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IN THE HIGH COURT OF SOUTH AFRICA
(NORTHERN CAPE HIGH COURT, KIMBELEY)

Case No: K/S 26/14
Delivered: 19/11/2014

In the matter between:
THE STATE

V

PATRICK SEKGORO
ELVIN ALTON BARENDSE

Accused 1
Accused 2

JUDGMENT

PAKATI J

[1] Messrs Patrick Sekgoro and Elvin Alton Barends, accused 1 and 2 respectively, appear before me on two charges. In count 1 they are charged with rape read with s 51 of the Criminal Law Amendment Act, 105 of 1997 (“the Act”), and s 256 of the Criminal Procedure Act, 51 of 1977 (“the CPA”). In count 2 they face a charge of murder read with the provisions of s 51 (1) of the Act. They are alleged to have raped and killed the deceased, A..... K..... P....., on 09 July 2013 in Kimberley.

[2] Accused 1 is represented by Mr J Cloete and accused 2 by Mr T Fourie on the instructions of Legal Aid South Africa, Kimberley. Accused 1 pleaded guilty to count 1 (rape) and not guilty to murder (count 2). In support of his plea, a s 112 (2) statement (Exh “A”) was handed in and read into the record. It records as follows:

“1. Ek, Patrick Sekgoro, is die beskuldigde in die saak.

2. Ek pleit skuldig aan die misdryf van oortreding van Artikel 3 gelees met Artikels 1, 55, 57, 58, 59 en 60 van Wet 32 van 2007 gelees met Artikels 256 en 261 van Wet 51 van 1977 en verder gelees met Artikel 51 asook Skedule 2 van Wet 105 van 1997 – Verkragting.

3. Ek erken:

3.1 dat ek op 30 Junie 2013 en te of naby Ramatshelastraat,

Galeshewe in die distrik van Kimberley was.

3.2 dat ek met Agnes Kediemetse Phoku, ‘n vroulike person ‘n

handeling van seksuele penetrasie gepleeg het deur haar vaginaal te penetreer met my penis sonder dat sy daartoe toegestem het.

3.3 dat ek die betrokke dag geweet het dat my optrede verkeerd was.

4. Die gebeure die betrokke dag was die volgende:

Op die betrokke dag van die voorval het ek vanaf 10:00 die oggend saam met vriende gedrink by my ouma se huis. Ons het ook dagga en mandrax gerook en ek het dronk in my kop gevoel. Die dagga en mandrax tesame met die drank het my oordeelsvermoë aangetas, maar ek het nogsteeds geweet wat ek doen.

Later die betrokke aand so 19:00 het ons vriende na Rooistoep Tavern gegaan en verder daar gaan drink. Ongeveer 22:00 is ons na Bill Tavern en het ook daar verder gedrink.

Ons het later huis toe gegaan en oppad na die huis het ons weer dagga en madrax gekoop en dit gerook. Ons het die oorledene in die straat waar ek by my ouma woon raakgeloop. Beskuldigde 2 het die oorledene gevang en sy het geskree. Hy het haar gepooitjie en sy het geval. Hy het haar op haar kop getrap en sy het stil geraak.

Hy het gese dat ek en Siyanda hom moet help en ons 3 het haar gedra na die veld. Beskuldigde 2 het vir Siyanda gestuur om by my huis kondome te gaan haal en Siyanda het toe gegaan en die kondome gebring en vir ons elkeen 'n kondoom gegee.

Beskuldigde 2 het eerste gemeenskap met die oorledene gehou. Ek het tweede met haar gemeenskap gehou en Siyanda was derde. Ons al drie het kondome gebruik.

Ek en Siyanda het huis toe geloop nadat ons klaar gemeenskap met die oorledene gehou het. Beskuldigde 2 het by die oorledene agtergebly.

Ek en Siyanda het by my woning verder mandrax en dagga gerook. Beskuldigde 2 het heelwat later by my woning opgedaag en aan ons meegedeel dat hy vir 'n tweede keer gemeenskap met die oorledene gehou het.

Beskuldigde 2 het saam ons dwelms gerook en ons het toe geslaap by my woning.

5. *Die polisie het my in November 2013 gearressteer en ek het my samewerking aan hulle gegee en het selfs 'n bekentenis met betrekking tot die verkragting afgelê by Kolonel Mills.*
6. *Ek het van die begin af my skuld erken wat betref die verkragting en weet dat my optrede verkeerd was en dit is hoekom ek 'n bekentenis afgelê het.*
7. *Ek het bitter spyt oor my optrede en het berou oor dit wat ek gedoen het, daarom pleit ek skuldig.*

Ad aanklag 2

8. *Ek ontken die klagte teen my en pleit onskuldig aan moord.*
9. *Ek ontken dat ek die klaagster op enige wyse aangerand het of dat ek haar vermoor het."*

- [3] The State Prosecutor, Ms Mabaso, did not accept the plea. She indicated that the facts admitted by accused 1 were not consistent with the facts which underlie the charge as contained in the charge sheet. Accused 2 pleaded not guilty to both counts. He gave no explanation of plea. Both accused made admissions in terms of s 220 of the CPA handed in as Exhibits “B” and “C” respectively.
- [4] On 29 June 2013 at 22h00 Ms Marie Leonard was alone at home asleep. She heard a woman’s voice screaming outside. She woke up and peeped through a window. She could not ascertain where the scream came from. She also could not tell what was happening. The scream lasted for an hour to an hour and a half. She was fearful and did not leave the house to investigate. She went back to sleep.
- [5] The following morning Ms C..... M..., her neighbour, called her to the scene, under a tree not very far from her house. She asked her to call the police and an ambulance which she did. Upon arrival at the scene Ms Leonard observed a lady, later identified as the deceased, lying under the tree and was covered with a duvet. She noticed that her face was swollen and her hands were covered in blood. She was still alive. Her pair of jeans were torn. She wore a pair of silver panty hoses. Her lower body was naked. The spot where she laid was wet as if she had urinated. Coincidentally a police vehicle that was driving past stopped. The police officers visited the scene.
- [6] Ms Leonard testified further that she knew accused 1 by the name of Peter. They reside in the same street. She knew accused 2 by sight. She used to see him at accused 1’s home. At some stage accused 2 resided with accused 1. The deceased was unknown to her.

- [7] Ms Leonard disputed accused's suggestion that they met the deceased after 02h00 or 03h00 in the morning. She further disputed that she screamed for only about two seconds. She explained that she was woken up by screams and when she looked at her cell phone the time was 22h00. Ms Leonard insisted that no other lady in that vicinity was assaulted except the deceased. Her evidence was corroborated by Ms M.... that she called her to the scene. She added that she brought the duvet that was used to cover the deceased's lower body.
- [8] Ms P..... subsequently died of her injuries. The autopsy was performed by Dr Adri Bouma. She testified that the deceased could not cough or clear her voice due to the serious head injury. She found multiple contusions under her frontal scalp. There was also bleeding in and around the brain. Ribs 2 to 6 on the right side were fractured. She found 400ml of yellow-red thick fluid in the right thoracic cavity and 100ml in the left. This fluid severely affected her capability to breathe on her own. She also sustained a bruise of the upper pole of the left kidney. She noted a small bruise on the right side of the vaginal opening. She explained that the injuries could have been as a result of assault or motor vehicle accident. She could not tell what instrument was used to assault the deceased but a great amount of blunt trauma was applied. The amount of muscle tissue that was injured was severe and consistent with the amount of force used. The assault was so severe that the deceased could have died earlier if there was no medical intervention at the stage that it happened. According to the doctor the injuries were consistent with being kicked on the head. After the assault the deceased could not have moved and if she did she did not move far. She testified that the deceased could not handle her body functions.

- [9] Dr Bouma recorded the chief post-mortem findings and the cause of death as follows:

“An acutely ill adult female with no known co-morbidities:

-Admitted for hospital care in a high-care facility;

-A craniotomy performed recently;

-Head injury;

-Minor injuries to the limbs;

-Pneumonia; and

-Sepsis”

The sepsis, an infection in the blood, overwhelmed the deceased's capacity to handle infection.

Initially Siyanda was a suspect but could not be placed on the scene of crime. No distances have been indicated in the key to points and photographs.

That concluded the State case.

- [10] Both accused elected to exercise their constitutional right to remain silent and closed their cases without leading any evidence.
- [11] In terms of s 186 of the CPA I called three witnesses, Sgt Altus Coetzee, the arresting officer, Mr Monnapule Godfrey Khatwane and Sgt Tanya Serfontein, as their evidence was essential to the just decision of the case. Sgt Coetzee testified that he was the first police officer to arrive on the scene after being called by the members of the community. Upon arrival at the scene he found the deceased lying on her back groaning in pain. Her lower body had already been covered. Her face was full of blood and severely injured. An ambulance and Galeshewe Police were called to the scene. He handed over the scene to Sgt Louw.

- [12] Mr Khatwane was requested by the investigating officer, Sgt Serfontein to arrest accused 1 because he was linked to the rape charge by the DNA results. Sgt Serfontein arrested accused 2 after accused 1 made a confession implicating him.
- [13] The following are common cause facts between the State and the defence:
- [13.1] That on or about 29 June 2013 both accused came across the deceased in the street walking at night;
 - [13.2] That the deceased was attacked and dragged from the street to a bushy open veld;
 - [13.3] That she was brutally assaulted and raped;
 - [13.4] That in the morning of 30 June 2013 she was found in the open veld where she was mortally wounded;
 - [13.5] That two used condoms were found on the scene the DNA analysis whereof matched the DNA profiles of both accused;
 - [13.6] That the deceased was removed to Kimberley Hospital where she died on 09 July 2013.
- [14] The question to be determined is the identity of the perpetrator who murdered the deceased. Accused 1's plea explanation in which he implicates accused 2 is not evidence against accused 2 as accused 1 did not take the witness stand to repeat the allegation under oath. S 219 of the CPA provides that no confession made by any person shall be admissible as evidence against another person. See **S v MOSES LITAKO AND OTHERS Case No. 584/2013 delivered on 16 April 2014 (SCA)**.
- [15] Accused 2 made the following formal admissions:

“1. Die identiteit van die oorledene, Agnes Kediemetse Phofu, word erken.

2. Ek erken dat die liggaam van die oorlede vanaf die vervoer vanaf die toneel op 30 Junie 2013 tot en met die uitvoering van die lykskouing deur Dr Adri Bouma op 16 Julie 2013 geen verdere beserings opgedoen het nie, behalwe vir die mediese intervensie deur mediese personeel te Kimberley Hospitaal.

3. Ek erken die regsgeneeskundige lykskouingsverslag en die inhoud daarvan as korrek. Daarvolgens word erken dat die oorledene gesterf het as gevolg van ‘n “Head injury, Pneumonia and Sepsis” en word dit opgehandig as bewysstuk D.

4. Die mediese verslag (J88) ten opsigte van die oorledene en die inhoud daarvan, opgestel deur Dr E Olivier op 30 Junie 2013, word as korrek erken en word opgehandig as bewysstuk E.

5. Ek erken die korrekheid van die inhoud van die foto album asook die sleutel tot die sketsplan soos opgestel deur Sers Donald Seleke en word dit opgehandig as bewysstuk F.

6. Ek erken die korrekheid van die inhoud van die foto album asook die sleutel tot die sketsplan soos opgestel deur Cst Piet Tshabadira en word dit opgehandig as bewysstuk G.

7. Dit word erken dat ‘n kontrole bloedmonster van die oorledene en gemerk 09D1AD0951MX aan Luitenant Ridwaan Boltman vir ondersoek besorg is en dat dit behoorlik versamel, verseël, verpak, versend, ontvang

en oopgemaak is.

8. Ek erken dat Suster Claudelia Jenkins te Thuthuzela versorgingssentrum op 12 November 2013 'n kontrole monster van my geneem het en dat dit gemerk is as 13DBAA5152EP.

9. Dit word erken dat bovermelde kontrole monster aan Luitenant Ridwaan Boltman vir ondersoek besorg is en dat dit behoorlik versamel, verseël, verpak, versend, ontvang en oopgemaak is.

10. Dit word erken dat die DNS van die oorledene sowel as my DNS gevind is op die kondoom vat gevind was op die toneel soos aangedui op bewysstuk "F", foto's 5 en 6, gemerk PA5001052639.

11. Die korrektheid van die inhoud van die DNS analise uitslag word erken en opgehandig as bewysstuk "H". "

- [16] The evidence presented by the State is circumstantial in nature. No-one witnessed the alleged rape and murder. In **S v REDDY AND OTHERS 1996 (2) SACR 1 (A)** at 8c-g Zulman AJA held:

*"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.'

- [17] There is direct and uncontested real evidence implicating accused 2 to the rape charge. In **S v MTHETHWA 1972 (3) SA 766 (A)** at 769D-E it was held:

"Where, however, there is direct prima facie evidence implicating the accused in the commission of the offence, his failure to give evidence, whatever his reason may be for such failure, in general ipso facto tends to strengthen the State case, because there is then nothing to gainsay it, and therefore less reason for doubting its credibility or reliability."

- [18] Heher AJA in **S v CHABALALA 2003 (1) SACR 134 (SCA)** 142 para 21 stated:

“The appellant was faced with direct and apparently credible evidence which made him the prime mover in the offence. He was also called on to answer evidence of a similar nature relating to the parade. Both attacks were those of a single witness and capable of being neutralised by an honest rebuttal. There can be no acceptable explanation for him not rising to the challenge. If he was innocent appellant must have ascertained his own whereabouts and activities on 29 May and been able to vouch for his non-participation...To have remained silent in the face of the evidence was damning. He thereby left the prima facie case to speak for itself. One is bound to conclude that the totality of the evidence taken in conjunction with his silence excluded any reasonable doubt about his guilt.”

[19] Mr Fourie, on behalf of accused 2, argued that the fact that accused 2’s DNA was found in the condom does not lead to the only inference that he raped the deceased. If he had consensual sexual intercourse with her his DNA would still have lodged inside the condom. He argued further that if accused 2 had consensual sex with the deceased it was not necessary for him to testify. The State, he says, bears the *onus* to prove its case beyond reasonable doubt. According to counsel, no evidence in this regard was led by the State except for the DNA results.

[20] Furthermore the State led the evidence of Dr Bouma. She stated that the small bruise on the right side of the vaginal opening was consistent with intercourse not obtained by consent. She added that an amount of force was used during sexual intercourse. In her additional notes she recorded *“evidence of aggressive sexual intercourse found but assault was not confirmed.”* The J88 (Exhibit “E”) completed by Dr E Olivier recorded that the inside of the deceased’s vagina was bruised and the central cervix

was also bruised. His conclusion was that *‘hymenal penetration took place and the vagina was red and bruised’*. In the face of this evidence accused 2 elected to remain silent.

- [21] In **S v BOESAK 2001 (1) SA 912 (CC)** 923 para 24 Langa DP as he then was, held:

“The right to remain silent has application at different stages of a criminal prosecution. An arrested person is entitled to remain silent and may not be compelled to make any confession or admission that could be used in evidence against that person. It arises again at the trial stage when an accused has the right to be presumed innocent, to remain silent, and not to testify during the proceedings. The fact that an accused person is under no obligation to testify does not mean that there are no consequences attaching to a decision to remain silent during the trial. If there is evidence calling for an answer, and an accused person chooses to remain silent in the face of such evidence, a court may well be entitled to conclude that the evidence is sufficient in the absence of an explanation to prove the guilt of the accused. Whether such a conclusion is justified will depend on the weight of the evidence.”

- [22] According to Ms Leonard the deceased screamed for about an hour and a half. Accused 1 admits that she screamed but claims that the screams lasted for only two seconds. Taking into account accused 1 and 2’s admission that they met the deceased in the street and the length of the screams as testified to by Ms Leonard; the fact that their used condoms were found on the scene is indicative of the fact that they were in each other’s presence during the screams, the assault and the rape. In the absence of the evidence by the accused to gainsay the direct evidence the

evidence stands uncontroverted. Mr Fourie acknowledged that the place where the deceased was found is quite a distance from the houses as can be seen from photo 2. Neither of the accused disputed that the deceased sustained injuries during the rape incident. Accused 1 admitted that she screamed for two seconds and was quiet. This shows that he was still at the scene at the time. Where proof of prior agreement between the participants can be established the State can rely on the common purpose doctrine to draw an inference that each perpetrator associated himself with the others. The following five requirements according to **S v MGEDEZI AND OTHERS 1989 (1) SA 687 (A)** at 705I-706C, must be met:

[22.1] The accused must have been present at the scene where the violence was being committed;

[22.2] The accused must have been aware of the assault on the victim;

[22.3] He must have intended to make common cause with those who were actually perpetrating the assault;

[22.4] He must have manifested his sharing of a common purpose with the perpetrators of the assault by himself performing some act of association with the conduct of the others; and

[22.5] He must have had the requisite *mens rea*.

[23] In **S v VAN AARDT 2009 (1) SACR 648 (SCA)** at 659 para 39 Kgomo AJA quoted with approval the case of **S v VAN WYK 1992 (1) SACR 147 (NmS)** at 161e – h where it was stated:

“The State is, from the nature of things, seldom able to offer direct

evidence of the accused's state of mind at the time of assaulting the deceased and must therefore rely on inferences to be drawn from the circumstances of the assault (including its nature and duration), the nature of any weapons used and the nature, position and extent of the injuries inflicted. These must in turn be weighed up against any other circumstances (such as the consumption of drugs or alcohol) which may indicate that the accused did not foresee the consequences of his actions. This does not involve any piecemeal assessment or process of reasoning. All the relevant facts which bear on the accused's state of mind and intention must be cumulatively assessed and a conclusion reached as to whether an inference beyond reasonable doubt can be drawn from these facts that the accused actually considered it a reasonable possibility that the deceased could die from the assault but, reckless as to such fatal possibility, embarked on or persisted with the assault.

On the medical evidence the injuries which caused death were the blows to the head. It is not possible to link up particular fist blows or kicks with particular injuries, nor is the trier of fact required to do so. Once it is established that accused No 1 killed the deceased, and it has rightly been so found by the Court a quo, the trier of fact can look at the assault as a whole in order to determine what accused 1's intention was.

In a case such as the present the trier of fact is not required to enquire into the subjective state of mind of the accused as he inflicted each injury. Neither principle nor common sense requires this."

- [24] In **S v PHALLO AND OTHERS 1999 (2) SACR 558 (SCA)** Olivier JA referred with approval to the case of **R v MLAMBO 1957 (4) SA 727 (A)** at 738A-C where Malan JA enunciated:

“In my opinion there is no obligation upon the Crown to close every avenue of escape which may be said to be open to an accused. It is sufficient for the Crown to produce evidence by means of which such a high degree of probability is raised that the ordinary reasonable man, after mature consideration, comes to the conclusion that there exists no reasonable doubt that an accused has committed the crime charged.

An accused’s claim to the benefit of a doubt when it may be said to exist must not be derived from speculation but must rest upon a reasonable and solid foundation created either by positive evidence or gathered from reasonable inferences which are not in conflict with, or outweighed by, the proved facts of the case.”

- [25] Accused 1 did not distance himself from the violent actions because after the assault he raped the deceased. He dragged the deceased to the open veld. I am satisfied that the accused assaulted the deceased in the presence of each other. Dr Bouma testified that the assault was the direct cause of death. This is not consistent with someone who had consensual sexual intercourse. In my opinion, by way of necessary and reasonable inference the accused acted with a common purpose when they attacked and inflicted the injuries on the deceased. The nature of the injuries sustained show that the accused foresaw the possibility of killing the deceased but were reckless whether death occurred or not. They assaulted her and removed her from the street to where she was ultimately found. They raped her in turns and left her to die. No attempt was made to take her to hospital for medical treatment. I am satisfied that the State proved its case beyond reasonable doubt.

The following verdicts are returned:

- 1. On count 1: Rape, Both accused are found guilty of having had sexual intercourse with the deceased, Agnes Kediemetse Phoku, without her consent.**
- 2. On count 2: Murder, Both accused are found guilty of murder of Agnes Kediemetse Phoku with *dolus eventualis* as a form of intent.**

**BM PAKATI
JUDGE**

*On Behalf Of The State:
Instructed by:*

*ADV MABASO
Directors of Public Prosecutor*

*On Behalf Of The Accused 1:
Instructed by:*

*ADV CLOETE
Legal Aid Board-Kimberley*

*On Behalf Of The Accused 2:
Instructed by:*

*ADV FOURIE
Advocate Theo Fourie*