

IN THE HIGH COURT OF SOUTH AFRICA(CAPE OF GOOD HOPE PROVINCIAL DIVISION)CASE NUMBER:

SS57/2008

DATE:

20 OCTOBER 2008

5 In the matter between:

THE STATE

versus

1. EMILY VAN DALEN2. ANGELIQUE VAN DALEN10 3. CHRISTO PRETORIUS

JUDGMENT

NGEWU, A J:

15 The matter was postponed to today for verdict. The three
accused were arraigned before this Court on the following
charges. That is murder, main count. In that on or about 29
September 2006 and at or near Keast Street in Bellville, the
accused wrongfully and unlawfully killed Antonio van Dalen by
20 assaulting him and stabbing him with a sharp object.

First alternative was conspiracy to commit murder. In that on
or about the same date and place as an in the main count, the
accused conspired to murder Antonio van Dalen. The second
25 alternative was incitement to commit murder. In that on or

/...

about the same date and place as mentioned in the main count, accused incited the murder of Antonio van Dalen.

Only the State led evidence. The defence opted to close its
5 case without leading any evidence. The State called evidence of Jacobus Hugo. He stayed at number 13 Keast Street. The Van Dalen's were neighbours to him, they stayed across the street for the past 18 years. He was friends with the deceased and the deceased's wife and children would visit his family as
10 well. On the morning of 29 September at about 07:00 to 07:30 hours, accused number 2 knocked at the front door. She spoke to his wife and reported that the deceased was on the ground. He got the impression that the deceased had had a heart attack, so he went with his son to check and they
15 entered the house through the garage door which led into the kitchen door that was open. He saw the deceased workbag on the floor. The deceased lay in the lounge. He further saw a big broken vase, a knife and the deceased's watch lying on the floor in the lounge area.

20

He ran to the deceased and felt his pulse. The deceased was already dead. The deceased lay in a pool of blood. His son assisted him to turn the deceased to lie on his back. He lifted the shirt of the deceased and they saw three stab wounds on
25 the lower body. Ms Hugo called the police. The front door was

/...

locked and the keys were hanging on the key rack. Police were called to the scene. Accused number 1 and 2 were given accommodation at his place, as they were not allowed into their house. Mr Swan arrived at his place. He had marks on
5 his face and looked suspicious to him, he then called the police.

Under cross-examination the witness testified that he had no personal knowledge of any abuse the deceased meted out on
10 his family. The deceased's son had reported to him though that the deceased hit him once or twice. He took this as some form of chastisement. The deceased's son, Marco, once told him about the molestation charges laid against the deceased regarding accused number 2. These charges were later
15 withdrawn as the accused number 2 was promised a bicycle or a motorbike. Ms Emily van Dalen never reported to him that the deceased assaulted her. He was further cross-examined about the discrepancies in the police statement he allegedly made. It became evident that the statement was not properly
20 authenticated.

The State proceeded to lead evidence of Dr Dempers, a specialist pathologist. She compiled the *post-mortem* report. According to her, death could have occurred between 01:00
25 and 07:00 a.m. The deceased died of multiple stab wounds

/...

and lacerations on the body. He had 47 stab wounds. The scalp injuries were inflicted whilst the deceased was still alive. All injuries were contributory to death.

5 Sergeant Rossouw testified that he was the first person to arrive at the scene. He arrived at about 7:50. The first State witness showed him the deceased's corpse. His evidence corroborated that of Mr Hugo to a large extent. He called the paramedics, who certified the deceased dead. He had
10 observed stab wounds on the deceased's chest, stomach, back of lower leg and upper leg. There were wounds on the neck. He handed the knife in for fingerprints testing. Ms Emily van Dalen told him that she did not know what happened. She was asleep. She heard a scuffle in the lounge. She woke her
15 daughter up and they locked themselves in the bedroom. She got out about twenty minutes after the quietening of the scuffle.

A trial-within-a-trial was held regarding the admissibility of the
20 statement made by Mr Pretorius. Morné van Greunen testified that he was the investigating officer in the case. He arrested Mr Pretorius on 8 November 2006. Mr Pretorius volunteered to make a confession. He made the necessary arrangements for such a confession to be taken. He never made any promises
25 to him. He was not influenced into making the statement. All

/...

his rights were explained to him, including his rights to remain silent, his rights to legal representation, that he was not obliged to make a statement that he was not obliged to make a confession and he fully understood same. He never promised
5 to make him a State witness in the case. Then he was a suspect.

Mr Ivan van der Heever testified that he was working at Bellville as a Detective Captain in the Serious Crimes Unit. He
10 had 39 years service. He was asked to take a confession from Mr Pretorius. He completed the confession form as he interviewed Mr Pretorius. He explained to him his constitutional rights, which Mr Pretorius further understood. No promises were mentioned by Mr Pretorius to him. The
15 information as per statement was volunteered by Mr Pretorius to him.

In the trial-within-a-trial Mr Pretorius stated that he was fetched from his house. He gave conflicting versions as to the
20 promises he alleged were made by the State witnesses. There was no firm basis on which he denied that his legal rights were explained. The documents contained clear evidence that his rights were duly explained. He confirmed that the original of rights form was given to him and he had same. He told the
25 inspector that he knew nothing. The inspector did not make a

/...

promise to him, but told him he would be a witness. The statement was ruled admissible by the Court as a statement that was made freely and voluntarily by Mr Pretorius, who was fully aware of his rights.

5

Inspector Van Greunen further testified in the matter. His testimony was corroborated, as I said, by that of Mr Hugo. According to him there were no signs of forced entry into the premises. All doors were neatly closed. There was a panic button in the main bedroom where the two accused, that is
10 accused number 1 and 2, allegedly hid themselves. The alarm system was on. It was strange to him that the panic button was not activated during the scuffle. There also was a cell phone on one of the bedroom pedestals. It was not used,
15 even after accused number 2 and number 1 had emerged from the bedroom shower.

According to him, Angelique told her that the deceased had touched her breasts. He had told her that he was in love with
20 her. He never had sexual intercourse with her, though. The bloodstained knife found in the lounge was similar to one of the knives found in the kitchen drawers. He saw Mr Swan on 30 September. He had an injury on the nasal area. The accused, Mr Swan, told him that he was there a night before
25 the incident, around 11:00, that is at night. There was

/...

Angelique's fingerprint found on a broken piece of an ornament that was found in the lounge area.

Mr Nel testified that in the statement, Mr Pretorius made a
5 pointing out. He pointed out some areas that he and accused
number 3 went to throw the bag in. According to him the bag
contents were bloodstained clothing of Mr Roy Swan and an
axe handle that was used in the commission of the offence.
Mr Pretorius then took him to all the scenes. The pointing out
10 was correctly compiled by Mr Nel and the accused's legal
rights were duly and properly explained.

In his statement, Mr Pretorius stated that during the end of
May, Angelique, Emily and Cindy were sitting around the table
15 with him. A joke was passed about the killing of the deceased.
He decided in June that that was serious. One Sunday he
slept over at the Van Dalen's with the sole purpose of
murdering the deceased. The deceased would come back from
his night duty and then they decided not to do this. On
20 Saturday, 16 September, they went to Roy Swan. He
personally asked him if he could not do the job. Two weeks
prior to the murder, Emily enquired from Roy if he was serious
and said yes.

25 On a Monday and Tuesday, he and Roy Swan slept over with

/...

the sole aim of waylaying the deceased and murdering him thereafter. They slept over there on Sunday with the sole aim of further executing the deed. He then withdrew by telling Roy, Angelique and Emily that he won't do this. Angelique,
5 himself and Emily told Roy not to do it.

In her statement Emily van Dalen stated that she, Angelique and Roy Swan were in her residence at about 06:30 in the morning on 29 September 2006. The deceased came. She,
10 Emily, opened the door. She told him to close the door as she was going to the toilet. Angelique was sleeping. Roy was in the sitting-room. She heard blows. She woke Angelique up, they hid in the shower. When it was quiet, they went to the lounge and found the deceased lying on his stomach. Roy
15 went to the shower saying "alles is verby". She never assaulted the deceased. She went to report to the neighbour, Mr Hugo, that Roy had assaulted the deceased.

In the statement to Mr Nel, Mr Pretorius stated that he wanted
20 to show him where the items were dumped as part of the evidence. This he knew. He further described the items. He further stated that he and Angelique disposed of the bag and its contents. The items were thrown into the river on 30 September 2006.

From the evidence the following became common cause. The deceased died in his house in the morning of 29 September as he came back from work. It is Emily van Dalen who opened the door and then rushed away to the toilet. A scuffle ensued
5 between the deceased and Roy Swan. Emily van Dalen and Angelique were in the house and were both aware that there was a commotion. They did not intervene. Emily heard blows. They went to hide in the shower in the main bedroom and did not raise alarms or even call the police. The panic button of
10 the alarm system in the bedroom was not activated, though the alarm system was on.

Roy Swan had slept over at the deceased's place. There was an agreement to kill the deceased between Ms Emily,
15 Angelique van Dalen, Mr Roy Swan and Mr Pretorius. Mr Roy Swan attacked the deceased and inflicted serious injuries on him. He claimed responsibility for about six of the 47 stab wounds sustained by the deceased. There is no evidence to suggest that somebody else further assaulted the deceased
20 and how. It cannot be argued that a knife or knives, with which the deceased was stabbed, was or were provided by accused number 1 and 2.

The Court would like to mention further documentary evidence
25 that the State had tendered. A photo album depicting the

/...

house of the deceased and the injuries that he sustained and some other items; a sworn statement by the pathologist; another photo album; 220 admissions regarding the conveyance of the deceased and that he never suffered any
5 further injuries, an SAP 14A form; the accused number 2's statement; statement of pointing out, another portion of the photo album, confessions, a 105 statement by Mr Roy Swan, (as he had already been convicted when he gave testimony for the State), a statement by Roy Swan, a letter by Roy Swan and
10 a statement Mr Swan made in Bellville; and Emily van Dalen's statement.

The Court found that there was a common thread that ran through the statements of Mr Swan, Emily van Dalen and Mr
15 Pretorius, in that there were several requests made by the Van Dalen's that the deceased be killed because he was abusive. The plan was that Christo Pretorius would also kill the deceased by hitting him with an wooden object. Roy Swan slept over at Van Dalen's place a day before the murder, the
20 purpose was to kill the deceased. There was a common agreement between the four of them and their roles were specified. Of course the Court knows that the accused number 2 would not have any active participation in the murder of the deceased.

Accused number 1 would open the door for the deceased. Mr Roy Swan would hit him with a wooden object. Mr Pretorius would stab him with a knife. Christo Pretorius, it is common cause, left the Van Dalen's residence later the evening prior to the murder. The plan changed, Emily would stab the deceased. It was also a statement that was unchallenged that Emily provided money to Mr Pretorius to buy a firearm with which to kill the deceased, though that never materialised. Mr Pretorius provided a wooden handle with which the deceased would be hit. Indeed, Emily opened the door as the deceased knocked. The deceased was hit with a wooden object, (which was disposed of by Mr Pretorius). Nobody alerted the police of the plan. Emily provided the black bag which was used to carry the blood stained clothing of Mr Swan and the wooden object which were thrown into the river.

I fully appreciate that the State's key witness was Mr Roy Swan, who was a co-conspirator and the very person who hit and stabbed the deceased. Therefore, this Court must approach his evidence with caution. The statements made by Ms Emily van Dalen and also Mr Pretorius, corroborate to a large extent Mr Swan's version, especially regarding the conspiracy. The Court appreciates that though Mr Swan did not want to shoulder responsibility alone, he did not exaggerate the roles played by each of the accused persons.

/...

He had ample opportunity to testify maybe that accused number 1 and 2 stabbed the deceased, or that accused 1 and 2 hit the deceased with a vase, hence the injuries on his head, or maybe that somebody else, I mean, could have been invited
5 by the two to kill the deceased, but he did not do that. He was honest enough to divulge that accused number 3 was not present during the commission of the actual offence and that he had left the evening before the commission.

10 The accused opted not to challenge the un-contradicted material evidence of Mr Swan, which is further corroborated by their statements that there was a prior conspiracy to kill the deceased. That Mr Pretorius was not present when the actual murder was committed, does not exonerate him at all. There is
15 nothing he did to frustrate the plans at all. Abandonment of his role is not a defence at all. From his conduct of disposing of the instrumentality of the offence and the clothing of Mr Swan, one reads re-association with the offence. This renders whatever withdrawal ineffective.

20

Accused number 1 and 2 were fully aware of what was happening. They also kept quiet and did not even intervene on behalf of the deceased. That there is no evidence detailing their actual roles in the commission of the murder, does not
25 exonerate them as well from the liability as co-conspirators.


/...

There was no evidence led to gainsay the State's version regarding the conspiracy itself and failure of the accused to testify strengthened the allegation by the State. And there was no reason to doubt the credibility or reliability of the
5 corroborated portion of the State's evidence.

It is trite that conspiracy becomes complete as soon as the agreement to commit an offence is reached. In the present case there was a conspiratory contract formed to kill the
10 deceased. The contract was implemented and there was discharge of the contract. Even if the deceased was not killed, the conspirators would still have been liable to prosecution. It is trite that a conspirator can withdraw from the enterprise even at the last moment. And if he withdraws, he may be
15 acquitted on the main charge, but he still remains liable to be convicted only of the offence of conspiring to commit the crime in question.

With the evidence before it, the Court has arrived at the
20 following conclusion. The only verdict that can be returned against the accused is that they are GUILTY on the first alternative count, that is conspiracy to commit murder, that is all three accused.

5



NGEWU, A J