

SOUTH AFRICA / JUDGMENT

S v Jaipal (593/02) [2004] ZASCA 45; [2004] 3 All SA 409 (SCA) (27 May 2004)

[2004] ZASCA 45

COURT

Supreme Court of Appeal

BEFORE

Farlam, Mthiyane, Ponnann

CASE / FILE NUMBER

593/02

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Last Updated: 4 September 2004

THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

Case number 593/02 Reportable up to para [14]

In the matter between: SHANE JAIPAL APPELLANT and THE STATE RESPONDENT
CORAM: FARLAM, MTHIYANE JJA et PONNAN AJA
HEARD: 17 MAY 2004
DELIVERED: 27 MAY 2004
SUMMARY: Criminal Procedure : Irregularity in connection with or during trial – assessors seen by public to be present in same office as prosecutor and investigating officer during first eight days of trial – whether fatal irregularity – in fact no discussion between assessors and prosecutor and investigating officer – full explanation given in open court when special entry applied for. _____

JUDGMENT

FARLAM JA

INTRODUCTION [1] The appellant in this matter was convicted by Squires J and two assessors in the Durban and Coast Local Division of the High Court on a charge of murder and sentenced to twenty years imprisonment. [2] He now appeals to this Court against his conviction both on the merits and on the ground of an alleged irregularity stated in a special entry made on the record of the case by the presiding judge in terms of section 317 of the Criminal Procedure Act 51 of 1977, as amended. THE SPECIAL ENTRY [3] The special entry made on the record is in the following terms: “That the proceedings in the trial of the accused are irregular and not according to law, in that the State Advocate, on a daily basis, the investigating officer with him from time to time and one of the State witnesses with both of them on isolated occasions, had been present in the same office accommodation being used by the assessors, both before the commencement of

court proceedings and/or during court recesses or adjournments, and were so seen by members of the public attending the trial.[4] The application for the special entry, which was eventually granted by the trial Court after the appellant had been convicted and sentenced, was originally made during the course of the trial, on the eighth day thereof. Counsel for the appellant stated to the court when the application was brought that he had himself seen that the assessors were, as he put it, sitting in the same office on a daily basis as the prosecutor, the investigating officer and the deceased's son, who was a State witness. He said that this did not bother him because he knew how things work, as he put it, now and then on circuit. Later in his address he said that he did not suggest that the assessors discussed the case with the others in the office. He said that after he had been approached by members of the public who were concerned about the matter he was instructed by the appellant to apply for the special entry.[5] The State Advocate who was conducting the prosecution then told the court that he did not have an office of his own in the building where the court was sitting and that he and the investigating officer had been obliged from time to time to make telephone calls, from the office where the assessors were, to witnesses to tell them that they were needed at court and to make arrangements in relation thereto. (It should be explained at this stage that the trial court was sitting in the Pinetown Magistrate's Court as there was no court room available at the Durban High Court.) He said that in the telephone calls that he made he did not discuss the case with any of the witnesses. He explained that the investigating officer had been present when the telephone calls in question were made because he had the witnesses' telephone numbers in his possession. As appears from the special entry the deceased's son was present with the investigating officer and the State Advocate on isolated occasions when these telephone calls were made.[6] After the State Advocate had given his explanation as to how it came about that he and the investigating officer and the deceased's son were in the same office as the assessors, the trial judge asked the appellant's counsel whether he was applying for the recusal of the assessors. Counsel for the appellant replied as follows: 'No, I'm not applying for recusal of assessors and I just want to put the record straight, not for a moment do I say that the case was discussed by them with the prosecutor, or with the State witnesses present in the office, like this morning again the State witness was there. It doesn't matter before or after his evidence, or whether or not they discussed it, the fact is that they were present just about every day in the same office. No, I'm not asking for the recusal. All I'm asking is the Court to grant me the leave, namely to make the special entry so this matter can be argued in the AD'.[7] In arguing the appeal on the special entry in this Court, counsel for the appellant contended that as a result of the facts set out in the special entry an irregularity had occurred in connection with or during the trial which involved so gross a departure from the established rules of procedure that it could be said that the appellant had not been properly tried and that there had per se been a failure of justice, with the result that it was unnecessary to enquire whether the guilt of the appellant was in any event proved beyond reasonable doubt.[8] Counsel relied strongly on the decision of this Court in *S v Moodie* 1961 (4) SA 752 (AD), and in particular the passage at 758 G-H where Holmes JA said that whether an irregularity amounted per se to a failure of justice depended upon the nature and degree of the irregularity. In developing his submissions in this regard counsel for the appellant referred to the well known dictum of Lord Hewart CJ in *R v Sussex Justices; Ex parte McCarthy* [1924] 1 KB 256 at 259 which reads as follows: 'A long line of

cases shows that it is not merely of some importance but is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done'. In this case the acting clerk to justices who convicted McCarthy of dangerous driving was a member of the firm of solicitors who acted for the proposed plaintiff in proceedings for injuries sustained in the same collision between motor vehicles which was the subject matter of the prosecution before the justices. When the justices retired to consider their verdict the acting clerk went with them taking his notes of the evidence in case the justices might desire to consult him. In fact the justices came to their conclusion without consulting him and, as Lord Hewart CJ put it, 'he scrupulously abstained from referring to the case in any way'. Lord Hewart CJ regarded the acting clerk's silence as irrelevant and said: 'The question . . . is not whether in this case the deputy clerk made any observation or offered any criticism which he might not properly have made or offered; the question is whether he was so related to the case in its civil aspect as to be unfit to act as clerk to the justices in the criminal matter. The answer to that question depends not upon what actually was done but upon what might appear to be done. Nothing is to be done which creates even a suspicion that there has been an improper interference with the course of justice.' He said that he was satisfied that the conviction had to be quashed 'unless it can be shown that the applicant or his solicitor was aware of the point that might be taken, refrained from taking it, and took his chance of an acquittal on the facts, and then, on a conviction being recorded, decided to take the point. On the facts I am satisfied that there has been no waiver of the irregularity'. The conviction was quashed.[9] Counsel for the appellant submitted that the facts of this case are in all material respects on all fours with those in the Moodie case. In that case the irregularity complained of, which was held (at 759) to be 'of such a nature as to amount per se to a failure of justice', was the fact that the deputy sheriff was closeted with the jury during their deliberations. Counsel for the appellant drew attention to the fact that the deputy sheriff took no part in the discussion in the jury room and submitted that it was thus clear that the question to be considered was not whether the administration of justice was interfered with but whether it appeared to be.[10] Counsel also relied on the decision of this Court in *S v Roberts* 1999 (4) SA 915 (SCA). In that case the trial magistrate adjourned the court after the accused had been convicted and summoned the prosecutor to see him. He then proceeded to discuss the case with the prosecutor in the absence of the accused's counsel. An application for his recusal was refused by the magistrate. This Court held that the discussion between the magistrate and prosecutor was irregular and that in the particular circumstances of the case the proceedings even before conviction were tainted and the conviction had to be set aside. In the course of his judgment Howie JA said (at 922 F) that if the discussion between the magistrate and the prosecutor occurred before conviction 'there can be no question but that the conviction would have been fatally irregular'. Earlier in the judgment (at 922) D-F), in the passage relied on by the appellant's counsel, he referred to what he called 'hallowed authority' that 'justice be done and be seen to be done.' He continued: 'In what is seen to be done, appearances play a varied role in the fulfilment of the need for fairness. The appearance of justice is not enough. Justice must not simply seem to be done. On the other hand the appearance of bias may be enough to vitiate the trial in whole or in part. That justice publicly be seen to be done necessitates, as an elementary requirement to avoid the appearance that justice is being administered in secret, that the presiding judicial

officer should have no communication whatever with either party except in the presence of the other : R v Maharaj 1960 (4) SA 256 (N) at 258B-C. That is so fundamentally important that the discussion between the magistrate and the prosecutor in the instant case warranted on its own, without anything more, the setting aside of the sentence.' Counsel for the appellant stressed that these dicta apply also to discussions involving the assessors, who make up, as he pointed out, the majority of the court.[11] Relying also on paras

[32] to [34] of the judgment of the Constitutional Court in *Van Rooyen and Others v The State and Others* 2002 (5) SA 246 (CC) at 272B-273E, he emphasised the importance, in a case such as this, that it appear to the public that justice is being done, the test being 'how things appear to the well-informed, thoughtful and objective observer'. Counsel also relied on Hlophe J's dictum in *S v Mayekiso and Others* 1996 (1) SACR 510 (C) at 513 h: 'confidence in the legal system is destroyed when right-thinking people go away thinking that the Judge or his assessor was biased.' In this case, he submitted, it was clear from the reactions of the members of the public who had approached him and expressed their concern about the fact that the assessors and the State Advocate and the investigating officer were seen in the same office on a daily basis that right thinking people were going away having lost confidence in the legal system in so far as the present case was concerned.[12] In my view it is important to note that the Constitutional Court in para [34] of its judgment in the *Van Rooyen* case, pointed out that 'the perception that is relevant is 'a perception based on a balanced view of all the material information'. In the instant case the material information on which public perceptions would be based would include the statements made by counsel for the appellant and the State Advocate when the application for the special entry was originally applied for. A thoughtful and objective observer, informed that no discussion about the case in fact took place between the assessors and the State Advocate, the investigating officer and the deceased's son and that their presence in the office used by the assessors was due simply to the need for certain telephone calls to be made to State witnesses, without anything being said about the case itself, would, I am satisfied, not lose confidence in the legal system and in particular its functioning in the case in which the appellant was being prosecuted.[13] This approach to the matter renders it unnecessary for me to decide whether, if the statements to which I have referred had not been made in open court when the special entry was originally applied for, it was open to the appellant to persist in his application for the special entry after he had been convicted when he had through his representative specifically declined to ask for the recusal of the assessors after he became aware of the facts giving rise thereto. In this respect the facts of this case differ from all the cases where irregularities which formed the subject of special entries were complained of on appeal and where the irregularities in question were only discovered after conviction. It is also unnecessary to consider whether on the facts of this case the special entry was correctly made or what the position would be if, although the public were not informed of the true facts underlying the alleged irregularity, the appellant is to be regarded as having waived his right to rely thereon.[14] In all the circumstances I am satisfied that the appeal based on the alleged irregularity set forth in the special entry must fail. APPEAL ON MERITS[15] I turn

now to deal with the question as to whether the trial court correctly convicted the appellant on the evidence before it.[16] The murder which the appellant was alleged to have committed was committed at about 1 pm on 21 October 1997 at a spot in Island View Road in the suburb of Bluff, Durban. Someone, the State says it was the appellant, threw petrol over the deceased, Mrs Argentina Pento Loutsaris, a 39 year old widow, and set her alight, causing her severe burn injuries from which she died shortly afterwards in St Augustine's Hospital.[17] The State sought to prove its allegation that it was the appellant who caused the deceased's death by placing a number of items of circumstantial evidence before the trial court. These may be summarised as follows:

(1) the person who threw the petrol over the deceased and set her

alight was a stockily built, medium height Asian man (a description which covers the appellant), who had arrived at the scene of the attack in a white delivery vehicle of 1200 or 1400 cc engine size;

(2) the appellant had been involved in a romantic relationship with the

deceased which had either ended or become troubled to such an extent that its continuance was in question;

(3) the appellant had been keeping the block of flats where the

deceased lived under observation since July 1997;

(4) he had used a white Nissan 1400cc delivery vehicle since that

vigilance began;

(5) the appellant had access to a white Nissan 1400 cc delivery vehicle

until 26 October 1997, five days after the murder, when the police took possession of the vehicle after obtaining its keys from the person who was in possession of the vehicle, one Nishal Ramesh, who lived in a different part of the same building as the appellant at the relevant time;

(6) a fingerprint made by the appellant's left little finger and a part of a

palm print made by his left palm were found on the right rear passenger window of the vehicle, a red Opel Monza motorcar, which was being driven by the deceased in Island View Road shortly before she was attacked;

(7) the vehicle on which the fingerprint and palm print were found

belonged to a friend of the deceased, one Shamugan Govender, who had lent it to her at 4 am on the morning of 21 October 1997.[18] The appellant's defence was an alibi. He testified that he was in Umtata at the University of Transkei on the whole of 21 and part of 22 October 1997, trying to arrange for his daughter to be admitted as a medical student at the University from the beginning of 1998.[19] The first item of circumstantial evidence relied on by the State was based on the evidence of a security guard, Trevor Steyn, who said that about ten minutes before the deceased

was first seen on fire at the spot from where she was taken to the hospital he was at the gate of the fuel storage farm which borders on Island View road. He looked down the road in a southerly direction and saw two vehicles, as he put it, parking next to each other, namely a red car and a white 1200 to 1400 litre delivery vehicle. A stocky Asian male was standing on the passenger side of the red vehicle and seemed to be talking to someone seated in the red car. As he was talking he was making gestures.[20] Counsel for the appellant submitted that his evidence was unreliable because he had said in his evidence that the red car he saw was a Monza and that a quarter of an hour later the State witness Dick came to him and wanted to use his radio in order to call an ambulance because a woman was burning in the car, while in his police statement made shortly after the incident he had merely spoken of a red car and had said that he did not know why Dick wanted to use his radio. Counsel also criticised his evidence because he was unable to say whether the white delivery van he saw had a canopy. He said that this was because the delivery vehicle was facing him. While there is substance in the criticisms in respect of Steyn's identification of the red car as a Monza and his statement as to why Dick wanted to use his radio, I do not think that they afford a basis for finding that Steyn's evidence on the other issues is unreliable.[21] I turn now to deal with the second item of circumstantial evidence on which the State relied, namely that the appellant was engaged in a romantic relationship with the deceased which had either ended or had become troubled to such an extent that its continuance was in question. It was common cause that there had been a romantic relationship between the appellant and the deceased. What was in dispute was whether it had ended or was in danger of ending. The appellant said that the relationship persisted up to the deceased's death and that there was no prospect of its coming to an end. Indeed, he said, she telephoned him the night before she died and he went to her flat, which belonged to him and which he was providing free of charge to her, and endeavoured to fix the driver's window on the red Monza, which she had at the flat. They also spoke on the telephone on the morning she died. He also stated that up to the time of her death he bought groceries for her every week. On the other hand the State witness Mrs Korkie testified about an incident which took place at the flat in 1997 when the appellant swore at the deceased and accused her of not wanting to pay his accounts, whereupon he hit her a few times in the face. A fight thereafter developed in the kitchen between the appellant, who grabbed a knife which was on the kitchen sink, and the deceased's brother, who had a screw driver. The witness said that she then telephoned the police. In the course of his evidence the appellant admitted an incident that took place on 3 September 1997 when the deceased hit him in the back with her bag and his shirt got torn. He had made a statement to the police about this in response to a charge she had laid against him. It was also established that in September 1997 the senior public prosecutor, Durban, wrote to the appellant and told him that the deceased had lodged a complaint on oath against him in which she had alleged that he had conducted himself violently against her, had threatened injury to her and had behaved in a manner likely to provoke a breach of the peace. He was warned that if there was a further complaint by her against him proceedings would be instituted against him for an order binding him over to keep the peace. The appellant denied receiving this letter but the fact that it was sent was not denied. As far as the appellant's assertion that he bought groceries for the deceased up to the time of her death is concerned, he said that the witnesses who said that groceries were found in the Monza motor car

after the incident were fabricating this evidence because he paid for her groceries and at the time of her death there was no need for her to buy groceries as she had sufficient groceries and besides she had no money to pay for them.[22] The third item of circumstantial evidence related to the appellant's keeping surveillance over the flat occupied by the deceased in

1997. The appellant did not deny that he had been keeping the block of flats where the deceased lived under observation but he alleged that this happened in 1996 and that he was observing the deceased's brother, who was staying in the flat in 1996 but not in 1997, and not the deceased herself. His reason for doing so was the fact that the deceased's brother was taking articles from the flat, which he, the appellant, had to replace and he wanted to catch him. The witness Kroutz, on whose premises the appellant parked his vehicle while doing the surveillance, was adamant that one of the occasions when the appellant parked his vehicle at his premises took place in June 1997. He stated that he remembered this because the appellant came to his home on his wife's birthday in June 1997. He remembered the year because that year he and his wife had gone out to supper to celebrate her birthday. He also stated that the practice was a frequent occurrence between June and September that year. Counsel for the appellant criticised the evidence of Mr Kroutz on the ground, so it was submitted, that he was not very sure about the year in which the surveillance took place. I do not think that this criticism is well founded. It is clear, in my view, that the incidents about which he testified took place in 1997.[23] The fourth item of circumstantial evidence related to the use by the appellant of a white Nissan 1400cc delivery vehicle since the surveillance began. The appellant denied this. He said that he used a white Passat motor car and never used a 1400cc delivery vehicle. Both Mrs Korkie and Mr Kroutz said that they saw him in a white 1400cc Nissan delivery vehicle. Counsel for the appellant criticised Mrs Korkie's testimony in this regard pointing to her evidence that she only said that the appellant was driving a Nissan vehicle because her husband told her that the vehicle concerned was a Nissan. This submission, however, overlooks the fact that she also said that the vehicle she saw being used by the appellant was a white 1400cc delivery vehicle with the word Champ written on it. According to the evidence of the appellant the deceased's brother had a white 1400cc Nissan delivery vehicle which was a 'Champ'. Counsel for the appellant was unable to suggest any reason for Mr Kroutz to have been mistaken as to the type of vehicle used by the appellant, who was, it will be recalled, frequently at his premises from June to September 1997 using the vehicle in question.[24] Another witness who linked the appellant with a white 1400cc Nissan delivery vehicle, similar to the vehicle of which the police took possession on 26 October 1997, was Victor Loutsaris, the deceased's son. His evidence was strongly criticised by counsel for the appellant on the grounds, inter alia, that he had told the court that he did not know of a romantic relationship between his mother and the appellant (a statement which he must have known was false) and he told the court that he did not like the appellant. Counsel for the State conceded that his evidence was unsatisfactory in certain respects but submitted that it should be accepted in so far as it was corroborated. As I have reached the conclusion that it would be more appropriate on the facts of this case only to have regard to his evidence where it corroborates that of other

witnesses and as the evidence of the other witnesses on the points on which he corroborates them does really not stand in need of corroboration. I do not propose referring to his evidence on the points in question. In my view, it does not take the case any further.[24] The State's contention that it proved that the appellant had access to a white Nissan 1400cc delivery vehicle of which the police took possession on 26 October 1997 was based essentially on two pieces of evidence: (a) the fact that a court order in relation to the appellant's sequestration was found under the seat of the vehicle, and (b) the facts that before the police took possession of the vehicle, at Verulam, it was under the control of Nishal Ramesh who lived in a different part of the house in which the appellant stayed in Clare Estate and they recovered the keys of the vehicle from Ramesh at his house before proceeding to Verulam. The court found that the vehicle 'would still have been accessible to someone like the accused living in that house prior to its removal [to Verulam] and if the keys were still kept in that house even after its removal, whenever that was.' Counsel for the appellant contended that the State had not proved that the appellant had access to that particular vehicle. He pointed out that Mr Ramesh, who was a State witness, said that the appellant did not use the vehicle. As far as the court order was concerned, Mr Ramesh's partner, Vishnu Purmasher, said that he had used the vehicle to move some of his papers from premises from which he had been evicted and the order had been among his papers, he having been the original petitioning creditor for the sequestration. It is true that he had been displaced in the sequestration application by an intervening creditor and it is, as the trial court put it, 'a strange coincidence that of all his personal papers only this one should have fallen loose from the rest and still be found in the vehicle', nevertheless, as the trial court also pointed out, this is not impossible. Counsel for the appellant submitted, correctly, that the trial court had erred in saying that the keys to the vehicle were still kept in the house of which the appellant occupied a part, after the vehicle was removed to Verulam. The evidence indicated that the keys were sent for from the house after the police arrived: they were not kept in the house. In my view, counsel for the appellant was correct in submitting that the State did not prove that the appellant had access to the vehicle of which the police took possession on 26 October.[25] The next two items of circumstantial evidence must be taken together. It was common cause that the appellant's fingerprint and palm print were found on the rear right passenger window of the red Monza. What was challenged was whether those prints were put on the window after 4 am on 21 October 1997. For all practical purposes it can be accepted that if they were put on the window after 4 am on 21 October they must have come there at the time of the fatal assault on the deceased. The appellant said that the deceased telephoned him twice on the evening of 20 October 1997 and that he went to her flat that evening. While he was there she requested him to fix the driver's window of Mr Govender's vehicle, which was already in her possession. He was unable to fix the window, which was malfunctioning, but he must have touched the rear right window and left his prints on it. He said that at 11 pm that evening he left for the University of Transkei at Umtata where he was for the whole of 21 and part of 22 October. He went there to endeavour to obtain admission for his daughter into the medical faculty for the next academic year. While he was there, on both days, he spoke to Miss

Mametsi Sethuntsa, the receptionist at the Science Faculty of the university and he also telephoned the deceased from a public telephone and gave her the number of the Science Faculty receptionist where she rang him back. In support of this alibi he called Miss Sethuntsa, who testified that he had spoken to her at the Science Faculty on 20 and 21 October, that he had gone to make a telephone call from a public telephone and that a telephone call had thereafter come for him on her telephone and that the person at the other end was a female. She stated that she was able to fix the date of the first day on which she saw the appellant as 20 October because it was that day on which she resumed work after being away on holiday. The appellant also called a witness, Mr Vicky Panday, who works in the customer services department of Telkom. He produced a document, exhibit S4, which purported to be a printout of all calls made by the deceased from the telephone in her flat on 20 and 21 October 1997. According to this printout two telephone calls were made from the deceased's telephone to the number used by the appellant on the evening of 20 October 1997 and another call was made at 10.59 am on 21 October to the Science Faculty at the University of Transkei.[26] As the State was taken by surprise by this evidence it was given leave to call evidence in rebuttal. Mrs Patience Kahla, the custodian of records of leave taken by employees of the University of Transkei, testified that Miss Sethuntsa applied for two days leave on 25 and 26 September 1997 and one day's leave on 10 October. Witnesses were also called from Telkom who produced a further printout of the deceased's telephone calls for the period in question, exhibit T, which was described as Telkom's official account statement. This printout did not contain the two telephone calls to the appellant's telephone number which exhibit S4 showed as having been made on the evening of 20 October nor the telephone call to the University of Transkei reflected as having been made on 21 October. Mr Panday was then asked to reproduce exhibit S4 on his computer but was unable to do so. Subsequently the court itself called a further witness from Telkom, VA Munnik, the senior manager for billing operations. The judgment of the trial court contains a full summary of the evidence given by the witnesses who testified regarding exhibits S4 and T. It is unnecessary for me to repeat it. It suffices for me to say that I am satisfied that the trial court's conclusion that exhibit S4 was not a true extract of the itemised billing records of the deceased's telephone number for 20 and 21 October 1997 and that it is overwhelmingly clear that Mr Panday had falsified it by adding information from other sources is correct.[27] My reasons for so holding are the following:

- (1) the tariff on exhibit S4 is incorrect : it shows a tariff charge of .44

of rand per unit, the present rate of charge at the time of the trial, not the charge in 1997, which was .271 of a rand per unit, with charges being made in units with a minimum charge of three minutes per unit;

- (2) calls to cellular telephones are billed on exhibit S4 at the same cost

as Telkom cells, which cannot be done on a Telkom account recording system;

- (3) the alleged call to the Transkei should have been reflected as a

national call instead of being linked to the same code as a local call;

(4) exhibit S4 does not differentiate between local, national and

international calls, (as does exhibit T), which is what should happen on a genuine Telkom account printout;

(5) Mr Panday was unable to reproduce exhibit S4 when asked to do so after the other Telkom officials had testified; and

(6) exhibit S4 purports to obtain 1997 data calls from Telkom's

flexibill billing system, which only came into operation in September 1999 and was backloaded with data from the old customer billing system from the end of February 1999.[28] Miss Sethuntsa tried, when she was recalled, to explain away Mrs Kahle's evidence by saying that leave she had taken for 25 and 26 September 1997 and 10 October 1997 had been augmented by two periods of five days and one period of one day non-accumulative leave which she had been granted in January and February 1997 but which she had not taken at the time and that she had taken an additional two or three days of previously worked overtime, which her superior had allowed her, which accounted for all the days between 29 September and 17 October 1997 when she was on leave, and which explained why she went back on 20 October.[29] The trial court correctly in my view rejected this explanation. It said: 'First, if Miss Sethuntsa had taken the eleven days leave from 29th of September, there would have been no need to apply for the 10th of October to be a day's leave, since that would have fallen comfortably within the eleven days, excluding weekends of course, from the 29th of September; and, secondly, on that basis, she would have had three and a half weeks leave and not the two weeks she originally stated she had taken, and in her evidence-in-chief she said she had returned from the Kruger National Park visit on the second Tuesday of her leave and then taken another three days off, which would have included the 10th of October, to see her family in the Transkei before returning to work. On that basis she would have returned to work on the 13th of October and not a week later on the 20th.'[30] The State sought to refute the appellant's explanation that his prints must have come onto the right rear window of the Mazda when he was allegedly trying to fix the driver's window on the evening of 20 October by calling Mr Govender, who said that the deceased accompanied him to a restaurant known as Trains Pub and Grill at 5.30pm on 20 October and stayed with him at the restaurant till it closed at 1 am on 21 October. According to Mr Govender the deceased remained in his company until about 4 am when they returned to his home in Westville, after which he allowed her to take the red Monza to drive herself home. He only gave her the keys to the Monza at 4 am and he had them in his possession until then. Counsel for the appellant suggested that Mr Govender had fallen asleep during the evening (he had been drinking alcohol) and was accordingly not aware that the deceased had taken his motor car and gone home for about two hours from 9 to 11 pm. This he denied. The most important aspect of his evidence in my opinion is his statement that he only gave the deceased the keys of the Monza at 4 am. If that is so, she could not have driven it before that. Morgan Chetty, the owner of the restaurant, testified that he remembered the event of the evening in question, that he and the deceased had

spoken the whole evening about her joining his business and that she had not absented herself for two hours during the evening. Counsel for the appellant submitted that his evidence was unreliable. He had only been asked about the events of the evening in question in June 2000, on the day he testified. He contended that nothing extraordinary happened that evening to give Mr Chetty a reason to recall the detail he testified about. This submission, in my opinion, overlooks the important fact that the deceased was murdered the very next day, a factor which would have helped him to remember the events of the previous evening.[31] In my opinion the State clearly established beyond reasonable doubt the factors listed above (except that the appellant had access to the vehicle seized by the police on 26 October). I am also satisfied that the trial court correctly found that Miss Sethuntsa returned to work on 13 October and not 20 October as she said, and that exhibit S4 was not a genuine document and that there was no trace in Telkom's records of the alleged telephone calls made by the deceased to the appellant on 20 October 1997 and to Miss Sethuntsa's number at the University of Transkei on 21 October 1997.[32] I am satisfied further that the facts proved lead to only one reasonable inference, viz that it was the appellant who threw petrol over the deceased on 21 October 1997, set her alight and thus caused her death. It follows that his appeal must fail.[33] The following order is made: The appeal is dismissed.

.....IG FARLAMJUDGE OF APPEAL

CONCURRINGMTHIYANE JAPONNAN AJA

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