REPUBLIC OF SOUTH AFRICA

THE SUPREME COURT OF APPEAL
OF SOUTH AFRICA

NOT REPORTABLE
Case number: 303/07

In the matter between:

OWEN FLOYD APPELS Appellant

and

THE STATE Respondent

CORAM: **NUGENT JA, HURT and KGOMO AJJA**

HEARD: **6 NOVEMBER 2007**

DELIVERED: **28 NOVEMBER 2007**

Summary: Appeal against conviction for murder dismissed. No reasonable possibility that accused's version may be true

Neutral citation: This judgment may be referred to as *Appels v The State* [2007] SCA 151 (RSA)

J U D G M E N T

HURT AJA

[1] The appellant was convicted of murder in the Regional Court, Kimberley. He appealed to the full bench of the High Court but the appeal was dismissed. He was however given leave to appeal to this court against the conviction only.

[2] At the commencement of the trial, the appellant pleaded not guilty to the charge of murder and reserved his defence. By the time the appellant's case was closed, though, the court was left with a narrow issue to resolve.

[3] It was common cause that there was a party at the appellant's house on the night in question. One of his guests was Mr Tyro Guys, who lived diagonally across the road. At about midnight Mr Guys' wife (to whom I will refer as 'the deceased') walked across the road to the appellant's house in order to call her husband away from the party. While she was in the course of doing this, an altercation developed between her and some of the guests at the party which led to the appellant's mother intervening. The deceased and the appellant's mother exchanged insults and the appellant, in turn, intervened and told the deceased to leave the premises. He escorted her, or followed her, into the street where the altercation continued. There the verbal dispute turned into physical aggression. It is at this point in the sequence of events that material conflicts between the version of the State and that of the accused emerged. But it is not in dispute that the appellant struck the deceased, while he was holding a glass in his hand. After she had been struck, the deceased was seen to be bleeding profusely from the area of her neck. She made her way back into her yard where she collapsed and died a matter of minutes later.

[4] The District Surgeon, Dr Olivier, who performed the post mortem examination, told the court that she had identified the cause of death as a gross loss of blood caused by a laceration of the subclavian artery which is located below the collarbone. She said that the deceased had sustained three injuries, a 1cm triangular-shaped laceration to the right of her right eye, an 11cm relatively superficial laceration extending from immediately below the triangular laceration downwards to the corner of the mandible and a 10cmx7cm incised wound in the neck, extending obliquely from below the right mandible to the vicinity of the notch in the centre of the collarbone. In response to questions by counsel and by the court, she had said that she considered that these injuries must have been caused by at least two blows. However, on more than one occasion, she made the concession that it was 'possible' that the injuries could have been sustained by a single blow. She expressed the firm view, though, that such a blow would have had to be directed in a downward direction.

[5] The divergence between the State and defence versions was simply this. According to the State witness, Emma Guys, the 16 year-old daughter of the deceased, the appellant struck the deceased twice. When the first blow was struck, against the side of the deceased's face, the glass broke and the appellant immediately stabbed the deceased on the neck with the broken remnant which was still in his hand. The appellant's version was that he had only struck one blow, not realizing that he was holding the glass in his hand. The significance of this divergence is that if the appellant stabbed the deceased with a broken glass in the vital area of the deceased's neck, then the only reasonable inference (and counsel were in agreement in this regard) must be that he foresaw death as a possible result and that he had criminal intent in the form of *dolus eventualis*. That being so, the conviction for murder was correct. Such an inference cannot properly be drawn, though, if the appellant struck only one blow. In that case, the offence would have been culpable homicide or assault with intent to do grievous bodily harm. To secure a conviction for murder, the State had to prove beyond reasonable doubt that the appellant had acted with *dolus eventualis*, and, in the light of the restricted issue referred to, this equated effectively to proof beyond reasonable doubt that two blows were struck. If, after a consideration of all the evidence, there

remained a reasonable possibility that the appellant had only struck the deceased once, he could not be convicted on the murder charge.

[6] In arguing the appeal before us, Mr Nel, who appeared for the appellant emphasized two aspects of the evidence adduced in the trial court. The first was that Emma had been a single witness to the attack on her mother, and her evidence was by no means free of blemish. The second was that Dr Olivier had conceded that the injuries she had observed at the post mortem could possibly have been caused by a single blow. These two features, counsel submitted, should have led the magistrate to conclude that there was a reasonable possibility that Emma might have been mistaken and that, in fact only one blow was struck.

[7] In *S v Van der Meyden* 1999 (2) 79 (W), Nugent J discussed the test for a 'reasonable possibility' in these terms (at p 82) :

'The proper test is that an accused is bound to be convicted if the evidence establishes his guilt beyond reasonable doubt, and the logical corollary is that he must be acquitted if it is reasonably possible that he might be innocent. The process of reasoning which is appropriate to the application of the test in any particular case will depend on the nature of the evidence which the court has before it. What must be borne in mind, however, is that the conclusion which is reached (whether it be to convict or to acquit) must account for all the evidence. Some of the evidence might be found to be false; some of it might be found to be unreliable; and some of it might be found to be only possibly false or unreliable; but none of it may simply be ignored.'

[8] In his judgment the magistrate acknowledged that Emma's evidence had to be approached with caution. She was only 16 years old at the time; she was a single witness; she was the deceased's daughter, which fact, alone, must have affected her ability to give an objective and dispassionate account of what she observed; there were conflicts between what had been recorded in her statement to the police on the day after her mother had died and the evidence which she gave in court; and she had contradicted herself on occasions while giving that evidence. But, having considered all of these aspects, he nevertheless concluded that Emma was a truthful witness. A court of appeal is, of course, obliged to attribute considerable weight to such a finding. Nor, in

my view, is there any basis to be found in the record for questioning the magistrate's conclusion as to Emma's credibility. The crucial part of her evidence concerned a brief and simple sequence of events. She observed the appellant's attack on her mother from a distance of one or two metres. She said she had covered her eyes when the first blow was struck but that she had been watching when the appellant administered the second and she had seen that the glass in his hand was already broken when he struck the deceased with it.

[9] The magistrate considered the appellant's version and rejected it. The appellant had demonstrated to the court the single blow which he said he had struck. It was described by the magistrate as a 'dwarsklap' ie a blow which travelled in a horizontal plane to the side of the deceased's face. In discounting such a blow as the possible cause of the deceased's injuries, the magistrate had relied upon Dr Olivier's evidence to the effect that if a single blow had caused all the injuries, it would have been administered in a downward trajectory to the side of the deceased's head.

[10] Despite the question of credibility, of course, the court had to be satisfied that there was no reasonable possibility that Emma had been mistaken when she said that there had been two blows. This was an aspect which the magistrate did not specifically mention in his ex tempore judgment. Mr Nel's submission was that the concessions by Dr Olivier to the effect that it was possible that the deceased could have sustained all the injuries as a result of a single blow, had been overlooked (or possibly erroneously discounted) by the magistrate.

[11] To deal with this submission, it is necessary to consider the 'concessions' in their context in the evidence. When asked by the prosecutor whether one blow could have caused the injuries, Dr Olivier's reply was ;

'Dit kon een handeling gewees het. As dit van bo af was is dit moontlik dat dit kon een handeling gewees het, maar nie met 'n soliede glas nie.'

She made similar comments at other stages during her examination-in-chief. Later, during cross-examination, she elaborated on her theory in the following terms :

'Wat ek sou net oor wil helderheid gee is dat, sou 'n person van bo af tipe van gesteek word met 'n stuk glas dan kan dit een handeling wees wat dan altwee laserasies veroorsaak het. Wanneer 'n glas net breek op die gesig kan die boonste een veroorsaak gewees het, die een op die wang, want dit was nie 'n baie diep laserasie nie, maar die een in die nek dan – sou dan 'n tweede handeling moes gewees het met 'n stuk glas.

(HOF) En dit bring ons by mnr Jameson se stelling wat hy nou net gemaak het. As die glas gebreek het met die kontak gemaak teen die wang, maar hy breek so dat daar 'n stuk in die hand oorbly en met die deurvoer van die klap kon dit die tweede wond . . .(tussenkoms)? - - - Dit is 'n moontlikheid ja, dit is.'

It is abundantly clear that Dr Olivier's evidence on this aspect amounted to no more than that a particular type of blow could possibly have caused all the injuries, and that was a blow with a downward trajectory. That qualification can obviously not be ignored in understanding what Dr Olivier considered to be possible. At the stage when she gave her evidence, the appellant had not testified and, significantly, his counsel did not put to Dr Olivier that the appellant would say that he struck only one blow in a more or less horizontal plane. There can be no doubt whatsoever that if it had been suggested to Dr Olivier that such a blow could possibly have caused all the injuries she would have replied firmly in the negative.

[12] The suggestion that there was a reasonable possibility that the appellant had struck only one blow can thus only be valid if the appellant's own evidence is ignored. That, as indicated in *S v Van der Meyden*, is not an acceptable approach. It follows that the magistrate was correct in concluding that the State had discharged the onus resting upon it.

[13] The appeal is dismissed.

N V HURT AJA

CONCUR:

NUGENT JA

KGOMO AJA