IN THE EASTERN CAPE HIGH COURT, GRAHAMSTOWN

CASE NO: CA & R: FB1/12

In the matter between:

RONKIE PIETERSE **Appellant**

and

THE STATE **Respondent**

JUDGMENT

Y EBRAHIM J:

[1] The appellant was arraigned in the Eastern Cape High Court, Grahamstown on five counts, namely (1) housebreaking with intent to steal and theft, (2) housebreaking with intent to rob, (3) robbery with aggravating circumstances, as defined in s 1(1)(b) of the Criminal Procedure Act, 51 of 1977, (4) murder, and (5) robbery with aggravating circumstances, as defined in s 1(1)(b) of the Criminal Procedure Act, 51 of 1977, and convicted on all counts. On count 1 the appellant was sentenced to imprisonment for 3 years, on count 2 to imprisonment for 5 years, on count 3 to imprisonment for 5 years,

on count four to imprisonment for life and on count 5 to imprisonment for five years with the sentences imposed on counts 2 and 3 to run concurrently.

[2] The appellant, with leave of the trial Court (Makaula J presiding), appeals against the convictions on counts 4 and 5, respectively murder and robbery with aggravating circumstances, as defined in s 1(1)(b) of the Criminal Procedure Act, 51 of 1977.

[3] The appellant's conviction on counts 4 and 5 was based solely on circumstantial evidence. The issue for determination is whether the inferences drawn by the trial Judge were consistent with all the proved facts and whether such facts excluded any other reasonable inference save that the appellant was the perpetrator of the crimes in counts 4 and 5.

[4] The circumstantial evidence presented by the state in support of a conviction on counts 4 and 5 may be summarised as follows:

(a) On 4 August 2009 Mr Kerneels Voolnool heard the appellant, then in custody in the court cells at the Venterstad Magistrate's Court, threaten to kill the deceased, who was standing in the courtyard of the court premises, should he not withdraw the case against the appellant. The deceased did not respond to the threat.

(b) The appellant was released on warning the same day and visited the shebeen of Mr Harry Badenhorst. There he was heard to say he was going

to kill 'the man'. Even though he did not name the person Mr Badenhorst assumed he was referring to the deceased.

(c) At about 9.00 pm that evening Ms Jesmeen Boorman was walking with the appellant when he entered the deceased's property via the gate and walked around the house. She assumed he was going to the back door and left. On returning ten minutes later she found the appellant standing at the gate. He did not have anything in his possession and there was nothing abnormal about him.

(d) The next morning, 5 August 2009, at about 7.00 am, Mr Hendrik Vaaltyn saw the appellant walking towards his parents' home. It appeared the appellant had come from an open veld that provided a short cut to the cemetery.

(e) The evening of the same day Mr Vaaltyn visited the home of the appellant's parents and saw a fire burning in the backyard. The next morning he asked his girlfriend (the appellant's sister) about the fire and she explained the appellant had burnt the clothes he wore in prison as they were full of lice.

(f) Six days thereafter, on 11 August 2009, a worker digging at the cemetery found a knife buried in the ground. The knife was full of blood and wrapped in plastic and was handed to the police.

(g) More than a year later, on 8 July 2010, the police asked Mr Vaaltyn if he could identify the knife found in the cemetery. He recognised it as one belonging to the appellant's mother as the blade's tip was broken off and he

had repaired the handle by fastening it with wire. The knife was then sent to the laboratory for forensic testing in respect of DNA.

(h) On 14 July 2010 individuals were cleaning the backyard of the home of the appellant's parents and dug up a burnt and rusted DVD player. The police took custody of the DVD player but could not establish its serial number due to its deteriorated condition.

[5] It is evident from the judgment that the trial Judge was cognisant of the legal principles applicable when relying on circumstantial evidence and the basis on which inferences may be drawn.[1] However, in evaluating the circumstantial evidence the trial judge regrettably erred in the application of these principles.

[6] The trial Judge, in convicting the appellant on counts 1, 2 and 3, found him to be a dishonest witness. The evaluation by the trial Judge of the appellant's testimony in respect of counts 4 and 5 reveal he regarded the appellant's veracity to be no better, as is apparent from what he said thereanent, namely:

> "As reflected above the accused was a very evasive witness and gave incoherent answers, his demeanour was poor. He would hesitate, mumble and kept on looking up instead of answering straightforward questions put to him. He was unimpressive as a witness and his demeanour left much to be desired. He was not a credible witness at all. When I take the events as they unfolded starting from the time he threatened the deceased on the 4th up to the stage when the accused was found burning clothes, coupled with the fact that he lied on more than one occasion leads me to conclude that the deceased was killed by the accused. These factors lead me to conclude that the State has established the guilt of the accused beyond reasonable doubt ..... .

[1] *R v Blom* 1939 (AD) 188; *S v Reddy and Others* 1996 (2) SACR 1 (AD); *S v Morgan and Others* 1993 (2) SACR 134 (A)

[7] Although an accused person's demeanour while testifying may be of some weight in assessing the person's credibility, it has been said that demeanour is at the best of times 'a tricky horse to ride'.[2] In my view, the trial judge erred in relying on the appellant's demeanour as demonstrating a lack of honesty and that he consequently had committed the crimes of murder and theft.

[8] The pertinent question is whether any inferences that may be drawn from the circumstantial evidence are consistent with all the proved facts and if those facts exclude any other reasonable inference save that the appellant is the person who perpetrated the crimes.

[9] The approximate date and time of the murder of the deceased is uncertain. The post-mortem report incorrectly records the time of death as 15h30 on 5 August 2009. The evidence shows that death would have occurred sometime between the afternoon of Monday, 3 August 2009, when his brother visited him, and the morning of Wednesday, 5 August 2009, when his brother found his body on the floor of his house.

[10] Dr Buyisa Matolengwe, who conducted the post-mortem examination, testified there had been a substantial loss of blood and the deceased's neck was cut so severely that only a layer of muscles and some skin held the neck at the rear. The photographs forming part of the appeal record, although not very clear, do show the deceased lying in a pool of blood.

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[2] *S v Kelly* 1980 (3) SA 301 (A)

[11] The trial judge misdirected himself in accepting that the appellant was seen entering the house of the deceased. This was not the evidence of Ms Boorman. Her testimony was merely to the effect that she saw the appellant entering the grounds and walking around the house and that she later found him standing at the gate. I am not of the view that only reasonable the inference to be drawn is that the appellant entered the house and killed the deceased. The evidence does not exclude the reasonable inference that the deceased may not have been home or had been killed already and the appellant returned to the gate without entering the house. It should be remembered that Ms Boorman also testified that the appellant did not have anything in his possession and appeared normal. In view of the extensive nature of the wound to the deceased's neck and the substantial blood loss it is hardly likely there would not have been any incriminating signs of blood on the appellant's clothes. From the testimony of Mrs Boorman it appears there was none and her testimony also confirms the appellant was not in possession of the DVD player taken from the home of the deceased.

[12] The finding in the cemetery on 11 August 2009 of a knife covered in blood and wrapped in plastic did not assist the state case. It was handed to the police immediately but sent for forensic tests only more than a year later on 8 July 2010. The state did not provide an explanation for the inordinate delay. The results of the tests, if any, were not placed before the Court and whether the blood was that of a human being was never clarified. In the circumstances the Court erred in drawing an inference adverse to the appellant regarding the finding of the knife and that the appellant was seen coming from the direction of the cemetery. None of this evidence incriminates the appellant.

[13] Even if the appellant was a dishonest witness his explanation that he burnt his clothes as these had become infested with lice while he was in prison is by no means far-fetched or implausible. The trail Judge erred in rejecting his explanation and in holding that this evidence incriminated the appellant.

[14] The trial Judge similarly erred in finding that the DVD player was in the deceased's house when he was murdered and the only person who could have taken it was the murderer, who was the appellant. Although the Court held the appellant had been obsessed with the deceased's DVD player and radio the evidence does not support this. The appellant acknowledged that he loved the deceased's tape recorder or radio tape, as he described it, but denied liking the DVD player as he had to borrow CDs to use it. Be that as it may, there was no evidence linking the appellant with the DVD player. The one found in the grounds of his parents' home was not identified as belonging to the deceased. The evidence regarding the finding of a DVD player did not incriminate the appellant.

[15] The fact that the appellant may have threatened to kill the deceased creates, at best, the suspicion that he might have done so. But, in the absence of any other evidence linking the appellant to the murder this is insufficient to justify the conclusion that he is guilty of the murder of the deceased.

[16] In the final analysis, the inferences drawn by the trial Judge are not consistent with all the proved facts and such facts did not exclude every reasonable inference save

the one the Court sought to draw, namely that it was the appellant who murdered the deceased and stole his DVD player.

[17] In the circumstances, the appellant's appeal against the convictions for murder (count 4) and theft (arising out of count 5) succeeds.

[18] In the result there is an order in the following terms:

(a) The appellant's conviction for murder and the sentence imposed are set aside;

(b) The appellant's conviction for theft and the sentence imposed are set aside.

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Y EBRAHIM
ACTING DEPUTY JUDGE PRESIDENT OF THE HIGH COURT,
BHISHO **1 February 2013**

I agree

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D Z DUKADA
JUDGE OF THE HIGH COURT

I agree

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N CONJWA
ACTING JUDGE OF THE HIGH COURT

Heard on:	22 October 2012
Judgment delivered on:	February 2013
For the appellant:	H McCallum
For the respondent:	J P J Engelbrecht