IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL LOCAL DIVISION, DURBAN

REPORTABLE

Case no: CC43/2015

In the matter between:

THE STATE

and

DONOVAN MARK RAMDASS **ACCUSED**

Judgment

Date: 16 September 2016

PLOOS VAN AMSTEL J:

[1] In the early hours of 3 March 2014 Mrs Dolly Singh arrived home after a night out with friends, when she found the lifeless body of her daughter, Ashika Singh, on her bed. She had been strangled. The accused, who was Ashika's boyfriend and shared the house with them, was not there, nor was the car which Ashika had been using. The car was found a short time later where it was parked in Mahatma Gandhi Street in Durban, and later that morning the accused was found in Umhlanga Rocks. He claims that he has no recollection of what had happened to Ashika or how he ended up in Umhlanga Rocks. He says he had been drinking the previous afternoon and smoked crack cocaine, and if it was he who killed Ashika then he did so without realising what he was doing and without the intention to kill her.

[2] In addition to the charge of murder the accused is also charged with robbery with aggravating circumstances, in that he took Ashika's cell phone, a Garmin navigational device, a camera charger and her house keys.

[3] The question whether it was the accused who killed Ashika presents no real difficulty. He lived with her and her mother in their home in Merebank. On 2 March 2014 the three of them went to a shopping mall and had lunch. On the way home Ashika dropped the accused at a tavern and she and her mother went home. The accused returned later in the afternoon. Mrs Singh testified that she could see he had been drinking and did not look his usual self. She said that was the first time that she saw him intoxicated. He and Ashika left together in the car and returned at about 8 pm. The records of the tracking company show that the car was driven to an address where the accused says he used to buy drugs. Ashika had a bath and then joined her mother in the lounge. A friend arrived at about 8.30 pm to fetch Mrs Singh as they were going to a casino. She said the accused was in the bathroom when she left. When Mrs Singh returned in the early hours of the morning she could not open the driveway gate as it was jammed. She entered through the neighbour's property, unlocked the doors and entered her house. The television was on quite loud and all the lights were on. She saw that the house had been ransacked. Cupboard doors were open and clothes and other items were lying on the floor. She went to her daughter's room and found her on her bed with a plastic bag over her head. She was dead. There was no-one else in the house. All the doors were locked and there was no sign of a forced entry. She started to scream and within a short while her neighbours, who were related to her, arrived. The courtesy car which Ashika had been using while her car was being repaired was not there. It was fitted with a tracking device and located quickly where it was parked in the Point area in Mahatma Gandhi Road. Later that morning, at about 11 am, the accused responded to an SMS which was sent to his cell phone by his cousin. He was in Umhlanga Rocks. When his cousin collected him from there the accused was in possession of a rucksack which contained Ashika's cell phone, her Garmin navigational device, her house keys and a charger for her camera. The accused agreed in his evidence that the facts overwhelmingly suggest that it was he who had killed Ashika, but said he has no recollection of it. He blamed this on his state of intoxication due to the consumption of alcohol and crack cocaine.

[4] I am satisfied that the evidence justifies the inference, beyond a reasonable doubt, that it was the accused who strangled and killed Ashika. It is important in this case to explain that in our law a person who kills another is only punished if he did so with criminal capacity and with the intention to kill or negligently. Criminal capacity in this context means the capacity to appreciate the wrongfulness of one's conduct and the capacity to act in accordance with that appreciation.[1] If a person lacked such capacity then it cannot be said that he acted unlawfully and the issue relating to intention or negligence does not arise.

[5] The position in our law used to be that voluntary drunkenness which did not result in a mental disease was no defence in respect of an offence committed during such drunkenness, even if the accused was so drunk that he lacked criminal capacity. See *S v Johnson*.[2] This was said to be illogical in principle but in accordance with the legal convictions of society.[3] The decision in *Johnson* was overruled in *S v Chretien*[4] where the Appellate Division held as follows:

'Whenever a person who commits an act is so drunk that he does not realise that what he has done was unlawful or that his inhibitions have substantially disintegrated, he can be regarded as not being criminally responsible. If there is a reasonable doubt, the accused ought to be given the benefit thereof. Someone who is dead drunk and is not conscious of what he is doing is not liable because a muscular movement which is done in this condition is not a criminal act. If someone does an act (more than an involuntary muscular movement) but is so drunk that he does not realise what he is doing or that he does not appreciate the unlawfulness of his act, he is not criminally responsible.'

Rumpff CJ also made the point[5] that one of the problems with regard to acts committed in a state of intoxication is that the person knows what he is doing while he is doing it, but later cannot remember what he had done. The mere fact that he cannot remember what he had done does not mean that he was not criminally responsible.

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[1] J Burchell *South African Criminal Law and Procedure Vol 1*, 4th ed at 51. Also see CR Snyman *Criminal Law*, 6th ed at 155-6.
[2] *S v Johnson* 1969 (1) SA 201 (A).
[3] *Op. cit.* at 207F-G.
[4] *S v Chretien* 1981 (1) SA 1097 (AD). I quote from the headnote as the judgment is in Afrikaans.
[5] Ibid 1108C.

[6] The decision in *Chretien* has been criticised by some academic writers[6] and supported, perhaps with reservation, by others. Burchell[7] says the decision removed voluntary intoxication from the direct influence of policy considerations and placed it firmly on the basis of legal principle with the result that it can affect criminal liability in the same way, and to the same extent, as youth, insanity, involuntary intoxication and provocation. This, he says, is subject to the later decision in *S v Eadie*.[8] In that case Navsa JA held that there is no distinction between sane automatism and non-pathological incapacity due to emotional stress and provocation.[9] He referred to *Chretien* and said[10] it was important to bear in mind a comment by Burchell to the effect that although *Chretien* cannot be faulted on grounds of logic or conformity with general principles, the judgment might well have miscalculated the community's attitude to intoxication. In spite of this implied reservation the court did not overrule *Chretien* and it reflects the current state of our law.

[7] Amnesia is not in itself a defence,[11] but may be relevant in determining whether a defence such as automatism or lack of criminal capacity has been established. The accused's defence is that due to the consumption of alcohol and crack cocaine he did not have criminal capacity to realise that what he was doing was wrongful and to act in accordance with such appreciation. He also says he had no intention to kill the deceased. Whether or not he suffered from amnesia is but one of the factors to be considered in determining whether he had the required capacity and intention. The onus in this regard is on the State. In *Eadie*[12] Navsa JA said the following:

'It is well established that when an accused person raises a defence of temporary non-pathological criminal incapacity, the State bears the onus to prove that he or she had criminal capacity at the relevant time. It has repeatedly been stated by this Court that:

(i) in discharging the onus the State is assisted by the natural inference that in the absence of exceptional circumstances a sane person who engages in conduct which would ordinarily give rise to criminal liability, does so consciously and voluntarily;

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[6] CR Snyman *Criminal Law* 6th ed at 221-2.
[7] *Op. cit.* 320.
[8] *S v Eadie* 2002 (1) SACR 663 (SCA) at 666.
[9] Ibid. para 57.
[10] Ibid. para 27.
[11] *S v Piccione* 1967 (2) SA 334 (N) at 335C-D.
[12] Op. cit. para 2.

(ii) an accused person who raises such a defence is required to lay a foundation for it, sufficient at least to create a reasonable doubt on the point;

(iii) evidence in support of such a defence must be carefully scrutinised;

(iv) it is for the Court to decide the question of the accused's criminal capacity, having regard to the expert evidence and all the facts of the case, including the nature of the accused's actions during the relevant period.'

[8] I must consider the totality of the evidence in order to decide whether the State proved criminal capacity and intention on the part of the accused beyond a reasonable doubt. This involves the background facts relating to their relationship, the nature and personality of the accused, a possible motive, his state of intoxication, the fact that he claims to have no recollection of what he did and his actions before, during and after the incident.

[9] The accused was 31 years old at the time and unemployed, apart from occasional jobs. He lived with his girlfriend and her mother. His girlfriend was 36 years old and employed by a firm of insurance brokers. According to her mother Ashika and the accused argued from time to time and sometimes slapped each other. She said they were nevertheless a happy couple and were planning to get married. According to her evidence the accused was good to both of them, was not a violent person and they got on well. She said he did not drink alcohol regularly and she never saw him intoxicated, save for the day of the incident. He did however use drugs in the past and attended meetings of an association called Narcotics Anonymous. His cousin, who testified as a state witness, said the accused was a humble and gentle person. The accused himself testified that he could not believe that he could have done to Ashika what he is alleged to have done. He said he was physical to her only once, when he separated her and her mother and shook her by her shoulders to bring her to her senses. When asked why he did not leave her in the light of her controlling and abusive behaviour he said he loved her unconditionally, believed their problems would get better and wanted to marry her.

[10] The evidence for the State was that the accused was found in Umhlanga Rocks the morning after the incident and when asked what he had done, appeared to think they were talking about the courtesy car and pointed out that he was a

designated driver. He looked disorientated and smelt of liquor. When he was asked about Ashika he said he loved her very much and did not seem to realise what had happened to her. His reaction when he was told that he had apparently killed her was that he would give himself up to the police and they should investigate what had happened.

[11] The State called a psychiatrist, Professor Mkhize, who was one of the doctors who interviewed the accused with a view to determining whether he was by reason of mental illness or mental defect not capable of understanding the proceedings so as to make a proper defence, or not criminally responsible for the offence charged, as contemplated in sections 77, 78 and 79 of the Criminal Procedure Act.[13] It was common cause before me that the accused was fit to stand trial and that he did not suffer from mental illness or defect at the time of the incident.

[12] The purpose of calling Professor Mkhize appears to have been to deal with the issue of amnesia. He was at a disadvantage in this regard as the sole purpose of his interviews with the accused was to determine whether he was fit to stand trial and whether he was mentally ill at the time of the incident. I have to say, with respect to Professor Mkhize, that his evidence was not entirely consistent. He explained that after the excessive use of alcohol a person may do something deliberately and conscious of what he is doing, but may not remember the next day what he had done. He referred to this as alcoholic amnesia. He said the accused's inability to remember what he had done could be due to substance intoxication in the form of alcohol and crack. He thereafter expressed the view that the actions of the accused when he left the house were goal directed and accordingly his inability to remember them could not be explained by alcoholic amnesia. He provided no reasons for this statement, which was inconsistent with his own example of a person who drank too much at a party, drove home, stopped at traffic lights, parked the car, entered the house and the next morning could not remember how he got home. He referred to that as goal directed behaviour which could not be recalled due to alcoholic amnesia.

[13] Most of the questions directed to Professor Mkhize by counsel related to whether or not it was likely that the accused suffered from amnesia. His evidence relating to amnesia was perfunctory and not always consistent. When Professor

[13] Criminal Procedure Act 51 of 1977.

Mkhize was asked, on the assumption that the accused was in fact unable to remember the incident, whether it was reasonably possible that due to the consumption of alcohol and crack cocaine he did not have the capacity to appreciate that what he was doing was wrong or to form the intention to kill he said it was a reasonable possibility. It is of course the function of the court to make findings of fact and Professor Mkhize's view is only relevant in the sense that he could not exclude that possibility on psychiatric or scientific grounds.

[14] The question whether the accused suffered from amnesia should not be considered in isolation. His *ipse dixit* is obviously not enough. His evidence, that of the state witnesses and the probabilities must be carefully scrutinised. The contention on behalf of the State that he falsely claimed to suffer from amnesia implies that he knowingly and intentionally strangled and killed the deceased.

[15] A puzzling aspect of the case is the motive to kill. The evidence for the State was that the accused is a humble and gentle person and that he was good to Ashika and her mother. Mrs Singh testified that the accused and Ashika were a happy couple and were planning to get married. She said they argued from time to time, but regarded this as normal. It seems from the evidence that Ashika was the stronger personality and exercised excessive control over the accused. On the day of her death Ashika took the accused and her mother for lunch and on their way home dropped him off at a tavern and gave him money for drinks. It seems likely that later that day she accompanied him to go and buy drugs. There is no evidence of an argument or other unpleasantness before Mrs Singh was fetched by her friend at about 8.30 pm, at which time the accused was probably smoking crack cocaine in the bathroom. The tracking report shows that the car left the house less than an hour later, by which time Ashika must have been dead. The motive suggested by counsel for the State was that the accused resented the deceased because of her controlling and abusive behaviour, or that they may have argued because he wanted more money to buy drugs. I see no merit in these contentions. The accused agreed that there were problems in their relationship but was adamant that they were working on them and were planning to get married. This was consistent with Mrs Singh's evidence. The possibility of an argument over money is mere speculation and there is no evidence to support it. It does not seem likely that if the accused was in control of his senses he would have killed the deceased for one of the reasons suggested by

counsel, especially not in the manner in which he did. In my view no motive to kill the deceased was established even as a reasonable possibility.

[16] The evidence for the State was that when the accused was found the following morning and asked what he had done, he appeared to think the complaint related to his use of the car. He appeared not to know what had happened to Ashika and was disorientated. Counsel for the State submitted that the witnesses who testified to this effect were biased as they were related to the accused. They were state witnesses and I certainly did not get the impression that they were not telling the truth.

[17] The evidence as a whole does not suggest that the accused was untruthful about his inability to remember what had happened to the deceased. It is correct, as counsel for the State submitted, that his evidence was not always consistent as to what he was able to remember. I am not able to find that he was untruthful in this regard. He was not a bad witness and my impression was that he was at times uncertain whether he knew something because he recalled it or because he had read it in a statement or heard it in court. It is also correct that he mentioned some facts to Professor Mkhize which he said in court he did not remember. There was no expert evidence regarding the working of the mind and its ability to recall facts consistently. Suffice it to say that it was not my impression that the accused was faking his inability to recall the event.

[18] I interpose here a reference to an application, after the case for the accused was closed, to reopen the case for the State in order to recall Professor Mkhize and to call Ms Elkington, a clinical psychologist employed by the Department of Health of KwaZulu-Natal, who interviewed the accused and whose report was handed in by agreement during the trial. I refused the application and said I would provide the reasons for that ruling in this judgment.

[19] Counsel relied on the decision in *S v Felthun*[14] where the court said that a trial court has a general discretion in both civil and criminal cases to allow a party who has closed his case to reopen it and lead evidence at any time up to judgment. Vivier JA said the proper approach is that the Court's discretion should be exercised

[14] *S v Felthun* 1999 (1) SACR 481 (SCA) at 486.

judicially upon a consideration of all the facts of each particular case, having regard to the considerations mentioned in the cases and applying them as guidelines and not inflexible rules. He said the following:[15]

'The considerations mentioned by the Courts include the following: the reason why the evidence was not led timeously, the degree of materiality of the evidence, the possibility that it may have been shaped to relieve the pinch of the shoe, the possible prejudice to the other side, including such factors as the fact that a witness who could testify in rebuttal may no longer be available, the stage which the proceedings have reached and the general need for finality.'

[20] It is not unusual for the State to be given an opportunity to lead evidence in rebuttal where the defence had called an expert witness. That is not the case here. The defence did not call an expert witness and there is no such evidence to rebut. Counsel said he wanted to recall Professor Mkhize and call Ms Elkington so that they could comment on the version given by the accused in his evidence, which counsel contended differed materially from what he had said to them in the interviews and from what had been put in cross-examination.

[21] Ms Elkington interviewed the accused on four occasions in January 2015, some ten and a half months after the incident. She says the following in her report:

'Currently, Mr Ramdass' cognitive functions appear intact, and there is no evidence of visual or verbal memory impairment. However, he displayed a relative weakness in his ability to retain verbal information. He was able to give an adequate account of his personal history, but unable to recall any details of the alleged crime. His account of the hours leading up to and following the incident is simplistic. Mr Ramdass reports a history of substantial substance misuse, leading to the occurrences of sporadic amnestic episodes. He reports symptoms of withdrawal and tolerance. He further reports that he was intoxicated at the time of the alleged offence'.

Her statement that there was no evidence of verbal memory impairment, to which counsel referred in argument, was obviously a reference to his condition at the time of the interview and not to the incident itself, which she further on said he could not recall.

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[15] Op. cit. at 487.

[22] Counsel motivated his application to reopen the case on the basis that the accused's evidence differed from what was contained in his plea explanation, from what was put by defence counsel in cross-examination and from what the accused had told the people who interviewed him. He submitted that accordingly they should be given an opportunity to comment on his evidence. I asked counsel what kind of comment he had in mind and he said whether or not the accused's evidence as to what he could remember was likely.

[23] While there may be some merit in saying that the accused was not entirely consistent as to what he remembered and what he had reconstructed I do not consider that there were material contradictions between his plea explanation, what he had told the people who interviewed him and his evidence.

[24] The purpose of Ms Elkington's report does not appear from it, save that it says that the reason for the referral was a forensic psychological assessment. There is nothing in the report which is in material conflict with the accused's evidence, and the opinions recorded in the report deal with his intellectual capacity, personality traits and personality functioning.

[25] It seems plain that the State's decision not to call Ms Elkington was a deliberate one and not due to a mistake or misunderstanding. I failed to see why it should be allowed to call her after the defence case was closed. In all the circumstances of the case, and the content of her report, there seemed to be no reason to believe that her evidence would assist me in any material way, or that it would have been fair to the accused to let the State call evidence at that stage of the proceedings to attack his credibility. The same goes for Professor Mkhize.

[26] I turn to consider whether the State discharged the onus of proving beyond a reasonable doubt that the accused at the time of the incident had the required capacity to be criminally responsible. If there is a reasonable doubt about this then he is entitled to be acquitted.

[27] Counsel for the State correctly submitted that there is no evidence as to how much alcohol the accused consumed. The deceased's mother said when he got home he was not himself and it was the first time that she saw him intoxicated. The question as to how much he had drunk becomes less important in the light of the fact

that he thereafter smoked crack cocaine. He then strangled the woman he was intending to marry, apparently in the course of a struggle that left them both with scratch marks. There is no apparent motive as to why he would have done this. He was described by a state witness as a gentle and humble person who would not hurt a fly. He then drove off and left the car in Mahatma Ghandi Street in Durban. The following morning he responded to a call from his cousin and told him he was in Umhlanga Rocks. When he was found there he had no recollection of what had happened or how he came to be in Umhlanga Rocks.

[28] Counsel for the State submitted that the accused could not have been so intoxicated that he lacked criminal capacity, having regard to his actions when he left the house. He had to unlock and open the front door and security gate, open the driveway gate, drive the car out, close the gate and then drive to the city centre. He also drew attention to the cupboards that the accused opened in the house, the items he threw on the floor and the fact that he took the deceased's phone, camera charger and Garmin device. There is no expert evidence to the effect that these apparent goal-directed actions are inconsistent with the state of intoxication in which he says he must have been. On the contrary, Professor Mkhize expressed the view, on the assumption that his amnesia is genuine, and with knowledge of his subsequent behaviour, that he may have lacked the capacity to realise that what he was doing was wrong or to act in accordance with such appreciation or to form the intention to kill.

[29] I am conscious of the need for caution in finding too readily that a person who had killed someone is not criminally responsible because he acted involuntarily or without criminal capacity. Rumpff CJ said in *Chretien*[16] this may bring the administration of justice into disrepute. Nevertheless, this does not mean that the court may shirk its duty to determine whether the guilt of an accused person was established beyond a reasonable doubt. If there is a reasonable doubt as to his criminal capacity then he must get the benefit of that doubt.[17]

[30] In my view the accused established a sufficient foundation for the defence of lack of criminal capacity. On the totality of the evidence before me there is a reasonable doubt whether he had the required capacity when he strangled the

[16] Op. cit. at 1105H.
[17] *Ibid.* 1106C.

deceased. I say this on the basis of the evidence regarding their relationship, that they were planning to get married, the absence of any motive to kill her, the fact that he was regarded by those who knew him as a gentle and humble person, that what he did was completely out of character, the evidence that he had consumed alcohol and smoked crack cocaine, the fact that he could not remember what he had done, the fact that he was found in Umhlanga Rocks the following morning, that he did not try to avoid those who were looking for him, and that he still had the bag with the items which he had taken from the house and did not try to hide it. There was no expert evidence to suggest that it was likely that he killed her well knowing that what he was doing was wrong. I cannot have regard to statements made by judges in other cases which are based on expert evidence before them, such as, for example, that alcoholic amnesia is a rare occurrence.[18] There was no such evidence before me. Added to this is the fact that the accused wanted to plead guilty until counsel advised him that on his version he may in fact not be guilty.

[31] Counsel for the State submitted that in those circumstances the accused should be convicted of culpable homicide. In the absence of a finding that the accused had criminal capacity he cannot be convicted of culpable homicide as it too requires that the accused was able to appreciate the wrongfulness of his conduct and to act in accordance with such appreciation. If he was not then his conduct was not unlawful.[19]

[32] I should perhaps explain that after the decision in *Chretien* some commentators questioned whether a person who commits a prohibited act while extremely intoxicated should escape all criminal liability and argued that legislative reform to fill the gap left by *Chretien* could provide the answer. In 1982 the Minister of Justice requested the South African Law Commission to consider the matter. Its report was published in 1986 and resulted in the Criminal Law Amendment Act 1 of 1988.[20]Section 1(1) of the Act created a statutory offence in the following terms:

'Any person who consumes or uses any substance which impairs his or her faculties to appreciate the wrongfulness of his or her acts or to act in accordance with that appreciation, while knowing that such substance has that effect, and who while such faculties are thus

[18] *R v Botha* 1959 (1) SA 547 (O) at 549F.
[19] J Burchell *Principles of Criminal Law*, 4th ed, at 569.
[20] Ibid page 308-9.

impaired commits any act prohibited by law under any penalty, but is not criminally liable because his or her faculties were impaired as aforesaid, shall be guilty of an offence and shall be liable on conviction to the penalty which may be imposed in respect of the commission of that act.'

[33] The difficulty with the statutory offence is the requirement that the accused must have been so drunk that he lacked criminal capacity. In a case where the accused is acquitted on a charge of murder on the basis that there is a reasonable possibility that he was so drunk that he lacked the required capacity he cannot be convicted of the statutory offence unless the court can find beyond a reasonable doubt that he did not have such capacity. This difficulty has been pointed out more than once by the courts and academic writers.[21] It is however up to the legislature to decide whether or not the statute should be amended.

[34] The outcome of this case does not mean that persons charged with violent crimes can escape liability easily by claiming a lack of criminal capacity due to the use of alcohol or drugs. Each case will be decided on its own facts and the evidence scrutinised carefully. The State will be well advised to lead expert evidence to assist the courts in deciding the issues relating to criminal capacity. Such expert evidence should be cogent and thorough, which unfortunately was not the case before me.

[35] My finding is that the State has not proved beyond a reasonable doubt that the accused had the required criminal capacity when he caused the death of the deceased. The result is that he cannot be convicted on either the murder or the robbery charge. He is acquitted on both counts.

[21] *S v Hutchinson* 1990 (1) SACR 149 (D) at 154-5; *S v Mbele* 1991 (1) SA 307 (W) at 311; *S v September* 1996 (1) SACR 325 (A) at 327-8. Burchell op. cit. at page 310 and further; Snyman op. cit. at page 227 and further.

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PLOOS VAN AMSTEL J

Appearances:

For the State	**:**	Adv. K Shah
Instructed by	**:**	Director of Public Prosecutions Durban
For the Accused	**:**	Mr M Qulo
Instructed by	**:**	Legal Aid Durban
Date of Hearing	**:**	25,26,28,29 April 03 May 2016 05, 07, September 2016
Date of Judgment	**:**	16 September 2015