

SOUTH AFRICA / JUDGMENT

Wentzel v S (CA&R202/2015) [2017] ZAECHGC 132 (23 November 2017)

[2017] ZAECHGC 132

COURT

Eastern Cape High Court, Grahamstown

BEFORE

J M Roberson, P T Mageza

CASE / FILE NUMBER

CA&R202/2015

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IN

THE HIGH COURT OF SOUTH AFRICA

EASTERN

CAPE DIVISION, GRAHAMSTOWN

CASE NO: CA&R202/2015

DATE HEARD: 15/11/2017

DATE DELIVERED:

23/11/2017

In

the matter between

GAVIN

CHRISTOPHER WENTZEL

APPELLANT

and

THE

STATE

RESPONDENT

JUDGMENT

ROBERSON J:-

- [1] The appellant stood trial in the Regional Court, Grahamstown, for the murder of his wife, Sanet Wentzel (the deceased). He was convicted and sentenced to ten years' imprisonment, three years of which were suspended for 5 years on condition he was not convicted of murder committed during the period of suspension. This appeal lies against the conviction only, with the leave of the trial court.

[2] The deceased died a gruesome death. The cause of death was recorded in the post mortem examination report as “extensive

burns and blunt force injury to scalp”. It was not in dispute at the trial that the deceased and the appellant were

together in a room at their home when a fire was started. The appellant suffered burns but was able to leave the room. The deceased however remained in the room and her burned body was found in the room later that day by the police. The issues at the trial were whether or not the appellant had inflicted the blunt force injury on the deceased, and whether it was the appellant or the deceased who had started the fire which caused her to be burned. The appellant denied inflicting the blunt force injuries and claimed it was the deceased who had started the fire because she wanted to take her own life. It was not in dispute that prior to the events in the room the deceased was free of the injuries which were recorded in the post mortem examination report. The evidence on which the appellant was convicted was circumstantial.

[3] The events occurred on 31 July 2002 at the Military Base, Grahamstown.[1] At the time the appellant was a member of the South African National Defence Force and he and the deceased lived at the Base, together with their children. It was not in dispute that after he left the room where the fire was burning, the appellant made his way to the sick bay at the Base and on his way there met Mr September Mentor (September) and his sister-in-law Ms Sanet Mentor (Sanet).

[4] September testified that he and Sanet were returning from the shop on the Base when they met the appellant, who was walking to the sick bay. The appellant, who appeared calm, said to them that he had burned himself and their friend (“Ek het vir my en julle vriend gebrand”). He did not say why he had done so. The appellant had burns to his face and hands, and his jacket had also been burned. September and Sanet continued on their way and saw smoke coming out of the window of the appellant’s house. September realised then that by referring to their friend the appellant was referring to his wife. They could not enter the house because the smoke was too dark. About five to ten minutes later persons arrived and extinguished the fire. September denied that the appellant had asked him and Sanet to help his wife. September agreed that because of the lapse of time since the events there were things which he could not remember.

[5] Sanet testified along much the same lines as September. She said that the appellant was walking and said to them that they should go and see that he and his wife had been burned (“ons moet gaan kyk dat hy en sy vrou gebrand het”). In her statement to the police she said that the appellant was running. She said that the appellant appeared to be in great pain, but otherwise appeared to be his normal self.

[6] Lieutenant Johan van Heerden attended the scene on 31 July 2002 and took several photographs. The album he compiled was handed in as an exhibit. Photographs of the room where the fire occurred revealed the deceased lying on her back on the floor between two beds. One of the beds was much more severely damaged by fire than the other. A metal

toolbox was partially under this bed. There was a box of matches and a fire extinguisher on the floor in the corner of the room furthest away from the more severely damaged bed. A wristwatch lay on the partially damaged bed. A large portion of the pane of a window in the room was broken. Van Heerden testified that there was suspected blood on the inside of the window pane. A photograph taken of the outside of the house showed a tap with a hammer lying nearby. Van Heerden testified that there was suspected blood on the wall next to the tap. It was not in dispute that it was the appellant's blood on the window pane and the wall.

- [7] Van Heerden returned to the scene on 4 August 2002 and collected blood samples from the bathroom door, the floor of the room where the fire occurred, and the wristwatch which was on the bed.
- [8] Forensic results showed that the DNA in the blood sample taken from the wristwatch was a mix of the deceased's DNA and male DNA. The hammer found outside the house was never tested for the presence of blood.
- [9] Captain Zamele Lekebuza was the investigating officer in the case. He testified that he attended at the scene, having been notified that it was a case of arson. He pushed open the door of the room where the fire occurred, and found the deceased and observed the damaged beds. He could not see the deceased's body clearly because it was surrounded by smoke. He found a plastic basin of petrol under a partially burned bed. He was not sure if this was in the room where the fire occurred or in another room in the house, from which smoke was issuing. He was told that the appellant had gone to the sick bay but when he arrived there the appellant had already been taken to hospital. He only met with the appellant the following year when he informed the appellant of the charge of murder.
- [10] Dr Stuart Dwyer performed the post mortem examination of the deceased on 6 August 2002. I have already mentioned what he determined to be the cause of death. The chief post mortem findings were:

- Extensive burns
- Posterior scalp laceration
- Two areas of bleeding scalp tissues
- Subdural haemorrhage present
- Soot in trachea

There was also a 50 mm circular contusion on the left thigh and a small laceration on the front left of the scalp which had not been recorded in the post mortem report.

- [12] Dr Dwyer testified that there were extensive deep partial thickness and full thickness burns of the entire body. The 50mm posterior scalp laceration would have been caused by blunt force. The blunt force would have split the skin over the bone of the skull. The bleeding of the scalp tissues was in two circular areas, one at the front of the head and the other at the

back of the head, both about 5cm in diameter. One of the circular areas of bleeding could have been caused by contact between the deceased's head and a flat surface but the other circular area was caused by something round. The subdural bleeding was caused by the application of blunt force. This bleeding would have impaired the deceased's level of consciousness. There was soot in the oesophagus as well as in the trachea, which meant that the deceased not only breathed in soot particles from smoke but also swallowed them into the oesophagus. Smoke inhalation was not the cause of death but it could have caused a decreased level of consciousness. The circular contusion on the thigh would have been caused by blunt force with an object with a round end such as a hammer or a knobkerrie. This contusion was less than 48 hours old. The circular injuries were consistent with having been inflicted with the hammer shown in the photograph taken by van Heerden.

- [13] Dr Dwyer was of the opinion that the deceased must have been alive after being struck with a blunt object. He said that it was impossible to explain the sequence of the injuries but a logical sequence would have been that the deceased was unconscious or semi-conscious from the blow to the head and unable to escape the fire. He said that it appeared that the deceased was

incapacitated, because her whole body had been burned. Burning is very painful and a person who was alert would do everything

possible to extinguish the fire. Dr Dwyer said that when a body is as burned as the deceased's was, the common scenario

encountered occurs when a person is unconscious from the consumption of alcohol and a fire occurs in their house. The deceased's

body had a similar appearance to that of a person who was unconscious when burned, although this did not mean that the deceased was not being restrained or was otherwise unable to extinguish the fire. If she had been restrained or unable to leave the room for one or other reason, she would eventually have been overcome by the inhalation of smoke.

- [14] It was put to Dr Dwyer in cross-examination that the appellant had shoved the deceased towards the beds in the room and he was asked if she could have sustained her injuries by hitting her head against one of the beds, the wall, or the windowsill. Dr Dwyer said that this was not possible. Bleeding around the brain involves a moderate degree of force, which means a lot of force, and cannot be caused by falling over or falling against a bed or a wall. The bleeding around the brain could not be caused by pushing someone over, unless they were pushed off the top of a cliff. In addition, the circular area of bleeding could not have been caused by falling in the room but was caused by blunt force applied with a round instrument. Dr Dwyer said that he could not see anything in the photograph of the room which could have caused the circular bleeding.

- [15] The appellant testified that on 31 July 2002 he was at home with his children. He had recently returned from Burundi where he had been stationed. His six year old son reported to him that he had suffered from toothache while the appellant was in Burundi and that the deceased had not taken him for treatment. His son further reported that while the appellant was in Burundi the deceased had been drunk every day and had slept with other men in the house. The appellant was not shocked to hear about the other men because two weeks earlier he had learned from colleagues that the deceased was sleeping with other men. The appellant assaulted the deceased on 19 July 2002 when he confronted her about what he had heard from colleagues. He agreed that he was angry and felt betrayed by the deceased.
- [16] After this incident the deceased left the matrimonial home. The appellant opened a case of fraud against her because she had purchased clothes on his account without his permission. Later he contacted her and apologised for the assault and said they should work on their marriage relationship. The deceased returned home. The day before the fire, they went to a social worker for marriage counselling in order to try to save the marriage, after which the appellant felt positive about their relationship. He could not say what the deceased's attitude was.
- [17] Returning now to the events of 31 July 2002, after the appellant's son had made his report, the deceased arrived and the appellant asked his son to repeat in front of her what he had told the appellant. The deceased said the child was lying. They argued and the deceased became hysterical and stormed out of the living room. The appellant found her in the room which he used as his storeroom for his equipment and tools. She was standing between the two beds and was holding a container near her mouth, as if she was drinking from it. He smelled petrol and asked the deceased what she was doing. She answered that it was the only escape from being assaulted by him again ("dit is die enigste uitweg as om weer geslaan te raak deur my"). The appellant told the deceased that the day before they had been to a social worker for advice about their marriage and that he had withdrawn the fraud case which he had opened against her.
- [18] The appellant thought that the deceased wanted to set herself on fire. He grabbed the container of petrol from the deceased and it fell on the floor. He was momentarily distracted by his children, and when he turned around he saw the deceased holding a box of matches. By this time his children had gone out of the house. He pushed her away from the petrol, and the match which she had lit fell on the floor where the petrol was. The deceased fell, the appellant was not sure if it was against the bed, and he told her to get onto the bed in order to keep away from the flames. This was the bed which was the most damaged by the fire. At this time the deceased was awake and in her full senses.
- [19] The appellant unsuccessfully tried to extinguish the flames and ran to the door of the room and closed it to keep oxygen out of the room. The door was on the opposite side of the room from the beds. He closed the door, as opposed to the two of them escaping from the room through the door, because he did not want the fire to spread to the whole house and he was not sure if the children were still in the house. He thought that the fire would die down if he

cut off the oxygen by closing the door. He looked around for a blanket or something similar to throw on the flames but there was nothing available and within moments the whole room was in flames. At the time there was a fire extinguisher in the house which was not in working order and which he used as a door stop for the door of that room.

- [20] He and the deceased tried to open the door but were unable to. He thought it might have become swollen from the heat. He also said that he did not think he could have persuaded the deceased to run out of the room through the door because she was the one who started the fire. He then ran to a window, followed by the deceased, because they were beginning to suffocate from a lack of oxygen in the room. The appellant opened the window for fresh air and the deceased grabbed his arm and pulled him back, causing his wristwatch to fall off. He broke loose from her and broke the window pane, cutting his arm in the process. At this stage he was burning. He did not know when the deceased caught fire. He managed to get out through the window but his wife was not able to do so because she was more stoutly built than he was. When he last saw her she was moving around in the room and he told her that she should try to avoid the flames and that he was going to get help to open the door. She had not screamed or cried out at any stage because, according to the appellant, she wanted to remain in the fire.
- [21] He went to the outside tap and wet his head which was burning. He called out but there was no-one nearby and the neighbours were not at home. He ran to the sick bay, which was about 200 to 300 metres away, to get help, and on his way he passed September and Sanet. He told them that they should go and help their friend who was trapped in the house. He said he was looking for help from someone who could force open the door of the room. At the sick bay one of the nurses who attended to him extinguished the flames on his clothes. He told the nurses that they should not worry about him, and should call the fire brigade and help his wife who was trapped in the fire. Thereafter he passed out. He woke up in hospital and was later transferred to a hospital in Port Elizabeth. He learned the following day that the deceased had not survived.
- [22] The appellant denied that he had struck the deceased and said he had no knowledge of her injuries. He thought she might have fallen against the bed or hurt herself when they had moved around in the room. With regard to the hammer shown in the photograph he said that it looked like his hammer and thought that the reason it was lying outside was because his son liked playing with it. He denied taking it out of the toolbox which had been partially pulled out from under the bed.

DISCUSSION

- [23] Because of the largely circumstantial nature of the evidence, there were few areas of factual dispute. I do not think that too much should be made of the evidence of the Mentors, in relation to their evidence of what the appellant said to them. They testified a long time after the events, their versions of what the appellant said to them differed, and Sanet's police statement differed from what she said at the trial, in that in her police statement she said the

appellant was running. The most one can accept from their evidence concerning what the appellant said to them is that he mentioned that the deceased was burning.

- [24] Dr Dwyer's evidence, although he was challenged as to how the deceased could have sustained the blunt force injuries, was uncontroverted by any other expert evidence.
- [25] The magistrate, with reference to *R v Blom* 1939 AD 188, concluded from various common cause and proved facts that the only reasonable inference that could be drawn from those facts was that the appellant had inflicted the head injuries on the deceased with the hammer and set her on fire.
- [26] The principles which apply to circumstantial evidence were comprehensively considered, with reference to authorities, in *S v Reddy and Others* 1996 (2) SACR 1 (A) at 8c – 9e, as follows:

"In assessing circumstantial evidence one needs to be careful not to approach such evidence upon a piece-meal basis and to subject each individual piece of evidence to a consideration of whether it excludes the reasonable possibility that the explanation given by an accused is true. The evidence needs to be considered in its totality. It is only then that one can apply the oft-quoted dictum in R v Blom 1939 AD 188 at 202-3, where reference is made to two cardinal rules of logic which cannot be ignored. These are, firstly, that the inference sought to be drawn must be consistent with all the proved facts and, secondly, the proved facts should be such 'that they exclude every reasonable inference from them save the one sought to be drawn'. The matter is well put in the following remarks of Davis AJA in R v De Villiers 1944 AD 493 at 508-9:

'The Court must not take each circumstance separately and give the accused the benefit of any reasonable doubt as to the inference to be drawn from each one so taken. It must carefully weigh the cumulative effect of all of them together, and it is only after it has done so that the accused is entitled to the benefit of any reasonable doubt which it may have as to whether the inference of guilt is the only inference which can reasonably be drawn. To put the matter in another way; the Crown must satisfy the Court, not that each separate fact is inconsistent with the innocence of the accused, but that the evidence as a whole is beyond reasonable doubt inconsistent with such innocence.'

Best on Evidence 10th ed 297 at 261 puts the matter thus:

'The elements, or links, which compose a chain of presumptive proof, are certain moral and physical coincidences, which individually indicate the principal fact; and the probative force of the whole depends on the number, weight, independence, and consistency of those elementary circumstances.

A number of circumstances, each individually very slight, may so tally with and confirm each other as to leave no room for doubt of the fact which they tend to establish. . . . Not to speak of greater numbers, even two articles of circumstantial evidence, though each taken by itself weigh but as a feather, join them together, you will find them pressing on a delinquent with the weight of a mill-stone. . . . Thus, on an indictment for uttering a bank-note, knowing it to be counterfeit,

proof that the accused uttered a counterfeit note amounts to nothing or next to nothing; any person might innocently have a counterfeit note in his possession, and offer it in payment. But suppose further proof to be adduced that, shortly before the transaction in question, he had in another place, and to another person, offered in payment another counterfeit note of the same manufacture, the presumption of guilty knowledge becomes strong. . . .'

Lord Coleridge, in *R v Dickman* (Newcastle Summer Assizes, 1910 - referred to in *Wills on Circumstantial Evidence* 7th ed at 46 and 452-60), made the following observations concerning the proper approach to circumstantial evidence:

'It is perfectly true that this is a case of circumstantial evidence and circumstantial evidence alone. Now circumstantial evidence varies infinitely in its strength in proportion to the character, the variety, the cogency, the independence, one of another, of the circumstances. I think one might describe it as a network of facts cast around the accused man. That network may be a mere gossamer thread, as light and as unsubstantial as the air itself. It may vanish at a touch. It may be that, strong as it is in part, it leaves great gaps and rents through which the accused is entitled to pass in safety. It may be so close, so stringent, so coherent in its texture, that no efforts on the part of the accused can break through. It may come to nothing - on the other

hand it may be absolutely convincing. . . . The law does not demand that you should act upon certainties alone. . . . In our lives,

in our acts, in our thoughts we do not deal with certainties; we ought to act upon just and reasonable convictions founded upon just and reasonable grounds. . . . The law asks for no more and the law demands no less.'

[27] In order to consider the evidence in its totality, it is useful to set out the proved or undisputed facts in sequential order.

1. Prior to the events which occurred in the storeroom on 31 July 2002 the deceased was uninjured.
2. On 31 July 2002 the appellant had a positive attitude towards the marriage. The deceased had returned to the matrimonial home; the appellant had apologised for assaulting her; he had withdrawn the criminal case against her; and they had been for marriage counselling.
3. The appellant and the deceased argued after the appellant asked his son to repeat in front of the deceased what he had told the appellant.
4. The appellant and the deceased were thereafter alone together in the storeroom and a fire broke out, caused by the igniting of petrol.
5. The appellant closed the door of the room and escaped through a window.
6. The deceased remained in the room and died there.

7. The post mortem examination of the deceased revealed extensive burns, a posterior scalp laceration, a laceration on the front left of the scalp, circular areas of bleeding of scalp tissues, a subdural haemorrhage, a circular contusion of the thigh, and soot in the trachea.
8. The posterior scalp laceration, the subdural bleeding and the contusion of the thigh were caused by blunt force.
9. The severity of the blunt force was such that it could not have occurred as a result of the deceased falling over after being pushed, or falling against a bed or a wall.
10. The subdural bleeding would have impaired the deceased's level of consciousness. The inhalation of smoke would have caused a decreased level of consciousness.
11. One of the circular areas of bleeding could have been caused by contact between the deceased's head and a flat surface, but the other circular area of bleeding and the contusion of the thigh were inflicted with a round object.
12. There was no object in the room visible in the photographs of the scene taken on 31 July 2002 which could have caused the circular injuries.
13. The circular injuries were consistent with having been inflicted with the hammer which was photographed on 31 July 2002, lying next to the tap where the appellant doused himself with water after escaping from the room through the window.
14. The appellant suffered burn wounds.
15. The deceased's DNA was found in the DNA mixture sample taken from the appellant's wristwatch.
16. The appellant proceeded from his house to the sick bay on the Military Base which was 200 or 300 metres away. On his way he met September Mentor and Sanet Mentor. He told them that his wife had been burned and that they should help her.
17. The appellant arrived at the sick bay and told the nurses to get help for the deceased because she was trapped.
- [28] No other person was in the room with the appellant and the deceased when she suffered the blunt force injuries and the fire started. The blunt force injuries were therefore inflicted by the appellant or suffered by the deceased when her head came into contact with one or other object in the room. It was not suggested that she deliberately inflicted the injuries on herself and indeed the injury to the back of her head could not have been self-inflicted. Dr Dwyer ruled out the possibility that she suffered the injuries by falling and hitting her head on the bed or the wall. While he conceded that one of the circular areas of bleeding could have been caused by contact between the deceased's head and a flat surface, nonetheless the degree of force was such that it could not have been caused by falling on something. His example of being pushed off the top of a cliff graphically illustrated the degree of force involved and demonstrated the remoteness of the blunt force being caused by falling in the

room. According to Dr Dwyer the deceased would have been incapacitated from these injuries. This incapacity, as opposed to the deceased still moving around the room when the appellant escaped, would explain why the deceased did not manage to escape from the terrible pain of being on fire. The inference that it was the appellant who inflicted the blunt force injuries is therefore, in my view, the only reasonable inference that can be drawn.

[29] While on its own, the discovery of the hammer next to the tap where the appellant doused himself with water might “weigh but as a feather”, but in the context of the medical evidence that a round instrument was used, it attains much more weight. It also fits with the fact that the toolbox was partially pulled out from under the bed in the room.

[30] Similarly, the deceased’s DNA on the appellant’s wristwatch fits with physical contact between them and would also

explain how the appellant himself came to be burned. In any event it was not in dispute that the appellant was in the room when the fire burned and even if he was the aggressor, it was not improbable for him to suffer burns.

[31] It was submitted on behalf of the appellant that no blood was found on the hammer and there was no evidence that the blunt force wounds were caused by the hammer. However, the hammer was never tested for the presence of blood, and it must be remembered that in deciding whether or not the guilt of a person has been proved by circumstantial evidence, one does not look at facts in isolation but in the context of the evidence as a whole. I venture to say that even if no hammer had been found, in the absence of any other plausible explanation for the infliction of blunt force, the only reasonable inference to draw would still have been that the appellant inflicted the blunt force injuries.

[32] Once any other explanation for the blunt force injuries is excluded, it is in my view grossly improbable that it was the deceased who started the fire with the intention of taking her life. A number of factors militate against this scenario. The appellant had apologised for assaulting her, he had withdrawn the criminal case, and they had been for marriage counselling. There was therefore no reason from her point of view to choose to die rather than suffer further assaults. The appellant was also ambivalent with regard to her conduct after the fire started, namely whether she wanted to remain in the room in accordance with her intention to die, or to escape. On the one hand he said they both went to the window because of the lack of oxygen in the room, on the other hand he said she tried to pull him back into the room. He said her intention was to remain in the room but also said that she could not fit through the window in order to escape. He said that they had both tried to open the door of the room to escape but also said that he did not think he could have persuaded her to leave the room through the door.

- [33] The fact that the appellant closed the door rather than escape with the deceased through the door, is in my view problematic. He said that he did not want the fire to spread to the rest of the house and was concerned for his children because he did not know if they were still in the house. However he had said earlier that the children had left the house. Further, in my view, the most natural reaction when the fire in the room could not be extinguished, would have been to leave the room through the open door.
- [34] All these factors in my view exclude the inference that it was the deceased who started the fire to end her life. On the contrary the only reasonable inference to draw from these factors as well as the infliction of the blunt force injuries on the deceased, is that it was the appellant who started the fire with the intention of burning the deceased and preventing her from escaping from the room.
- [35] The appellant's conduct after he escaped from the house is also in my view consistent with an inference that it was he who inflicted the injuries on the deceased and set her on fire. It was not the conduct of a person desperately seeking to save the life of his wife. He clearly came across the Mentors by chance. What he thought they could do in the circumstances is difficult to answer. It must have taken some time to run to the sick bay. When he left the house the whole room was in flames and his wife could not escape. It would not have taken long for her to burn to death. I accept that he was badly burned but if he was able to douse his head at the tap then surely he was able to enter the house and push open the door to save her life.
- [36] In my view therefore, all the facts "tally with and confirm each other as to leave no room for doubt of the fact which they tend to establish". They as a whole exclude any inference other than that it was the appellant who inflicted blunt force injuries on the deceased and deliberately started the fire which caused her to be extensively burned. The appellant was therefore correctly convicted of murder.
- [37] The appeal is dismissed.

J M ROBERSON

JUDGE OF THE HIGH COURT

MAGEZA AJ:-

I agree

P T MAGEZA

JUDGE OF THE HIGH COURT (ACTING)

Appearances:

For the Appellant: Adv S Sephton instructed by Huxtable Attorneys, Grahamstown

For the Respondent: Adv D Els, Director of Public Prosecutions, Grahamstown

[1] For unknown reasons the trial only began in May 2014.

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