

**IN THE HIGH COURT OF SOUTH AFRICA
(Northern Cape Division)**

**Case Nr: K/S 58/08
Delivered: 03-02-09**

In the matter between:

STATE

VERSUS

FREDDIE BOITUMELO NYATHI

JUDGMENT

Tlaletsi J:

Introduction

- [1]** The accused in this matter is Freddy Boitumelo Nyathi an adult male aged 21 years and a resident of No:, Mataleng, Barkly-West.
- [2]** The accused is arraigned before this court on a charge of murder. The allegations in the charge are that the accused on 9 September 2008, at Barkly-West, wrongfully and intentionally killed P L who was at the time a minor woman. It is not clear whether the deceased was a minor in terms of the old legal

regime or the new legal position. The charge of murder is read with the provisions of sec 51 of Act 105 of 1997.

- [3]** To the charge of murder, the accused pleaded guilty. He is represented by Mr Cloete. A written plea explanation was read into the record. In terms of the explanation, the accused admitted that he stabbed the deceased several times with a knife and that he caused her death.

He explained that he had a love relationship with the deceased for the three (3) years preceding the incident. The Sunday preceding the day of the incident he saw the deceased walking with a man on the street. The accused became angry, aggressive and jealous as a result as he really loved the deceased. The accused went to them intending to speak to her. She did not want to speak to him and continued walking. He says that he was hurt to see them together.

- [4]** The accused states that later during the night, the deceased phoned him and asked him to forgive her for having been with another man. On the day of the incident he went to her home to speak to her about the incident. As he was still at her home the man who she was with before arrived. The deceased asked the accused to leave. He refused.

- [5]** The accused states further that the deceased went to the neighbour and he followed her. Because he was angry and jealous as she wanted to send him away after the arrival of this other man, the accused stabbed her several times with a knife out of anger and jealousy. He says that he really loved her and was unhappy about what she had done.

- [6] After stabbing her he went to a police officer's house and reported to him what happened and also asked him to call the police. The police officer took him to the police station and he was arrested. He states that he regrets what he has done and is remorseful and he as a result pleads guilty.
- [7] The plea explanation was explained and interpreted fully to the accused. He confirmed it as correct and adhered to the contents thereof. The documents was accepted as exhibit "A"
- [8] Ms Louw, on behalf of the state indicated that the state does not accept the plea of guilty as presented by the accused. She indicated that the state's case would be that when the deceased was killed the accused's intention was in the form of "*dolus directus*" and not "*dolus eventualis*". She further informed the court that the state does not accept the explanation by the accused regarding how the incident happened.
- [9] At this stage the Court entered a plea of not guilty and explained to the accused the issues placed in dispute and further that the admissions made on other aspects which are not indispute would remain as common cause.
- [10] The State called Dr Adin Don Surtie. He holds an MBCHB degree as well as a Dip.Om from the University of Stellenbosch. He is employed by the Province as a Medical Officer in Forensic pathology and is stationed in Kimberley. He testified that on 10 September 2008 from 9:00 he examined the body of the deceased. Her estimated age was 16 years. He conducted an autopsy on the said body and recorded his findings on document

GW 7/15. This document was admitted as exhibit "B" with the consent of the accused.

[11] Dr 'Surtie read his findings onto the record. Of significance is that there were several stab wounds, totalling 12 in number, which were discovered on the body of the deceased. These wounds were on the neck, cheeks, spine and shoulders. According to him not all of these wounds were fatal. He testified that only two were fatal and were the cause of the deceased's death.

These were:

- (a) 40mm incision right posterior neck 30mm from midline and 25 mm above spinous process of 7th cervical vertebra with tract anteriorly with insision of internal jugular vein, and
- (b) 18mm incision right back 115mm from midline and 25, below spinous process of 7th cervical vertebra entering chest.

[12] According to Dr Surtie, all these wounds were fresh and were inflicted at the same time. On completion of his evidence the defence indicated that they do not have any question to put to him. He was as a result not cross-examined.

[13] The state thereafter called Ms Leentjie Kassana Modise. She testified that she is 56 years old and reside at Mataleng. Her home is opposite to the home of the deceased. She knew the deceased very well as she grew up before her. She also knew

the accused by sight and had seen him pass on the street before.

[14] Ms Modise testified that on 9 September 2008 she was at her home at 12:00 midday cleaning her house inside. The deceased called her from her house saying that she must come and see the accused who was saying that he would take anything that he wanted from the house. She went outside and stood next to the deceased who was about 2 paces from her. She said to the deceased that they should wait and see what would he come out with. The accused came out of the deceased's home, walked across the street and stood next to the witness' gate. The accused then said to the deceased that he asked her for water and she said that he must drink from the tap and that he is not a dog. The deceased said nothing.

[15] The witness then told the accused as a parent, that a person does not do such things and that the parents of the deceased are at work. The accused said nothing. He entered her yard violently. She tried to hold him and he pushed her aside. He ran towards the deceased who was trying to run away. He grabbed her on the back, threw her down and started to stab her repeatedly. At this stage the deceased was sitting on the ground with her legs stretched. The accused mentioned that he can go to jail. The witness screamed for help. The deceased then stood up and ran towards her. She grabbed the deceased and she immediately fell down and passed out. The accused then ran away. She did not notice the direction he ran to. The deceased had no weapon in her possession.

[16] Under cross-examination it was suggested that there was another man who was in the house. She testified that she did not see or know about what happened in the deceased home. She saw nobody else other than the accused. She did not hear any noise whilst she was still inside her house before the deceased called her.

[17] At the completion of Ms Modise's evidence. The state handed up a photo album containing pictures as well as a key thereto, compiled by constable Simon Morakanele. Mr Cloete together with the accused confirmed that they do not dispute the contents as well as the correctness and accuracy thereof and that it can be accepted as evidence. The document was accepted as exhibit C, the affidavit being exhibit C1, the key as Exhibit C2 and the photos as exhibit C generally.

[18] The photos depicts house no: , point where the witness was standing, the point where the deceased was stabbed and the place where the deceased had fallen. There are also photographs of the deceased with several stab wounds and a picture of a knife used to stab the deceased.

[19] The State closed its case. The defence also closed its case.

[20] In argument the state urged the Court to find that the accused's intention was in the form of *dolus directus* in that , he was reprimanded but instead, pushed the witness aside and chased the deceased, put her down and stabbed her and also that he stabbed her 12 times. She submitted that the Court should find that there was no other person when the accused arrived at the

witness's gate only mentioned that he was told to drink from the tap.

[21] Mr Cloete on the other hand submitted that the two points of dispute have not been disproved by the two state witness and that only the accused's version should be accepted, namely; that there was another man, and that the accused stabbed the deceased out of anger and jealousy and as such he did not have direct intent to kill her.

[22] As the argument from both the state and the defence ensued there is no dispute about the elements of the offence of murder. The parties are ad idem that the accused wrongfully and intentionally killed the deceased by stabbing her several times with a knife, and that she died as a result of the two stab wounds on the right posterior neck and the one on the right back. There is also no dispute as to how the deceased was stabbed. The full explanation emanated from the evidence of Ms Modise that the deceased ran away and the accused caught up with her threw, her down and stabbed her several times. Her evidence that the accused said that he can go to jail as he was stabbing her is not disputed.

[23] What seems to be disputed is the question whether there was another man present as the accused says and what should the Court make out of the facts of the case, ie whether there was *dolus eventualis* or *dolus directus*. Put differently, what conclusion should the court arrive at with regard to the form of intention based on the undisputed and proven facts.

- [24] As a starting point I must mention that the principle enunciated in **S v Francis 1991 (1) SACR 198 (A)** will be kept in mind when evaluating the evidence. The principle is to the effect that while an accused person's failure to testify may in appropriate circumstances be a factor in deciding whether his /her guilt has been proved beyond all reasonable doubt, this is only so where the state has prima facie discharged the onus upon it. A failure to testify will not remedy a deficiency in the state case, such as the absence of apparently credible implications against the accused.
- [25] An accused person has a right to remain silent and not to testify in criminal proceedings against him or her. The exercise of the right should in no way be used against him. I mention all this because the accused in this case elected not to testify.
- [26] *Dolus directus* comprises of a person directing his will towards achieving the prohibited result or towards performing the prohibited act. In casu, it must be shown that the accused had the direct intention to kill the deceased. *Dolus indirectus* consists of a person not intending the prohibited result as his or her main goal but realizes that if he wants to achieve his/her main goal, the prohibited act or result will of necessity materialise.
- [27] *Dolus eventualis* will occur where a person directs his will towards a certain event or result but foresees that if he wants to achieve this result there is a possibility that another event or result may ensue and he or she nevertheless proceeds with his original plan to bring about his event or result, indifferent as to whether another event will ensue or not.

[28] In this case the first point of dispute relate to the fact as to whether the deceased was on a previous occasion walking with another man; that she phoned the accused to apologise; whether on the day of the incident this man found the accused with the deceased and finally whether the deceased had been in a relationship with the deceased for a period of three years prior to the incident. Clearly the state has not tendered any evidence to gainsay what the accused has said in his plea explanation and any doubt should be to his favour. I say this despite the fact that this person did not, present himself to the second state witness when the unfortunate event happened. One would have expected him to go to the second state witness to explain what happened. Secondly, according to the second state witness the accused only mentioned the incident about the water and not that he had been instructed to leave the deceased's home because of the arrival of this other man. This evidence by the second state witness was not at all tested or contradicted. As I said the benefit of doubt in this regard will be infavour of the accused.

[29] The second point of dispute relating to the form of intention should be considered from the objective proven facts of the case. What I gather from the accused's plea explanation is that he loved the deceased very much, and as a result of his jealousy and anger and because he was being told to leave because of the arrival of this other man, he then decided to stab her several times with a knife. It is not at all mentioned in the plea explanation, what result the accused desired to achieve, and that in achieving that result, he foresaw the possibility of the deceased dying in his endeavour to achieve his intended result. Furthermore, the fact that the accused states that he acted

“recklessly” by stabbing the deceased with a knife whilst he appreciated the possibility that he may seriously injure her or kill her, is not on its own enough to establish the form of intent. Put differently, his *ipse dixit* that he was reckless does not suffice. One must look at the objective proven facts.

[30] On this aspect, the evidence of Ms Modise, who I found to be a reliable, truthful and honest witness is of importance. In fact there was no attempt by the defence to discredit her or dispute any aspect of her evidence.

[31] It must therefore be accepted that the deceased called Ms Modise from her house and reported to her that the accused mentioned that he would take anything he liked from the house; that she told the deceased that they should wait and see what he takes; that the accused walked up to her gate and complained that he is not a dog and cannot drink water from the tap as the deceased told him; that Ms Modise somehow reprimanded the accused she being an elderly person that he must not behave that way and that the deceased’s parents were at work; that the accused came into her yard through the gate; that Ms Modise tried to stop the accused and he pushed her aside and chased the deceased; that he caught her and threw her down and that he repeatedly stabbed her when she was sitting flat on the ground; and that Ms Modise screamed for help but to no avail.

[32] In my view all that I have said is the only evidence before me about the incident and serves as the facts upon which one should consider what form of intention the accused had, also being mindful of the fact that one should not be an armchair

critic considering all the circumstances with the benefit of hindsight.

[33] The fact that the accused used a knife which is reflected on photo 19, which is sharp and pointed, of the type of an oukapi, that the deceased presented no threat or danger at all that he chased and threw her down and stabbed her at least 12 times, all of which directed at the most sensitive parts of the body, whilst mentioning that he can go to jail, only points to one direction, that being that he had the direct intent to kill the deceased. These are in my view the objective facts that support my conclusion.

Without saying more the accused is found guilty of Murder with direct intent.

**L P TLALETSI
JUDGE OF THE HIGH COURT
NORTHERN CAPE DIVISION**

Appearance:

For the State: Ms Louw

Instructed by: Director of Public Prosecutions

For the Accused: Mr Cloete

Instructed by: Kimberley Justice Centre

