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IN THE HIGH COURT OF SOUTH AFRICA
(NORTH GAUTENG HIGH COURT)

Case Number: A841/2011

DATE: 21/02/2013

In the matter between:

JAPASI FANUEL MWALE

APPELLANT

VS

THE STATE

RESPONDENT

Coram: PRETORIUS J et HUGHES AJ

JUDGMENT

Delivered on: 21 February 2013

Heard on: 07 February 2013

1. The appellant, Japasi Fanuel Mwale, was charged with rape and murder in terms of s 51(2) of the Criminal Law Amendment Act 105 of 1997 ("the Act"). On 27 May 2009 he was convicted on both charges in the Kriel Magistrates Court. On 05 June 2009 he was sentenced to ten (10) years imprisonment for the rape and life imprisonment for the murder. The 10 years imprisonment for the rape was ordered to run concurrently with the life sentence for the murder. Leave to appeal on both conviction and sentence was granted by the court a quo.

The appellant's bail was extended pending the appeal.

2. At the commencement of the trial the appellant, who was legally represented, pleaded not guilty and exercised his constitutional right to remain silent. At the conclusion of the state case he opted not to take the stand in his defence. He was in the end convicted of the rape and murder of the deceased, SCN, in Matla Coal Village, on 22 November 2003.

3. On the day in question the appellant met the deceased in the company of Happy Sibiya ("Happy") and Tom Kamang ("Tom") at a tavern known as "House 66" in Malta Coal Village. Happy and Tom testified that they were in the company of the deceased prior to all three going to House 66 where they met the appellant who joined them. After a while Happy left for Witbank. The others continued drinking at the tavern.

4. Later all three proceeded to the appellant's home where he prepared a meal. Whilst doing so, Tom and the deceased fell asleep. When Tom woke up the deceased was not around. The appellant informed Tom that the deceased had left. Tom and the appellant returned to House 66 and continued drinking. At 05:30 in the afternoon of 23 November 2003 the body of the

deceased was discovered on a vacant property that was close to House 66.

5. The appellant was arrested at his home. A blue pair of trousers and a blue and white shirt were found hidden on top of a wardrobe. The appellant stayed on these premises with his father and Mandla Sokho. Incidentally, Sokho, was a witness that was not called by the state. The trousers were soiled by some red sand, similar to that found at the scene where the deceased was discovered. The striped shirt was stained with what resembled a blood stain.

6. Inspector Kolobe, the investigating officer, found the clothing items. He testified that he was in the presence of Inspector Zulu when he retrieved those items. Zulu on the other hand testified that he was not present in the room when the items were recovered. He was in fact in the sitting room.

7. Forensic analysis was conducted on the shirt, trousers and a blanket. The blanket was found on the alleged crime scene. Blood samples were taken from both the appellant and the deceased for DNA analysis. The clothing items and the "crime kit" containing the DNA specimen of the deceased were marked with serial no. 02D1AB018000XX. The blood and DNA specimen from the appellant was sealed in a forensic bag with serial no. HK36873ZZ by Inspector Kolobe. These items were handed over to Captain Van der Merwe, who personally on 14 January 2004, handed them to the Forensic laboratory, in Pretoria.

8. It has transpired that when the blood sample and DNA specimen were taken from the appellant the attending doctor failed to make the relevant note on the appellant's J88 form. A further, complication is that the specimens from the deceased were not taken in the presence of Inspector Kolobe. He was in fact called four days after the post mortem was conducted to

uplift the specimen kit. Things seem to get even worse for the state when it transpired that Sergeant Taylor, who at that stage was attached to the forensic unit from 2000, recorded that the crime kit she received for analysis purpose in this case, had the serial no.

02D1AB0180XX. This was evident from "EXHIBIT I" which the state handed into court in terms of section 212 of the Act. It must be noted that neither the state nor the magistrate sought an admission of such evidence from the defence, for what it would have been worth.

9. In the judgment of the court a quo the magistrate has stated the following concerning the different serial numbers:

"Nou op die oog af wil dit voorkom of hier na twee verskillende seelnommers verwys word en dat die betrokke polisiebeamptes by die misdaadtoneel verwys na seelnommer 1800XX terwyle die betrokke getuie verwys na seelnommer 180XX. Indien egter eerstens die MAS-nommer in aanmerking geneem word asook die betrokke bewysstukke vervat in die betrokke sogenaamde 'crime kit'r dan is dit duidelik dat hierdie dieselfde pakkle was en dat dit 'n blote fout was en dat die een nul weggelaat was deur die betrokke getui."

10. From the outset it must be pointed out that there was no direct evidence linking the appellant to the charges. The court a quo's conviction was based on circumstantial evidence given by Happy and Tom, as to what had transpired before and after the incident, as well as the forensic evidence. The magistrate placed a lot of emphasis on the forensic evidence. It is evident from the judgment that the appellant's guilt stems from the evidence obtained from the forensic analysis conducted by Sergeant Taylor. To this end I refer to a passage in the judgment:

"Die getuienis wat deur die staat aangebied is by wyse van 212 verkla rings,, was prim a facie getuienis van wat daar in vervat is. Dit het die verdediging vrygestaan uiteraard om

weerspreekende of opponerende getuienis aan te bied."

11. In *S v Boesak* 2001 (1) SACR 1 (CC) at para 24 the Constitutional Court per Langa DP held:

"[24] 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. What is stated above is consistent with the remarks of Madala J, writing for the Court; in *Osman and Another v Attorney- General, Transvaal* when he said the following: 'Our legal system is an adversarial one. Once the prosecution has produced evidence sufficient to establish a prima facie case, an accused who fails to produce evidence to rebut that case is at risk. The failure to testify does not relieve the prosecution of its duty to prove guilt beyond reasonable doubt. An accused, however, always runs the risk that, absent any rebuttal, the prosecution's case may be sufficient to prove the elements of the offence. The fact that an accused has to make such an election is not a breach of the right to silence. If the right to silence were to be so interpreted/ it would destroy the fundamental nature of our adversarial system of criminal justice..

12. The forensic evidence that the magistrate relies on would have had credence only if the chain of custody of this forensic evidence was not broken. The chain of custody evidence, which illustrates what happened to the exhibits from its dispatch, receipt, and examination must be proven if the accused or defence does not admit it.

13. Counsel for the appellant argued that, amongst others, the fact that the numbering differed on the evidence bag submitted for forensic examination, to that which was uplifted by Captain Van der Merwe, was a misdirection under the circumstances for the magistrate to have admitted this evidence as being prima facie proof. I must agree with these concerns because the possibility is not too remote that the forensic examination could have been conducted on other specimens, which did not even belong to the appellant and/ or the deceased.

14. In my view nothing of assistance to the state really turns on the evidence of Happy and Tom, as they do not provide direct evidence that the appellant was the perpetrator of the crimes committed. The fact that Tom gave a description of the clothes that the appellant had on, on the day in question, and that these clothing items were found hidden in the house where the appellant lived with his father and Mandla Sokho, raises suspicion but not cogent evidence. In light of all these factors put together I am of the view that there is no direct evidence or circumstantial evidence from which the proved facts eliminate all other reasonable inferences except the one sought to be drawn. See *S v Reddy* 1996 (2) SACR 1 (A) at 8c - 9e.

15. This case was poorly investigated and not particularly well presented. It is a travesty of justice to allow guilty people to go free but it is an even greater injustice to convict an innocent

person. There are strong suspicions that the appellant may have been in improper contact with the deceased. However, suspicion cannot be a substitute for facts.

16. For the reasons set out above the appeal succeeds and the following order is made:

16.1 The appeal is upheld.

16.2 The order of the court a quo is set aside.

16.3 The convictions and sentences are set aside.

W. Hughes

Acting Judge of the High Court I Agree;

C. Pitorius

Judge of the High Court

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