IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE NUMBER: A390/2012

DATE: 26 OCTOBER 2012

In the matter between:

BONGINKOSI KHOZA Appellant

and

THE STATE Respondent

J U D G M E N T

LE GRANGE, J:

The appellant appeared in the Regional Court Cape Town and was convicted of one count of murder and one count of theft. The murder conviction attracted the provisions of section 51 (2) and 52 (2) and 52(A) and 52 (B) of the criminal procedure act, in terms of the minimum sentence act, Act 105 of 1997. The appellant, in respect of the murder conviction, was sentenced to a term of 15 years imprisonment and in respect of the theft conviction to a term of 6 months imprisonment. The appellant now, with leave of the court a quo appeals only against his conviction. The appellant's principle ground of

appeal against his convictions is that the trial court erred in its reasoning that the only reasonable inference to be drawn from proof and facts, was that he committed the crimes of murder and theft.

It's common cause that the deceased died on the 13th of March 2009 as a result of multiple head injuries and the consequences thereof. The state did not present direct evidence but relied on circumstantial evidence to prove its case against the appellant. The state relied on the evidence of the following witnesses, namely that of Dr Alphonso, Mornay Meyer, Captain Leon Hanana, Maria Stoffels, William Fielies, Nico Kleinhans, Christopher Botha, Jaftha Nel, Magdalena Neethling, Margaret Loggenberg, Louis Solomons and Anthony Roux, to prove its case against the appellant.

The appellant testified in his own defence. The evidence of the state witnesses can briefly be summarised as follows. Dr Alphonso, the pathologist, who conducted the post-mortem on the deceased's body testified that the deceased suffered severe blows to his face and neck area and as a result died of head injuries and the consequences thereof. Constable Morne Meyer, who was stationed at Beaufort West Police Station, testified that he was called to the scene to take certain photographs of certain items and points on a bus as pointed

out by Captain Hanane. He further testified that he collected certain items on the scene, which was sealed and later booked in at the police station as exhibits for safe keeping.

Captain Leon Hanane testified regarding the circumstances surrounding the arrest of the appellant at the Engen garage in Beaufort West. Hanane also testified how he had to return to the bus to collect the appellant's luggage and the discovery items including the appellant's ID book belonging to the deceased. Maria Stoffels was a friend of the deceased and shared a flat with him. According to her, the deceased was gay and she assumed that the appellant and the deceased were in a relationship.

It was not uncommon for the appellant to overnight at the flat. She testified that on her return from work on the day in question, she had unlocked the front door of the flat. As she entered, she noticed the suitcase are packed and clothes scattered on the bed. She then noticed the body of the deceased in a pool of blood in the bathroom. She ran to the neighbours to notify the police. She was also the person who cleaned the flat after the body of the deceased was removed. The bus driver, William Fielies, testified about the appellant's behaviour in the bus. According to him, the appellant was smoking in the bus toilet that was strictly prohibited and

needed to be remanded about it.

He also received a report that the appellant was sweating profusely and needed to adjust the air conditioner to a lower temperature. Thereafter the other passengers started to complain that the air conditioner is too cold in the bus and had to re-adjust it again. Fielies testified he later received a phone call from the police informing him of a possible murder suspect on the bus and was requested to stop the bus at the Engen garage in Beaufort West. He was present when Captain Hanane eventually arrested the appellant.

Nico Kleinhans was the first police inspector from the Sea Point Police to arrive on the scene where the body of the deceased was found. Constables Botha and Bezuidenhout were the police men that went to fetch the appellant in Beaufort West and brought him back to Cape Town. Jaftha Nel testified that he was a friend of the deceased. He came to know the appellant a week prior to the death of the deceased. According to Nel, on the day of the murder, he met up with the deceased and the appellant at the Tulip Hotel.

Nel testified that at the Hotel they discussed the details of the appellant and deceased's trip to Lesotho and left them at about 4 pm that afternoon. According to Nel, he was at 8:15

pm informed that the deceased had been murdered. He also made mention of three cell phone messages that he received from the appellant. At the police station the content of the messages were in detailed copied in his statement to the police. According to Nel, the police thereafter handed the cell phone back to him.

The cell phone was however afterwards stolen and the information of the messages could not be verified. The three messages Nel received from the appellant was recorded at the police station. The first message was at 7:39 pm the evening. The following was recorded:

> *"I am at Sea Point and some black guys came over to her so I figured it is her boyfriend but I can still leave tomorrow. They say they are looking for their passports and kept yelling at her".*

Nel received the second message at 8:34 pm. The following was recorded:

> *"I am in the Nigerian pub. Meet me there. The pub".*

The third message was at 12:30 am, in the early hours of the following morning and it reads as follows:

> *"I am at the station in need of a ride. Please help".*

The deceased's neighbour, Magdalena Neethling, testified that on the day of the murder at about three pm the afternoon she saw the deceased on his way to his flat. An hour later she saw a person's shadow walking past her window, coming from the deceased's flat and carrying a bag. She further testified that she did not hear any suspicious noises emanated from the deceased's flat during the period that the deceased arrived and the unknown person leaving the flat.

According to her at about 5 pm the afternoon, the deceased's flatmate came to call for help and asked that she must phone the police. She confirmed that about a week or two before the murder an unknown person was peeking through the keyhole of deceased's flat and enquired from her if the deceased was staying at the flat. She answered the person in the affirmative but did not make much or did not take much notice of the person as he did not raise any suspicion with her.

Margaret Loggenberg was employed by Roadlink, the bus company on which the appellant was travelling. She confirmed that appellant, on the day of the murder at about 2 pm the afternoon, came to enquire about the bus routes. The appellant later at about 5:30 pm the afternoon purchased a ticket to Bloemfontein on the name of Mr D Khere. He was very nervous and informed her if he can wait outside her office

as someone with a blue top was following him from his house. According to her, just before departure, a fellow passenger came to complain that he does not want to sit next to the appellant as the appellant was irritating, making him nervous and scares him.

She then placed the appellant in a seat on the lower deck at the back and informed the driver that the appellant does not look normal. She also informed the hostess about the situation and to keep an eye on the appellant. The evidence of Solomons and Roux was in relation to the trial within a trial, where the admissibility of a statement made by the appellant was ruled as inadmissible by the trail court. The state also handed in certain exhibits, namely the post-mortem report and a photo album. These were not placed in dispute.

The appellant's version briefly stated is the following. He was friends with the deceased and they were planning to go on a trip to Kroonstad via Bloemfontein for a graduation ceremony. He further testified that in the afternoon they went to the flat to go and pack for the trip. Whilst at the flat, a person named Serge, who was a friend of the deceased, came to the flat. Serge was apparently looking for his passport which he handed to the deceased as security for monies which the deceased loaned Serge.

An argument ensued between Serge and the deceased. He tried to intervene and in their altercation punched the deceased in the face. According to the appellant, he decided to leave as he did not want to be further part of the argument. Deceased tried to stop him. He however left and was warned by Serge that he is not done with him. He also testified that on his way out, he saw another person going to the deceased's flat. He decided to leave Cape Town and go alone on his trip without the deceased.

He denied killing the deceased. The approach a trial court needs to adopt in assessing circumstantial evidence, has been fully discussed by Zullman, AJ, as he then was, in S v Reddy & others 1996 (2) SACR, page 1 (A) at (8c – 9e). In assessing circumstantial evidence, one needs to be careful not to approach such evidence upon a piecemeal basis and to subject each individual piece of evidence to a consideration of whether it excludes the reasonable possibility that the explanation given by an accused is true.

The evidence needs to be considered in its totality. It is only then that one can apply the oft quoted dictum in Rex v Bloem 1939 (AD) (188) (202-203), where reference is made to two cardinals rules of logic which cannot be ignored.

"These are firstly that the inference sought to be drawn must be consistent with all the proved facts and secondly, the proved facts should be such that they exclude every reasonable inference from them save the one sought to be drawn".

The matter is well put in the following remarks of Davis, AJA, in R v De Villiers 1944 (AD) (493) (508-509):

"The court must not take each circumstance separately and give the accused the benefit of any reasonable doubt as to the inference to be drawn from each one so taken. It must carefully weigh the cumulative effect of all of them together and its only after it has done so, that the accused is entitled to the benefit of any reasonable doubt which it may have as to whether the inference of guilt is the only inference which can reasonably be drawn. To put the matter in another way, the crown must satisfy the court, not that each separate fact is inconsistent with the innocence of the accused but that the evidence as a whole is beyond reasonable doubt inconsistent with such innocence. Based on the evidence, stand to reason section 297, page 261, puts the matter thus. The elements or links which compose a chain of presumptive

proof are certain moral and physical coincidences which intermediary indicates the principle fact and the probative force of the whole depends on the number, weight, independence and consistency of those elementary circumstances. A number of circumstances, each individually very slight, may so tell you with and confirm each other as to leave no room for doubt of a fact which they tend to establish. Not to speak of greater numbers, even two articles of circumstantial evidence, although each taken by itself weigh but as a feather, join them together you will find them pressing on the delinquent with a weight of a milestone. Thus on an indictment for uttering a banknote, knowing it to be counterfeit, proof that the accused uttered a counterfeit note amounts to nothing or next to nothing. Any person might innocently have a counterfeit note in his possession and offer it in payment, but suppose further proof to be adduced that shortly before the transaction in question, he had in another place and to another person offered in payment another counterfeit note of the same manufacturer the presumption of guilty knowledge becomes strong".

Lord Coalrix in Rex v Dittman, Newcastle summer, this is 1910, referred to in Wills on circumstantial evidence, the 7th edition

at page 46 and 452 – 460, made the following observations concerning the proper approach to circumstantial evidence:

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

Against this background, the totality of the evidence must be considered to determine whether the trial court erred in

Having read the record and applying the well known principles as set out in the Reddy matter, *supra* at 8c – 9e, to the evidence as set out in the record and herein, there could be no fair-minded support, in my view, for the appellant's denial of any involvement in the killing of the deceased and it falls to be rejected.

Moreover, the cumulative effects of all the proven facts are, or to use Wills metaphor, a network so coherent in its texture, that the appellant cannot break through it. More particularly, if the following facts regarding the murder charge are considered.

A. At about 3 pm the afternoon the deceased's neighbour sees him coming to the flat. The appellant admitted at about 4 pm he was involved in an altercation where he struck the deceased on the nose with his fist. At about the same time the deceased's neighbour notice a person with a bag coming from the deceased's flat on his way out. Thereafter at about 5 pm, she was alerted by the flatmate about the murder and to phone the police.

B. The appellant's discomfort at the time when he bought the ticket. Whilst waiting for the bus to arrive and even after the departure of the bus must be a cause of concern. There is no evidence that persons were following or that there was any risk that someone would

follow him after he left the deceased's flat. Moreover, there was no reason to use a false name when he purchased his bus ticket. It would clearly have been his presence that would have stirred anyone following him into action and not a name on a ticket. The trial court in my view correctly came to the conclusion that the use of a false name was clearly to cover his tracks and to make his detection difficult. It's also highly unlikely that his severe discomfort even after the departure of the bus from Cape Town could have been the result of unknown person or persons following him. In my view it is more probable that his discomfort was as a direct result of him knowing much more of what really happened between him and the deceased and how the injuries was caused which resulted in the deceased's death.

C. Furthermore, the appellant's version that the blood on his one shoe was as a result of the nose bleed of the deceased is inconsistent with the objective facts. The photo of the one shoe of the appellant, which he changed when boarding the bus, does not depict drops of blood but rather a side that was soaked in blood. Moreover, according to the appellant the events which caused the nose bleeding of the deceased occurred in the vicinity of the front door of the flat. Stoffels, who afterwards cleaned the flat, was adamant that there was no blood

spots at the vicinity of the door. The photographs and sketch plan of the murder scene supports Stoffels' version. The photographs and sketch plan depicts a significant blood loss of the deceased in the bathroom. It also points out two small blood spots in the bedroom next to the bed. The version of events according to the appellant that he struck the deceased on the nose, causing it to bleed near the front door of the flat, is therefore not plausible.

D. A closer scrutiny of the three messages that the appellant sent to Nel is in my view a further indication that the appellant was desperately trying to avoid being detected and to keep his whereabouts unknown. He clearly attempted to create the impression that he was still in Cape Town whilst being on a bus to Bloemfontein. The question is why would the appellant wanted to create such an impression. Nel held no threat for the appellant and was a good friend of the deceased. In my view, the inescapable conclusion is that the appellant was covering his tracks, knowing full well what happened to the deceased and that he may be a suspect.

E. The trial court correctly pointed out that Hanane was not a very good witness, but that does not mean that his entire version falls to be rejected. The trial court correctly accepted the evidence of Hanane that the

appellant tried to get rid of the deceased's ID document. This conduct of the appellant, in my view, further supports the conclusion that the appellant wanted as far as possible not to be linked to the events that occurred at the deceased's flat.

F. The injuries that the deceased sustained are a direct result of blunt force to the maxilla frontal bone and orbital plate of the skull. Deceased was therefore severely assaulted on the front part of his face, neck and head and the result in injuries caused his death. The appellant's version that he tried to intervene between the deceased and his ex boyfriend and accidentally injured the deceased on the face is in my view against overwhelming evidence far-fetched and can safely be rejected as not reasonably possibly true.

In respect of count 2 it was disputed by the appellant that he had intention to permanently deprive the deceased of the goods which was found in his possession. In my view, having regard to the totality of the evidence and the fact that the deceased was about to travel with the appellant, the explanation proffered by the appellant of how the deceased packed some of his belongings in his bag as he still had place in his bag, cannot in my view be rejected as not reasonably, possibly true.

The destruction of the ID book was clearly not to deprive the deceased permanently of his ownership but an attempt to avoid being linked with the events of that afternoon at the flat. The appeal against the conviction of theft must as a result succeed and the sentence of 6 months imprisonment needs to be set aside. The only issue for consideration is whether on the proven facts, the only reasonable conclusion can be drawn that the appellant beyond a reasonable doubt had the necessary *mens rea* to kill the deceased. It is trite law that the test to determine intention is subjective. Since the court must consider an accused person's real knowledge and visualisation of the facts and of the law. Moreover, in crimes of intention the accused person is blameworthy because he knew or foresaw that his conduct was forbidden and it was unlawful but nevertheless proceeded to engage in the conduct.

In crimes of negligence on the other hand, an accused person is blameworthy because he did not know of foresee something or did not do something although according to the legal standards of the law he should have known or foreseen something or should have performed a act. In this regard, see criminal law CR Snyman, 4th edition at page 208, paragraph 2. On the proven facts of this case, it is

common cause that the appellant and the deceased were friends. On the day in question their plan was to go by bus to Lesotho via Bloemfontein. At about lunch hour both of them spend some time with friends before moving to the flat in order to pack their luggage for the trip. At that time and before reaching the flat, there is no evidence that there was any animosity between the appellant and the deceased.

Logic and common sense dictates that at the flat an argument must have ensued between the two. It is therefore not strange that during the address in mitigation at page 474 of the record, the appellant's attorney at the trial suggested that it cannot be excluded that an emotional conflict arose between the two and that it may have been a crime of passion. In view of the injuries sustained by the deceased and the fact that the medical evidence only refer to a blunt force that was used, I have serious doubt whether the only reasonable inference to be drawn from the proven facts is that the appellant in fact did subjectively foresee that death would ensue as a result of the assault.

I have no doubt that the appellant is guilty of culpable homicide. The reasonable person in the shoes of the appellant, in my view, would have foreseen the possibility that death would ensure as a result of the assault against

the face and head of the deceased and would have taken steps to guard against the ensuing result. In this regard see S v Mamba & ander, 1990 (1) SASW (227) (A) (237c) and S v Maritz 1996 (1) SASV (405) (A) (417b). It follows that the conviction of murder must be substituted with culpable homicide. This court is now entitled to consider sentence afresh.

The appellant's personal circumstance has been fully dealt with by the trial court. It need not be repeated again. Having considered all the relevant circumstances of the appellant and the factors pertaining to sentence, I'm of the view that a term of 6 years imprisonment would be a just and equitable sentence in the circumstances of this case. For these reasons the following order is made.

The appellant's convictions and sentences are set aside. The appellant is convicted of culpable homicide and sentenced to a term of six years imprisonment.

The sentence is antedated to 23 May 2012.

LE GRANGE, J

/RG

I agree.

5

_____

VAN STADEN, AJ