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IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CC118/2017

13/3/2018

In the matter between:

THE STATE

V

TOKOLOGO MBONANI

ACCUSED

Coram: Phahlane AJ

JUDGMENT

Phahlane AJ

[1] The accused was charged with four counts, namely:

Count 1: Kidnapping;

Count 2: Murder, read with the provisions of sections 51 (1) and section 51 (2) of the Criminal Law Amendment Act 105 of 1997;

Count 3: Robbery with aggravating circumstances, read with the provisions of section 51 (2) of Act 105 of 1997;

Count 4: Rape, read with the provisions of section 51 (2) of Act 105 of 1997.

[2] The specific allegations were as follows:

Count 1, in that upon or about 20 March 2017 and at or near Brakpan, in the district of Brakpan, the accused did unlawfully and intentionally deprived YVONNE FIKILE SIBEKO, an adult female, from her freedom of movement by taking her to a secluded place in Brakpan.

Count 2, in that upon or about 20 March 2017 and at or near Brakpan, in the district of Brakpan, the accused did unlawfully and intentionally kill YVONNE FIKILE SIBEKO an adult female.

Count 3, in that upon or about 20 March 2017 and at or near Brakpan, in the district of Brakpan the accused did unlawfully and intentionally assault YVONNE FIKILE SIBEKO and then and there and with force took from her possession a Nokia cellular phone, aggravating circumstances being present in that serious bodily injuries were inflicted.

Count 4, in that upon or about 20 March 2017 and at or ear Brakpan in the district of Brakpan the accused did unlawfully and intentionally commit an act of sexual penetration with a female person to wit YVONNE FIKILE SEBEKO by inserting his penis into her vagina without her consent.

[3] The accused who is legally represented by Mr Moeng from Legal Aid SA confirmed that the provisions of section 51 of the Minimum Sentences Act¹ as well as the Competent Verdicts to the counts of kidnapping; robbery and murder were explained to him.

[4] The accused pleaded guilty in terms of section 112 (2) of the Criminal Procedure Act of 1977 (CPA) to counts 2 and 3. However, with regards to count 3, the accused pleaded guilty to Theft and not Robbery. The accused then pleaded not guilty to counts 1 and 4 and did not give a plea explanation with

¹ Act 105 of 1997

regards to these counts. The section 112 statement was read into the record.

[5] State did not accept the section 112 statement on the basis that count 2 of murder lacks the averments for the requirements of premeditated murder and submitted that State will lead evidence. As a result, court did not question the accused with reference to the alleged facts of the case and court could not accept or confirm the contents of the section 112 statement which has been rejected by the state.

[6] In terms of section 113 of the CPA, the court changed the plea of Guilty to a plea of Not Guilty. The court also explained the procedure and effect of section 113 of the CPA to the accused and the accused confirmed that he understands.

[7] The accused made formal admissions in terms of section 220 of the CPA. It also appeared that the accused had made a Pointing Out and both the state and defence agreed that there will be no need to hold a trial within trial. The reason according to the accused counsel, was that the accused has confirmed that his constitutional rights were explained to him; and that he was not threatened or assaulted. The only issue in dispute with regards to the pointing out was the allegation of a confession made to Captain Magane who conducted the Pointing Out as it was not reduced to writing.

[8] In support of its case, the state called Captain Simon Magane (Magane) as its first witness. He testified that he is stationed at Daveyton police station and that on 28 March 2017 he was requested by Colonel Mangani to interview the accused and conduct a pointing out. He said he was not involved in the investigation of this case as it was investigated by the Brakpan police. He testified that he spoke Zulu language to the accused and there was no interpreter needed because they both understood each other. This interview was done at Brakpan police station in the computer room.

[9] Captain Magane testified that he completed part 1 and 2 of the 'Notes on Pointing Out' (handed in as **exhibit F**) before the actual pointing out was done. I interpose to state that Part 1 and 2 is a proforma relating to, among others, the particulars of the captain and the accused; and the constitutional rights of the accused. Magane further testified that after the interview in terms of part 1 and 2,

the accused indicated that he was willing to do a pointing out. He says going to do a pointing out, they left with the driver and a photographer. He testified that the accused was giving directions which led to them driving up to the end of town, to the beginning of the veld. It is a distance of about plus minus 7 kilometres from the police station to the area where the deceased was found. According to him, the accused told them to stop at the place where the houses end and they had to walk for about twenty minutes from where they stopped the motor vehicles to the spot where the deceased body was found.

[10] Magane explained that it is a difficult terrain to walk through because there was water and they walked with difficulty through the path. He says walking towards the spot where the deceased was found, the accused was leading the way and they were following him. He says the accused did not struggle or have difficulty taking them to the spot where the deceased was found.

[11] Magane was referred to **Exhibit G**, which is the photo album containing the photos of the body of the deceased. He testified that when the accused was pointing at the deceased, he gave a version of what happened on the day he was with the deceased, ie. That they were from town and took a short cut into the veld and upon reaching a spot where the deceased was lying, he raped her and then stabbed her. Magane said he asked the accused where the knife was, which he used to stab the deceased with and the accused indicated that after stabbing the deceased, he just threw it away but he did not go and take it. On the question whether accused told him about the phone belonging to the deceased, he responded by saying he could not remember if accused told him about the phone belonging to the deceased. He further told the court that when the accused was telling him about the rape and the knife, they were still standing right at the spot where he was pointing out at the deceased.

[12] Magane further testified that where the deceased was found, there was grass. Asked about the accused emotions when he pointed at the deceased, Magane said the accused did not show any emotions, he just stood there and showed them the deceased. He says he completed the form regarding the notes on pointing out itself back at the police station. He confirmed that he did not write about the rape in this form. The reason according to him was that on their return

upon arrival at the police station, the accused was not corporative and wanted to go back to prison, as he complained about missing his food. He says he had to beg him to sign.

[13] Under cross-examination Magane explained that before the pointing out, he did not know the charges against the accused or what was to be pointed out. He is not sure whether the spot where the deceased was found is the same spot where the rape and killing took place. He testified that he could not ask questions of where the rape and killing happened or where they were coming from and the accused did not explain either.

[14] Magane further testified that it was the first time for him to do a pointing out and he was guided by Exhibit F in conducting a pointing out. He was challenged at length with regards to Part 3 of Exhibit F. It was put to him that Part 3 required him to note everything that was said by the accused and that he did not, to which he responded by saying the accused was not corporative. It was further put to him that at the time when he submitted exhibit F, he had not finished writing what he alleged the accused had told him, and that as a justice of peace who holds the same position as a magistrate, he should have noted all the information given to him by the accused. Magane responded by saying it is true that the information is not in the form but he didn't know what was happening. He testified that it was only after five months of doing the pointing out that he was requested by the OPP to make a statement explaining whether accused told him about the rape.

[15] It was put to him that the accused denies telling him that he had raped the deceased. It was further put to him that he might have assumed that the deceased was raped seeing that she was found naked. Further that it did not matter if the accused was impatient, he should have done what was required of him [ie. Write everything said to him by accused] or at least written the words "rape" in the form, to which he responded by saying he did not.

[16] There was no re-examination for this witness and the next witness for the state was P P S. She testified that she is 24 years old and stays in Brakpan. She works at a shop as a cashier and during March 2017, she was still working at the

same shop. She confirmed that she knew the accused because accused used to come to the shop with his girlfriend. She testified that the accused had indicated that he is looking for a lady because there is a job at the place where he is working, and then she contacted Ntombi. She testified that the accused left with Ntombi, and the report she received later from Ntombi was that where they went with the accused, they found that there was somebody already working there. The accused told her that his employer will look for another place for him, and that's where Ntombi will be employed. However, Ntombi had reported to her that they found a lady and a child at a place where they went but the owner was not there.

[17] To the question of how it happened that the accused went away with the deceased, S responded by saying that she phoned the deceased on the morning of 7 March 2017, and the deceased came to her workplace and thereafter, the accused came. She testified that the deceased and the accused were alone when they left and the deceased was comfortable going with the accused. Ntombi wanted to go along with them but the accused was in a hurry. The accused said the job was in Brakpan Oos/East. According to her, it was the first time that the accused and deceased were together.

[18] Around 11 she phoned the deceased and there was no reply. She says around 12h20 she received a whatsapp message from the deceased's phone saying: "*I am disappointed, we can't find the place to the accused's workplace, I am turning back, the battery is running down, ie. the phone will go off*". Ms S testified that she was expecting the deceased to come back to her workplace but she never turned up. She kept trying her phone but it was off.

[19] The next day she went to look for her at the vicinity of Brakpan Oos/East. They then went to plastic village to look for the accused. She testified that the accused room was not locked and they took a picture of his room and asked people around if they haven't seen the accused. The neighbours there said the accused left on Tuesday morning going to a place where he was working. She stated that they went to the police station to open a case of missing person and went back to plastic village to ask the neighbours for the accused's number.

[20] She said around 3pm accused came to the shop where she was working,

indicating that he took the deceased to catch a taxi to Duduza taxi rank. Accused indicated that he did not see if there were people in the taxi as he was standing a distance away. The accused then bought a Cell C SIM card. She asked the accused if he has a cell phone and the accused said he's got one. She testified that later on she realised that the deceased's (her aunt) messages were opened.

[21] The third state witness was N M M. She testified that she is known as Ntombi but that Ntombi is her nickname. She said she was approached by P that there is a person looking for someone for a job. She testified that she left with the accused going to a white man's house. On arrival she knocked three times and a child came out and said her mother has a person working there. The helper came out, saying the owner of the house went to fetch the child from school. She stated that she left with the accused going back to P and when they got there the accused said they found the owner of the house. She explained that she told P that she did not see the owner of the house and she cannot even say whether the owner has got white or black hair. According to her, this happened before the death of the deceased. She further said on the way the accused asked severally if she was serious about looking for a job. Her reply to the accused question was that she is desperately looking for a job because she has children. She indicated that she started knowing the accused after P had introduced him. There was no cross-examination of this witness.

[22] The last witness for the state was Dr Solly Skosana. He testified that he compiled **Exhibit C** which is a post mortem report. He received information that the deceased had died on 28 March 2017 and when the body of the deceased was brought to him, it was already refrigerated. He testified that the deceased body was burned.

[23] I interpose to state that the findings or cause of death on the post mortem report compiled by Dr Skosana is reflected as follows: **PROVISIONAL INTERIM CAUSE: Undetermined based on post mortem findings alone (Blood results pending)** **Exhibit D** is an affidavit by XV Tshabalala in terms of section 212 (4) of the CPA stating the carbon monoxide saturation of the blood sample taken from the deceased. The results according to the analysis done by Tshabalala was that *"Carbon Monoxide content of the blood specimen was 16.6 % saturation of the*

total Haemoglobin".

Exhibit E is an additional post mortem report by Dr Sarang who stated in his report that "*after the toxicology results were examined, the cause of death is consistent with "CARBON MONOXIDE INHALATION".*

[24] Dr Skosana testified that at the time when the second toxicology report was made, he was no longer working. When asked if the deceased was still alive or dead at the time she was burned, the doctor responded by saying, finding carbon monoxide in the system of the deceased meant that when she was burned, she was still alive and that is why she inhaled smoke. He explained that smoke can only get on the body through inhalation.

[25] Referring to his report on the appearance and examination of the body of the deceased, I will highlight only on the points to which he was referred to. The following is noted:

EXTERNAL APPEARANCE OF THE BODY AND CONDITION OF THE LIMBS:

1. The body is burned over the face, anterior chest, right breast and right arm.
2. She is still wearing a red and white panty that is burned
3. Pubic area badly burned and both thighs
4. Right breast is burned and contracted
5. Toenails printed pink
6. There is a blue and white ligature around the neck which is partially burned
7. There appears to be a burned rug which has been stuffed into the mouth
8. There is also maggots present in the vagina
9. 1cm incised puncture wound left upper quadrant with disembowelment.

HEAD AND NECK

1. SCALP: Extensive bruising scalp
2. INTRACRANIAL CONTENTS: Sub-arachnoid staining involving occipital lobe
3. ORBITAL, NASAL AND AURAL CAVITIES: nose is normal. Lips burned
4. MOUTH, TOUNGE, AND PHARYNX: White and black cloth stuffed into mouth and pharynx extending to pharynx
5. NECK STRUCTURES: Hyoid bone intact. Extensive bruising strap muscles.

ABDOMEN

1. INTESTINES AND MESENTERY: Incised wound mesentery

[26] To the question whether the deceased was raped, his answer was that he could not determine that rape had occurred due to the maggots that were found in her vagina and also that the body was in a state of decomposition. Dr Skosana further testified that there was bruising on the neck muscles which could also have been caused by external forces like strangulation for example. He explained that the cloth stuffed into the mouth and throat of the deceased made it impossible for her to breath. This according to him, means that the cloth was forced, or rather force was used to push the cloth into the pharynx/throat of the deceased.

[27] He testified further that the bruising of the scalp indicated that blunt force was applied on the head, hence the force on the occipital lobe (ie. the back part of the head).

[28] Further that the incised wound on the abdomen means a sharp object like a knife could have been used. He explained that the insides of the stomach were coming out. In his opinion, the degree of violence like the bruising on the scalp meant that force was used on the head, resulting in the bleeding of the occipital lobe.

[29] Under cross-examination, Dr Skosana admitted that it was possible that the blow on the head of the deceased could have been caused by falling on a

hard object. To the question of how long carbon monoxide could last in the body of a person, he responded by saying that he is not sure because he has not done research on that. When asked whether the concentration of carbon monoxide content of 16.6 % is enough to kill a person as reflected on **exhibit D**, he responded by saying 16% could not have been the cause of death, and that there are other factors which could have contributed to the death. He closed his evidence by saying that he rules out carbon monoxide as the cause of death.

[30] The state closed its case and the defence followed suit without applying for a discharge in terms of section 174 of the CPA. With regards to count 1 state conceded and submitted that with the evidence as presented, State did not prove kidnapping and would therefore not be asking for conviction on this count. They submit however that with the count of rape, though Dr Skosana testified that he could not determine that rape had occurred, the fact that captain Magane gave evidence that the accused told him during the pointing out that he had raped the deceased, that evidence was not challenged by the accused and the court should take it into consideration as rape having been proven beyond reasonable doubt.

[31] By electing not to testify, the accused was merely exercising his constitutional rights in terms of section 35(3)(h) 'to remain silent and not to testify during the proceeding's. It is trite law that in criminal proceedings, the prosecution must prove its case against the accused beyond a reasonable doubt and that the accused has no duty to prove his innocence. The presumption of innocence is an established principle of South African law which places the burden of proof squarely on the prosecution. It requires that the prosecution bear the burden of proving all the elements of a criminal charge.

[32] As stated in Schwikkard²², *"the presumption of innocence both at common law and as a constitutional right places a burden on the prosecution to prove the guilt of an accused person beyond reasonable doubt. The presumption of innocence applies to those elements of the state's case that must be established in order to justify punishment"*.

[33] Captain Magane confirmed that he did not write this information on Part 3

²² Principles of Evidence, PJ Schwikkard *et al*, Fourth Edition 2016 at page 554

of exhibit F. He explained that five months after conducting a pointing out with the accused, he was requested by the DPP to write a statement explaining whether the accused had told him that he had raped the deceased. When challenged about what he was required by the form on 'Notes on Pointing Out', that the rules or guidelines stated in the form says it is a must, that what is being said by the accused should be recorded verbatim, he said the accused did not want to continue with the interview, stating that he is in a hurry to go back to prison to get his share of the food. The specific portion of this instruction in the form is couched in the following: " *Report all movements, observations and what the person says. (His exact words and all words by the officer must be recorded verbatim and within quotation marks)*"

[34] It is important to note that there was no DNA done on the body of the deceased to determine whether she was raped or not. I have earlier stated that Dr Skosana's evidence was that he could not determine that rape had occurred due to the maggots that were found in the deceased's private parts.

[35] State submitted that the uncontested evidence of captain Magane clearly establishes that the deceased was raped. State further submitted that based on the provisions of section 208 of the CPA, the court should convict on the uncontested evidence of Captain Magane alone.

[36] Section 208 of the CPA provides that:

An accused may be convicted of any offence on the single evidence of any competent witness.

In **S v Webber**³ it was stated that:

"Conviction is possible on the evidence of a single witness. Such witness must be credible, and the evidence should be approached with caution. Due consideration should be given to factors which affirm, and factors which detract from the credibility of the witness. The probative value of the evidence of a single witness should also not be equated with that of several witnesses".

³ 1971(3) SA 754 (A)

In ***S v Sauls and Others***⁴ DIEMONT JA stated that:

"Where, for instance, the state relies upon the evidence of a single witness and does not adduce other available evidence, there is a greater need for caution".

[37] In my view, captain Magane's evidence constitutes hearsay evidence, the credibility of which is dependent on the accused. I say this because this evidence stands uncorroborated by neither the 'Notes on Pointing out' nor DNA. The fact that Magane only made a statement five months after the pointing out was done about the information which he did not volunteer, but was guided on, is a fact which the court has to treat with caution. It is a fact which in my view, goes to the credibility of the witness himself.

[38] State submitted that the statement made by the accused to Magane constitutes a confession and it need not be in writing. As such it should be admitted by the court. Relying on the requirements of section 217 of the CPA, defence argued that all the requirements for a confession have not been complied with, specifically, that the statement was not reduced to writing.

The section provides that:

1. Evidence of any confession made by any person in relation to the commission of any offence shall, if such confession is proved to have been freely and voluntarily made by such person in his sound and sober senses and without having been unduly influenced thereto, be admissible in evidence against such person at criminal proceedings relating to such offence: Provided-
 - (a) That a confession made to a peace officer, other than a magistrate or justice, or, in the case of a peace officer referred to in section 334, a confession made to such peace officer which relates to an offence with reference to which such peace officer is authorized to exercise

⁴ 1981 (3) SA 172 (A)

any power conferred upon him under that section, shall not be admissible in evidence unless confirmed and reduced to writing in the presence of a magistrate or justice.

(b)

A 'peace officer'⁵ as defined in section 1 of the Act includes 'any magistrate; justice; police official; and a correctional official as defined in section 1 of Act 8 of 1959⁶

[39] The defence has under cross-examination referred to captain Magane as 'justice of the peace', who was expected to reduce the statement of the accused in writing.

[40] If a confession was made to peace officer who is not also a justice of the peace or a magistrate, it must be confirmed and reduced to writing in the presence of a magistrate or justice of the peace. A justice of the peace is basically "a person who is a justice of the peace under the provisions of the Justices of the Peace and Commissioners of Oaths Act of 1963. This refers to an officer in the SA Police Service, including someone with the rank of **captain**, superintendent, senior superintendent, director and commissioner. Those in the lower ranks of constable, sergeant and inspector are not officers, and therefore not justices of the peace. The terms "peace officer" includes "any magistrate, justice, police official, member of the prison service etcetera. All justices of the peace are therefore peace officers, but the opposite does not apply.

[50] It is therefore clear that captain Magane is a peace officer who is also a 'justice of the peace'. As such, Du Toit *et al* makes it very clear that confessions made to peace officers other than magistrates are inadmissible unless they are confirmed and reduced to writing.

[51] The defence submitted that the statement or evidence of Magane cannot be said to have proven the count of rape beyond reasonable doubt as he could not even produce a pocket book of what he did or was said to him on the day he

⁵ See Schwikkard *supra* at 368; Commentary on the Criminal Procedure Act, Du Toit *et al* Service 57,2016, 24- 61

⁶ Correctional Services Act 8 of 1959

took the accused out for a pointing out. Defence further submitted that court should not rely on the captain's recollection which is not backed up by any evidence.

[52] I am inclined to agree with this submission. Magane did not write on the Form that accused confessed to the rape of the deceased. There is no medical evidence or proved facts which has been placed before this court to enable it to come to a conclusion that the deceased was indeed raped.

[53] This leaves grave doubt on whether the accused raped the deceased. In the circumstances, I am worry to conclude that the state has proven its case beyond a reasonable doubt that indeed the accused raped the deceased as proffered in count 4.

[54] With regards to count 1 of kidnapping, I have already stated that State had submitted, and also conceded in their heads of argument that there is insufficient evidence in respect of this count. I am in agreement with this submission because no evidence has been placed before court to prove this count. Under the circumstance, the accused is entitled to a benefit of doubt and should be acquitted.

[55] In asking for a conviction on the count of murder, state submitted that the murder of the deceased was premeditated and gave the following reasons:

1. That no employment offer existed as promised by the accused
2. That the accused took the complainant to a deserted area and lured her far away from any houses or businesses.
3. That the accused was armed with a knife which he used to stab and kill the deceased on his own version
4. That he tried to conceal evidence pertaining to the murder, by burning the deceased whilst she was alive.
5. That the accused not only had direct intent, but also had carefully planned the execution of the offence.

[56] Having made such submissions, state added that failure by the accused to testify where there is a clear case for him to answer or give a reasonable explanation under oath is prima facie case against him, which became conclusive

proof of his direct intent and planning of the offence.

I have earlier touched on the aspect of the accused exercising his rights in terms of the constitution to remain silent and the presumption of innocence which I will not repeat.

[57] In my view, in order to prove premeditation where there is evidence or proven facts, State must lead evidence to establish the period of time between the accused forming the intent to murder and the carrying out of his intention. There is no such evidence presented in this court.

[58] Turning to the five reasons given by the state to rely on its submission that murder was pre-planned or premeditated, it is important to note that state had from the beginning rejected the section 112 statement tendered by the accused. The effect of which meant state had the onus of proving all the elements of each and every charge proffered against the accused. I see no reason why state would want to use the information on the rejected section 112 statement, as it does on point 3 [above] of its reasons, to prove premeditated murder. Nevertheless, it is important to note that accused version is not evidence and state cannot rely on that.

[59] Magane's evidence was that when the accused was pointing at the deceased, he gave a version of what had happened on the day he was with the deceased. His evidence is that the accused had told him that he had raped and stabbed the deceased with a knife. His evidence was also that the accused told him that he threw the knife away but did not go and take that knife. When asked whether accused had said anything about the phone of the deceased, Magane said he does not remember if accused told him about the phone belonging to the deceased.

[60] The explanation given by Magane under cross-examination was that when this information was given to him, he did not ask where exactly the stabbing or rape took place and the accused also did not explain where he stabbed the deceased.

[61] In short, Magane did not bother to ask for the details of the information given to him. Of importance, this information is not contained in the 'Notes on

pointing out'. Magane did not even make a statement relating to this information that was given to him. It was only after five months of doing the pointing out that he was asked by the OPP to write a statement explaining whether the accused had told him that he had raped the deceased. No request was made to him to explain whether the accused had told him he had killed the deceased or burned her because this information is also not recorded in the form of 'Notes on pointing out'.

[62] I need to mention that the forms relating to 'Notes on Pointings' out and 'Confessions' are made for a reason. They require every detail relating to the particulars of the accused; his rights; injuries observed on the accused, for example, to be noted in full. Most importantly, they require verbal communication of a person doing the pointing out to be written down, and his exact words to be recorded verbatim and in quotation marks. This form says it is a must to record all words.

[63] I am worry of accepting the evidence of Magane, more particularly because nothing relating to the murder; rape and robbery of the deceased has been recorded on the document where he was supposed to note such details. I also take note of the fact that Magane did not volunteer the information but was approached to write a statement by the OPP, which in my view, was a guidance on what to write on such a statement. I also note that paragraph 3 of Part 4 of exhibit F, a question asked to the accused read as follows: Do you have any complaints about the manner in which I conducted the pointing out? Accused answered Yes.

[64] The relationship between evidence and proof has been explained by schwikkard⁷ as follows:

"Proof of a fact means that the court has received probative material with regard to such fact and has accepted such fact as being the truth for purposes of the specific case. Evidence of a fact is not vet proof of such fact. The court must still decide whether or not such fact has been proved. This involves a process of evaluation".

⁷ At 21

[65] Relying on **R v Blom**⁸ state also submitted that circumstantial evidence available justifies the inescapable inference that the accused had planned the offences. The court in this case said:

*"in reasoning by inference in a criminal case there are two cardinal rules of logic which cannot be ignored. The **first rule** is that the inference sought to be drawn must be consistent with all the proved facts. If it is not, the inference cannot be drawn. The **second rule** is that the proved facts should be such that they excluded every reasonable inference from them save the one sought to be drawn. If these proved facts do not exclude all other reasonable inferences, then there must be a doubt whether the inference sought to be drawn is correct. This second rule takes account of the fact that in a criminal case the state should furnish proof beyond reasonable doubt".*

In **Rex v De Villiers**⁹ the court pointed out that:

"the court should not consider each circumstance in isolation and then give the accused the benefit of any reasonable doubt as to the inference to be drawn from each single circumstance. This approach can also be put differently: the state must satisfy the court, not that each separate item of evidence is inconsistent with the innocence of the accused, but only that the evidence taken as a whole is beyond reasonable doubt inconsistent with such innocence".

[66] Having stated previously that accused elected not to testify, in my view, no adverse inference can be drawn against an accused merely by virtue of the fact that he has exercised his constitutional right to refuse to testify.

[67] In setting out a test for determining when proof beyond reasonable doubt would nevertheless be necessary, Schreiner JA In **R v Mthembu**¹⁰ said the following:

"I am not satisfied that the trier of fact is obliged to isolate each piece of evidence

⁸1939 AD 188

⁹ 1944 AD 493 at 508-9

in a criminal case and test it by the test of reasonable doubt. If the conclusion of guilt can only be reached if certain evidence is accepted or if certain evidence is rejected then a verdict of guilty means that such evidence must have been accepted or rejected, as the case may be, beyond reasonable doubt. Otherwise the verdict could not properly be arrived at. But that does not necessarily mean that every factor bearing on the question of guilt must be treated as if it were a separate issue to which the test of reasonable doubt must be distinctly applied. I am not satisfied that the possibilities as to the existence of facts from which inferences may be drawn are not fit material for consideration in a criminal case on the general issue whether guilt has been established beyond reasonable doubt, even though, if the existence of each such fact were to be treated by the test of reasonable doubt, mere probabilities in the Crown's favour would have to be excluded from consideration and mere probabilities in favour of the accused would have to be assumed to be certainties. Circumstantial evidence, of course, rest ultimately on direct evidence and there must be a foundation of proved or probable fact from which to work. But the borderline between proof and probability is largely a matter of degree, as is the line between proof by a balance of probabilities and proof beyond reasonable doubt. Just as a number of lines of inference, none of them in itself decisive, may end their effect lead to a moral certainty (Rex v de Villiers 1944 AD 493 at 508)) so, it may fairly be reasoned, a number of probabilities as to the existence of facts from which inferences are to be drawn may suffice, provided in the result there is no reasonable doubt as to the accused's guilt".

[68] I note that all circumstantial evidence depends upon the facts which are proved by direct evidence. Turning to the first cardinal rule in Blom *supra*, I am of the view that State did not prove any facts on which this court can draw an inference from.

[69] Having said this, it is now for this court to decide whether on the evidence at hand, it can be said that state has proven its case against the accused beyond a reasonable doubt. When evaluating or assessing evidence, it is imperative to

¹⁰ 1950 (1) SA 670 (A) at 679-680

evaluate all the evidence, and not to be selective in determining what evidence to consider.

See in this regard ***S v Van der Meyden***¹¹ where NUGENT J stated at 450 that:

"What must be borne in mind, however, is that the conclusion which is reached (whether it be to convict or to acquit) must account for all the evidence. Some of the evidence might be found to be false, some of it might be found to be unreliable, and some of it might be found to be only possibly false or unreliable, but none of it may simply be ignored".

[70] What is clear from the evidence of Ms P P S is that the deceased had left with the accused and the deceased was comfortable going with him. Around 11 she, phoned the deceased and there was no reply. She said around 12h20 she received a whatsapp message from the deceased's phone saying: *"I am disappointed, we can't find the place to the accused's workplace, I am turning back, the battery is running down, ie. the phone will go off".* She further testified that she was expecting the deceased to come back to her workplace on that day but she never turned up. She kept trying her phone but it was off. She told the court that around 3pm the next day, accused came to the shop where she was working, indicating that he took the deceased to catch a taxi to Duduza taxi rank, and accused indicated that he did not see if there were people in the taxi as he was standing a distance away.

[71] Unfortunately, this evidence does not assist the court in any way, in determining the factors surrounding the death of the deceased and the robbery thereto.

[72] No evidence has been presented to prove that accused indicated that he had burned the deceased. It may be that the accused had pointed out at the body of the deceased. However, I have difficulty accepting or inferring that the pointing out which is not backed up by direct evidence is conclusive proof beyond

¹¹ 1999 (1) SACR 447 (W)

reasonable doubt that accused burned the deceased. Therefore, the fourth reason given by the state ie. that accused tried to conceal evidence pertaining to the murder by burning the deceased while still alive is also not supported by evidence.

[73] In evaluating the evidence of Magane as a whole, I am unable to conclude that Magane was a credible and reliable witness for the reasons given above. With this doubt in my mind, and having considered the evidence as a whole, I am of the view that Magane's evidence was not supported by any proven facts and as such, his evidence is rejected. No evidence has been placed before court to even prove the count of robbery.

[74] Under the circumstances, this court finds that state did not prove beyond a reasonable doubt that (1) the accused has killed the deceased; (2) the accused has raped the deceased (3) the accused had robbed the deceased. As such, accused has to be given the benefit of doubt.

In the circumstance, the accused is acquitted of all counts.

PD Phahlane AJ

ACTING JUDGE OF THE HIGH COURT

Appearances:

For the State : Adv. *GJC Maritz SC and Adv. PW Coetzer*

Instructed by : National Prosecuting Authority

For the Defendant : Mr S Moeng

Instructed by : Legal aid SA

Date heard : 06 - 08 March 2018

Date delivered : 13 March 2018