

SOUTH AFRICA / JUDGMENT

Ssengendo v S (A564/13) [2014]

ZAWCHC 147 (22 September 2014)

[2014] ZAWCHC 147

COURT

Western Cape High Court, Cape Town

BEFORE

Dolamo, Samela, Weinkove

CASE / FILE NUMBER

A564/13

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IN

THE HIGH COURT OF SOUTH AFRICA

(WESTERN

CAPE HIGH COURT, CAPE TOWN)

CASE

NO: A564/13

DATE:

22 SEPTEMBER 2014

In

the matter between:

STELLA

JOSEPHINE BAGENDA SSENGENDO.....Appellant

And

THE

STATE.....Respondent

JUDGMENT

DELIVERED ON 22 SEPTEMBER 2014

DOLAMO, J

- [1] The appellant was convicted by Allie J (sitting with an assessor) on one charge of theft and one of accessory after the fact to murder. She was sentenced to five (5) years on the theft conviction and seven

- (7) years on the accessory after the fact charge. She was granted leave to appeal to the full court of this division against both conviction and sentence. She is pursuing this appeal before this court.
- [2] The appellant, as accused no 3, stood trial in the court a quo together with her siblings. These were her brother, who was accused 1, and her sister, who was accused 2. (I shall continue to refer to appellant's co-accused in the Court a quo as accused 1 and 2 respectively) They were all from Uganda. The accused were charged with robbery with aggravating circumstances of a Mazda motor vehicle ("the Mazda") belonging to the deceased in the murder charge.
- [3] The deceased was of Danish origin and was married to accused 2. They married in March 2001. They lived together as husband and wife and their minor children at 46 Chapman Avenue, Gordon's Bay in the Western Cape. After acquisition of this immovable property deceased made improvements thereto, including building a flat-let. When appellant came to South Africa in 2000 she went and joined her sister, accused 2, where she was allowed to live in the flat-let. She continued to occupy the flat-let
- with her son, who was born in South Africa. In return appellant did domestic chores in the main house for the deceased and accused
2. She accordingly had unrestricted access to the main house. Accused 1, on the other hand, had his own place of residence in Woodstock, Cape Town. He too did odd maintenance jobs for the deceased and as such was a frequent visitor at no 46 Chapman Avenue, though at times he gained illegal access to the main house by forcing open a sliding door.
- [4] In the trial the evidence led by the State painted a picture of conniving and deceit by the accused after the brutal slaying of the deceased. This started on the 15 January 2008 when accused 2 reported to the South African Police Service ("SAPS") that the deceased was missing since the 14 January 2008. She alleged that the deceased left on the morning of the 14 January 2008 in his Mazda to play golf at the local golf course and never returned home, which was unusual. She also alerted deceased's family in Denmark about the deceased's alleged disappearance. As a result members of the deceased's family flew from Denmark to South Africa, arriving on the Thursday 17 January 2008.
- [5] A meeting was held on the 18 January 2008 at the deceased's home with accused 2 deceased's Danish family and the SAPS, led by Greeff the investigating officer in the matter in attendance. As a result of accused 2's conduct in the meeting deceased's family suspected foul play, with accused 2 being their prime suspect. As a result the family of the deceased later met alone with the investigating officer, where they articulated their suspicions. These suspicions were triggered, inter alia, by accused 2's nonchalant attitude when deceased's family raised concerns about their safety in the house since it was alleged that deceased's keys were not accounted for, and that the house was uncharacteristically clean, especially the garage, with the interior of the house appearing to have been recently painted.

[6] Sensing foul play the SAPS started investigating in earnest, with deceased's home being the focal point. The search in the house, together with meticulous investigation, produced evidence which revealed, inter alia, that on the 14 January 2008, at approximately 08h45, appellant went to a shop where she regularly purchased a multi-purpose cleaning gel ("gel") which removes stains, including blood stains, looking for this product; that this particular shop did not have the gel in stock; that this appeared to upset the appellant; that appellant also seemed nervous; that appellant was referred to another shop in the complex which had the product in stock and where she bought 500ml of the gel; that appellant thereafter left in an orange coloured Jeep 4X4 motor vehicle driven by accused 2; that at about 17h00 on the same day appellant, together with accused 1 and 2, went to a carpet shop where they purchased a carpet and insisted that it be fitted the same

day but were eventually persuaded to settle for an arrangement that it be fitted the following day, Tuesday 15 January 2008; that the workmen who went to fit the carpet on the Tuesday detected a smell of fresh paint in the room where the carpet was to be fitted and noticed that gripper strips, which allow for the carpet to be stretched properly, were attached to the perimeter of the room to which the carpet was to be fixed and were visible, which indicated that a carpet had recently been stripped from the floor in that room.

[7] The SAPS also launched a comprehensive forensic investigation of the deceased's residence. Observations and findings at the scene were recorded, photographed and, where applicable, collected for forensic analysis. Dogs which were specifically trained to detect biological body fluids were also used in the investigation. The search of the deceased's premises yielded a wealth of forensic material. In the course of investigation "Amidu Black", a chemical used to detect the presence of blood, was applied to various parts in the house. The result was an indication of the

presence of blood in the garage, deceased's bedroom, on the stairs leading from the kitchen to the garage and in the flat-let

which was occupied by the appellant. These blood stains were of two kinds: smear marks and impact marks. A smear mark would be created when a bloody object came into contact with a surface while an impact splatter would be the result of force being applied to a bloody surface. Accused 1's blood splatter was found in the deceased's bedroom as well as in the flat-let. The other blood marks in the flat-let, however, did not have sufficient ridge characteristics for positive identification.

[8] Accused 2 and appellant were asked by the SAPS to participate to eliminate them as suspects regarding the bloody footprint which was on the stairs. Though their footprints did not match that print, the possibility could not be excluded that this footprint was of a person related to them, as it displayed certain characteristics common to their prints. Attention was as a result turned to accused 1 as a suspect in the disappearance of the deceased. Accused 2 and appellant were thereafter asked to help

the police to lure accused 1 to Gordon's Bay, where on arrival, was arrested. After his arrest, accused 1 admitted to killing the deceased but gave an exculpatory version. On reviewing the available evidence, particularly signs of tampering with deceased's

bedroom, the SAPS decided to arrest accused 2 and appellant as well.

[9] Accused 1's version was that on the Sunday of the 13 January 2008, he was out drinking with his friend Frank and, past midnight, went to deceased's place in Gordon's Bay. He and Frank climbed over the boundary wall to gain entry onto the property. Once inside the yard they sat in the garden and continued to smoke tik and drink alcohol. Later they moved from the garden and went to sit inside a car which was parked in the garage. Appellant alleged that he later heard the sound of a television coming from the house and, on investigation, found the deceased in the kitchen making coffee. After a conversation with the deceased about the renovation work, which accused 1 was doing for deceased, returned to the garage where he continued smoking tik with his friend. Deceased later came to the garage and became angry when he realised that they were smoking tik. This led to a scuffle, with the

deceased grabbing the knife which was on accused 1's waist and stabbing the latter therewith on his left arm. Accused 1 alleged that the next thing he could remember was that he was on the floor holding the knife in his hand with the deceased next to him. There was blood all over.

[10] On realizing that the deceased was dead he panicked and decided to get rid of the body. He then went into the house and proceed to the deceased's bedroom. He took therefrom a bedcover and, from the cupboard touching the bottom of the door to avoid smearing his blood thereon, took out some cloth and went back to the garage. Accused 1 started to clean the traces of blood through the garage and all the way into the house.

[11] After wrapping the deceased's body with the cloth material and plastic he placed it in the boot of the Mazda. He changed into fresh clothes and put the blood stained ones in the boot of the Mazda as well. Appellant thereafter drove out of the premises and went to park the Mazda at a shopping centre and returned with his friend to the flat-let where he fetched his friend's jumper. Accused 1 found appellant still in bed and asked her for a plaster to cover his wound. He told her that he was injured while working. He also asked her for money which was ostensibly meant to purchase a carpet and skirting's for the renovation he was doing on the premises. Appellant refused to give him the money but agreed to pay it directly to the shop for the carpet.

[12] According to accused 1's version he later, on the same Monday of the 14 January 2008, went with appellant to the carpet shop where they purchased a carpet. He could not succeed with his plans to cancel the sale and to get a refund of the money paid. He and appellant later that day joined accused 2 at the beach where the latter was with her children. Accused 1 and appellant later left accused 2. Accused 1 went to fetch the Mazda from the shopping mall and drove to Woodstock where he resided. He had the keys to this vehicle which he had found inside the vehicle where they were usually left.

- [13] Accused1 thereafter sought the help of his friend to dispose of the deceased's body. He used pool acid and another product, which he mixed, to prevent decomposition and smells, and which he poured onto the body, after piercing holes with a knife through the plastic wrap. He drove with his friend to a bushy area in Blouberg in Cape Town where they dumped the body. Thereafter they drove to Guguletu also in Cape Town, where accused 1 abandoned the Mazda at a car wash. The following day he called accused 2 and 3 and was told that deceased was missing. The two were crying as they related the story to him. He was suspicious when later in the week accused 2 and 3 called him, speaking in English, and informing him that the police came looking for him but that everything was in order. Accused 1 also testified that he had intended to abandon the Madza where he had parked it at the carwash.
- [14] Deceased's body was found on 20 January 2008 with multiple stab wounds. A post mortem report revealed that there were stab wounds on the left anterior aspect of the body including the neck. Three stab wounds penetrated into the left chest cavity. There was one superficial stab wound track in the left upper lobe area of the lung. A further 8 stab wounds were present in the neck area. One penetrated the left internal jugular vein; another stab wound was in the right temporal area of the head and another incised wound in the right ear lobe. No skull fractures were found, though tramline abrasions on the vertex of the head were detected. Those were usually caused by something with a linear shape. There were blunt trauma signs to the neck with a fracture to the left posterior horn of the thyroid cartilage and hyoid bone. A ligature was loosely tied around deceased's neck which was usually associated with strangulation.
- [15] According to the post-mortem report the neck fracture of the cervical spinal column were injuries that occurred while the deceased was still alive. Multiple skin lesions were caused by post morbid burns. The neck was broken between the 5th and 6th vertebrae. Due to this and decomposition, skin loss had occurred and which did not assist in interpreting the cause of the neck injury. The clothing was extensively burned. Parts of the left lung and oesophagus showed changes consistent with burning. Numerous sharp trauma injuries were also found, especially to the left side of the chest and to the neck. Of these, 48 were stab wounds were sustained during life. One entered the lung and another entered a major blood vessel. These were fatal.
- [16] Despite these injuries, there was a marked lack of defence wounds. There was a small incised bruising on one of the arms at the back of the wrist. Some kind of burning occurred to the body which charred clothing and parts of the skin and cooked the content of the upper airways. In the post mortem report under the heading "appearance", it was stated that the body was wrapped in a duvet and ligatures were tied around the legs and arms. The skin showed advanced decomposition including mummification i.e. drying out. There was, however, a marked lack of large maggots with only small ones buzzing around, indicating that the body was hidden where flies only discovered the body at a late stage. The conclusion was that multiple stab wounds, signs of strangulation and neck injury caused death.

- [17] Appellant also testified in her own defence. Her version was that she lived in the flat-let and served as a caretaker of deceased's property for which deceased paid her R1000.00 per month; that accused 1, in the cause of carrying out renovations to the house on the instructions of the deceased, had painted most of the interior walls except the deceased's bedroom, garage, living-room and laundry. This was during the week of the 7 January 2008: i.e about a week before the deceased was killed; that because of dampness in the house deceased's bedroom required urgent attention and that as a result accused 1 had removed the carpet and underfelt from this room. According to appellant, accused 1 was often found in the house though she never bothered to establish how he had gained entry.
- [18] Appellant further testified that on the morning of the 14 January 2008 accused 1 came to knock on the door of her flat-let and asked for a plaster to cover a wound on his left arm which was bleeding; that accused 1 told her that he was injured while removing the carpet in deceased's bedroom: that accused 1, after taking the plaster from where she pointed it out to him, left her flat-let; that when, approximately 45 minutes later after accused no 1 had left, she went to the main house, found the kitchen sliding door open; that this was not unusual as deceased was in the habit of leaving it open in the morning, after standing in the doorway taking in the view; that she found that accused 2 was still in bed with her children playing on her bed; that, as she had arranged with accused 1 to purchase a carpet that day, she called him on his cell phone when she did not find him in the house; and that together with accused 1 later went to purchase the carpet.
- [19] According to appellant she did not find deceased in his bedroom when she went into the main house; that she locked deceased's bedroom and left the key in a cupboard as she feared that the children may be injured by the sharp nails which were exposed after the carpet was removed, the bed lifted and left standing on its side; that she closed the gate which was left half open and which she assumed was left open by the deceased when he left that morning; that she later left accused 2 with the children at Wimpy in Strand when she went to meet accused 1; that together with accused 1 went to the carpet shop where they purchased a carpet, paying a deposit of R1300.00; and that she kept the receipt as she wanted to claim back the money from the deceased. According to appellant after the purchase of the carpet she and accused 1 went back to join accused 2. She alleged to have thereafter gone back to the shop to arrange the time as to when the workmen would come to fit the carpet and that an agreement had already been reached that this would be on the Tuesday.
- [20] Appellant alleged further that she and accused 2 phoned around to try and establish deceased's whereabouts when they realised that he had not returned home from playing golf, and that she stayed in the main house with accused 2 until at approximately 01h00. Appellant also alleged that she stayed home on the 15th January waiting for the handymen, who were to come and fit the carpet; that accused 2 left in search of the deceased and returned at about 11h00, after reporting the deceased as missing to the police. She went on to allege that deceased, contrary to what his Danish family had testified, never carried with

him any house keys or remote controls and relied on accused 2 to open for him. Appellant unexpectedly, as this version was never put to state witnesses, alleged that she had shown the SAPS around the house and particularly where the dampness was clearly visible; and that on Wednesday 17 January 2008 she and accused 2 cleaned the house with the gel in preparation for the arrival, the following day, of deceased's Danish family.

[21] The learned trial Judge held that for accused 1 to succeed with his version that he killed the deceased without the knowledge of accused 2 and the appellant he had to provide an explanation of how he gained entry into the house. In this respect the Learned trial Judge found that the explanation given by accused 1 was "elaborate but wholly unexplained and unconvincing account" of how he had opened a sliding door from the outside. Accused 1's version was rejected as false. That left the door open to consider the involvement of accused 2 and the appellant in the robbery with aggravating circumstances and deceased's murder.

[22] The Learned trial Judge went further and held that on the evidence on record the State had proved that accused 1 used the deceased's Mazda to transport the body and eventually dispose of it but had not proved that accused 1 killed the deceased in order to steal the Mazda and consequently that robbery had not been proved. The Learned trial Judge was, however, satisfied that the evidence, in particular accused 1's act of abandoning the vehicle in Guguletu, proved theft in that he had no intention of returning the vehicle to the heirs of the deceased. As theft was a competent verdict of robbery with aggravating circumstances accused 1 was accordingly convicted of theft.

[23]

In convicting accused 2 and the appellant of theft, the learned trial Judge held that[1]:

"[255] Since all three accused assisted one another in staging circumstances that could lead the police to believe that the deceased was abducted while travelling to or from gold, that stealing of the Mazda vehicle of the deceased was an integral part of their plan to conceal the true circumstances in which the deceased was killed."

and at 258-259 that:

"[258] Snyman, in discussing why South African law does not recognise accessories after the fact in theft explains at pages 509-510 that since theft is a offence, there can be no perpetrator who assists the original thief after theft has been completed. [see: S v Morgan & others 1993(2) SACR 134(A)]"

[259] In this case, Accused 1 admitted that he abandoned the car with the intention of not returning it to the deceased or his heirs. While the car remained under control of accused 1 and later was abandoned, accused 2 and 3 led the police and the Danish son and daughter of the deceased to believe that they had no way of establishing where the car was nor where the deceased was. They are accordingly guilty of theft of the Mazda motor vehicle that belonged to the deceased."

- [24] On the murder charge the trial Judge found that the State did not prove beyond reasonable doubt that accused 2 and appellant were present when the fatal blows were dealt to the deceased but had proved, beyond reasonable doubt, that they assisted in concealing the fact that the deceased was murdered by accused 1 in his home. With reference to the role played by appellant the trial Judge found that “Accused 3 clearly took it upon herself to cover the tracks of accused 1 and to distance accused 2 from any knowledge of the murder”[2].
- [25] Appellant’s conviction, on the competent verdicts of theft and accessory after the fact to murder, was attacked on the basis that the Learned trial Judge erred in finding that the State had proved beyond a reasonable doubt that the appellant stole the Mazda in that there was no evidence of any physical involvement by the appellant in the removal and disposal of the vehicle; that the circumstances in which the removal and disposal of the vehicle took place which were described in accused 1’s evidence, were linked to the murder of the deceased; and that the trial court erred in making a finding that since the accused assisted one another in staging circumstances which could lead the police to believe that the deceased was abducted while travelling to or from playing golf, the stealing of the Mazda was an integral part of the plan to conceal the true circumstances in which the deceased was killed and, since theft was a continuing crime and the appellant led the police and family of the deceased to believe that they had no way of establishing where the car or the deceased were, appellant was guilty of the theft of the Mazda.
- [26] As regards appellant’s conviction as an accessory after the fact to the murder it was submitted that there was no evidence that appellant intentionally staged any circumstances to mislead anyone. Secondly that there was no evidence of a prior arrangement involving the appellant to stage these circumstances in order to mislead the police or anyone else.

[27]

It is trite law that theft is a continuing offence and that a person who becomes an accessory thereafter by assisting the thief to escape is a socius criminis and as such is guilty of theft.[3] What is meant by theft being a continuous crime is succinctly set out in LAWSA [4]

“Theft is a delictum continuum as a continuing crime. This means that the theft continues as long as the stolen property is in the possession of the thief or of some other person who was a party to the theft, or even of some person acting on behalf of or even, possibly, in the interest of the original thief. The important effect of this doctrine is that initially no differentiation is made between the perpetrator or socius criminis on the one hand, and an accessory after the fact on the other. Any person, who assists the original thief or, his or her socius whilst the theft continues, is a thief. He or she cannot be an accessory after the fact, because the original theft has not yet been completed. A further reason why such a person is regarded as a thief is that he or she also has the necessary intention permanently to deprive the owner of property. Even if the assistance which is given to the original thief does not in itself amount to an independent appropriation of the property (for example where it merely consists in rendering advice on how to dispose of the property), he or she is nevertheless liable as an accessory to the crime. Obviously assistance or advice rendered before or during the original appropriation makes a person a socius criminis to theft.”

[28] In my view the above passage correctly reflects the law as to theft being a delictum continuum. It follows that in casu for appellant to have been convicted of theft the State had had to adduce evidence which proved that appellant was aware that accused 1 had appropriated the Mazda with the intention to permanently deprive the heirs to the deceased's estate; had the intention to associate herself therewith and that, when she associated herself with the actions of accused 1, the Mazda was still in the latter's possession.

[29] The evidence adduced by the State, in my view fell short of covering these two essential requirements. There was no evidence that clearly proved that appellant was aware that accused 1 had appropriated the Mazda or that she intended to associate herself with his actions. In other words, there was no evidence to prove that appellant was aware that the Mazda was missing; that it was missing because accused 1 had appropriated it; and that he used it to convey deceased's body.

[30]

Secondly, there was no evidence to prove that when appellant embarked on the process of cleaning the deceased's house to remove traces of blood, assisted in the purchase of the carpet, and so forth, (i.e associating herself, after the fact with the deceased's murder) that the Mazda was still in the possession of accused 1. It is not clear from the evidence whether appellant was aware that the Mazda was missing at all, from which an inference could be drawn that she was aware that accused 1 had taken it and had used it to convey the deceased's body. In my view in addition to there being no evidence that appellant was aware that accused 1 approached the Mazda there was no evidence the she was aware that accused was still in possession of the Mazda and that she intended to associate herself with such continued possession. In the absence of evidence to that effect an inference cannot be drawn that appellant was aware of the theft of the Mazda by accused 1, associated herself therewith and, as theft was a continuing crime, that she herself was guilty of theft. These shortcomings cannot be supplemented by the untruthful evidence given by the appellant.[5] In the circumstances the State has failed to prove appellant's guilt on the theft charge. The appellant's conviction and sentence on this charge ought to be set aside.

[31] The next question is whether the appellant was correctly convicted as an accessory after the fact to the murder. In determining whether appellant's guilt, on this charge, was proved beyond reasonable doubt, the purchase by applicant of the gel; the cleaning of the deceased's house, her involvement in the purchase of, replacement of the carpet, the painting of deceased's bedroom, the presence of blood in the house stairs, garage and the flat-let are all factors to be considered.

[32] Bastra, who testified about appellant's acquisition of the gel, was certain that appellant purchased it on the 14 January

2008. Bastra was cross-examined about her statement to the police in which she gave the date of the 18th January 2008 as the date on which appellant came looking for the gel. Her explanation was that the date which she mentioned to the police was the 14 January 2008 and that the error in recording the date as the 18 January 2008, which was later corrected, was that of the police who took down her statement. Titus, another witness who testified about appellant's movements on the 14 January 2008, was certain that appellant came to her shop on the 14 January 2008 at approximately 08h45. She was certain about the date because this was the day on which her shop re-opened after the Christmas holidays.

[33] Mr Klopper, arguing for the acceptance of the appellant's version as reasonably possibly true as to entitle her to an acquittal, submitted that it should be borne in mind that the events which the witnesses were testifying about occurred five years prior to the trial and that it was quite natural that witnesses, including the appellant, would differ concerning certain aspects and have difficulty recalling other facts with accuracy. According to Klopper the amendment of the original date in Bastra's statement, from 18 January 2008 to 14 January 2008, was indicative of this uncertainty regarding dates.

[34]

While it is correct that with the passage of time witnesses tend to be confused as to details, such as the exact date, this does not appear to be the case with Bastra. She was certain that appellant came looking for the gel on the 14 January 2008 and that the date of the 18 January 2008 was an error on the part of the police who recorded her statement. In any event the mere fact that it is evidence that there were self-contradictions must be approached with caution[6]. Furthermore police statements are notorious for their inaccuracies and care must be taken not to lay the blame for such inaccuracies at the door of a deponent to a police statement when this differ with the evidence given in court[7]. The explanation by Bastra, in my view, removed any doubt regarding the date on which appellant bought the gel. It can therefore be accepted as proved beyond reasonable doubt that appellant purchased the gel on the 14 January 2008.

[35] Secondly, Mr Klopper argued that no inference of guilt can be drawn from the mere purchase of the gel in the light of the fact that appellant had in the past purchased this product. According to Mr Klopper appellant was the caretaker of deceased's property and responsible for cleaning duties. There was therefore nothing improbable nor sinister about the fact that she did some cleaning prior to the arrival of the Danish family, since the house was untidy and dirty, he argued. Mr Klopper further submitted that there was no evidence that the gel was intentionally used to clean away any blood related to the death of the deceased since no tests were done at the places where there was suspicion that cleaning had taken place to establish whether the gel or some other substance had been used.

[36] The replacement of the carpet, painting the house and the complicity of the appellant therein was, according to Mr Klopper, not indicative of her guilt as an accessory after the fact on the murder charge. In this respect, Mr Klopper submitted that the deceased intended to place the house on the market to take advantage of the 2010 Football World Cup which

was going to take place in South Africa. Accordingly, it was submitted, this was part of maintenance work to deal especially with defects which required immediate attention, such as the dampness and water damage to the carpet in deceased's room, to enhance the prospects of getting a good price.

[37] Mr Klopper argued also that there was no evidence that anything linked to the murder of the deceased was the cause of the removal and replacement of the carpet since the totality of the evidence indicated that the deceased was attacked in the garage area and not in his bedroom. He accordingly submitted that the trial court's finding that the removal of the carpet was related to the death of the deceased was mere conjecture and speculation.

[38]

In assessing the probative value of the evidence of cleaning, carpet replacement and painting, it must be borne in mind that the State was only required to prove its case beyond reasonable, not beyond any shadow of doubt[8]. Each piece of evidence, furthermore, should not be viewed in isolation but placed on the evidentiary scale and accorded due weight together with other admissible evidence to determine whether the State had proved its case beyond reasonable doubt.

[39] The evidence was that appellant first went to purchase the gel on 14 January 2008. While there is nothing wrong with her purchasing this product, the evidence was that appellant was visibly upset when she did not find it from her usual supplier. She had to be comforted and directed to another shop where she bought this item. It is evident that appellant was desperate to acquire this product and it was imperative to have it that same day. The question is why was it so important to her to have this specific product on that day? Clearly she had an urgent need for the product which was intended for immediate use.

[40] Secondly, appellant played a role in the purchase of the carpet and insisted that the carpet be installed in the deceased's house that same day. There was a dispute as to whether appellant was with accused 1 only or accused 2 when the carpet was purchased. In my view it is not necessary to resolve this aspect since, whoever was with appellant in the shop, acted in consent with her. Appellant whether with accused 1 or 2, had to be persuaded that it was only on the following day that the carpet can be installed. Appellant, and whoever was in her company, had initially asked for a second-hand carpet and only settled for the cheapest new one when the shop informed them that it did not have a second hand carpet in stock. Appellant, and whoever was in her company, deliberately gave the wrong address as the place where the carpet was to be installed. Appellant and company, according to Reinhardt Anthony Isaacs who was employed at the carpet shop, also gave a fictitious name (i.e. "Francis") to whom the invoice was made. All these occurred on the Monday of the 14 January 2008, the day on which deceased was murdered in his house. Again the question to ask is why was appellant and company anxious to have the carpet installed on the same day of its purchase given that, on appellant's version, the old carpet in deceased's bedroom was removed a week before? Why did they give a false name and false details regarding the

address where the carpet was to be fitted?

- [41] On the Tuesday of the 15 January 2008 appellant remained home waiting for the carpet people. She alleged to have single-handedly removed the furniture out of the deceased's bedroom before the carpet arrived; and that she only locked the deceased's bedroom on the Monday of the 14 January 2008, according to her was to prevent the children from being hurt by the exposed nails after the removal of the carpet, which occurred allegedly a week before. It is not clear from the evidence whether the bedroom had previously been locked, after the removal of the carpet, for the alleged safety of the minor children. The mere mention of locking the bedroom in appellant's evidence, however, creates the impression that it was only locked for the first time on 14 January 2008. If that is so, why was the bedroom not locked on the previous occasions if the intention was to prevent the children from being injured by the exposed nails?
- [42] From the expert evidence it is clear that the cleaning was specifically focused on areas where blood was found to have earlier been deposited. The result of the use of the gel was to dilute the blood to such an extent that some did not have sufficient ridge characteristics for positive DNA identification. It is evident that the intention with the cleaning was to obliterate any traces of blood and the gel was a suitable medium for this purpose.
- [43] The argument by Mr Klopper that the replacement of the carpet in the deceased's bedroom was not conclusively connected to the murder of the deceased since, on accused 1's version, deceased was killed in the garage, is without merit. On accused 1's version he was bleeding and obviously would have left traces of blood on the carpet in the deceased's bedroom when he went to fetch the bed cloth with which he wrapped the deceased's body. It is for this reason, in my view, that the carpet had to be removed so that no traces of blood, of whomsoever, were found in the house. Any traces of blood, especially in the deceased's bedroom after he had gone missing, would have called for an explanation and this was what appellant and company wanted to avoid. It does not matter whether it was the deceased's blood, accused's blood or any other person's blood: the presence of blood in the bedroom would have been a dead giveaway. This had to be removed at all costs and immediately.
- [44] In addition to the removal of the carpet there was a smell of fresh paint in the house. This was, according to the evidence of Denver Miller the handyman who was part of the crew that went to fit the new carpet in deceased's home, coming from the deceased's bedroom. The contention by the appellant that the smell of paint emanated from elsewhere in the house and was not connected with the murder of the deceased must be rejected in the light of the evidence of Miller who was certain that this was coming from the deceased's bedroom where the carpet was installed.

[45] The State, in my view, had proven beyond reasonable doubt that the activities of the appellant referred to supra were aimed at concealing the fact the deceased was killed by accused 1 in his own home. I am satisfied therefore that, on a conspectus of all the evidence, appellant's guilt as an accessory after the fact to the murder had been proved beyond reasonable doubt and consequently her conviction as such cannot be disturbed.

[46] I turn now to deal with the appeal against sentence. Appellant was sentenced to 7 years imprisonment on her conviction as an accessory after the fact to the murder. It was submitted on behalf of the appellant that the court a quo over-emphasised the seriousness and the nature of the actual crime committed by the appellant and attached insufficient weight to her personal circumstances; that the court a quo erred in finding that the appellant showed no remorse; that it overlooked the fact that appellant offered assistance to the police by identifying accused 1 and was instrumental in his arrest. It was submitted, furthermore, that the trial court erred by failing to take into consideration the period of 5 years and one month which the appellant had spent in custody awaiting the finalisation of her trial.

[47]

It is trite law that sentence is pre-eminently a matter for the discretion of the trial court. A court of appeal may interfere with

the sentence imposed if the trial court materially misdirected itself or where the sentence imposed is shockingly inappropriate. The misdirection contemplated in this context was described by Trollip JA in *S v Pillay*[9] in the following terms:

"...Now the word "misdirection" in the present context simply means an error committed by the court in determining or applying the facts for assessing the appropriate sentence. As the essential inquiry in an appeal against sentence, however, is not whether the sentence was right or wrong but whether the Court in imposing it exercised its discretion properly and judicially, a mere misdirection

is not by itself sufficient to entitle the Appeal Court to interfere with the sentence; it must be of such a nature, degree or seriousness that it shows directly or intentionally, that the Court did not exercise its discretion at all or exercised it improperly or unreasonably. Such a misdirection is usually and convincingly termed one that vitiates the Court's decision on sentence..."

[48]

The discretion to impose sentence, as it is clear from the above passage, must be exercised properly and judicially. The court must take into consideration all the relevant factors and circumstances, aggravating and mitigating, and based thereon impose an appropriate

sentence. Over-emphasising of any of the relevant factors, in certain circumstances, may amount to a misdirection. Similarly a failure to accord due weight to an important factor may also amount to misdirection which may vitiate the exercise of the sentencing

discretion. It is always important to bear in mind, however, that a failure to specifically mention a relevant factor does not

necessarily mean that it has been overlooked for no judgment can be perfect and all embracing[10].

[49] I am not persuaded that the Learned trial Judge had over-emphasized the seriousness of the offence committed by the appellant at the expense of her personal circumstances. The Learned trial Judge dealt with all the factors and circumstances which were placed before court in mitigation of sentence. There is merit in my view, however, in the argument that the period appellant spend in custody awaiting trial should have been taken into consideration in determining an appropriate sentence.

[50] Does the failure to take into consideration the period spent in custody awaiting trial constitute a misdirection in the sense set out in the Pillay judgment; (supra) entitling this court, on appeal, to interfere with the sentence imposed.

[51] In practice the period an accused spent awaiting trial is usually taken into consideration in the determination of an appropriate

sentence[11]. There is however, no uniformity in how such a period is to be calculated as well as the rationale for this approach[12]. In *S v Njikelana*[13] the accused who faced the prospects of life imprisonment in terms of Section 51(1)(a)(2) of the Criminal Law Amendment Act 105 of 1997 was sentenced to 14 years imprisonment. In imposing this sentence Thring J arrived at the conclusion that there were substantial and compelling circumstances which commutatively justified the sentence. According to the Learned Judge these included, inter alia”, the fact that “you have been in custody awaiting trial or sentence for 35 months. That is a long time to have the prospect of life imprisonment hanging over one’s head. As I said, it was a unnecessarily long a time.” The learned Judge went further and held that:

“... In normal circumstances I would have imposed a sentence on you of 18 years’ imprisonment. That sentence would be in line with the sentences which were imposed in the cases of S v Swartz and Another 1999(2) SACR 380 (C),

S v Jansen 1999(2) SACR 368 (C) and S v Dithotze 1999(2) SACR 314 (W). However, I am going to reduce that number of years by three, because that is the approximate period during which you have been in custody awaiting trial and sentence. Furthermore I am going to reduce it by an additional year to make allowance for the fact that, at least since your trial commenced in the regional court on 17 April 2000, you have had to endure the mental anguish of the prospects of life imprisonment.[14]” (own emphasis)

[52]

In *S v Vilakazi*[15] Nugent JA held that[16]:

“[60] There is one further consideration that must be brought to account. The appellant was arrested on the day the offence was committed and has been incarcerated ever since. At the time he was sentenced he had accordingly been imprisoned for just over two years. While good reason might exist for denying bail to a person who is charged with a serious crime it seems to me that if he or she is not promptly brought to trial it would be most unjust for the period of imprisonment while awaiting trial is not then brought to account in any custodial sentence that is imposed...”

[53]

What is apparent from these illustrative judgments is that the period spent in custody, though taking into consideration, was not computed with any degree of mathematical certainty but a rough estimation was used. There are however other judgments where the actual period spent in custody pre-conviction was deducted from the period of imprisonment imposed after conviction. Rumpff CJ in *S v Hawthorne en 'n Andere*[17] reasoned this approach as follows:

“... ‘n Persoon wat in bewaring aangehou word in afwagting of verhoor, ondergaan nie gevangenisstraf as sodanig nie en daarom word daar ook spesiale voorsiening gemaak ten opsigte van voedsel, klere, beddegoed en leesstof vir sodanige persone, onder andere in artikel 82 van die Wet op Gevangenis. Daar is ook spesiale bepalings wat van toepassing is op sodanige persone... Vanselfsprekend kan ‘n Verhoorregter by die oplegging van vonnis die feit in oorweging neem dat beskuldigde ‘n geruime tyd in aanhouding verkeer het, maar hy kan daardie feit ten voordele van die beskuldigde aanwend onder andere deur die periode van gevangenisstraf wat wel opgelê word korter te maak as wat anders die geval sou gewees het...[18]”

[54]

In certain cases the Courts have adopted the approach that the time spent by an accused person awaiting trial was the equivalent of a sentence of twice that length[19]. In *S v Brophy and Another*[20] Schwartzman J (with whom Masipa J and Salduker J concurred) gave as reasons for deducting double the time spent awaiting that in trial in the following terms:

“[18] There is no evidence before this court detailing the living conditions of awaiting-trial prisoners, who are presumed to be

innocent and who are first offenders. What does not require evidence is that time spent in prison awaiting trial is, at the very least equivalent to time served without remission. In addition, such prisoners, do not get the benefit of any presidential pardon. What cannot be disputed is that the lot of the awaiting trial prisoner is harsher than that of a sentenced prisoner in that he or she cannot participate in the programmes that a prison may run. What he or she is condemned to is a seemingly endless routine of boredom in the course of which he or she cannot earn any privileges for which serving prisoners can qualify by reason of good conduct. Judicial cognisance can also be taken of the gross overcrowding in prisons housing awaiting-trial prisoners...

[19] There is no science from which it can be determined that such conditions are equivalent to double or treble or less than double

time served. Taking all conditions into account- and there are probably others that may be found in some prisons-and notwithstanding

the reservations expressed by Goldstein J am satisfied that the ratio in the Stephen case ought to be followed.”

- [55] Problems may arise, as alluded to by Goldstein J in *S v Vilakazi* and *Another supra*, where the period spent in custody pre-conviction was doubled and then deducted from the sentence imposed. An example will be appropriate to illustrate the difficulty with this approach. Where the nature of the offence and the circumstances of its commission would normally have justified a sentence of 2 years, for argument’s sake, and the accused had already spent a period of 12 months in custody before he/she is sentenced[21] does it mean that in such a case the trial court must caution and discharge him/her or how would the period spent in custody pre-sentencing be computed? Such an approach in my view may lead to absurd sentences being imposed and may undermining the confidence of the public in the administration of the criminal justice system.
- [56] While we did not have the benefit of full argument on this point I am of the view that the overriding consideration, where an accused was held in custody for any considerable length of the time before conclusion of the trial and sentencing, in my view, is that the accused’s liberty was curtailed in circumstances where his or her guilt had not yet been pronounced. He or she in all fairness must receive credit for the time spent in custody awaiting trial, once his or her guilt has been established and he or she has received a custodial sentence. In such circumstances only the actual period spent in custody should be considered. A failure to take this period into consideration is a misdirection which entitles a court on appeal to step in and remedy the situation by imposing an appropriate sentence.
- [57] The seriousness of the offence committed by the appellant is reflected in the severity of the sentence imposed by the trial Judge. The appellant aligned herself with the conduct of accused 1 who had committed a gruesome murder of the one person who was generous to them. The period of 7 years imprisonment would have been a fitting sentence for the role played by appellant in assisting accused 1 to conceal the deceased’s murder. Her pre-conviction incarceration however would have to be taken into account to determine the period she would have to serve.
- [58] In the circumstances and in order to reflect a consideration of the period of 5 years and a month which the appellant had spent in custody prior to the conclusion of her trial, the sentence I would propose is 2 years imprisonment which is antedated to the 28 February 2013, being the date on which the appellant was sentenced.

I accordingly propose the following order:

1. The appeal against the appellant’s conviction on the competent verdict of theft and the sentence of 5 years imprisonment is upheld. The conviction and sentence are set aside.

2. The appeal against the appellant's conviction on the competent verdict of being an accessory after the fact to murder is dismissed;
3. The appeal against the sentence of 7 years imprisonment imposed on the appellant on her conviction as an accessory after the fact to murder succeeds. The sentence is set aside and replaced with the following:

"Accused 3 is sentenced to 2 years imprisonment which is antedated to 28 February 2013".

DOLAMO, J

I agree and it is so ordered.

SAMELA, J

I concur.

WEINKOVE, AJ

[1] At paragraph 255 of the judgment

[2] At paragraph 273 of the judgment

[3] Per Claassen JP in R v Munango and Another 1956 (1) SA 438 (SWA) at p 440.

[4] volume 6 par 294 as follows:] See S v Mtsweni 1985 (1) SA 590 (A) at 594 F

[4] volume 6 par 294 as follows:

] See S v Mtsweni 1985 (1) SA 590 (A) at 594 F

[6] See S v Matalediso en Andere 2003 (1) SACR 583 (SCA) where Olivier JA held at 593G that :

[7] See S v Khosala 1996 (2) SACR 162 (O)

[8] S v Ntsele 1998 (2) SACR 178 (SCA)

[9] 1977

(4) SA 431(A) at 534

[10] See S v Pillay supra at 535B

[11] See for example S v Olyn en Andere 1990 (2) SA 73 at 76A where Buys J held that: "Veral in gevalle soos hierdie, waar n beskuldigde vir n relatiewe kort tyd na die gevangenis gestuur word, mag die tydperk wat hy 'n aanhouding was terwyl hy verhoorafwagtend was, nie weggedink word by vonnisoplegging nie..."

[12] Commenting on the lack of uniformity in the approach to this aspect of sentencing Cachalia JA in S v Dlamini 2012(2) SACR 1 at paragraph 42 has this to say: "... the courts have not spoken clearly on how to calculate this period. One approach has been to do an inexact subtraction; another is to deduct the period actually spent, yet another is to treat the time

spent in custody at the very least, as equivalent to time served without remission; and a fourth, more adventurous method is to treat the period as equivalent to about twice the length, because of the harsher conditions that awaiting trial prisoners are subjected to in comparison with the conditions of sentenced prisoners.”

[13] 2003

(2) SACR 166 (C)

[14] At page 175 of the judgment.

[15] At paragraph 60 of the judgment.

[16] 2009

(1) SACR 552 (SCA) / 2007 (2) SACR 56 (WLD)

[17] 1980(1) SA 521 (A)

[18] *S v Hawthorne en n Andere* supra at 52 C – E.

[19] See *S v Stephens and Another* 1994 (2) SACR 163 at 168 F where Schultz J in an obiter dictum held that: “A Further factor that I take into account is that both accused have been in custody for six months awaiting trial and I would agree that there is force in Mr Du Plessis’ submission based on the Canadian decision of Gravino (70171) 12 Crim LQ 434 (Quebec Court of Appeal): ‘imprisonment whilst awaiting trial is equivalent of a sentence of twice that length’”. This approach was criticized by Goldstein J in *S v Vilakazi and Others* 2001 (1) SACR 140 (W) at 148 a – e.

[20] 2007

(2) SACR 56 (WLD)

[21] Which is not uncommon

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