

SOUTH AFRICA / JUDGMENT

S v Rabotshankga (564/94)

[1997] ZASCA 22 (25 March 1997)

[1997] ZASCA 22**COURT**

Supreme Court of Appeal

BEFORE

Vivier, Harms, Scott

CASE / FILE NUMBER

564/94

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Case No 564/94

THE

SUPREME COURT OF APPEAL

OF SOUTH

AFRICA

In the matter of:

GILBERT

RABOTSHANKGA APPELLANT

and

THE

STATE RESPONDENT

CORAM

: VIVIER, HARMS ef SCOTT JJA

HEARD:

3 MARCH 1997

DELIVERED:

25 MARCH 1997

JUDGMENT

SCOTT JA/...

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SCOTT JA:

The appellant, a 28 year-old man, was convicted of murder in the former Witwatersrand Local Division and sentenced to death. In addition, he was convicted of assault, theft and rape for which he was sentenced to imprisonment for periods of 6 months, 1 month and 10 years respectively. The present appeal comes before this court in terms of s 316 (A) (1) of Act 51 of 1977 and accordingly is in respect of the conviction and sentence on the count of murder only. Leave to appeal was not sought in respect of the other convictions.

At the time of her death, the deceased was employed as a domestic worker in Rembrandt Park in the district of Johannesburg. On 26 March 1993 her employers, Mr and Mrs Yeowell, went on holiday leaving her in charge of the house. They were due to return on 4 April 1993. On Friday 2 April 1993 at about 4:45 pm one of the couple's sons, T.,

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who was then 19 years of age and undergoing his military training, returned home for the weekend. He found the front door wide open. The deceased was lying naked on the floor in a room described in evidence as the "playroom". Her head was battered and covered in blood. She was obviously dead. A subsequent post mortem examination revealed the cause of death to have been fractures of the skull with intracranial haemorrhage. There were in fact three such fractures. One in particular, was comminuted and described by the pathologist who conducted the examination as "massive". Further medical examination revealed the presence of spermatozoa in the deceased's vagina which also contained blood, probably because she was menstruating. A portion of a shaft of a golf club, a putter, was found on the floor of the playroom. It had blood on it. Two other sections of the putter were also found in the room. Another golf club, the shaft of which had been bent, was lying on the floor near the front door.

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Both clubs had come from Mr Yeowell's golf bag which was kept in an office upstairs and immediately above the playroom. The injuries sustained by the deceased were consistent with blows inflicted with a golf club.

There was a solitary bed in the playroom. On it lay a clay carafe which had been smashed. The deceased's dress, soaked in blood, was also on the bed. There was blood on the duvet as well as on the wall at the head of the bed. The deceased's underwear was found lying on the floor in one of the other bedrooms in the house.

Two hairs which matched those taken from the appellant's head were found on the duvet on the bed in the playroom. According to the expert evidence tendered by the State (and not placed in issue) the chance of two persons having identical hair was one in 4 500 or, expressed differently, a chance of 0,02%. Pubic hairs from the deceased as well as hairs from her head were also found on the duvet.

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Ms Miriam Ramohlolo was a friend of the deceased. She, like the deceased, was a domestic worker and was employed by the occupants of a house nearby. She was a frequent visitor to the deceased's place of employment and was known to Mr Yeowell. On the morning of 3 April 1993, and in the company of her employer, she went to the police station and reported what had happened at the Yeowells' house the previous afternoon. As a result of what she said, the appellant was arrested the following day. Ramohlolo and the appellant had had a love relationship which had been terminated by the former some two weeks prior to the fatal day. This was confirmed by Ramohlolo's employer. There was disagreement, however, as to the cause of the break-up. Ramohlolo said it was because she had been assaulted by the appellant on more than one occasion and had become frightened of him. This was denied by the appellant. He said their differences related merely to some money which

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Ramohlolo owed him.

At the trial Ramohlolo (who testified on behalf of the State) and the appellant gave mutually destructive versions of how the deceased came to meet her end. Each accused the other of being the killer. The court a quo (Schabert J sitting with two assessors) accepted the evidence of Ramohlolo and rejected that of the appellant. In this court it was argued that the court a quo had erred in doing so.

It is necessary to set out, as briefly as the circumstances permit, the version of each.

Ramohlolo testified that on 2 April 1993 at about 2 pm she went to visit the deceased. On arriving at the Yeowells' house she rang the bell at the security gate but received no response. She was about to leave when suddenly the gate opened. She went in and was surprised to see the front door wide open. She said she walked inside and was suddenly

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grabbed from behind by someone wielding a knife which was held to her neck. She saw it was the appellant. He took her to the playroom where the deceased was lying naked on the bed covered in blood. Ramohlolo said he invited her to ask the deceased why he had been hitting her. The deceased replied that the appellant wanted her employers' firearms but she did not know where they were kept. (They had in fact been left at the bank.) Ramohlolo testified that the appellant then picked up a golf club lying on the floor and proceeded to hit the deceased on the head with it. She implored him to stop but he refused and threatened to kill her as well. The golf club broke

and he ordered her to go upstairs and fetch another. She said she went upstairs and opened a window in order to jump out. The appellant, however, came into the room, took a club from the golf bag and struck her on the back with it. (This was the subject of the count of assault on which the appellant was convicted.) She said that they then heard a

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noise downstairs. He went to investigate and she followed. She saw that the deceased had crawled as far as the passage. She said that the appellant dragged the deceased back to the playroom and began beating her with the second golf club. While he was doing so, Ramohlolo heard footsteps outside. She said to the appellant that there were people coming. She went into the passage and pressed the button to open the security gate and ran out. The security gate closed behind her with the appellant on the inside. She ran towards her employer's house but the appellant caught up with her before she got there. She said he was carrying a green and black kit-bag which she had earlier seen in the house. (This was the subject of the count of theft on which the appellant was convicted.) She said that the appellant threatened that if she went to the police he would kill her and if he was unable to do so because he was arrested first, he would tell them that he and she had together killed the deceased.

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Ramohlolo testified that on arriving back at her employer's house she locked herself in her room and then fainted. She later telephoned her sister who told her to go to the police. She also spoke to her employer's son but she said that she was in such a turmoil and so upset that she could not express herself properly in English. It was only the next morning that she was able to give a proper account of what had happened to her employer and they went to the police station together.

I turn to the appellant's version. It was briefly as follows. He said that on 2 April 1993 he went to Ramohlolo's place of employment between 1 and 2 pm in order to recover some money which he said she owed him. There was no response to the doorbell and a woman from next-door came and told him that Ramohlolo had gone to visit a friend (the deceased) and gave him the number of the house. He then went there and rang the bell at the security gate. A man whom he did not know but who

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he later discovered was the deceased's boyfriend came out and asked him what he wanted. He said he was looking for Ramohlolo and he was invited in. There he found the deceased and Ramohlolo. He said they were both in tears and he noticed that Ramohlolo's face was swollen. The deceased was dressed. Suddenly the man who had invited him in drew a firearm and marched him upstairs where he ordered him to jump out of the window. The appellant said he refused to do so. The man put away his firearm, which the appellant suspected did not work, and began hitting him. The appellant fought back. He said that while they were fighting Ramohlolo came up and gave him a golf club. The other man then ran downstairs and fled through the front

door. The appellant said he walked back from the front door and found Ramohlolo in the playroom sitting on the deceased and hitting her with a golf club. The deceased, he said, was lying on the floor close to the door. He saw blood on both of them but did not observe

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whether the deceased was injured or not. Nor, he said, did he notice whether she was naked. He said that he told Ramohlolo to stop hitting the deceased. When she continued doing so, he took the club away from her and broke it. He also pulled her off the deceased. To do so it was necessary to go no further than about 2 feet into the room. Apart from this, he did not go into the playroom. He then asked Ramohlolo to open the door so that they could leave. He also asked her why he had been attacked by the deceased's boyfriend. She replied that she did not know but that she would tell him more when they got to her room.

He testified further that they walked back to Ramohlolo's place of employment where she later explained that the cause of the trouble was that the deceased had taken her clothes and money and refused to return them. The appellant said he was concerned about the deceased and suggested to Ramohlolo that she return to see if the deceased was all right.

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Ramohlolo refused to do so and the deceased said that he himself walked back to the house but received no response when he rang the bell. He then returned to Ramohlolo's place of employment. He rang the bell and when he got no answer he left. He was arrested on Sunday 4 April 1993.

The court a quo found Ramohlolo to be an impressive witness. There is nothing in the record which suggests that this finding was not justified. In this court counsel for the appellant pointed to certain imperfections in the evidence of Ramohlolo. In my view they are inconsequential and not such as to adversely reflect upon her credibility in so far her account of the events of 2 April 1993 are concerned. The evidence of the appellant, on the other hand, was riddled with improbabilities. I agree with the trial court that they were of such a nature as to justify the rejection of the appellant's version in favour of that of Ramohlolo. It is sufficient to mention only some of the more obvious

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improbabilities in the appellant's evidence.

- (1) The evidence of Ramohlolo that the deceased was naked was corroborated by T.Y. who was on the scene very soon

after the event. According to the appellant, he did not notice whether the deceased was naked or not. Having regard to his evidence that he actually pulled Ramohlolo off the deceased, his failure to observe her nakedness is improbable to say the least.

- (2) The same is true of his evidence that he did not observe any injuries on the deceased; he merely saw blood on both Ramohlolo and the deceased. The photographs handed in as exhibits show the deceased to have sustained horrendous injuries on and about the face and head. If the appellant was as close as he says he was, he must have observed them.
- (3) On the appellant's version the only person who could have undressed the deceased (before or during the assault) was Ramohlolo. The

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explanation he gave was that Ramohlolo told him that the deceased had refused to return some clothing which was hers, and presumably the deceased had been wearing the clothes in question. In the first place, it is highly improbable that in the course of such a quarrel between two female friends, the one would undress the other so as leave her totally naked. But equally inconsistent with the explanation is the fact that the clothing was left behind and not taken by Ramohlolo. The deceased's underclothes were found on the floor in a bedroom at the other end of the house. This, too, would appear inconsistent with the appellant's explanation.

- (4) According to the appellant, he proceeded no further than two feet into the playroom. Yet hairs from his head were found on the duvet on the bed. His explanation that somehow or other the hairs could have found their way on to the bed was in truth no explanation at all.
- (5) The injuries sustained by the deceased were indicative of

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a brutal attack. It is difficult to imagine that such an attack could have arisen out of a quarrel between two friends over clothing and some money. (6) It is improbable, to say the least, that the deceased's boyfriend should suddenly, without rhyme or reason, draw a firearm, march the appellant upstairs, order him to jump out of the window and when the appellant resisted, run away leaving his girlfriend behind. This aspect of the appellant's evidence is quite bizarre.

In my view there is no merit in the appeal against the conviction on the count of murder.

I turn to the appeal against sentence. The trial commenced on 30 August 1994, ie after the coming into operation of the Constitution of the Republic of South Africa (Act 200 of 1993) on 27 April 1994. Subsequent to the appellant being sentenced to death the Constitutional Court in *S v Makwanyane and Another* [1995] ZACC 3; 1995 (2) SACR 1 (CC) declared

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the death sentence to be inconsistent with the Constitution and accordingly invalid. As the sentence imposed by the court a quo was therefore invalid, another sentence must be substituted. In the circumstances, it seems to me that the appropriate course to take would be to remit the matter to the court a quo for the imposition of a competent sentence. The following order is made:

The appeal against the conviction on the count of murder is dismissed.

The appeal against the sentence of death is upheld and the sentence of death is set aside.

The matter is remitted to the court a quo for the imposition of a competent sentence on the count of murder.

D G SCOTT

VIVIER JA

Concur

HARMS JA

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