the building site where they were working, in the company of four people including the wife of the deceased, the first appellant and his wife, and another lady by the name of Auntie. The deceased was accused of stealing items belonging to the group (the detail of which was not mentioned) and which was said to be at his, Mokgatla's place. When Mokgatla denied being involved in the theft of any items, the wife of the first appellant grabbed the deceased by his clothes, pulled him away and the group left with the deceased. He observed a scratch mark under the left eye of the deceased which was not bleeding much. He did not know how the injury was caused. That was the last time he saw the deceased. He heard the following day that the deceased had died.

- [7] Ntapo testified that she knew both appellants as they would visit her brother at their home. The second appellant was in fact her cousin. She did not know the deceased. She saw the appellants on 19 January 2014 at around 22h00pm. They arrived at her house that evening as she and her mother were asleep. They knocked at the door which woke her and her mother Zanele Ntapo. The appellants wanted money for cigarettes. The first appellant was holding a panga in his hand. When she asked him about the panga, he told her that they were chased by 'tsotsies' (gangsters) and they ran away in different directions. The first appellant further told her that after they were chased, he returned to where they were to look for the second appellant. It is at that time that he picked up the panga along the road. She enquired from the first appellant whether he was not afraid

of being injured by the panga and he indicated that he would throw it away when they left. She saw him throwing the panga away some two houses away, when they left. The police arrived at her house a few weeks later to interview her. She provided a statement to the police and when asked about the panga the first appellant had with him, she went to fetch it in the veld where the first appellant had thrown it away.

[8] The life partner of the deceased Naquataza testified that she resided with the deceased. They were not married; but living together as husband and wife. She knew the appellants as friends of the deceased who would pay visits to each other. The deceased was older than the appellants. When she arrived home at around 17h00pm on 19 January 2014 she found the deceased at home. The deceased thereafter left without informing her where he was going but returned home at around 18h00pm. The deceased told her that he was at the house of the first appellant where they were drinking (consuming alcohol). The deceased, however, was not intoxicated. A few minutes after the deceased arrived home, the appellants arrived to find the deceased outside his house. They all left together. At around 21h00pm she went to the house of the second appellant to check on the deceased. When she did not find anyone there, she returned home to sleep.

[9] The next morning her landlord arrived and asked her to accompany her to see what had happened to the deceased. When she arrived where the deceased was, he had already died. She proceeded to the

house of the second appellant and questioned him about what happened to the deceased since they left her house together. She thereafter proceeded to the house of the first appellant and questioned him about the deceased. She then requested her sister to call the police. She denied any knowledge of any stolen items. She further denied ever being with the first appellant and his wife or going to the building site where Mokgatla was or knowing Mokgatla for that matter. According to her the first appellant did not have a wife. She was present at her home when the police took photographs at her house.

- [10] Kgatsa testified that she knew the appellants as they all resided in the same street. She also knew the deceased, who resided opposite her house. On 19 January 2014 at around 19h00pm she was throwing out her bath water when she saw the second appellant and his wife (“Kutala”). They were at the house of the deceased in the yard in the company of the deceased and his wife. The second appellant was assaulting the deceased with open hands by slapping him. The second appellant insisted on the deceased leaving with him, but the deceased refused to go with him. The ladies were reprimanding the second appellant and holding onto him and pulling him away from the deceased, to stop him assaulting the deceased. When she was preparing to leave for her boyfriend’s house, the second appellant was still trying to pull the deceased out of his yard. The deceased’s wife was present at that time.

[11] At around 20h00pm her boyfriend arrived at her house, and they sat in his car which was parked in the street. She saw the deceased struggling to open the door of his house. The deceased left to borrow a set of pliers at her house, and when he returned his wife had already opened the door. At around 21h40pm she saw the deceased, the first appellant, the second appellant and a fourth person leaving the yard of the deceased. It was not too dark, and even though the moon was not visible, it was just fine, and she could see. A streetlight two houses away from her house was also working. The first and second appellants were holding onto the deceased on either side of the deceased, restraining his hands. She could not see who the fourth person was as that person was walking in front of the deceased and the appellants who were blocking her view. She could not see whether the fourth person was a male or a female. They walked down the street into the dark. She did not see any weapons in possession of any of the appellants.

[12] Naquataza emerged from her house and left for the second appellant's house. Naquataza and Kutala later returned to the deceased's house after searching for the men for about 10 to 15 minutes. She later saw the appellants emerging from the direction in which they earlier left, returning to their houses. The next morning at around 06h00am she heard of the death of the deceased. She proceeded to the scene where the deceased was found which was not far from her house (four houses away); at the corner of the fourth house.

The evidence of the appellants

- [13] According to the first appellant he did not murder the deceased. The deceased was his friend; they were drinking together. He also knows the deceased's wife, Naquataza. He worked with the second appellant. They were both friends of the deceased. The second appellant lived in the same street as the deceased.
- [14] On 19 January 2014, a Sunday, he was preparing a meal between 15h00pm and 16h00pm. After cooking he went to his sister's house. His sister reported to him that when the second appellant's sister was at the tuck shop, the deceased went to her house and took cups, glasses, cigarettes and a phone. He left his sister's house and proceeded to the house of the deceased to get the items back. When he arrived there the house was locked. He returned to his house to fetch a jacket and then proceeded to the second appellant's house. The second appellant suggested that they go back to the deceased's house. Upon arrival there, the deceased's house was still locked. They proceeded to a drinking hole and consumed alcohol. He left the second appellant at the drinking hole and went to a nearby tuck shop to buy cigarettes.
- [15] Whilst chatting to a friend he met along the way he saw the deceased arriving at his house. He proceeded to the deceased to confront him about the stolen items. Naquataza arrived and requested him to get the second appellant to go with the deceased to find the stolen items.

They left the deceased's house at about 18h15pm. The deceased told them that he sold the items at the hostels. Whilst on their way to the hostels walking along a gravel road, the deceased changed his story and said that he sold the items in Ext 15.

- [16] When they reached the tar road at around 19h00pm, they encountered several people wielding pangas and different other objects (weapons). He told the deceased and the second appellant that these people were gangsters and would not let them pass. The gangsters uttered the words "*This is our time*", upon which they ran away in different directions. He ran to the house of the deceased which was closest but found the house locked. Naquataza was home and told him that the deceased was not there. He told her that he parted ways with the deceased and the second appellant when they encountered gangsters on their way to Ext 15. He then proceeded to the house of the second appellant but did not find him home. He then left for home to sleep. As he was about to sleep the second appellant arrived at his house and asked him for a cigarette. Since he did not have cigarettes the second appellant suggested that they go to the second appellant's sister's house to get money to buy cigarettes. The second appellant's sister opened the door and her daughter also joined them. The second appellant borrowed money for cigarettes from his sister. When they went to the second appellant's sister's house, he had a panga in his possession. This panga, the first appellant took from his house to protect himself from the gangsters. From the second appellant's sister's house they left for their respective homes.

[17] The following morning, five minutes after waking up to get ready for work, Naquataza arrived at his place crying. She informed him that the deceased was found dead in the veld. They proceeded to where the deceased was found to find police officers and other people surrounding the deceased. The second appellant and Kutala arrived there as well. At that stage the second appellant was arrested.

[18] During cross-examination the first appellant was confronted with the evidence of Ntapo that he picked up the panga when they were running away from the gangsters whilst he testified that he took the panga from his house. The explanation he proffered for this contradiction was that he was dizzy from the alcohol he consumed. He remained evasive on the contradiction of his evidence with that of Ntapo. He disputed throwing away the panga and maintained that he took it back home with him. He confirmed Kgatsa's evidence about himself and the second appellant and another unknown person leaving with the deceased but maintained that it was between 19h00pm and 19h30pm. He denied going to Mokgatla's place and claimed that Mokgatla appeared to be confusing him with the second appellant. He did not know if the second appellant went to Mokgatla's place. He only heard Mokgatla in his evidence referring to him using the name of the second appellant; Sibosiso.

[19] According to the second appellant he resided about 800 meters from the deceased's house. The deceased was his friend. If the deceased needed something he would come to him because he knew he was

paid every Friday. The first appellant resides in the next street ahead of his house. They are co-workers and both are from the Eastern Cape. On 19 January 2014, at around 11h00am Ntapo was at his house with Naquataza. Naquataza told his wife about the deceased stealing items from the second appellant's sister's house and she in turn told him about the stolen items. Naquataza and Zanele then left for Mokgatla's place with his wife. He remained in his yard consuming alcohol and did not accompany them since he was drunk.

[20] The first appellant later arrived at his house at some time past 16h00pm and asked if he heard about the theft by the deceased at Zanele's house. The first appellant suggested that they should go to the deceased to find out where he had sold the items. The first appellant wanted to confront the deceased since it was still possible to get the stolen items back. They proceeded to the house of the deceased but did not find anyone there. They then left for a drinking hole where they remained until way after 19h00pm, at which time the first appellant once again wanted to look for the deceased.

[21] The first appellant left and returned after some time, informing him that he found the deceased. They left for the house of the deceased where they found him. The first appellant confronted the deceased who told them that he sold the items at the hostels. They left for the hostels and whilst on their way the deceased changed his story and said that he sold the items in Ext 15. On their way to Ext 15 they met several people who asked them what they were doing there. These people then uttered the words "*This is our time*". They ran away in

different directions. He ran to his house and later left to look for the first appellant. He found the first appellant at his house. They were concerned about the deceased since he was old and could not run. The first appellant told him that he was at the deceased house and the deceased was not there. He thought the deceased may have gone to consume alcohol somewhere.

[22] He requested the first appellant to accompany him to Zanele's house to go get money to buy cigarettes. From Zanele's house they went back home and he went to sleep. In the morning he was woken up by Naquataza who told him that the deceased had not returned home that evening and that he was found dead. They all proceeded to where the deceased was found where they found the police and the deceased. The police took statements and asked him to accompany them to the police station. He gave the police a statement and left the police station. On his way home the police arrived, told him that his statement was incomplete and requested him to accompany them back to the police station. He was arrested and detained that evening. He has no knowledge if the first appellant threw away the panga. He disputed any assault on the deceased by himself or the first appellant; nor having any argument or altercation with him.

The test on appeal against conviction

[23] The findings of fact and credibility by a trial court are presumed to be correct because it is that court and not the court of appeal which has had the advantage of seeing and hearing the witnesses and is in the

best position to determine where the truth lies. See *S v Leve* 2011 (1) SACR 87 (ECG) at paragraph 8. It is trite that a court of appeal will not overturn a trial court's findings of fact, unless they are shown to be vitiated by material misdirection or are shown by the record to be wrong. See *S v Francis* 1991 (1) SACR 198 (A) at 204 c-e.

The nature of the evidence against the appellants

[24] The conviction of the appellants on the charge of murder was based solely on circumstantial evidence. There were no eyewitnesses to the murder of the deceased. The trial court found the versions of the appellants so improbable to be rejected as false beyond a reasonable doubt; and was satisfied that the only reasonable inference that could be drawn from the proven facts to the exclusion of all other inferences was that the appellants killed the deceased.

[25] The argument advanced on behalf of the appellants is that it is reasonably possible that the deceased could have been murdered by the group of people roaming the streets on the night in question.

[26] The approach to circumstantial evidence is trite. In *R v Blom* 1939 AD 188 at 202 to 203 the following was said regarding circumstantial evidence:

“There are two cardinal rules of logic which cannot be ignored. First, the inference sought to be drawn must be consistent with all the proven facts. If not, the inference cannot be drawn, and secondly, the proved facts should be such that

they exclude every reasonable inference from them save the one sought to be drawn.”

[27] In *S v Reddy and Others* (416/94) [1996] ZASCA 55 (28 May 1996); 1996 (2) SACR 1 (A) at page 8C-9E, the Supreme Court of Appeal elaborated on the approach to circumstantial evidence as follows:

“In assessing circumstantial evidence one needs to be careful not to approach such evidence upon a piece-meal basis and to subject each individual piece of evidence to a consideration of whether it excludes the reasonable possibility that the explanation given by an accused is true. The evidence needs to be considered in its totality. It is only then that one can apply the oft-quoted *dictum* in *R v Blom* 1939 AD 188 at 202-3, where reference is made to two cardinal rules of logic which cannot be ignored. These are, firstly, that the inference sought to be drawn must be consistent with all the proved facts and, secondly, the proved facts should be such ‘that they exclude every reasonable inference from them save the one sought to be drawn’. The matter is well put in the following remarks of Davis AJA in *R v De Villiers* 1944 AD 493 at 508-9:

‘The Court must not take each circumstance separately and give the accused the benefit of any reasonable doubt as to the inference to be drawn from each one so taken. It must carefully weigh the cumulative effect of all of them together, and it is only after it has done so that the accused is entitled to the benefit of any reasonable doubt which it may have as to whether the inference of guilt is the only inference which can reasonably be drawn. To put the matter in another way; the Crown must satisfy the Court, not that each separate fact is inconsistent with the innocence of the accused, but that the evidence as a whole is beyond reasonable doubt inconsistent with such innocence.’

Best on Evidence 10th ed 297 at 261 puts the matter thus:

‘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. ...

Lord Coleridge, in *R v Dickman* (Newcastle Summer Assizes, 1910 - referred to in *Wills on Circumstantial Evidence* 7th ed at 46 and 452-60), made the following observations concerning the proper approach to circumstantial evidence:

‘It is perfectly true that this is a case of circumstantial evidence and circumstantial evidence alone. Now circumstantial evidence varies infinitely in its strength in proportion to the character, the variety, the cogency, the independence, one of another, of the circumstances. I think one might describe it as a network of facts cast around the accused man. That network may be a mere gossamer thread, as light and as unsubstantial as the air itself. It may vanish at a touch. It may be that, strong as it is in part, it leaves great gaps and rents through which the accused is entitled to pass in safety. It may be so close, so stringent, so coherent in its texture, that no efforts on the part of the accused can break through. It may come to nothing - on the other hand it may be absolutely convincing. ... The law does not demand that you should act upon certainties alone. ... In our lives, in our acts, in our thoughts we do not deal with certainties; we ought to act upon just and reasonable convictions founded upon just and reasonable grounds. ... The law asks for no more and the law demands no less.’

[28] In *S v Chabalala* 2003 (1) SACR 134 (SCA) at 139i – 140a, the SCA said that the correct approach would be to weigh up all the elements which point towards the guilt of the appellants against all those which are indicative of their innocence taking proper account of inherent strengths and weaknesses, probabilities and improbabilities on both sides and having done so, to then decide whether the balance weighs so heavily in favour of the state as to exclude any reasonable doubt about the guilt of the appellants.

Discussion

[29] The trial court's analysis of the evidence may be succinctly summarized as follows. There were no eyewitnesses to the murder of the deceased. When the deceased was last seen by the state witnesses he was still alive and in the company of the appellants. The state witnesses had no reason to falsely implicate the appellants. Their evidence was accepted as true, except for the evidence of Naquataza (the life partner of the deceased). Mokgatla's evidence was clear, that the deceased was accused of theft and was manhandled in his presence. Ntapo is related to the second appellant with no reason to falsely implicate her own relative. Her uncontroverted evidence, which the first appellant shied away from is that the first appellant had a panga in his possession which he disposed of in the veld. The possession of the panga was in fact common cause.

[30] Kgatsa's evidence was considered very important or crucial. Kgatsa's evidence was that both appellants took the deceased from his house and walked with him towards the veld. It is in the veld where the deceased was found dead the following morning. Kgatsa saw the appellants returning without the deceased. Kgatsa's evidence was corroborated by the traces of blood that were found extending from the deceased's yard to the veld where the deceased was found. The trial court found that the traces of blood were indicative of the fact that the deceased was taken bleeding from his house to the veld where he was killed. The trial court correctly raised why the first appellant would take a panga from his house and not go back home with the panga but throw it away, even though he disputed this. The trial court was of the view that after Ntapo questioned him about the panga, he threw the panga away because he realized that the panga could possibly get him in trouble.

[31] The trial court's approach to the evaluation of the evidence cannot be faulted. The trial court regarded Kgatsa as a very important witness for the state and found no reason why she would fabricate evidence if she never saw the appellants' altercation with the deceased. In assessing her evidence, the trial court found it to be detailed and elaborate.

[32] It was not disputed that the appellants confronted the deceased about the stolen items. Kgatsa's evidence was that she knew the deceased and his wife. She also knew the appellants as they all resided in the same area. On 19 January 2014 at around 19h00pm she saw the

second appellant and Kutala with the deceased and his wife, in the yard of the deceased. The second appellant was assaulting the deceased and trying to pull him out of his yard. Kgatsa did not know what the altercation was about and her evidence only related to what she had witness on that particular day. Mokgatla's evidence corroborated Kgatsa's evidence. Mokgatla testified that around 19h00pm the deceased came to the building site with four people who were accusing the deceased of stealing their items. The deceased had an injury to his left eye and it was bleeding. The second appellant confirmed in his evidence that his sister Zanele and the Naquataza left his house to look for the deceased and that they went to Mokgatla's place. Kgatsa further testified that at around 20h00pm she saw the appellants leaving with the deceased in the direction were he was found the next day. She also saw the appellants when they returned without the deceased.

[33] The appellants confirmed that they left with the deceased to go to the hostels to go look for the stolen items. The fact that she could not see who the fourth person was does not take the matter further. The trial court had the advantage of observing Kgatsa and found that Kgatsa's evidence was not fabricated. The trial court cannot be faulted for accepting Kgatsa's evidence.

[34] Naquataza also confirmed that the appellants were the last persons with the deceased. When Naquataza learnt of the news about the deceased she immediately went to confront the appellants. The appellants confirmed that Naquataza came to their houses early the

morning when the deceased was found and confronted them. The deceased died of excessive blood loss. There were traces of blood found extending from the house of the deceased to where the deceased was found dead in the veld.

[35] Ntapo only told the court about what she saw that night and what the first appellant told her. What is of importance is that the first appellant had a panga and he confirmed it during his evidence. Ntapo's evidence about the panga was corroborated by the fact that when the police went to Ntapo's house a few weeks after the deceased was found dead, she went to the veld where the first appellant threw the panga and gave the panga to the police.

[36] Given that there were no eyewitnesses to the murder, three of the witnesses for the state testified that the appellants had a confrontation with deceased and that he was in fact physically assaulted. The appellants did not dispute that they confronted the deceased about the stolen items and that they were seen leaving with the deceased on that particular night.

Conclusion

[37] In light of all the evidence and the factual findings made by the trial court, there can be no doubt that the state proved the guilt of the

appellants beyond a reasonable doubt. The facts found to be proven by the trial court, to the exclusion of the versions of the appellants which were rejected, satisfied the two-pronged approach set out in *Blom*.

[38] The appeal against conviction by the appellants accordingly stands to be dismissed.

Order

[39] In the result, the following order is made:

The appeal against conviction by both appellants is dismissed.

Z WILLIAMS

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA

NORTH WEST DIVISION, MAHIKENG

I agree.



A H PETERSEN
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
NORTH WEST DIVISION, MAHIKENG

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