IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: A64/2019

In the matter between:

THATO KUTUMELA Appellant

(1) REPORTABLE: ~~YES~~ / NO

(2) OF INTEREST TO OTHER JUDGES: ~~YES~~ / NO

14/10/19
DATE

SIGNATURE

and

THE STATE Respondent

JUDGMENT

Tuchten J:

1 Zanele Khumalo (the deceased) was born in 1993. On 21 April 2011, she was 18 years old and about five months pregnant with the child of the appellant. On that day, she was killed in her parents' house in a residential complex (the complex) in a suburb of Pretoria. Her death was caused by pressure applied to the sides of her neck which resulted in her heart failing. The appellant visited the deceased and had sexual intercourse with the appellant on the day she died.

2 The deceased was found by her parents later that day. She was lying face down, naked on the lower of a pair of bunk beds in the bedroom she shared with her younger sister. She did not respond to her parents' urgings to wake up and was rushed to hospital where, after efforts to revive her, she was declared dead.

3 It was found that the deceased's shortie pyjamas, underwear and robe (the garments or the deceased's garments), which she had been wearing earlier that day, were missing. The garments were never found.

4 Arising from the death of the deceased, the appellant was charged in the Pretoria High Court before Kruger AJ with the crimes of murder, rape and robbery of the garments. He pleaded not guilty to all the charges but was convicted of murder, rape and the theft of the garments. The appellant was sentenced to imprisonment for 20 years for the murder, 10 years for the rape and 6 months for the theft. The latter two sentences were ordered to run concurrently with the first. So the effective sentence was 20 years.

5 The learned trial judge granted the appellant leave to appeal against the convictions. This is the judgment of the court in the appeal.

6 We have had the benefit of a lucid exposition of the facts by the learned trial judge, as well as full heads of argument from counsel. For present purposes, it is unnecessary to iterate the facts in the same detail as the learned trial judge. I shall therefore mention only those facts which are necessary to explain why I have come to my conclusions in the appeal.

7 I describe the evidence in question as facts because the trial court found them to be proved as such. Counsel in the appeal did not challenge any finding of fact made by the trial court. The argument for the appellant was that the proven facts did not sustain the inferences drawn by the trial court. The appellant himself did not give evidence and called no witnesses at the trial. This is an aspect to which I shall revert.

8 At the time of her death, the deceased was taking a gap year, which in the present context appears to have been a year off between her high school studies and her anticipated tertiary education. She was living with her parents and her younger sister in the unit in the complex.

9 The appellant had been in a relationship with the deceased since at least 2010. That was when the deceased's father learnt of the relationship. He was told by the deceased that the appellant was to be her partner at her matric dance that year. To enable the family to meet and get to know the deceased's new boyfriend, the appellant was invited to Sunday lunch at the unit with the deceased and her family.

10 In January 2011, the deceased told her father that she was pregnant with the appellant's child. In March the deceased told her father of what she described as her problems with the appellant. Shortly thereafter, in the same month, the deceased's father interviewed the appellant and confronted him with the allegations made by the deceased. The appellant denied the allegations and said that they had just had a quarrel. But the appellant admitted to having taken the deceased's cellphone away from her against her will. He gave the cellphone back to the deceased's father.

11 Because of what the deceased had told him and the cellphone incident, the deceased's father asked the appellant not to set foot in the unit again.

12 On the day of her death, the deceased appeared to be in good spirits and quite excited by the prospect of becoming a mother. She made plans to go window shopping with a female friend to decide on clothes for the new baby.

13 But beginning during the night before the deceased died and extending into following day at 02h12, the deceased had a telephone conversation with the appellant during a series of telephone calls. The deceased's part in these discussions was heard by her young sister, with whom the deceased shared a bedroom. The deceased's sister testified that she heard the deceased cursing during the conversation, after which the deceased terminated the call.. The learned trial judge made no finding in relation to the evidence of cursing but I see no reason not to accept it. So it was established that the deceased and the appellant had an argument over the telephone a few hours before the appellant visited the deceased on the day of her death.

14 The same female friend who had arranged to go window shopping with the deceased testified, and the trial court accepted, that following an incident at a swimming pool in the complex witnessed by the friend, the appellant had used force to drag the deceased away from the swimming pool. Later that day, the witness said, she observed what she called a scar on the back of the deceased's head. The

witness, who was a confidant of the deceased, described how the deceased was unhappy in her relationship with the appellant and that the appellant would not let her end the relationship.

15 The trial court characterised the relationship between the appellant and the deceased as turbulent. I would go further. On the evidence to which I have just referred, the appellant was abusive, both emotionally and physically, towards the deceased.

16 Access to the complex through its entrance gate can only be effected by a visitor who uses a device commonly called a remote or by making contact with a person inside an individual unit within the complex. Such contact can be made either by using the intercom system at the entrance gate to the complex or by telephoning a person inside a unit. If the person within the unit wishes to allow the visitor at the gate to enter the complex, the person within the unit pushes a button which electronically opens the entrance gate. The visitor is thereby enabled to enter the complex. That is called buzzing a visitor in.

17 The unit with which we are concerned had a front and a back gate. Both of these gates are secured by locks and latches which can be opened from the inside or, from the outside, by someone with a key.

18 At the time relevant to this case, the appellant worked for Woolworths as a shelf packer in its Lynwood Bridge branch. On the crucial date, the appellant came late for work. He tried to falsify the attendance register which as an employee he had to sign when he reported for work. He wrote in the register that he checked in at 09h02. But the person who signed in *before* the appellant did so at 09h50. So the appellant must have checked in after 09h50.

19 The reason the appellant came late to work on that day is that during the morning he went to the complex for the purpose of an interaction with the deceased. The appellant arrived at the complex, by this time on foot, at about 08h00. The appellant was dressed in a set of clothes akin to a uniform and referred to in the evidence as a work suit. It consisted of a separate top and trousers. The work suit was the colour blue, like the blue in the national flag. The work suit worn by the appellant was similar to that worn by the ground staff in the complex. The appellant carried with him a backpack which was empty or almost empty when he arrived. The backpack was also described as a school bag. This is because many, if not most, learners these days carry their possessions to and from school in such a bag. A schoolbag is considerably smaller than the backpack used, for example, by hikers.

20 The appellant stood at the entrance to the complex for about five minutes. During that time he operated the keypad on his cellphone. He did so in an attempt to make voice contact with the deceased. But the deceased did not take the call which registered as a missed call on the server through which the call went. The corresponding entry on the deceased's cellphone was however deleted around the time of her death.

21 A motor vehicle then arrived at the outer gate to the complex and its occupant used a remote to open the gate. The appellant took advantage of the open gate and entered the complex grounds. He went to the unit occupied by the deceased and her family.

22 The deceased opened the outer gate and door of the unit for the appellant and let him in. Their meeting within the unit was not harmonious. Mrs Matusowsky lived in a neighbouring unit with her young daughter, Sasha. Sasha was a friend of the deceased and used to visit the deceased regularly. On the day in question, Sasha visited the deceased between 09h30 and 10h00 but returned to her mother to tell her that the deceased was crying.

23 Mrs Matusowsky ran to the deceased's unit. She knocked on the outer door to the deceased's unit. The deceased came to the door, wearing a gown and slops, a type of sandal. Upon Mrs Matusowsky's enquiry, the deceased said that she was fine. But the deceased appeared to Mrs Matusowsky to be looking down rather than at Mrs Matusowsky when the deceased was talking to her.

24 While Mrs Matusowsky was talking to the deceased, she glimpsed a man moving from the kitchen yard to the kitchen of the unit. The man was wearing blue trousers and had a backpack on his back. He appeared to Mrs Matusowsky to be trying to avoid being seen by her.

25 At some time after the deceased was seen by Mrs Matusowsky at between 10h00 and 11h00 and her body was discovered by the deceased's parents at about 16h30, the deceased was killed. Her death was caused by pressure applied to the carotid bodies on both sides of her neck, which caused heart failure. The pressure could have been applied for as little as fifteen seconds to cause death. The deceased had also had sexual intercourse on the day of her death.

26 The body of the deceased was found naked and face down on the lower bunk bed, in which her younger sister usually slept. The deceased's garments were all missing.

27 The appellant was observed between 10h00 and 11h00 at the outer gate when he left the complex. At this stage, his backpack was full. A witness described the backpack as being at that stage bulging or bulky. At this stage the appellant was dressed in the blue trousers I described earlier. The appellant took off the blue trousers in the road behind what a witness called a "danger box", which I take to be an electrical substation.

28 The appellant made a statement in terms of s 115 of the Criminal Procedure Act. This statement was considered by the learned trial judge and rejected where it was contradicted by what the t rial court found to be credible evidence. As I have said, the appellant did not testify and called no evidence.

29 In the heads of argument submitted on behalf of the appellant, it was placed in issue whether the appellant was the person who killed the deceased. Counsel who appeared before us at the appeal conceded that the appellant was proved to have applied the pressure to the

deceased's neck which killed her. That concession was in my view well made.

30 Counsel who drew the heads of argument for the appellant pointed to the facts that the deceased was found in bed, in the position in which she usually slept; the gates to the unit were found locked from the inside and the unit was enclosed by a wall which may have been as high as two metres; nothing in the unit indicated an earlier physical altercation; and the deceased had no defensive injuries. Indeed the only external injuries to the deceased were bruises on either side of her neck.

31 None of this is to my mind of any moment. The deceased was killed by *somebody*. The person who killed the deceased obviously left the unit by climbing over the outer wall surrounding the unit. The question is whether the deceased was killed by the appellant or some other person who gained access to the unit and killed her.

32 The submission in the appellant's heads of argument would require us to accept that after the appellant, a 26 year old proven abuser of he deceased, had had a turbulent encounter with the deceased that morning, which included two acts of consensual sexual intercourse with the deceased, the appellant left the unit in which the deceased

was living and *another* man entered the unit without any damage to the doors or locks to the unit, had sexual intercourse with the deceased (after she had already had two acts of sexual intercourse with the appellant) and then killed her.

33 The submission in the heads of argument would have required us to find there was further sexual intercourse with the deceased by this unknown person because the deceased's body was found by her mother with "whitish stuff" between its thighs. As the deceased suffered no injuries except the bruises to the neck, that substance could only have been semen.

34 Quite aside from the inherent improbability of this suggested scenario, the submission must fail because the deceased was stripped naked of the clothes she was wearing when the appellant arrived. The deceased's garments were then stolen that same morning. The appellant arrived at the complex with a backpack which had space within it into which goods could be packed. The appellant left the complex with a backpack which was full.

35 The learned trial judge properly set out the law and cited the applicable authorities. I shall not repeat them in detail. The evidence must been seen as a whole. It would be wrong to focus too intently on

individual items of evidence. An accused person is not automatically to be convicted because no evidence was adduced to rebut the evidence for the prosecution. Silence does not supplement deficiencies in the state case. But there are consequences attached to a decision to remain silent during a trial. If there is evidence which calls for an answer and an accused person remains silent in the face of such evidence, a court may well be entitled to conclude that the evidence is sufficient in the absence of an explanation from the accused. Each case will turn on its own facts and the weight of the evidence produced. A *prima facie* case can become conclusive in the absence of a rebuttal where it lies exclusively within the power of the other party to show what the true facts were but fails to give an acceptable explanation.[1]

36 What did the appellant put in his backpack while he was inside the complex? The only reasonable inference is that the appellant stole the deceased's garments and put them in his backpack. Why did the appellant do this? The only reasonable inference is that the appellant stole the deceased's garments because they would provide evidence

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1 The learned trial judge referred to *S v Radebe* 1998 1 SA SACR 422 SCA 425g-h; *S v Van der Meyden* 1991 SACR 447 W; *S v Henna and Another* 2006 2 SACR 33 SE; *Sv Boesak* 2001 1 SACR 1 para 24; *Sv Boesak* 2000 1 SACR 633 SCA para 47

of what had happened to the deceased while the appellant was with her.

37 The trial court concluded that the deceased's garments were torn when the appellant forced himself upon her and killed her. I agree.

38 To stand back from the events I am discussing: we have a young woman, barely out of girlhood, in an abusive relationship with a young, but older, man. He is the father of her unborn child. She does not want to see him but cannot bring herself actively to sever the relationship. The appellant comes to the complex wearing clothing designed to enable him to pass himself off as one of the complex's ground staff and thereby gain entrance to the complex grounds. This shows that the appellant anticipates that the deceased might not buzz him in but intends to get in, and get to her, anyway.

39 When the appellant comes to see her that morning, the deceased tries passively to avoid the encounter by declining to buzz the appellant in. The appellant then enters the complex when a person with a remote opens the gate. When the appellant arrives at her unit, she cannot bring herself to refuse him entry and make a fuss. Even when Mrs Matusowsky arrives to find out if she is alright, she cannot

bring herself to precipitate the inevitable confrontation that would ensue.

40 Before the appellant leaves the unit, he deletes the evidence on the deceased's cellphone that he called her that morning when he arrived at the complex. Then, when the appellant leaves the unit, he steals the deceased's garments because they will provide evidence of the nature of his interaction with her. He leaves the unit in a hurry and jumps the wall surrounding the unit. He leaves the complex again by walking through the outer gate when a person with a remote opens it. As soon as he is outside the complex, he changes his clothing. At work, he falsifies records to create a partial time alibi for the period he was away from work.

41 In my view, the only reasonable inference is that the appellant, faced with the desire of the deceased to end the relationship, was unable to accept that he had been rejected by the deceased. He decided to demonstrate his greater power in the relationship by imposing himself on the appellant morally and physically, ie by forcing her to have sexual intercourse with him, and then by actually applying physical force to her neck. That physical force to the deceased's neck killed her.

42 That leaves one question to be determined: did the appellant intend to kill the deceased? The trial court, having regard to the mosaic of evidence, found that the appellant had "viciously throttled" the deceased and, in doing so had had the species of intent known as *dolus eventualis*. In context, the finding was that the appellant foresaw that his actions might bring about the death of the deceased, reconciled himself with that possibility and proceeded with his actions regardless.

43 Counsel for the appellant submitted, correctly, that the pressure which the appellant applied to the neck of the deceased was not of a long duration. From this foundation, counsel submitted that the trial court misdirected itself by finding *any* form of intent proved beyond a reasonable doubt.

44 I disagree. Every adult knows that there is a risk of death when violent pressure is applied to the neck of a weaker person. The appellant must have known, and therefore did know, that this was so.

45 The events of the day did not take the appellant unawares. He planned for them. He entered the complex by a subterfuge, knowing that he had been forbidden to do so by the father of the deceased. He did so to demonstrate his physical and moral power over the

deceased and not because he wished to visit and be intimate, in the true sense of the word, with the mother of his unborn child. He used violence towards this vulnerable woman, even though every decent instinct urges human beings to treat pregnant women with care and solicitude.

46 I have said that I agree with the learned trial judge that the appellant probably tore from the deceased the clothes she was wearing. When the appellant saw that the deceased had lost consciousness, he either left her on the bunk bed or put her body on the bunk bed on which it was later found by her parents. If the appellant had not foreseen that his actions might kill the deceased, or if he had not reconciled himself to possibility of her death at his hands, he would immediately have sought assistance to get her medical treatment. The appellant had a choice: he could leave the deceased possibly to die or he could try to make it look as if he had nothing to do with the situation he had caused. He chose the latter.

47 The appellant did not seek any assistance for the deceased. Counsel submitted that the appellant might have simply elected to leave the scene rather than accept responsibility for his actions. But there is no evidence of panic or confusion on the part of the appellant or a rush to leave the scene. Instead, he took substantial steps to cover up his

conduct; even going so far as to erase from the cellphone of the deceased the evidence of the call to her by the appellant earlier that morning. He left the unit locked from the inside. Then he changed his clothes once he was outside the complex. And finally he tried to create a false time alibi for himself in the records of his employer. In my view, this is clear evidence that the appellant reconciled himself with the possibility of the death of the deceased.

48 In my view, therefore, the trial court correctly found that the appellant intended to kill the deceased.

49 It follows, then, that the appeal against conviction must fail. There is no appeal against sentence.

50 I make the following order:

The appeal is dismissed.

NB Tuchtén
Judge of the High Court
9 October 2019

I agree.

PM Mabuse
Judge of the High Court
9 October 2019

I agree.

N Engelbrecht
Acting judge of the High Court
October 2019