**IN THE HIGH COURT OF SOUTH AFRICA**

**(WESTERN CAPE DIVISION, CAPE TOWN)**

Case No: A488/14

In the matter between:

**Reportable**

**THULANI MTOTO** Appellant

and

**THE STATE** Respondent

**Before: GAMBLE et BOQWANA JJ**

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**JUDGMENT DELIVERED ON 22 APRIL 2015**

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**BOQWANA, J**

**Introduction**

[1] The appellant was arraigned before the Parow Regional Court on one count of housebreaking with intent to rob and robbery (Count 1) and a count of murder (Count 2). He pleaded not guilty to the charges. On 26 February 2014 he was convicted on both counts and subsequently sentenced, on 04 June 2014, to 7 years imprisonment in respect of count 1 and 18 years imprisonment in respect of count 2. The effective term of imprisonment was accordingly 25 years. The appellant appeals against conviction and sentence with the leave of the magistrate.

**Evidence**

[2] On 27 August 2010, near Wagenaar Street, Goodwood in Cape Town, Hester Roberts ('the deceased'), a 70 year old woman, was found murdered in her house, having been strangled with a piece of clothing, some of which was shoved into her mouth, and her hands and feet tied up with the strings of her dressing gown. Her house was broken into and a cell phone and DVD player were found to be missing.

[3] The deceased's body was discovered at approximately 19:45 by her son, Johannes De Wet ('Johan'), who was with his son Jacques De Wet ('Jacques') at the time. They had been expecting her to attend dinner at their house at 19:00 as she normally did on Fridays and at that time. They grew suspicious after she failed to attend the dinner and did not answer her phone. They decided to go to her place and upon reaching her house they found the door open. The house was in disarray with her window open and her body lying down. They called the police. Jacques corroborated his father's testimony in material respects. Jacques further testified that he noticed the missing DVD video machine because he had personally installed it. The machine was a combined Sansui CD/DVD and VCR player. He changed the plug on the video machine from a two point to a three point plug. The cash slip for the video machine was handed in at trial as an exhibit.

[4] Constable Jacklyn Julies ('Julies') went to the scene after being called by Johan. He noticed two bricks on the window sill of the open window. He immediately notified standby detectives and cordoned the scene off. He handed the scene over to the detectives. Peter Ivan Lotter ('Lotter') testified that he was the investigating officer in this case. Whilst conducting investigations at the scene he noticed, amongst others, prints of a formal shoe and that of a training shoe[1] on the flowerbed outside the house. He was informed by Johan's wife ('Mrs De Wet') that the deceased's Nokia 26100 cell phone was missing. Mrs De Wet was however not called to testify. On 1 September 2010, Lotter also received a call

[1] Also known as takkies

from a certain Mr Groenewald from Vodacom who informed him that he had received instructions from his employers to assist Lotter with the investigations. The State requested the Court to provisionally allow this hearsay evidence.

[5] Lotter then contacted Vodacom and gave them the relevant cell phone number. He was informed that on 26 August 2010 at 21:36, a SIM card was activated on that cell phone. There was however no RICA information on that SIM card. He then requested information regarding two cell phone numbers which were in regular contact with this particular SIM card. Two cell phone numbers were identified *via* RICA information. One belonged to a person by the name of Sisa Dlokolo ('Sisa') and another one to a young lady by the name of Sibongile Mgxiki ('Sibongile'). They both resided in Gugulethu. Sisa's SIM card had also been in a Samsung C300.

[6] On 6 September 2010 Lotter followed up on the information he had received regarding the two SIM cards and traced Sisa and Sibongile at the specific addresses in Gugulethu. The relevant persons were subpoenaed in terms of the Criminal Procedure Act, 51 of 1977 ('the Criminal Procedure Act'). Sibongile could not assist but Sisa informed him that the cell phone number that had contacted him belonged to his girlfriend, Zukiswa Botha ('Zukiswa'). Both Zukiswa and Sisa informed Lotter that the appellant at one stage had taken Zukiswa's phone. When asked by Sisa about the whereabouts of Zukiswa's phone, the appellant informed him that he had already sold the cell phone. The appellant then produced another cell phone and removed a SIM card which belonged to Zukiswa and gave it to Sisa. Zukiswa testified that her phone disappeared whilst she was walking with the appellant. Sisa testified that he went to fetch Zukiswa's SIM card from the appellant after Zukiswa asked him to do so. The appellant is his cousin.

[7] Sisa took Lotter to the appellant's place, at approximately 2:00 or 3:00 in the morning of 7 September 2010. They found the appellant's father who took him to the appellant's shack. The appellant was not there but Lotter noticed a DVD combination player similar to the one missing which was described to him by the

deceased's family. He noticed that the bed was still warm as if someone had just woken up. As they left the appellant's house to drop Sisa off, they found the appellant who was on his way home. They returned to the appellant's shack, with the appellant. The appellant said the DVD player was his. Lotter noticed a pair of training shoes under the bed. He then took the photos which were taken from the scene by the forensic team when they lifted the footprints in the flowerbed and tried to compare the training shoes under the bed with those in the photos. He had no expertise in the identification of footprints but to him they looked the same. The appellant informed him that the training shoes were his. He warned the appellant of the charges against him and arrested him. The training shoes were booked in at Goodwood SAP13/1103/2010. The training shoes and the DVD player, silver in colour, were booked out for forensic investigations. The receipt he obtained from Jacques, with respect to the missing DVD player, had no serial number. It only had a model name. The name of the model on the receipt was the same as that of the DVD player found at the appellant's place. Lotter was present when Jacques identified the DVD player as his grandmother's. A warning statement of the appellant was handed in by agreement between the parties and read out by Lotter into the record. The relevant portion of the statement went as follows: *'The cellphone and the DVD I bought it's mine. The SIM card I had was Zukiswa's'*.

[8] Captain Danie van der Westhuizen ('van der Westhuizen') testified that he is a fingerprint expert and a footwear analyst. On 10 September 2010, he photographed the soles of a pair of white Adidas training shoes which were handed to him by Captain Joubert ('Joubert'). He printed the images to a scale of one to one, the purpose of which was to establish whether shoe prints numbered 1 to 5 found on the scene, which consist of marks photographed by Captain Smith, were made by the shoes booked in for forensic testing. During the comparison he was able to draw the following conclusions: The pattern and size of shoeprint number 3 found on the scene corresponded with the right shoe marked as exhibit A and thus was probably made by the same shoe. The pattern and size of shoe print numbers 1 and 2 found on the scene corresponded with the left shoe marked as exhibit A and

therefore were probably made by the same shoe. Shoeprint numbers 4 and 5 could not be matched. The pattern on both sets of photographs depicting the shoes was plus/minus 70 millimetres in length, measured exactly on the same spot which indicated that the size was correct. The emblem of the Adidas brand was visible on both shoes as encircled on the court chart. Advanced wear and tear was found, showing that the shoe was not new. That led van der Westhuizen to the conclusion of "probable". In the identification process one would either get a result of 'not identified', 'possible', 'probable' and 'very probable'. On photo 3 the shoe print patterns were visibly better. He decided to use that photo to explain the wear and tear and the pattern. The print was probably made with the back part of the shoe. Van der Westhuizen came to the conclusion that the shoe under investigation was most likely the shoe that made the print but it could not be said to be 100% accurate.

[9] A soil sample was collected by Captain Elsie Joubert ('Joubert') from the flowerbed opposite the front door of the deceased's house on 15 September 2010 at 15:10 and she sealed it in a forensic bag.

[10] Rodger David Dixon ('Dixon') examined the soil from the flowerbeds to determine whether it was comparable with soils lifted from the soles of the Adidas shoes (found by Lotter under the appellant's bed). In order to do that he examined the soil samples with a microscope looking at different types of soil particles, including mineral grains, organic components and a variety of other materials that can be found in the soil. The soil on the shoes contained similar sand grains to those from the flowerbed, as well as containing material from other sources. Dixon noted that the appearance of the soil, the different types of grain and the range of material from the flowerbed were present in the soil from the shoe. He contended that flowerbeds tended to have soil which is different from that of the general vicinity because when people make flowerbeds they add compost, fertilizer, they dig it around, and material grows there. Because the soil is turned and cultivated it would gain an appearance which is different to the general soil and in this way

there would be a degree of uniqueness which means that the soil is restricted in its distribution to the flowerbed. As a result he was of the opinion that the soil on the shoe came from the flowerbed. He could not rule out the possibility that similar soil might be found in a different area in Cape Town. However, the same original type of soil would have to be present, and the same set of events which contributed to the formation of the flowerbed would have to be repeated. Furthermore similar compost and debris, or whatever gave the chalky appearance in creating the soil must be present. According to him, the match was so great between the soil in the shoe and the flowerbed that it was highly unlikely that it came from anywhere else. He however could not rule it out 100%. It was put to Dixon in cross-examination that where the appellant lived there was a garden and fruit trees, and that the area had been cultivated with compost that they buy from somewhere else. Dixon's response was that in order to exclude the soil referred to, it would have to be compared with others; he was however not requested to collect more samples (such as from the appellant's house) but to determine if there were sufficient similarities between the soil from the shoe and that which came from the flowerbed.

[11] Mandy Date Chong ('Dr Chong') identified the body of the deceased at the deceased's place on 28 August 2010. The ambient and rectal temperatures were closely matching at 15.6 and 17.5 degrees Celsius respectively. Taking that into consideration, as well as the fact that the window was open in the room since the deceased's death, the customary estimation of time of death by calculation was deemed invalid. According to Dr Chong the spot-check as described in the Third Edition of Knight's Forensic Pathology gives a crude estimation of eight to 36 hours post-mortem interval as a rule of thumb, taking into account that the body was cold to touch and rigor mortis was present. In other words, the deceased could have been dead for a period estimated to be between eight to 36 hours.

[12] The appellant testified that he was not at the deceased's house on 27 August 2010 or any time before that. He denied any involvement in the crimes. He testified that he received the SIM card, which was said to be Zukiswa's, from his

cousin Themba. He did not know how Themba came to be in possession of the SIM card. He used the SIM card in a Nokia which he had. He gave the SIM card to Sisa, who had a relationship with Zukiswa. He sold the Nokia he had. The DVD player found at his place was his. He bought it at Nyanga Junction three days or a week before he was arrested. He testified that he was the only person who wore the pair of Adidas shoes taken by the investigating officer. He stated further that his father has a garden which has been there since he grew up. He is responsible for the maintenance of this garden. He used to water it and sometimes bought manure to prepare the soil, in order to make it fertile. He bought the compost in Nyanga. Blood and fingerprints were taken from him. In cross-examination, he testified that he was informed by Sisa that police were looking for him at about 4:00 in the morning. He went to give a friend Tik when he met the police in the early hours of the morning. He also bought the Nokia cell phone at Nyanga Junction, two weeks before his arrest. He bought the cell phone for R100 and the DVD player for R50 on the same day from unknown persons. He sold the cell phone for R300 three days before his arrest.

**Magistrate's decision**

[13] The magistrate found that the circumstantial evidence presented by the State weighed together created a unit of evidence which led to the only conclusion possible, namely that the appellant broke into the house of the deceased, murdered her and then took the items mentioned in count 1, being a cell phone and a DVD player.

**Grounds of appeal**

[14] The grounds of appeal submitted on behalf of the appellant are, *inter alia*, the following. Firstly, Lotter failed to provide any evidence or testimony that the appellant was actually in the house, despite the forensic team being at the scene for 3 days while carrying out their investigation and the rooms at the house being turned upside down and drawers thrown out. Secondly, Lotter also failed to mention how, through his investigation, the appellant could be tied to the murder

and housebreaking and robbery of the deceased as he only found a DVD/VCR player in the possession of the appellant that matched the description of the one belonging to the deceased. Thirdly, van der Westhuizen's investigations, with regard to the shoe print, ultimately led to the conclusion that it was only probable that the appellant's shoe made the print in the garden. Thus there was a degree of doubt in his findings. Fourthly, when one considers Dixon's evidence, it is evident that the soil specimens cannot be taken as evidence of such a unique nature that it can be deemed absolute evidence. This is because his tests/investigations did not exclude the possibility of such soil being present in the vegetable garden that the appellant had at his parent's house. Counsel for the appellant argued that the magistrate erred and misdirected himself in his application of the law to the facts by attaching too much weight to the circumstantial evidence in finding the appellant guilty as charged. In regard to sentence, it was submitted that the magistrate erred by overemphasizing the seriousness of the offence, the previous convictions of the appellant, the deterrent effect of the sentence and the retributive element of sentencing.

**Discussion**

[15] It is perhaps convenient to start off with the reminder that circumstantial evidence is no less cogent than direct evidence. On the contrary it can sometimes be more compelling as was stated in **S v Musingadi and Others**[2]. The Court in that case quoted with approval a passage from Zeffertt, Paizes and Skeen's *The South African Law of Evidence* at page 94 which stated the following:

> '. . ., circumstantial evidence may be the more convincing form of evidence. Circumstantial identification by fingerprint will, for instance, tend to be more reliable than the direct evidence of a witness who identifies the accused as the person he or she saw. But obviously there are cases in which the inference will be less compelling and direct evidence more trustworthy. It is therefore impossible to lay down any general rule in this regard. All one can do is to

[2]2005 (1) SACR 395 (SCA) at paragraph 20

> keep in mind the different sources of potential error that are presented by the two forms of evidence and attempt, as far as possible, to evaluate and guard the dangers they raise'

[16] In dealing with each piece of evidence and the inferences to be drawn therefrom, two important principles must be borne in mind. The first is established, which is that the court must examine all the evidence. A court does not look at the evidence implicating the accused in isolation to determine whether there is proof beyond reasonable doubt, and so too it does not look at the exculpatory evidence in isolation to determine whether it is reasonably possible that it might be true. As was stated in **R v Hlongwane**[3] the correct approach is to consider all evidence 'in the light of the totality of the evidence of the case'. The second principle which the court must bear in mind in assessing all the evidence involves the approach to be taken in drawing inferences. Inferences are not to be mere speculation but are to be based on fact. The court in **R v Blom**[4] laid out two rules of logic to be followed. The first rule is that the inference sought to be drawn must be consistent with all proven facts. The second rule is that the proven facts must be such that they exclude every other reasonable inference.

[17] The body of evidence that was said to implicate the appellant was the following: firstly, the RICA information that led to the tracing of the SIM card allegedly used on the missing cell phone alleged to be that of the deceased, which was linked to the appellant; secondly, the DVD/VCR player found at the appellant's place fitting the description of the DVD/VCR that was found to be missing when the deceased's body was discovered; thirdly, the findings made by van der Westhuizen that the shoe print on the flowerbed at the deceased's house was made by the Adidas shoe found under the appellant's bed; and fourthly, the evidence of Dickson that the soil samples from the flowerbed and the appellant's Adidas training shoes had the same characteristics and origin.

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[3] 1959 (3) SA 337 (A) at 341A
[4] 1939 (AD) 188.

[18] As regards the deceased's cell phone, the State failed to call Mrs De Wet who informed Lotter about the missing Nokia cell phone. That part of Lotter's evidence was hearsay. Lotter also had a conversation with Groenewald from Vodacom regarding RICA information and cell phone records involving the deceased's alleged cell phone. Cell phone records were supplied by Vodacom to Lotter following an application in terms of section 205 of the Criminal Procedure Actthat he prepared. Lotter noticed that the cell phone records that were requested in terms of the section 205 application did not contain statements in terms of section 212 of the Criminal Procedure Act.

[19] Vodacom refused to allow Groenewald to testify. I found it strange that Vodacom would take that kind of stance when it approached Lotter and offered to assist him with his investigations in the first instance. An explanation was offered by Vodacom's legal department that section 212 statements could not be provided because of the time period that had lapsed and that they no longer had those records.

[20] Be that as it may, the information received from Groenewald led Lotter to Sisa and Zukiswa, who eventually connected him with the appellant. Sisa and Zukiswa testified about the SIM card. The contradictions noted from their evidence were not material. I am of the view that the trial court carefully considered the law in relation to admission of hearsay evidence, in particular section 3 of the Law of Evidence Amendment Act[5] as well as the relevant case law on this issue[6], when it concluded that the hearsay evidence by Lotter in respect of communications made to him by De Wet and Groenewald were admissible. The key issue is that the court had regard to the factors to be taken into account in terms of section 3(1) (c) of the Law of Evidence Amendment Act.[7] Furthermore, section 3 of the Law of Evidence

[5] Act 45 of 1988

[6]See S v Molimi 2008 (2) SACR 76 (CC) at pages94 – 95 ; S v Litako and Others 2014 (2) SACR 431 (SCA) at paras 67 and 69

[7] Being; the nature of the evidence, the purpose for which the evidence was tendered, the probative value of the evidence, the reason why the evidence was not given by the person upon whose credibility the probative value of such evidence depends, any prejudice to a party which the admission of such evidence might entail and any other factor which should in the opinion of the court be taken into account.

Amendment Act permits a court to admit hearsay evidence only if it is of the opinion that such evidence should be admitted in the interests of justice.[8] It must however be remembered that a section 205 application requesting the cell phone records was made and those were provided by Vodacom.

[21] At the end of the day, even if hearsay evidence pertaining to the conversations Lotter had with De Wet and with Groenewald may have wrongly been allowed, the fact that remains is that the appellant was found with evidence linking him to the deceased. Evidence given by Jacques with regard to the DVD/VCR player was clear. He positively identified the machine because he had personally installed it. He changed the plug from a twin plug to a three pronged power plug and that was the unique feature. He gave compelling evidence in this regard.

[22] The appellant's version of how he came to be in possession of a Nokia cell phone and the DVD player was less than convincing. He claimed that he bought the items at Nyanga Junction from unknown people. He contradicted himself as to when the cell phone was bought and sold. First, in his evidence in chief he stated that he bought the DVD player three days or a week before his arrest. In cross-examination he stated he bought the cell phone a long time before and sold it two weeks before his arrest. He later said he bought the cell phone at the same time that he bought the DVD player three days before he was arrested. When cornered by the prosecutor, he changed his version to state that he sold the cell phone three days before his arrest. This simply did not make sense. It clearly showed that the appellant was untruthful.

[23] As regards, the shoe print, it is useful to refer to the Appellate Division decision of **S v Mkhabela**[9] where Corbertt JA held the following:

> ' I do not think that any general principles are to be derived from these cases, save that evidence of footprints is admissible, that the Court must nevertheless be cautious of relying upon such evidence, especially where it is the only evidence against the

[8] S v Litako supra at para 67
[9] 1984 (1) SA 556 (A) at 563B-F.

accused, and that the cogency of such evidence must depend upon all the circumstances of the case. In regard to this last-mentioned point, the Court may, for example, find it easier to rely on footprint evidence where it relates to the imprint left by a boot or shoe that has some distinctive characteristic or pattern than where it relates to the imprint made by a naked human foot. Similarly, it will always be more satisfactory if the Court is able, by means of a photograph or a plaster cast orsome other visual medium, itself to make the necessary comparisons and to assess the cogency of the footprint evidence.

In the present case it is important to note that the footprint, or shoe-print, evidence was not the only evidence against the appellant. There was, in addition, a substantial web of circumstantial evidence (including the inculpatory statements made by the appellant), which pointed to the guilt of the appellant. The very existence of this other circumstantial evidence tends, in my opinion, to make it more likely that the footprints at the scene of the crime was correctly identified as having been left by the appellant.'(Own emphasis)

[24] Unlike in the **Mkhabela** case and in **R v Makiep**[10]**,** an expert testified in the present matter. The trial court in this case also made its own observations from the photographs submitted during the trial and it found clear similarities between the shoe print found at the murder scene and the shoe print of the appellant's Adidas training shoe. According to my observations of the photos, the resemblance of the characteristics in the shoe prints is extraordinary. In particular, a star like characteristic (an Adidas emblem) and wear and tear on the training shoes on both prints are observed. Evidence was given that the training shoes are of the same size, length and width. Van der Westhuizen's evidence supported by photos has strong evidential value. This evidence does however not stand alone.

[25] Dickson's evidence on the soil samples seems to complete the picture. He was adamant about the uniqueness of the soil from the flowerbed because of the compost and other substances that existed in the material. It is apparent that the soil was not one that would be found anywhere else in Cape Town. If a similar type of soil existed, which he did not exclude, the same processes would have to be

[10] 1948 (1) SA 947 (A)

repeated for it to be exactly the same. I am alive to the appellant's evidence that they had a garden at his parent's house which he was responsible to maintain. The difficulty I have with this, in view of the fact that that was to be his defence,is that the appellant never requested Dickson or any other expert to test the soil at his house.

[26] The State could not be expected to anticipate that the appellant would raise that issue, when he testified. They cannot be held responsible in my view for failing to investigate whether there was a garden at the appellant's house containing soil which resembled that found in the flowerbed situated at the deceased's house and for not sending the soil at the appellant's alleged garden for testing. The trial court could not be faulted in my view for relying on Dickson's evidence as part of the evidence it considered when convicting the appellant.

[27] The totality of evidence places the appellant at the deceased's house. The appellant's counsel argued that there was no evidence that the appellant was inside the house and that at best the shoe-print placed him outside the house. A number of issues arise which dispel this argument. The first is that the shoe print was found outside the bedroom window of the deceased's house. There was evidence that the burglar proofing of the window had been forced opened which suggests that entry was gained through the window. It is reasonably possible that there was someone else with the appellant as a print of a formal shoe was also found. The DVD/VCR player which was found in the appellant's room was removed from inside the house. Even if the appellant was with someone else when the crimes were committed and he never went inside the house, the doctrine of common purpose would, in any event, apply. The fact that no DNA was collected or found inside the house does not absolve the appellant. The magistrate was justified in my view to attach a great deal of weight on the shoe print along with other evidence presented.

[28] The only reasonable conclusion from the facts is that the appellant,whether alone, or in association with another or others (which at this point is purely speculative), entered the deceased's house, strangled her and robbed her of her

DVD/VCR player and cell phone. Viewing the evidence in its totality I am satisfied that the magistrate was correct in coming to the conclusion that the appellant broke into the deceased's house, murdered and robbed her of her belongings. There was therefore no misdirection on his part.

[29] As regards sentences, minimum sentences prescribed by the Criminal Law Amendment Act[11] were applicable, being 15 years in respect of count 1 because the offence was coupled with robbery with aggravating circumstances and life imprisonment in respect of count 2 of murder. The magistrate found that the imposition of minimum sentences on both counts would not be appropriate, although he did not clearly articulate what substantial and compelling circumstances the court considered to justify deviation. The personal circumstances of the appellant are that: He was a 27 year old unmarried man when he was sentenced. He was unemployed and lived with his father. His mother had passed away. He had been in custody for over two years before he was sentenced. He had several previous convictions of house breaking with intent to steal and theft.

[30] In my view the magistrate showed a measure of mercy by imposing a lesser sentence, taking into account that the deceased was killed in a cruel manner, in the privacy of her home and robbed of her belongings. The submission that the sentence of 25 years is strikingly inappropriate because the appellant was convicted entirely on circumstantial evidence has no legal basis and must accordingly be rejected. There is therefore no reason for this Court to interfere with the magistrate's decision both on conviction and sentence. The appeal should accordingly be dismissed.

[31] In the result, I propose the following order:

1. The appeal is dismissed and conviction and sentence confirmed.

[11] Act 105 of 1997

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**N P BOQWANA**

**Judge of the High Court**

I agree, and it is so ordered

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**PAL GAMBLE**

**Judge of the High Court**