Death Sentence

189/70

G.P.-S. J. 445.

# In the Supreme Court of South Africa
# In die Hooggeregshof van Suid-Afrika

(APPELLATE DIVISION).
AFDELING).

**APPEAL IN CRIMINAL CASE.**
**APPÈL IN STRAFSAAK.**

PETTY BEKEMBU
**Appellant.**

*versus/teen*

THE STATE
**Respondent.**

*Appellant's Attorney* Pro Deo *Respondent's Attorney* A. G. (C'town)
*Prokureur van Appellant* *Prokureur van Respondent*

*Appellant's Advocate* E. K. W. LICHTEN *Respondent's Advocate* M.M. BALLARD S.C. / E. MILLER
*Advokaat van Appellant* *Advokaat van Respondent*

*Set down for hearing on* Monday 22nd. March, 1971.
*Op die rol geplaas vir verhoor op*

4,6,7.

(E. C. D.) CORAM: JANSEN, J.A., DIEMONT ET MILLER, A.JJ.A.

APPELLANT: 9.56 AM - 10.42 AM.

RESPONDENT: 10.42 AM - 11.00 AM
11.13 AM - 11.36 AM

APPELLANT: 11.36 AM - 12.07 PM (In reply)

C.A.V.

Diemont A.J.A.:- APPEAL DISMISSED.

REGISTRAR.
5.4.1971

IN THE SUPREME COURT OF SOUTH AFRICA

APPELLATE DIVISION

In the matter between:

PETTY BEKEMBO ..... APPELLANT

AND

THE STATE ..... RESPONDENT

Coram: Jansen, J.A., Diemont et Miller, A.JJ.A.

Heard: 22nd March, 1971

Delivered: 5th April, 1971

JUDGMENT

DIEMONT, A.J.A. :

I have read the judgment of Miller, A.J.A. It sets out the relevant facts, so they need not be repeated here. I agree that the case is by no means easy of decision, but after giving the matter anxious thought, I have arrived at a different conclusion for the reasons which follow.

Some twenty-two witnesses gave evidence at the trial; of these the most important were undoubtedly the

two ..... /2

two men who were in the deck, Bekembo (the appellant) and Gebuza (accused No. 2) and their two lovers, Nomajapan and Lola. Before turning to the facts I propose dealing shortly with the credibility of these persons. The learned Judge in the Court a quo came to the conclusion that the evidence of both the girls could be accepted. In regard to appellant's lover he said:

> "I want so say something about Nomajapan's evidence at this stage. She did seem hesitant in giving evidence and she did at times seem reluctant to be forthright. However, we find that we can accept Nomajapan's evidence without any fear. We are satisfied that the reason why she was hesitant was that she was giving evidence against her lover with whom, according to the evidence, she is still on good terms, and a natural reluctance to give incriminating evidence against such a person, is only understandable."

In regard to the second girl, Lola, he said that the Court was conscious that she was Gebuza's lover and would naturally try to protect him, nevertheless she "created a good impression".

In short, both the girls were accepted by the trial court as trustworthy witnesses. I have studied their evidence carefully and I can find no good reason to

reject ..... /3

reject this finding. Neither of the girls was given to exaggeration. They made no apparent attempt to implicate the appellant, as for example, when they were asked to try and remember when last he was seen wearing the belt which played such an important part in this case. It is true that their answers were not always confident, as where Nomajapan was asked to explain how she remembered that appellant had not slept in her room on the Saturday night. She hesitated but her recollection does not appear to have been at fault since both Gebuza and Lola corraborated her. Lola was also a little unsure of herself when asked to tell how she remembered that Gebuza was wearing a black belt on Saturday night, but looking at her evidence as a whole I find no reason to doubt that she was a truthful witness. The same cannot be said for the appellant. His evidence is in conflict with that given by Nomajapan, Lola, Gebuza, John Marx and the two police Sergeants. Moreover there are many features - features to which I shall refer - which render it improbable and unacceptable. I see no reason to differ from the finding of

the ..... /4

the Court a quo that appellant was an untruthful witness.

So far as Gebuza is concerned the Court a quo acquitted him without making any finding in regard to his credibility. His evidence was criticised on two grounds: that he is in conflict with the witness Mabel, and that he made an incorrect statement to the police about the watch. I am not satisfied, for reasons which I shall give later, that the criticism is well founded.

I turn now to consider the facts on which my conclusion is based.

The evidence relating to the belt is of cardinal importance in this case. It will be recalled that the deceased's neck was tied to the trunk of a tree by a belt; she had been strangled and there appears to be no doubt that the instrument which casued her strangulation was the belt. It was proved that this belt belonged to the appellant; indeed, he did not dispute that the belt was his but he offered an explanation which, if accepted, would weaken the inference which the Court must otherwise inevitably draw. He stated

that ..... /5

that he had not worn the belt for two weeks before the day on which the murder was committed and that it was left hanging with a jacket behind the door in Nomajapan's room. It was defective, he said, and the buckle was about to come off. He also alleged that he had noticed that Gebuza was wearing his (appellant's) belt when he saw him in the location on the Saturday afternoon, that is shortly before the murder was committed. He admitted that he was in need of a belt and that he borrowed a pink belt from Nomajapan on the Sunday morning. His explanation was that he was wearing new trousers which were too large and that is why he required a belt.

There are several features which cast grave doubt on the appellant's evidence in regard to the belt and there is also evidence directly contradicting him - evidence which I shall refer to presently. In the first place it seems that the defect in the belt, if any, was of a trivial nature. I cite from the evidence:

"There ..... /6

"There was nothing wrong with this belt? --- Yes, there was something wrong.
What was wrong with it? --- What was wrong with that belt is the rivet to the leather itself was one out and the rivet was going to go out and that is what was wrong.
BY THE COURT: That is where the leather is doubled over in the buckle and riveted to hold it down. --- Yes.
MR. MULLINS: And did the buckle come off? --- Yes, it was about to come off.
Was the buckle still on it though? --- Yes.
I want you to look at this, and particularly at the rivet, and tell me whether you do not agree that could easily in a matter of half a minute that rivet could have been pushed back and doubled over? --- Yes.
And the rivet is not torn at all? Where the rivet goes through? --- The rivet was to come off."

If the belt was in fact, so defective that appellant thought that he was unable to wear it, it seems strange that he was content that Gebuza should wear it. Again if he did see Gebuza wearing his belt on Saturday evening it seems strange that he should ask Nomajapan, on Sunday morning, to tell him where the belt was. He admits that he asked Nomajapan this question and that when he asked her he knew where the belt was. His explanation as to why he was without a belt on the Sunday morning and why he then for the first time for two

weeks ..... /7

weeks suddenly needed a belt and had to borrow one from his girl friend is unconvincing. What is even more unconvincing is his explanation as to why he did not trouble to ask Gebuza for his belt back at any time during the ensuing week.

Apart from these unsatisfactory features there is, as I have indicated, evidence which contradicts the appellant and which, if accepted, establishes that he was lying in regard to this matter.

Nomajapan stated that she saw that appellant was without his belt on the Sunday morning. She asked him what had happened to the belt and he replied, not that Gebuza had it, but that he was going to repair it. He borrowed a belt from her but did not mention that he had new trousers which were too big for him; she said that he had never borrowed a belt from her before. Her roommate, Lola, stated in her evidence that she never saw the belt in the room when appellant was not there; when she saw it he was wearing it. She agreed that he wore the belt regularly and remembered seeing him with the belt a few days before the murder took

place ..... /8

place but could not remember the exact day. Under cross-examination Lola told the Court that her lover Gebuza normally wore a black belt; she never saw him wearing the appellant's belt, and on the Saturday evening he was wearing his own black belt. Gebuza himself denied that he wore appellant's belt on the Saturday. He said that he did not notice what belt appellant was wearing on that day but he himself had three belts - and would have had no need to borrow the appellant's belt.

Regard being had to the fact that both Lola and Nomajapan were found to be truthful witnesses: whereas appellant was found to be untruthful, and regard also being had to the many unsatisfactory features in the evidence which appellant gave about the belt, there is, I apprehend, only one inference which can reasonably be drawn and that is the inference which the Court a quo drew:-

> "We have the fact that this woman was tied with his (appellant's) belt and we reject his suggestion that this belt was being used by somebody else on the fatal evening."

There is other evidence which weighs heavily against the appellant.

which follows:

"Did you see your girl friend Nomajapan that morning? --- After Ginger had left, I saw Nomajapan.
Did you show the watch to her? --- Yes.
Tell us what happened about the watch between you and Nomajapan? --- Ginger wanted me not to tell my girl friend that I got that watch from him.
Did he say why you weren't to tell her? --- Because his girl friend would quarrel with him.
So you were going to give the watch to Nomajapan? --- Yes, I showed her the watch.
Did she keep it or return it to you? --- I took the watch from her.
Did you tell her that she was not to tell anybody about the watch? --- No.
And that she was not to show it to anyone? --- No."

The evidence given by Nomajapan on this issue is at variance with appellant's on virtually every point:

"Did accused No. 1 come to your room again on Sunday? --- Yes.
About what time was it when he came there? --- It was in the afternoon.
What happened when he came to the room? --- He came in and sat down. He took out a watch out of his pocket and said that he bought it for me.
Did he say where he had bought it from? --- He made a report to me that he bought it from another girl that was going to Bloemfontein.

Did ..... /11

Did you put the watch on? --- He put it on my hand and I took it off again.
Did you refuse the watch? --- Yes I refused the watch.
Why did you refuse it? --- (No reply)
BY THE COURT: Why wouldn't you take this watch. You had been given a present by your lover. Why wouldn't you take it? --- I never accepted it.
Yes, but I want to know why you did not accept it? --- I felt like not taking it.
MR. MULLINS: Did accused No. 1 say anything about whether you must mention this watch to other people? --- Yes, he said so.
What did he say? --- He said I must not show the watch to other people.
Not show the watch or mention the watch? --- I must not show the watch to other people.
Was this before or after you refused to accept the watch? --- It was before I refused the watch. Was it because he told you so about the watch that you refused it? --- Yes."

The Court believed Nomajapan and rejected appellants version of this conversation; it seems to me that there was good reason for so doing. If Gebuza had in fact taken the watch from a girl on the previous evening it is unlikely that he would disclose this fact to appellant, particularly if the girl had been murdered. In any event if Gebuza did acquire the watch by murder or robbery - as no

doubt ..... /12

doubt the appellant intended the Court to infer - it is most improbable that he would have warned appellant not to tell his girl friend because she would quarrel with him. The warning would obviously have been in more general terms: tell nobody. The Court found, as I have said, that Nomajapan was reluctant to give evidence which might injure her lover, but on this issue she spoke candidly. She was not prepared to let it be said that she would receive or possess stolen property. Her evidence has the ring of truth, and the Court was, in my view, entitled to believe her and to find that appellant was in possession of the stolen watch on the Sunday and that the explanation for his possession which he gave to his lover was wholly false.

The matter does not end there; the additional evidence relating to the watch further implicates the appellant.

The appellant was a police informer and admitted giving the police vital information in other cases. In this case he was specifically requested on Wednesday by

Sergeant ..... /13

Sergeant Van der Merwe to obtain information about the missing wrist watch, indeed he was told that a reward would be given for information. He kept silent. He did nothing on the Wednesday or the Thursday, although, if he is to be believed, he knew that the watch was in Gebuza's possession from the previous Sunday. It was not until the Friday evening that he acted and then the action which he took was passing strange. His explanation for the delay is that the police did not speak to him until the Thursday, and then that he did not connect the watch which Gebuza had shown him on the Sunday with the watch which the police were now looking for. This is stretching credulity too far.

On Friday evening he decided to take steps and inform the police about the watch. His explanation for this action is that he saw Gebuza on Friday 8th May.

"He said to me if someone would come and ask for a watch I must go and tell his girl friend to go and get the watch in his jacket."

Why Gebuza would give him this message to give to Lola is not

clear ..... /14

clear since Gebuza himself spent every night with the girl. Nor does the message make sense in the light of the next statement: that he would not sell the watch to anybody living in Sterkspruit.

On Friday evening appellant finally took action. He visited a friend, John Marx, who was also a police informer. He said that Marx had informed him earlier that Gebuza wanted to sell him the watch; he told Marx to try and buy the watch and when he learned on Friday evening that Marx had failed to get the watch they decided to report the matter to the police. They accordingly reported the matter to the police, and then accompanied the police to the room in which the girls live. The watch was found in Gebuza's pocket and Gebuza was arrested.

Again there are strange features in the story. He is unable to give a satisfactory reason as to why he delayed telling the police about the watch for three days. His explanation as to how he knew the watch was in Gebuza's pocket is also highly suspect; he claims, as I have said, that

Gebuza ..... /15

Gebuza himself told him that the watch was in the jacket pocket.

But Marx tells a different story:

> "He told me that he had found the watch in the pocket of Ginger's (appellant's) jacket. I then asked him: 'How did you know it was there'? He then said he went stealthily to the rooms while the girls were in the kitchen and searched there."

Marx's evidence was criticised by counsel but it is difficult to reject this evidence, again it has the ring of truth. It would be only natural for Marx to ask the appellant how he knew that the watch was in the jacket pocket. If appellant told him that he knew because Gebuza had himself disclosed where the watch was hidden, Marx would certainly not have forgotten or sought to conceal this fact since they both intended to incriminate Gebuza and were on their way to the charge office to do so. Moreover, Marx denies that Gebuza ever tried to sell the watch to him, but he admits that he made a statement to this effect to the police. This statement he said he made at appellant's instigation.

Marx gives other evidence about the watch which reflects on the appellant's credibility:

"I ..... /16

"I asked accused No. 1. 'By what do you recognise this watch'? and he told me that the police had told him the number on this watch."

This was a glib answer and no doubt it satisfied Marx, but if the police evidence is to be believed it was another falsehood. Sergeant Kruger gave evidence to the following effect:

"Het u te enige tyd 'n nommer van die horlosie aan hom gemeld of aan enigiemand gemeld? --- Geen nommer was bekend gewees nie. Ons het net geweet dit was 'n 'Tegrove' of 'n 'Tegroove', wat ook nie heeltemal seker was nie.
Was dit wel op die 8ste wat julle eers die werklike naam gekry het? --- Dis korrek, ja.
Maar die nommer het julle nooit gekry vóór die horlosie gekry was nie? --- Die nommer was nooit gekry voordat ons die horlosie teruggekry het nie.
Dit is 'n serienommer wat op alle onbekende goedkoop horlosies verskyn.
Met ander woorde as beskuldigde No. 1. vir John Marx gesê het dat die polisie vir hom die nommer gegee het, is dit onwaar? --- Dit is onwaar, ja."

There are however, two other aspects of the evidence relating to the watch which counsel for the appellant relied on and to which I must make reference. In the first place there is the fact that when the watch was found in

the ..... /17

the jacket pocket Gebuza stated in answer to a question put to him by the police that the watch had been given to him by one Pellie to repair and that it belonged to a young man by the name of Bennie Goeiœman. This was untrue and much was made of the fact that Gebuza must have known that the statement was untrue. I am not satisfied that Gebuza wilfully told an untruth. It was pointed out in the judgment in the Court a quo that the room was dark save for the light of a home-made lamp and that Gebuza was given no opportunity to examine the watch. Sergeant Kruger said:

> "Dit was n dowwe soort paraffienliggie wat die Bantoes gebruik."

Once he was shown the watch under the electric light in the charge office he immediately said that he did not recognise it and that it did not belong to Bennie Goeiœman. There appears to have been little point in deliberately telling a lie if he was going to tell the truth a few minutes later. That he was genuinely confused is corroborated by the fact that further search established that he did have a ladies' wrist watch belonging to Bennie Goeiœman in his possession. Admittedly

this ..... /18

this watch was found in his own bedroom, but, as was stated by Lola, he also kept a box of watches for repair in the girls' bedroom. His arrangements appear to have been a little haphazard; He was questioned as to how the watch could have got into his pocket and said:

> "It is because I go round with my watches, I put them down sometimes and I take them out and leave them there and I thought perhaps I left the watch out and my girl friend took it and put it in the pocket."

In my view no significance can be attached to the fact that Gebuza failed to give the correct answer to the police when first questioned about the watch.

Counsel for the appellant also laid stress on the fact that the watch which was found in Gebuza's pocket had been repaired. Gebuza is a man who repairs watches and the suggestion is therefore that he must have worked on this watch. The evidence is very unsatisfactory on this issue. The owner of the watch, Kehle, said that the watch had been repaired since he had last seen it and that it was now possible to set the hands with the winder which he had been unable to

do ..... /19

do previously. Unfortunately, as counsel for the State pointed out, this question was not investigated. No evidence was called and we are left in the dark as to whether or not the repair operation was one which would have called for the attention of an expert Gebuza denied that he had repaired or even seen the watch. He was asked:

> "Can you tell me if someone else might have done it? --- and replied:
>
> 'I don't know because one sometimes does repair his own'."

Appellant admitted that he knew that the winder was broken but was not asked whether he had attempted to repair it or whether he had asked anybody else to do so.

The learned Judge in the Court a quo drew attention to these facts but did not draw any inference adverse to Gebuza. Regard being had to the inconclusive nature of the evidence I do not think his conclusion can be said to be wrong, although in his reasoning he erroneously relied very largely on the assumption that an alibi for Gebuza had been conclusively established by the medical evidence and the evidence of Lola.

I pause here to point out that Gebuza's evidence was criticised in another respect. The witness, Mabel Sekhobo, a sister of the deceased, testified that she went

to ..... /20

to a dance on Saturday night and returned from the dance on Sunday afternoon. She met Ginger (Gebuza) when she was crossing the bridge; he told her that her sister was dead. The evidence reads as follows:

> "Did you on that Sunday receive a report about your sister's death? --- No.
> When did you first hear that she was dead? --- I first heard on Sunday when I was going home.
> Who did you hear from? --- Ginger told me.
> Did you know Ginger? Is he here in Court? --- (Witness points out accused No. 2.)
> Where did you see Ginger? --- I met him when I was just crossing the bridge.
> What time was this when you met Ginger? --- It was in the afternoon. I can't tell the time.
> What did Ginger tell you? --- I did not ask him, but he just made a report that there was someone dead.
> Did he describe the person? --- He explained that it was a woman with brown slippers on and black and white chiffon.
> Did he tell you anything about this woman's death? How or where she had died? --- No.
> Did he tell you how he knew about this woman's death? --- No."

Gebuza denied that he had given Mabel a description of the clothing worn by the deceased:

> "I did not tell her because I did not see the deceased".

It ..... /21

It may be that Mabel's recollection is at fault, no doubt she was under stress at the time. In any event her evidence is not clear: having said that she first heard from "Ginger" that her sister was dead, she went on to say that he merely told her that a woman was dead. Even if she is correct and Gebuza mistaken I do not think any sinister inference can be drawn. They were testifying to a conversation which took place six months before; Gebuza may have got his information from a third party. In my view very little weight can be attached to this conversation.

Apart from the evidence relating to the belt, fortified as it is by the evidence relating to the watch, there is other evidence which points to appellant as the man who murdered Sekhobo. There is the fact that appellant attempted to establish a false alibi. He stated that he went to the girls' bedroom on Saturday evening and that he found both girls and Gebuza there. After a time Gebuza left but appellant remained and spent the night with Nomajapan. The evidence is

flatly ..... /22

flatly contradicted by Nomajapan; she saw her lover on the Sunday when he produced the watch but she did not see him on the Saturday. She is corroborated by Lola who said that she was quite sure that the appellant did not come to the room on the Saturday evening. After reviewing the evidence the Court a quo came to the following conclusion:

> "We are quite satisfied that we can accept Lola and Nomajapan and hold that accused No. 1. did not sleep in the room on the night of Saturday, the 2nd May."

There is one other unusual feature in the evidence to which I must direct attention: the attempt made by the appellant to fabricate evidence which would implicate Gebuza. The inference is clear: if he can cast suspicion on Gebuza he will go free himself. In order to achieve this result he deposes to the following facts:

1. Gebuza gave him money to buy dagga on Saturday afternoon.
2. Gebuza was wearing the belt with which the girl was later strangled.
3. When it got dark he saw Gebuza assaulting a woman; when a knife was drawn appellant intervened.
4. Later he heard further quarreling and heard Gebuza accuse the woman of going with other men after he had spent money on her. He again intervened.

5 ..... /23

5. On Sunday morning Gebuza showed him the watch which he claimed to have taken from this woman.
6. Gebuza subsequently told him that the watch was hidden in his jacket pocket and that he would sell it to nobody in Sterkspruit.
7. On Friday Marx told him that Gebuza had tried to sell the watch to him.
8. On Friday evening he and Marx informed the police that the missing wqtch was in Gebuza's pocket.

I have already dealt with some of these allegations and drawn attention to their falsity; the others, save for the last one, are uncorroborated. So far as the last allegation is concerned the circumstances are suspicious. The jacket in which the watch was found was hanging on a nail in the girls' bedroom. Appellant had access to it as he slept in that room throughout the week following the murder. This jacket was not longer in use and had been hanging there for some weeks under the clothes which Lola wore everyday. When the police searched the room the jacket had been moved and was now hanging on top of Lola's clothes. The jacket appears to have been moved shortly

before ..... /24

before the police arrived as Lola noticed that it was out of position when she arrived in her room on Friday evening. If Gebuza had been so foolish as to hide the watch in his jacket pocket it seems unlikely that he would invite discovery by putting the jacket in a conspicuous position. If, on the other hand, appellant had put the watch there in the hope that the police would find it he might well have moved its position.

Viewing this evidence, as a whole and having regard to the evidence given by Lola, Nomajapan, John Marx and the police, the pattern becomes clear: appellant fabricated evidence which would point to Gebuza as the guilty man. He failed because his attempts were too clumsy to carry conviction.

To sum up: The State proved that Sekhobo was strangled with a belt, that that belt belonged to

appellant .... /25

appellant and that Gebuza did not use the belt. It was also proved that the wrist watch which Sekhobo was wearing when she was last seen was in appellant's possession on the morning following the murder, that he gave a false explanation for his possession and asked his lover not to speak about the watch. It was further proved that appellant's alibi was false and that his whereabouts at the time when the crime was committed was unknown. And finally there is no reason to doubt that the appellant fabricated evidence against Gebuza.

Regard being had to these findings I come to the conclusion that the Court a quo rightly convicted the appellant of murder.

I think the appeal should be dismissed.

M.A. DIEMONT, A.J.A.

IN THE SUPREME COURT OF SOUTH AFRICA.

APPELLATE DIVISION.

In the matter between:

PETTY BEKEMBO ..... APPELLANT

AND

THE STATE ..... RESPONDENT

Coram : Jansen, J.A., Diemont et Miller, A.JJ.A.

Heard : 22 March 1971 Delivered: 5th April 1971

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J U D G M E N T .

Miller, A.J.A. :

The appellant and another, Gebuza, were charged in the Aliwal North Circuit Local Division (Kannemeyer, J., and an assessor) with the murder, on or about 3rd May, 1970, of a Bantu woman named Elizabeth Sekhobo. The appellant was No. 1 accused at the trial and Gebuza, No. 2 accused. (I shall refer to the latter as Gebuza.) They pleaded not guilty. Gebuza was acquitted, but the appellant was convicted and sentenced to death. He appeals with leave of the trial Judge.

The deceased's charred body was found

at .... /2

at approximately 10 o'clock on Sunday morning, 3rd May, 1970, by a boy who had been sent by his father to look for turkeys in a poplar plantation on the outskirts of the village of Sterkspruit. The body lay near a small tree, to the stem of which the deceased's neck was tied by a belt. The ground around the tree was covered by fallen leaves but near the body there was a patch of burnt leaves. It was evident that the leaves had caught alight, or been set alight, and that the resulting flames had charred the deceased's clothing and body and scorched the belt, which was only partially intact. The district surgeon, who examined the body on 4th May at about 4.30 p.m., was of the opinion that death resulted not from burning but from strangulation and that the belt was probably the instrument by which the deceased was strangled. Because of the charred state of the body, she found it very difficult to determine how long before her examination death had occurred, but made an estimate that it had occurred "more or less 40 hours" before. She later added that forty hours would be the maximum. It is apparent from the evidence, however, that this

was ..... /3

was no more than ~~an estimate~~ a guess and that she could not be certain. The Court a quo found, on the strength of the district surgeon's estimate, that death had occurred "somewhere about midnight or just after midnight on the night of Saturday the 2nd or the early morning of Sunday, the 3rd."

It appears from evidence which may safely be accepted that the deceased and a man named Tsele were at that time lovers. Tsele said that he visited the deceased at her home on the Saturday afternoon and towards dusk she set out to accompany him for part of the distance to his home. They walked together through the village to a point beyond a cafe, where they parted company, Tsele to continue on his way home and the deceased apparently to return to her home. Before parting, however, Tsele lent his wristlet watch to her. It was a ladies "Tegrove" watch which he had purchased some months previously. The deceased put it on her wrist and was to return it to him on the following day. Although the watch was then in good working order in the sense that it kept time, it was, according to Tsele, defective to the extent that the winder

could ..... /4

could not be operated to move the hands of the time-piece. If it were found necessary to move the hands, the watch-case would have to be opened to enable them to be moved. It is implied in Tsele's evidence that that defect had existed for some time before he lent the watch to the deceased, for he explained that "I used to open it at the back and then I moved the winder ... to move the hands". He made it clear that without opening the case and "working the mechanism", the hands could not be moved simply by means of the winder which "was stiff and it did not move". I emphasize this seemingly unimportant detail because of the significance which it assumed in the investigation of the case and still assumes. It is necessary to add that the distance from the place where Tsele and the deceased parted company at about 6.15 p.m. on Saturday, to the place where the deceased's body was found on Sunday morning, is about sixty yards. The deceased's sister, Mabel, who was herself away from home on Saturday night, returning only on the following day, first heard of the death of her sister on Sunday afternoon. She had become anxious when she

found ..... /5

found that the deceased had not returned home and had gone out to look for her. On her way back, having made fruitless inquiries concerning the reason for the deceased's absence, she met Gebuza. He informed her that a woman had died. He also volunteered the information that the dead woman wore brown slippers and a "black and white chiffon". He did not say who the woman was, nor where her body had been found. Mabel then went to the police and in due course discovered that the dead woman was her sister. She was shown the charred clothing which had been found on or near the body, including a pair of brown slippers and a headcloth (apparently called a "chiffon") and identified them as the deceased's clothing. The belt which was found round deceased's neck was not the deceased's property. The appellant admitted that it was his belt. Gebuza, when he gave evidence at the trial, denied that he had told Mabel what the dead woman wore, although he admitted telling her that a woman had died.

The appellant was at that time unemployed, but he had previously acted as a police informer. He claimed

that .... /6

that he had never met the deceased during her life time and would not have known who she was if he had seen her. Gebuza was employed at the local power station but he had other interests too, which yielded him additional income. He was an amateur photographer and a repairer of watches. He appears to have had some reputation for skill in mending watches. He acknowledged that he had known the deceased for some years before her death but said that they had never been intimately associated with one another. He and the appellant knew one another well; they had a common meeting place, for their respective lovers shared a room in a house in the village and the two men often spent the night in that room. The appellant's lover is Nomajapan and Gebuza's is Lola. Both girls gave evidence. Another witness who needs to be introduced is John Mark. He, too, lived in the location and was a police informer.

It appears that shortly after the police commenced their investigations, they discovered that Tsele had on the eve of the murder given the deceased his watch and they knew that no watch had been found on or near the body. It

was ..... /7

was therefore obvious that their immediate objective must be to trace the missing watch. Sgt. Kruger, in charge of the investigation, testified that on or about Wednesday, 6th May, he informed the appellant that the police were looking for a watch which the dead woman had had in her possession. No doubt it was because the appellant had on occasions acted as an informer that Sgt. Kruger gave him this information. Sgt. Kruger could not recall having passed the information on to John Marx also, but he thought that he probably did so, for he told many people that the police would like to find the missing watch. John Marx himself said that he was not told of the missing watch by the police, but by the appellant who told him about it on Friday, 8th May. On that day the appellant approached him and, according to Marx, told him that he had found the watch belonging to the deceased in the pocket of Gebuza's jacket. In answer to Marx's question, the appellant explained that he had stealthily searched the room occupied by Lola and Nomajapan and thus found the watch in the jacket which Gebuza apparently kept in that room. According to Marx, the appellant suggested that they

should .... /8

should go to the police to inform them of the discovery and that he, Marx, should falsely tell the police that Gebuza had offered to sell the watch to Marx. The appellant was also said by Marx to have added that he intended telling the police that Gebuza had also offered to sell the watch to him (the appellant) ~~but~~ and that he had declined the offer. The reason which the appellant is said to have advanced for wishing to visit trouble upon Gebuza, was that Gebuza "was silly" and had once spoken rudely to him. The appellant admitted having told Marx that Gebuza had in his possession a watch which might be the one taken from the deceased, but denied the rest of the conversation testified to by Marx. I shall return later to this conflict. It is clear, however, that on Friday, the appellant and Marx went to the police and informed Sgt. Kruger that the missing watch was to be found in the pocket of Gebuza's jacket. According to Sgt. Kruger, Marx told him ~~the~~ that Gebuza had tried to sell the watch to him. Sgt. Kruger was emphatic that Marx did not tell him that appellant had told him to tell the police that; Marx's evidence was to the effect that he in fact told Sgt. Kruger that appellant had told him to say that Gebuza had offered the watch for sale.

As a result of the information imparted to him, Sgt. Kruger went to the girls' room where Gebuza's jacket was said to be. He was accompanied by Marx, the appellant and a Bantu constable. They found Gebuza there. Sgt. Kruger asked Gebuza if he might search the room. Gebuza gave his consent. Sgt. Kruger went directly to the jacket which appellant had described and found the watch, which, it is common cause, was the Tegrove watch given to the deceased by Tsele, in the inside pocket thereof. He asked Gebuza where he had obtained the watch to ~~what~~ which Gebuza replied that a man named Pellie had given him the watch for repair. Sgt. Kruger took possession of the watch and asked Gebuza to accompany him to the charge office. After their arrival there, he again questioned Gebuza about the watch. Gebuza examined the watch closely (~~what~~ which he had not previously done in the girls' room) and then explained that he had been mistaken in saying that this was the watch given him by Pellie. He claimed never to have seen this watch before. He also said that he would show Sgt. Kruger where the watch was which he had obtained from Pellie and in due course he did

so ..... /10

so. In a room near the police station, about half - a - mile distant from the room where the Tegrove watch was found, Gebuza produced a cardboard box which contained a few watches. He identified one of these (Exh. 4) as the one which Pellie had given him for repair. That watch was not intact; some of the parts were loose and it was evident that the watch had been partially dismantled for purposes of repair. Exh. 4, too, was a ladies watch. All the other watches in the box were men's watches. Gebuza was questioned as to how he could possibly have mistaken the Tegrove watch found in his jacket pocket for the partially dismantled watch lying in a box in another, distant room. His only explanation was that when confronted with the Tegrove watch he could only think of the watch he had received from Pellie and that he had then forgotten that Exh. 4 was in a box in another place. This explanation was accepted by the Court a quo. I shall return to this aspect of the matter at a later stage. The evidence of Sgt. Kruger is to the effect that the Tegrove watch was kept in the custody of the police from the time that he took possession of it until it was

produced .... /11

produced at the trial. When it was thus produced, it was found that the defect which Tsele so fully described no longer existed. The winder worked perfectly and it was an easy matter to move the hands of the watch merely by operating the winder. Tsele observed this at the trial and commented thereon. He said that he did not know who could have repaired the watch for it was not in the condition in which it was at the time when he handed it to the deceased on 2nd May. It was suggested to Gebuza that he, a watch repairer of some repute in the locality, had repaired the watch. He denied this, saying that he had never set eyes on the Tegrove watch until it was suddenly produced by Sgt. Kruger from the pocket of his jacket.

I turn now to the evidence given by Nomajapan and Lola, more particularly in the respects in which their evidence bears upon the evidence of the appellant and Gebuza.

Nomajapan said that the appellant did not sleep in their room on the Saturday night but that he came there on Sunday afternoon, when he offered to make her a present

of a watch he said he had bought for her from a girl who was going to Bloemfontein. He asked her, however, not to show the watch to other people. Because of this strange request, she refused to accept the gift. She was actually shown the watch and wore it for a moment or two before handing it back to the appellant. When shown the Tegrove watch at the trial, she said that it appeared to be similar in appearance to the watch which the appellant wished to give her. The appellant admitted in evidence that he had offered the watch to Nomajapan but denied that he added that she was not to show it to anybody. He also maintained that he had in fact slept in the girls' room on Saturday night. It is, I think, advisable ~~admirable~~ to reproduce the evidence of Nomajapan relating to the question whether appellant slept in her room on Saturday night. In chief:

> 'Did accused No. 1 sleep in your room the Saturday night? - He was not there.
>
> Did you see accused No. 1 at all on that Saturday? - He was present.

What ..... /13

What time did you see him on the Saturday? - He slept there.

You just told us a few minutes ago he did not sleep there on the Saturday night? - No, I never saw him on Saturday.

In the course of cross-examination by the appellant's counsel:

"Some nights accused No. 1 slept in this room and other nights he slept somewhere else? - He slept in the location.

Was there any regularity in his sleeping pattern at this room? Did he sleep there at specific nights of the week, or not? - He had specific days of sleeping there.

Which nights did he sleep there? - No, he just came whenever he felt like coming.

So he did not have specific nights on which he slept in your room? - No, he had no specific days. He just came.

Can you tell me whether he slept there on the Friday

night ..... /14

night before the Sunday the deceased was found? - He was not there.

Are you sure of that? - I am sure of that.

Did he sleep there on the Thursday? - Yes, on Thursday he slept there.

How do you remember that? - (No reply.)

Since you have no reply to that question, can you tell me why you remember that he did not sleep there on the Saturday night? - I have no reason."

Lola, her room-mate, was as firm in her evidence that appellant slept in their room on Friday night as Nomajapan was firm that he did not. As far as Saturday night is concerned, Lola said that she only arrived at their room shortly after 9 p.m. and that she left, with Gebuza, probably shortly before midnight, not returning until the following day. She said that during the time that she was in the room she did not see the appellant there. To that extent only, she corroborated Nomajapan but she certainly contradicted the appellant who said that he was in the room while Lola was there. The two girls also gave evidence

concerning .... /15

concerning the important issue involving the appellants belt, which appears to have been the instrument of murder. As I have already mentioned, the appellant admitted that the belt was his property but denied that he had worn or had it in his possession on the Saturday night. He maintained that Gebuza sometimes borrowed his belt, which he frequently left in the girls' room, and that he (Gebuza) wore it on the Saturday. On Sunday morning he looked for his belt but could not find it. He asked Nomajapan where it was but she did not know. He borrowed Nomajapan's belt because, so he said, he was wearing new trousers which needed to be supported by a belt. The old trousers which he had worn the previous day could be and often were worn by him without a belt. His evidence in this regard was disputed by Nomajapan who, while admitting that she lent him her belt on Sunday because he did not have his own, said that he told her, in answer to her inquiry about his own belt, that he was going to have his belt repaired. She could not deny that appellant wore a new pair of trousers on the Sunday nor could she admit or deny that appellant had worn his old trousers

without .... /16

without a belt. Gebuza denied that he wore the appellant's belt on the Saturday, or ever; he said he had three of his own.

Lola's evidence was mainly directed to the activities of Gebuza on the Saturday night. She was in domestic employment at that time and appears sometimes to have worked long hours. On the Saturday, she commenced work at 7 a.m. and returned to her room at approximately 9 p.m. On the way to her room, she passed the power station, saw Gebuza sitting there and waved to him. He arrived at her room very shortly after she did - that is, shortly after 9 p.m. They were together in her room (Nomajapan was also present) until it was time for him to return to the power station, where he was to be on duty from midnight to morning. He asked her to accompany him which she agreed to do and they went together to the power station at what must, according to her evidence, have been shortly before midnight. She says she spent the night there and returned to her room the following morning at about 7 a.m. Thereafter she went to work. Her account of their movements from approximately 9 p.m. until her return to her room the following morning,

co-incided .... /17

co-incided with Gebuza's own account. It is to be noted, however, that Lola did not say, nor was she asked, what she did at the power station from midnight until her return home. Certainly she did not say that throughout that time she remained awake and kept Gebuza constantly under observation. Nor did Gebuza give any evidence as to their activities during the time they spent together at the power station. Concerning the appellant's belt, Lola said that she had often seen him wearing it but that she had last seen the appellant wear the belt a few days before "this thing happened". She claimed to remember that on the Saturday night she saw that Gebuza was wearing his own black belt. Questioned about her certainty in that regard, she gave the following evidence:

> "Where did you see that? - I saw that belt at the power station, when he took off the belt.
>
> Why did he take the belt off? - He was taking off the jacket when we arrived at the power station.
>
> But why did he take his belt off? - No, I said when he took off his jacket."

The ..... /18

The general trend of the evidence given by the appellant and Gebuza has already emerged, in rough outline, from what I have summarized of the evidence of other witnesses. It is necessary to emphasize certain aspects of their evidence, however, and particularly of the appellant's evidence. He said that on Saturday afternoon, at approximately 6 p.m. he was at Tienbank location drinking beer. He met Gebuza there. They went together to the appellant's room in the location. Gebuza was wearing his (the appellant's) belt. Gebuza told him that he had taken it from behind the door in the girls' room. It appears that appellant was not much concerned about it because, according to him, he had not worn the belt for some time. ~~Some time~~ After he and Gebuza had parted company, and at about 7 to 8 p.m. that evening, after leaving Pretorius' cafe where he had stopped to buy tobacco, he again saw Gebuza who was involved in an argument or fight with a woman. He said that he saw Gebuza strike the woman with his flat hand and that when he, appellant, went to intervene, Gebuza took out a knife. The young woman then ran away, with Gebuza in pursuit of ~~him~~ her.

Appellant .... /19

Appellant followed on his bicycle and later heard a girl screaming. On approaching closer he again saw Gebuza and the same young woman. They were quarrelling. Gebuza taxed her with spending his money but nevertheless "standing with other men". Appellant again intervened but was told by Gebuza to mind his own business. Appellant then left, as did Gebuza and the young woman. According to the appellant they appeared to walk away together quite peacefully. He said that he did not know the young woman. Later, after stopping at the hotel, he went to the girls' room where he found both girls and Gebuza. As I have already said, appellant claimed to have slept in the girls' room that night. Early the following morning, Sunday, Gebuza told him that he had taken a watch from the young woman which he was prepared to sell for R12.00. Appellant was willing to buy it but did not then have the money to pay for it. Gebuza nevertheless handed him the watch, (which appellant identified as being the Tegrove watch) the understanding being that appellant was to borrow money from another man in order to pay for it. It was thereafter, he said, that he offered the

watch ..... /20

watch to Nomajapan. He attempted to raise money during Sunday but was unsuccessful and he duly returned the watch to Gebuza on Sunday afternoon. He admitted that he thereafter, on Friday, told John Marx about the watch in Gebuza's possession. I have already referred to the conflict between his evidence and that of Marx in that connection. Appellant also explained that he knew that the watch was in Gebuza's jacket because Gebuza had told him so. Gebuza denied appellant's evidence in almost every material respect. He claimed that the Tegrove watch had never been seen or handled by him before it was produced by Sgt. Kruger out of the pocket of the jacket hanging in the girls' room. He denied that he had ever worn appellant's belt and he said that the appellant's account of the argument or fight which he, Gebuza, was said to have had with a young woman on Saturday evening was fabrication from beginning to end. He maintained that the appellant "planted" the watch in his jacket pocket in order to implicate him in a crime which he had never committed. Both the appellant and Gebuza made statements

to .... /21

to the police. The appellant's was made on 10th May, 1970 and Gebuza's on 11th May. In substance, if not in every detail, Gebuza's statement co-incided with the evidence he gave in Court; there are inconsistencies between the statement made by appellant and the evidence he gave at the trial, but in the main they co-incide.

The learned trial Judge made no findings of credibility based upon the demeanour of the appellant, or Gebuza, or indeed, of any of the witnesses, save that he said that Lola made a good impression on him and that Nomajapan, although she appeared sometimes to be hesitant and "reluctant to be forth-right", gave evidence which could be "accepted without any fear". After reviewing the evidence, he concluded for reasons which, as I shall later show, were largely founded upon a misconception, that it was safe to accept that appellant did not receive the watch from Gebuza, that the belt found around the deceased's neck was not worn by Gebuza at the relevant time and that appellant did in fact tell Nomajapan not to

mention .... /22

mention the watch to anybody. Because the only evidence against Gebuza was that of appellant himself who had "a clear motive to implicate accused No. 2", the learned Judge held that "it would be dangerous to attach any weight" to appellant's evidence. He therefore discharged Gebuza because "the State has not proved beyond reasonable doubt that he is guilty of the crime charged or of any crime associated therewith." Turning to "the position of the appellant" the learned Judge said that the evidence against him was "entirely circumstantial" and that the test laid down in R. v. Blom, 1939 A.D. 188 at pp 202-3, had to be applied. Having regard to the "proved facts", the trial Court concluded that they were consistent with appellant's guilt and that they excluded any reasonable inference other than that he murdered the deceased.

The case is by no means easy of decision. Questions of some difficulty arise in regard to the proper findings on the essential issues of fact and it is necessary to define what such truly essential issues are, bearing in mind that in the ultimate result a finding that the appellant is

guilty ..... /23

guilty could only be the result of inferential reasoning from the "proved facts". There are two factors only which tend to link the appellant with the commission of the crime; they are

(i) that he was shown to have been (and, indeed, he admitted that he was) in possession of the Tegrove watch on Sunday morning, and

(ii) that the belt which was found at the scene of the murder was his property.

Without those factors, there is no ground whatever for linking the appellant with the crime, for there is nothing to suggest, even remotely, that he ever knew the deceased, or that he had any motive for killing her (there is no evidence that she was sexually interfered with); nor, apart from the two factors, is there any evidence whatever placing him at or near the scene of the crime at any relevant time. Whatever the inference the Court might have drawn from those two factors in the event that they remained unexplained by the appellant or by any other evidence or circumstances, the fact is that in this case the appellant tendered an explanation in respect of each of them; explanations

which ..... /24

which tended to show that not he but Gebuza was involved in the commission of the crime. It is therefore not a case in which the appellant demands that the State be required to negative all other notionally possible inferences which might be drawn, even though there is no evidence to support them; what the appellant is entitled to require of the State is that it negative the concrete alternative inference presented as a possibility by his evidence and all the circumstances of the case. The State is not required to prove beyond reasonable doubt each piece of evidence , considered in isolation, upon which it relies, nor is it required "to negative beyond reasonable doubt all pieces of evidence favourable to the appellant". But if the guilt of the appellant depends essentially upon the acceptance or rejection of certain evidence, "then a verdict of guilty means that such evidence must have been accepted or rejected as the case may be, beyond reasonable doubt". (per Schreiner, J.A., in R. v. Mtembu, 1950(1) S.A. 670 at p. 679.) And this applies no less to cases in which the evidence is circumstantial and the guilt of the accused is to be determined by a process of

inferential ... /25

inferential reasoning. That reasoning must stem from "proved facts"; that is, facts established beyond reasonable doubt. If I understood him correctly, Counsel for the State contended that on an overall view, the evidence and circumstances point so strongly to the appellant's guilt that it should be inferred, even if it has not been shown conclusively that his explanations concerning the watch and the belt are false. I cannot accept that contention. Because the guilt of the appellant depends entirely upon those two factors, which alone link him with the crime, it is for the State to show beyond reasonable doubt that his explanation of them is false and cannot reasonably possibly be true. In the context of this case, another way of expressing what I have just said, is that the onus is on the State to negative beyond reasonable doubt the possibility that Gebuza murdered the deceased. Until that possibility is eliminated, the inference that the appellant murdered her cannot be drawn.

The conclusion of the Court a quo that the appellant's guilt was established beyond reasonable doubt appears to have been founded very largely upon its acceptance that

Gebuza .... /26

Gebuza established an effective alibi. After accepting the evidence of Gebuza and Lola that they had been together during Saturday night, first at Lola's room and thereafter at the power station until Sunday morning, the learned Judge said:

> "This finding is of importance because it is based on the State evidence itself, apart from that of accused No. 2, and it shows that Acc No. 2, when the medical evidence is taken into account, could not have committed this murder."

The conclusion that Gebuza "could not have committed the murder" is untenable. It was apparently founded upon an assumption that the murder was committed at about 12.30 a.m. on Sunday. I have already pointed out that the medical evidence was to the effect that because of the charring of the body and the resultant absence of rigor mortis, it was impossible to make an accurate or reasonably accurate estimate of the time of death. Indeed, the district surgeon, when making the estimate of 40 hours, took care to say "that is a guess". Moreover, it is very clear from her evidence that in estimating the period she made an unwarranted assumption; she said:

"The ..... /27

"The body was found the Sunday before and say the body might have been dead for say five hours. That is then more or less 40 hours."

This evidence does not by any means warrant a firm finding that the deceased was murdered at about midnight. When it is borne in mind that the deceased's body was found only about sixty yards away from where she parted from Tsele at about 6.15 p.m. on Saturday evening, the very real possibility cannot be excluded that she was killed not long after that time, while she was on her way home. The possibilities are legion. She may, after leaving Tsele, have entered the nearby plantation and met up with her assailant. There is nothing to suggest that after leaving Tsele she first went home (a distance of some miles) and then later returned to the place where she had left Tsele at about 6.15p.m. If the deceased was murdered shortly after leaving Tsele, the so-called "alibi evidence" of Gebuza and Lola is completely irrelevant. Gebuza only arrived at Lola's room at about 9.10 p.m. We do not know where he was between 6.15p.m. and 9.10p.m., or what he was doing. Nor did Lola claim to know.

But ..... /28

But even if the deceased was murdered at about 12.30 a.m. as the Court a quo appears to have found, there is no justification for the finding that Gebuza "could not" have murdered her. Lola's evidence, upon which the Court a quo strongly relied, does not reveal what she did at the power station from before midnight until about 7 a.m. Acceptance of her evidence that she spent that time at the power station does not warrant an assumption that she was awake and alert throughout the night and never lost sight of Gebuza. Having regard to her hours of work, to which I have referred earlier herein, the ~~possibilities~~ probabilities are overwhelming that if she spent the night at the power station, she slept there. It appears from the evidence of Sgt. Kruger and the sketched plan of the village, that the power station is behind the Hilltop Hotel which is virtually on the border of the poplar plantation. Clearly, the place of the murder was within easy reach of the power station. We do not know the ~~extent~~ exact distance but to judge from the evidence, it would appear that to walk from the power station to the place

where .... /29

where the body was found would take very little time indeed.

It is clear, therefore, not only that it cannot be found that Gebuza could not have committed the murder, but that in truth he could have committed it at any time between 6.15 p.m. and 9 p.m. on the Saturday evening or at any time between midnight and dawn. On Lola's evidence, the alibi is effective only for the period extending from 9 p.m. to about midnight. It is a matter for speculation what the verdict of the Court a quo would have been had it not erroneously concluded that the evidence showed that Gebuza "could not have committed this murder".

I turn now to consider whether the State discharged the onus, the nature of which, in the circumstances of this case, I have already described. On the issues which are fundamental to the ultimate decision, the State is undoubtedly assisted, to an extent, by the shortcomings of the appellant as a witness. It will be useful to compile a list of the main considerations which weigh against him. (a) His evidence, in general, does not engender confidence in his veracity. The

accused .... /30

account he gave of the alleged assault by Gebuza upon an unknown woman on Saturday evening, which he had also referred to in the statement he made to the police on 10th May, gives indication of animosity towards Gebuza. There is nothing inherently improbable in his account as such, yet it lacks the signs of authenticity and one is suspicious of the appellant's veracity and motives. It is also of a pattern with his behaviour during the latter part of the week, when he appears to have been concerned to incriminate Gebuza. It may be observed, however, that if he had reason to suspect Gebuza, no sinister inference may be drawn from his desire to inform against him. (b) His evidence conflicts sharply with that of Nomajapan concerning the offer of the watch to her on Sunday, more particularly in the respect that she said that he asked her not to show the watch to anybody. His explanation for telling her that he had obtained the watch from a girl who was going to Bloemfontein was undoubtedly untrue, but it should be observed that if he in fact obtained it from Gebuza, there is a measure of reason and probability in his explanation that Gebuza was not keen to have others know that he, Gebuza, had the watch. (c) His evidence that he slept in the girls' room is disputed not only by Gebuza, but also by Nomajapan and Lola.

On ... /31

On the face of it, the odds appear to be strongly against the appellant on that score. But it must be borne in mind that, as appears from the extracts from the evidence reproduced earlier herein, Nomajapan and Lola were not at one in their recollection of where the appellant slept on Friday night, and Nomajapan gave evidence of dubious quality on the question whether appellant was there on Saturday or not, saying first that he slept there and retracting soon afterwards. The evidence of Gebuza and Lola in any event extends only up to midnight. Neither of them could independently say whether or not the appellant slept in that room after midnight. (d) The appellant's explanations to Nomajapan as to why he did not have his own belt are inconsistent with his evidence that he saw Gebuza wearing it on Saturday morning. There is much force in the contention that appellant was untruthful in regard to some of the explanations he gave concerning the reason why he did not have his belt available. This is perhaps the strongest factor of all against him, particularly as it relates ~~direct~~ directly to one of the crucial issues of the case.

These.... /32

There are other criticisms which may be made of appellant's evidence but they are comparatively trivial and do not require to be specifically dealt with. I am not disposed to regard the evidence of John Marx as reflecting adversely upon the credibility of the appellant. John Marx was himself a wholly unconvincing witness, to judge by the quality of his evidence. I have previously referred to the fact that he was flatly contradicted by Sgt. Kruger on an important issue and that the probabilities also point strongly to his having been deliberately untruthful in saying that he discovered for the first time on Friday, when he spoke to the appellant, that the police were looking for the missing watch. It cannot be readily accepted that, in the circumstances deposed to by Sgt. Kruger, John Marx remained ignorant of what the other police informers and many people besides them, already knew.

The defects and weaknesses of the appellant's evidence might, in the face of convincing testimony from Gebuza on the essential issues, have been sufficient to tilt the

balance .... /33

balance so strongly in favour of the State as to justify the inference of the appellant's guilt. But in my judgment, Gebuza's evidence is far from convincing or satisfactory. It must be remembered that his evidence consisted in the main of a simple denial of what was alleged against him by the appellant. Except in so far as discovery of the watch in his jacket was concerned, his evidence was essentially of a negative character and therefore difficult to test. It is significant that in the one major respect in which he was required to explain what on the face of it appeared to be incriminating evidence, he fared not only unconvincingly but poorly, so as to warrant at least grave doubt concerning his credibility. His evidence on that point has previously been summarized herein. I do not share the view of the trial Court that the explanation given by Gebuza for saying that the Tegrove watch was a watch given to him by Pellie for repair, was reasonable and acceptable. It appears to me to be extremely unlikely that Gebuza, who had for some time had Pellie's watch and was still engaged in

repairing .... /34

repairing it, could honestly have thought that the watch produced from his jacket pocket in Lola's room was the watch which was in truth lying, partially dismantled, in a cardboard box in his own room. Making due allowance for the fact that he did not actually handle the Tegrove watch when it was shown to him by Sgt. Kruger and for the alleged inadequate lighting in the room at that time, there is no escape from the fact that he saw the watch, recognized it as a ladies watch and was able to see that it was intact. If he dishonestly asserted that the watch was one handed to him by Pellie for repair (and the probabilities point to that having been a dishonest assertion) the question arises why, if he had a clear conscience and nothing to hide, he should have been dishonest? On his showing, he was at that time blissfully unaware of the significance of the watch and knew nothing about its connection with the murder. It is reasonable to expect that if he were truthful and as innocent as he claimed to be, his immediate re-action would have been to say what he later said at the charge office, namely, that he knew nothing about this strange

watch ..... /35

watch and had never seen it before. The fact that he corrected himself at the charge office is not, as was suggested in argument, necessarily indicative of his having made a bona fide mistake; it is at least as consistent with his having realized, on reflection, that the truth of his assertion that it was Pellie's watch could be checked and that it would be better to say that he knew nothing about this watch.

Super-imposed on this unsatisfactory feature of his evidence is the probability, dictated by the circumstance that he alone in the circle in which he moved was a recognized watch-repairer, that it was he who remedied the defect to which the watch was subject when it was handed to the deceased. This is a real probability which must be faced and which, if unexplained, operates strongly against the contention that Gebuza was demonstrably innocent and not involved in the crime at all. The learned trial Judge recognized the difficulty, to which he expressly referred in his judgment, but did not resolve it; it was also this unresolved difficulty which influenced him to grant leave to appeal. When the matter in issue is the guilt

of .... /36

of the appellant, this difficulty in the way of negativing the possibility of Gebuza having been in possession of the watch cannot be resolved by the speculative and wholly unsubstantiated hypothesis that the defect might have been trivial and corrected itself, or that any layman might have been able to effect the repair. The onus which the State bears cannot be discharged by unsubstantiated theories. If, then, Gebuza repaired the watch, his denial of having possessed it prior to Friday, 8th May, was deliberately false; and even if it is no more than probable that he repaired the watch, that probability is sufficient to make it unsafe, if not impossible, to reject as false the appellant's evidence that he obtained the watch from Gebuza on Sunday morning, notwithstanding the several defects in appellant's own evidence. I might add that the evidence that Gebuza's jacket had been moved slightly from where it normally hung in the room does not, in my view, in any way answer the difficulties in the way of acceptance of his evidence relating to the watch or lend any real support to his complaint that the appellant "planted" the watch in his pocket.

The .... /37

The unsatisfactory and suspect evidence of Gebuza relating to the watch must needs affect the weight of his denials concerning the belt. I am far from suggesting that because his evidence cannot be believed on another issue, it must be disbelieved on this issue too. But his ~~general~~ claims to general credibility and reliability are necessarily affected thereby and his evidence on other issues must be considered against that background. This is particularly so when the issue on which he has been found wanting is directly related to the other issue which is to be investigated - where both issues are directly involved in one and the same question, which is, in this case, whether it is reasonably possible that Gebuza could have taken the watch and left the belt at the place where the deceased was murdered. The conflict of evidence in relation to the belt is essentially one between the appellant and Gebuza; it is the one's word against the other's. The only other witnesses who testify on that issue are Nomajapan and Lola and it is fair to say that neither of them was clear as to who wore the appellant's belt on the Saturday night. As I have pointed out, Nomajapan confessed ignorance or

uncertainty .... /38

uncertainty on that score and was unable to deny the appellant's evidence that his old trousers did not require to be worn with a belt and that that was why he had not worn his belt for some time. The extract from Lola's evidence, reproduced earlier herein, leaves me in no doubt that she did not really see what belt, if any, Gebuza was wearing that night. Her unsuccessful attempt to explain how she came to observe and remember precisely what belt Gebuza was wearing, manifestly reveals that what she said in that regard was said, without independant knowledge of the truth, only with the object of protecting her lover. If a choice has to be made between the two protagonists on this point, it may well be that because of the unsatisfactory nature of the explanation which appellant gave to Nomajapan when he borrowed her belt, namely, that he had to have his own repaired, the probabilities are against the appellant. But that is a far cry from saying that appellant's evidence that he did not wear the belt on Saturday night is necessarily false, just as, in the light of the fallibility of Gebuza on the issues I have mentioned earlier, it is not

safe .... /39

safe to say that Gebuza's denial that he wore the belt or possessed the watch is clearly true. It must be borne in mind that Gebuza was not a stranger to whom the appellant's belt would not ordinarily be accessible. To some extent the two men shared occupancy of Lola's room and it is clear that articles of clothing of each of them were kept, whether permanently or temporarily, in that room.

The conflict between the appellant and Gebuza was resolved by the Court a quo, not on their merits or demerits as witnesses, but substantially on the strength of its erroneous finding that Lola established an effective and conclusive alibi for Gebuza. In the same way as he had earlier said that Gebuza "could not have committed this murder" because of the evidence of Lola, the learned Judge, when dealing with the specific question whether Gebuza might reasonably possibly have taken the watch from the deceased said that he could not have done so

> "because he was not there- he could not have been there on the evidence which we accept."

The trial Court's findings of fact and its view of the possibilities arising therefrom are therefore clearly not entitled to the weight which the Court of appeal would otherwise assign to them.

Taking into account all the evidence and the reasonable possibilities which emerge therefrom when it is appreciated that

Gebuza ..... /39 a

Gebuza is not cleared of any possible complicity by an effective alibi, it appears to me to be decidedly unsafe to reach a firm and positive conclusion that he was not at all involved in the crime. If the appellant failed to account for his movements at all relevant times on that night, so did Gebuza, whose activities between 6.15 p.m. and 9 p.m. are unknown

and ... /40

and who, as we have seen, was from midnight onwards within very easy reach of the place of murder. It is not the appellant who had known the deceased for some time, but Gebuza. Also, it is Gebuza who told Mabel of the dead woman and of the brown slippers and chiffon found near her body and who later denied having told her so. There appears to be no reason whatever for doubting Mabel's evidence that that was what Gebuza told her, nor has any reason been suggested. It appears that she also gave that evidence at the preparatory examination.

It was also contended that even though Gebuza's evidence concerning the watch might be subject to serious criticism and might justify a conclusion adverse to him, the same could not be said regarding his evidence on the issue of possession of the belt, and that if the only inference to be drawn from the finding of appellant's belt at the scene of the crime was that appellant himself had left it there, that was sufficient to warrant an inference of his guilt, even if it could not be concluded that he took the watch; in other words, even if it were reasonably possible that Gebuza took the watch

from .... /41

from deceased's body. The fallacy in this argument is that it visualizes a situation in which it is reasonably possible that both the appellant and Gebuza were in some way concerned with the crime and present at the scene. In that situation, what inference is to be drawn as to the nature or degree of the participation, if any, of the appellant? There is no evidence of a common purpose to kill the deceased and it would be matter for speculation whether the one or the other or both of them killed her. Even if there were clear proof, therefore, that it was appellant who left his belt at the scene of the murder, (which I do not think there is) the Court would not be able to infer with safety that he murdered the deceased so long as there was a reasonable possibility that the watch was taken from the deceased woman by Gebuza, who might, therefore, reasonably possibly have killed the deceased.

In the final result, while there are clearly grounds for very grave suspicion that the appellant murdered the deceased, I am unable to conclude that that has been shown

beyond .... /42

beyond reasonable doubt. In the circumstances which I have described, evidence of the quality and decisiveness which induce what Wigmore has called an "intensity of human belief" in the guilt of the appellant (which is what proof beyond reasonable doubt implies) is lacking. The facts from which the inference is sought to be drawn are in themselves too insecure to make it safe to draw the final inference which the trial Court drew.

In my judgment the appeal succeeds and the conviction and sentence are set aside.

Miller, A.J.A.