IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE NUMBER: A192/2010

DATE: 28 JANUARY 2011

In the matter between:

BRANDON JANUARY Appellant

and

THE STATE Respondent

J U D G M E N T

FOURIE, J

Appellant (as accused 1) and two co-accused appeared in the Regional Court at Worcester on charges of murder, rape and indecent assault. They pleaded not guilty to all charges.

At the conclusion of the trial the Regional Magistrate found the appellant and his co-accused guilty of murder. Al three of them were acquitted on the charge of rape, while accused three only was found guilty on the charge of indecent assault.

The matter was then transferred to the High Court for sentencing in terms of Section 53 of Act 105 of 1997. In the High Court the appellant's conviction of murder was confirmed

and he was sentenced to 15 years imprisonment. He now appeals against his conviction with the leave of the Court *a quo*.

It appears from the record of the proceedings in the Regional Court that the following facts are common cause:

1. During the evening of 24 February 2004, the appellant was the driver of a motor-vehicle in which his two co-accused as well as three females were passengers. The female passengers were the deceased and the two state witnesses Elaine Wildschut and Janine Arendse.

2. Appellant drove the vehicle to a deserted area on the outskirts of Worcester where he said that they should look for some dagga that he had apparently hidden there on a previous occasion. He stopped the vehicle in the vicinity of a dam where they all got out of the vehicle. The appellant and his co-accused then walked to the dam wall where they stood talking for approximately five to ten minutes.

3. The appellant and his two co-accused then returned to the vehicle where accused 3 put his arm around the neck of the deceased and she willingly accompanied him in the

direction of the dam. A little while later accused 2 followed them. They were then out of sight and the appellant, Wildschut and Arendse sat waiting in the vehicle.

4. After about 15 to 20 minutes, they heard the deceased calling out in distress: "Eina my kop", indicating that somebody was hurting her. She called appellant's name asking him to come and help her. Appellant then climbed out of the vehicle and walked in the direction of the dam.

5. Approximately 10 to 15 minutes later appellant returned. His clothing was wet. After a while accused 2 and 3 also returned to the vehicle. Their clothes were also wet. The deceased did not return to the vehicle and they then drove back to Worcester.

6. The body of the deceased was discovered a few weeks later in this dam amongst reeds, some six metres from the edge of the water. The body had a gaping wound to the neck and Dr Erasmus, who conducted the *post mortem* examination, concluded that this neck wound or drowning could have caused the death of the deceased.

The state was not able to present any direct evidence relating to the manner in which the deceased met her death. The two

state witnesses who were present in the vehicle, i.e. Wildschut and Arendse, did not observe what had taken place in the vicinity of the dam. The Regional Magistrate, however, relied on the available circumstantial evidence and extra curial admissions made by the accused in convicting them.

I should add that the appellant and his co-accused declined to give evidence, which was also a factor taken into account by the Magistrate in convicting them of the murder of the deceased. In his judgment the Regional Magistrate found that the appellant and his two co-accused were present "*toe die oorledene gedood is*" and held that in view of their failure to answer the *prima facie* case against them, the only reasonable inference to be drawn is that all three of them were guilty of murder.

The approach of the Court in drawing inferences from circumstantial evidence was explained as follows in the well known case of R v Blom 1939 (AD) 188 at 203:

> "1. The inference sought to be drawn must be consistent with all the proved facts. If it is not, the inference cannot be drawn.
>
> 2. The proved facts should be such that they exclude every reasonable inference from them, save the one

sought to be drawn. If they do not exclude other reasonable inferences, then there must be a doubt whether the inference sought to be drawn is correct."

With regard to the failure of an accused to testify, the following was said by the Constitutional Court in Osman and Another v Attorney-General, Transvaal 1998(4) SA 1224 at para 22:

"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."

In applying the principles enunciated in R v Blom it has to be asked, firstly, whether an inference that the appellant participated in the murder of the deceased, or at least formed a common purpose with his co-accused to murder her, is consistent with all the proved facts.

Secondly, it has to be determined whether the proved facts are such that they exclude all other reasonable inferences which may be drawn from them. It appears to me that the finding of the Magistrate that all three the accused were present when the deceased was killed, is not justified on the evidence presented to the Court.

As indicated earlier, accused 3 left with the deceased, where-after accused 2 followed them and the three of them were absent for about 10 to 15 minutes, before the deceased called for help. According to her cries for help, she was clearly in distress. Only then did appellant get out of the vehicle and walk towards them.

The witness Arendse says that while appellant was walking away from the vehicle, "*het haar* (i.e. the deceased's) *stem begin daal*". This seems to convey that, while the appellant was still on his way to the dam, the deceased did not have the strength to continue shouting for help and may have lost consciousness.

In her evidence the witness Wilschut seems to suggest that the deceased may still have been shouting when the appellant arrived at the scene at the dam, but a reading of her evidence shows that she was not certain that this was in fact so. In my

view the evidence presented by the State does not exclude the inference that, while appellant was on his way to respond to the cries of the deceased, she had already been fatally wounded by one or both of the other accused.

I agree with the submissions made my Ms Joubert in her heads of argument for appellant, that there is no evidence presented by the State which renders such an inference unreasonable or improbable. In fact, there is admissible evidence which tends to support the drawing of such an inference. This is found in a written extra curial warning statement made by the appellant, which was tendered in evidence by the State.

It was handed in as an exhibit through the state witness Inspector Breytenbach, who had taken down the statement. The prosecutor relied on certain admissions made by the appellant in the statement, but it is significant to note that the statement is in fact exculpatory in nature.

It is settled law that once part of a statement has been allowed into evidence as an admission, the maker is entitled to have the whole statement before the Court as evidence, even if it includes self-serving statements. The Court obviously has to determine what weight is to be attached to the exculpatory portions of the statement, but the whole statement is part of

the body of evidence which the court has to consider at the end of the trial. See R v Valachia and Another 1945 AD 826.

In this statement appellant inter alia says the following:

> "Willem (accused 2) en Wurm (accused 3) het saam met Lilly (the deceased) 'n ent in die pad afgestap. Janine (Ms Arendse) het gesê ek moet gaan kyk want iemand het my op my bynaam geroep. Ek het in die pad afgestap en verby die plek geloop waar hulle was en ek het weer teruggedraai en vir Willem langs die pad gekry. Hy het vir my gesê dat Wurm vir Lilly gesteek het. Ek het na die dam se kant toe gestap en vir Wurm gekry met 'n mes in sy hand. Hy het toe vir my gesê dat hy nou vir Lilly gesteek het en ons moet ry. Ek het toe in die water ingestap en probeer kyk of ek vir Lilly sien, maar ek kon haar nie kry nie. Ek het weer na die kar se kant toe gestap, Willem en Wurm het toe nog daar gestaan en stry oor iets. Ek het in die kar geklim en wou al ry toe klim Willem en Wurm in die kar en ons ry toe terug Worcester se kant toe."

This version of appellant ties in with the evidence of Wildschut and Arendse and supports the drawing of an inference as a reasonable inference that the deceased had already been

fatally wounded when appellant arrived on the scene at the dam. It also explains why his clothing was wet when he arrived back at the vehicle, namely that he waded into the dam to try and find the deceased, but was unsuccessful.

In my view, the evidence as a whole does not show that appellant was in fact present at the scene when the deceased was murdered, nor did he perform some act of association with the conduct of those who murdered the deceased. In view thereof the State has also not, in my opinion, proved that appellant was part of a common purpose to murder the deceased.

It is so that, upon his return to the vehicle the appellant, according to Wildschut, warned that "enigeen wat praat gaan ook verdwyn." This evidence is, in my view, insufficient to save the day for the State. It does not necessarily prove knowledge of, or involvement by the appellant in, the murder of the deceased. In my opinion, it follows that the evidence produced by the State is insufficient to establish the guilt of the appellant beyond reasonable doubt.

As pointed out in the Osman case, the failure of an accused to testify does not relieve the prosecution of its duty to prove guilt beyond reasonable doubt. Notwithstanding the failure of

appellant to testify, the State case, in my view, remains insufficient to prove beyond reasonable doubt that appellant had committed the crime of murder or any other crime of which he may be convicted on the count of murder.

In the result, I propose that the appellant's conviction of murder and the sentence of 15 years imprisonment imposed upon him, be set aside and that a finding of not guilty and discharged should be substituted therefor.

FOURIE, J

YEKISO, J: I agree.

YEKISO, J

DESAI, J: I agree. In this case then the appeal succeeds. The appellant's conviction and sentence are set aside.

DESAI, J