IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE NUMBER: A03/2012

DATE: 4 MAY 2012

In the matter between:

MORNÉ RAYNARD Appellant

and

THE STATE Respondent

J U D G M E N T

BOZALEK, J

The appellant was convicted on 17 June 2010 on one count of murder and sentenced to 20 years direct imprisonment. He was refused leave to appeal against his conviction and sentence, but his petition for such leave was granted.

The appellant was charged with raping and murdering a Ms Colleen Adams in Sainsbury Street, Robertson, on 24 December 2005.

He pleaded not guilty to the charges and was legally

represented. Ultimately he was acquitted on the charge of rape. The deceased was a 23 year old woman whose partially clothed body was found in the early hours of the morning in question alongside an external tap and washbasin in what appears to be an informal settlement just off Sainsbury Street in Robertson. She had eight stab wounds to her chest, 12 to her back and shoulders and seven in her neck as a result of which injuries she had bled to death.

The appellant was initially charged with one Granville Plaatjies but the charges were withdrawn against the latter and he became the State's main witness.

In short, Plaatjies' evidence was that he had spent most of the night together with the appellant drinking at a number of shebeens and dances. During the course of the evening he had met the deceased with whom he had an intermittent sexual relationship. They had gone off together in order to have intercourse, leaving the appellant behind. Their first attempt was frustrated when a house owner chased them off his lawn. Whilst they were having intercourse in the secluded spot just off Sainsbury Street, Plaatjies had noticed that the appellant was close by observing them.

When he challenged the appellant, the latter indicated that he

too wanted to have intercourse with the deceased. An argument ensued and Plaatjies stormed off saying in effect that it was up to the deceased. He had second thoughts however and returned a few minutes later to find the appellant sitting astride the deceasing raining down blows upon her with something bright in his hand. Plaatjies went down on his knees to stop the assault and in the process received cut marks to his hand and a superficial stab wound to his chest from the appellant.

After an exchange of words the appellant took off a blood stained top, which Plaatjies had loaned him earlier in the evening, threw it down and ran off. Plaatjies dragged the deceased's body to the nearby tap/washbasin and, using her top, attempted the hopeless task of trying to wipe the blood off her. When he heard people approaching he fled, fearing that he would be accused of killing the deceased. A few hours later Plaatjies was arrested by the police and handed them the blood-stained clothing he had worn during the incident.

The State's case was buttressed by circumstantial evidence from a further half dozen witnesses. Mr Stefanus Botha confirmed that he had found Plaatjies and the deceased lying together in an embrace on his lawn that night and had chased them away. The deceased had appeared to him to be a willing

partner. Mr Daniel Stevens testified that he had seen Plaatjies and the deceased standing together near the spot where the deceased's body had been found and nearby, in the semi darkness, the appellant wearing a blue and red top. This describes the same top which Plaatjies testified he had loaned to the appellant earlier that night. Stevens testified that a little later he saw Plaatjies and the appellant engaged in an argument at the same spot while the deceased lay at their feet.

A police officer, Inspector George Jones, testified that he came upon the deceased's body in the early hours of the morning in question and noted that the wash basin was blood-stained and full of bloodied water. According to his observations someone had tried to wash the blood off the deceased's body.

Another police officer, Sergeant Jonathan Carelse, testified that he arrested the appellant later on the day of the murder and had seized the clothing which he was wearing because it appeared to be blood-stained. He had also seized a knife from him, also apparently blood stained, and sent all these items off for forensic analysis. It should be mentioned that, regrettably no results of forensic tests were ever forthcoming, apparently due to administrative difficulties.

Finally, a Dr Garth Schwegmann testified that he had examined Plaatjies on the day of the murder and had found three cuts on his left index finger and a three centimetre superficial knife wound on his left chest. These injuries were consistent with Plaatjies having warded someone off attacking him with a knife. He observed too that Plaatjies appeared to be in a state of shock and suffering from post traumatic stress.

The uncontroversial evidence of the doctor who performed the post mortem examination on the deceased completed the State's case.

The appellant testified in his own defence and called two witnesses, his brother, Mr Mario Raynard, and another witness, Mr André Marthinus, to support his alibi defence.

In his evidence in chief the appellant gave a lengthy and detailed explanation of his comings and goings on the night in question which boiled down to his spending time with friends at a venue in Robertson and then proceeding to various shebeens and night spots consuming alcohol all the while until after midnight. He then met up with Marthinus, a security guard at one of the shebeens, and left with him for home after one o'clock. Upon returning home, he and Marthinus drank for a while and then both went to sleep.

The thrust of the appellant's evidence was that at the time the deceased was killed, which appears to have been somewhere between one o'clock and two thirty that morning, he was nowhere near the scene of the murder and was together with Marthinus. He denied being in the company of either Plaatjies or the deceased that night at all.

The appellant's brother testified and confirmed his alibi, save for the crucial two hour period within which the deceased was killed and when the Appellant had allegedly been together with Marthinus.

The latter then testified and also confirmed the Appellant's alibi in all material respects. In cross-examination, however, his evidence was demolished when he was forced to admit that he had been in custody at the time in question and that his prior evidence had been a complete fabrication.

Grounds of appeal.

On appeal it was contended that the magistrate had erred in accepting the evidence of Plaatjies who was a former co-accused with a strong motive for falsely implicating the appellant, namely, to exonerate himself and who also was in

effect a single witness. It was submitted further that the magistrate had erred in rejecting the appellant's evidence as false and in not finding that his alibi defence could reasonably possibly be true.

The magistrate was clearly aware of the dangers inherent in the evidence of someone who could be viewed as an accomplice, but found none the less that Plaatjies had made a good impression on the Court, never exaggerating his evidence although he could have easily done so.

He found corroboration for Plaatjies' evidence in the medical evidence of his injuries and in that of Stevens who had earlier seen him together with the deceased and the appellant and then later engaged in an argument standing over the deceased.

He found yet further corroboration for Plaatjies' evidence in that of Botha who chased the amorous couple off his property. The magistrate found all these corroborating witnesses to be credible. Similarly, the magistrate found corroboration for Plaatjies' evidence in that of Inspector Jones who independently observed that someone had tried to wash the blood off the body of the deceased at the wash basin.

In argument reliance was also placed by the appellant's counsel on discrepancies between the evidence of Plaatjies and Stevens.

It is indeed so that there are a few discrepancies between their evidence, notably Stevens' evidence that when he was talking to Plaatjies at a particular shebeen and in the presence of the deceased, the appellant had indicated that he too was expecting sexual favours from the deceased. Although this incident was not mentioned by Plaatjies, this evidence is not out of keeping with the general thrust of his evidence.

It must also be recalled that during the long night, all parties appeared to consume considerable amounts of alcohol and thus relatively minor differences in their accounts are not unexpected.

A reading of Plaatjies' evidence confirms that, notwithstanding the lengthy and searching cross-examination to which he was subjected, no material discrepancies or improbabilities came to light in his version of events. His evidence has, furthermore, the ring of truth and is independently corroborated in the several important respects mentioned above. Apart from anything else the independent evidence and the probabilities strongly favour the witness' account of a consensual sexual

relationship with the deceased and the question naturally arises as to what possible motive he would have had for killing the deceased.

Although the magistrate made no specific finding to this effect, it was clear that he found that Plaatjies' evidence was entirely credible and met the requirements for a single witness. In this regard see S v Sauls 1981(1) SACR 172a–d.

It is when the appellant's case is considered however that any remaining reasonable doubt as to his guilt is removed. The appellant relied solely on an alibi and his key witness was Marthinus. Once the latter's evidence was revealed as false it dealt, in my view, a fatal blow to the appellant's defence. The two had spent some time together in prison and given the detailed nature of Marthinus' evidence confirming the appellant's alibi, the inference is inescapable that the two conspired together to place this false evidence before Court.

An incidental effect of Marthinus' evidence was to destroy the credibility of the appellant's other witness, his brother. In confirming the appellant's movements during the earlier part of the night, the brother, Mr Mario Raynard, specifically mentioned the presence and role of Marthinus.

In S v Van Aswegen 2001(2) SACR 97 (SCA), the Court confirmed the *dictum* in S v van der Meyden 1999(1) SACR 447(W) to the effect that in criminal matters a Court does not base its conclusion, whether it be to convict or to acquit, on only part of the evidence and its conclusion must account for all the evidence. Applying this holistic approach one finds on the one hand a strong State case consisting of a credible single witness who implicates the appellant directly in the killing. His evidence is corroborated in material respects by independent credible evidence. All this is met by an alibi defence, which is exposed as demonstrably false. The probabilities also favour the State's case since Plaatjies had no reason at all to harm the deceased. On the other hand, given the appellant's clear intent to have intercourse with the deceased, it seems overwhelmingly probable that when his advances were rejected, his response was to launch a deadly assault upon the deceased.

For all these reasons I consider that is no merit at all in the appeal against conviction.

The appeal against sentence.

On appeal it was contended on behalf of the appellant that the magistrate had over emphasised the seriousness of the

offence and had not give appropriate weight to the appellant's personal circumstances. It was further contended that in the light thereof the magistrate should have found that he was entitled to deviate from the minimum sentence and further that he should have placed greater emphasis on the appellant's prospects of rehabilitation. Finally, it was contended that the magistrate had erred in failing to take into account the lengthy period which the appellant in custody awaiting trial.

The magistrate approached sentence on the basis that a minimum sentence of 15 years was applicable in terms of Schedule I, Part 2 of the Criminal Law Amendment Act, 105 of 1997.

Having regard inter alia to the seriousness of the offence, he found no reason to deviate from the minimum sentence and using his full jurisdiction as a Regional Magistrate, as it then was, he added a further five years imprisonment thereby making up the sentence of 20 years direct imprisonment.

Appellant's counsel does not suggest that the sentencing framework used by the magistrate was incorrect and this appears to be the case since Section 51(2)(c) of the Act as it read at the time provided that a Regional Court could in those circumstances oppose a sentence not exceeding the minimum

sentence by more than five years.

Furthermore the State's inability to sustain a rape conviction or to provide any direct evidence of a rape or an attempted rape meant that the minimum sentence applicable was indeed 15 years imprisonment.

The personal circumstances of the appellant were that he was 22 years old when the offence was committed and 27 years old when he was sentenced. He had achieved standard 7 at school and was unmarried, but by the time he was sentenced he had a four year old child. Prior to his arrest he had been employed earning R60,00 per day.

This was the appellant's first conviction for murder but he had five previous convictions including one for assault with intent to do grievous bodily harm and another for robbery in respect of both of which he had been sentenced to direct imprisonment.

In my view the appellant's personal circumstances did not in themselves constitute substantial and mitigating circumstances justifying a departure from the minimum sentence.

When regard is had to the nature and seriousness of the

offence and the interest of the community, I can see no reason to interfere with the magistrate's finding in this regard and the exercise of his discretion in imposing the maximum sentence at his disposal.

The magistrate tellingly observed that over an 18 year period of serving as a Regional Magistrate, he had seldom encountered a more brutal attack as that upon the deceased. The appellant stabbed a defenceless 23 year old single mother of a young child no fewer than 27 times for no apparent reason other than that she rejected his sexual advances. The appellant denied his involvement to the last. He fabricated a false defence and indirectly sought to place the blame on Plaatjies whom he must have know was innocent. He expressed not a word of remorse for his actions.

In these circumstances the appellant's prospects of rehabilitation are not promising.

I can find no misdirection on the part of the magistrate in the sentencing process nor in all the circumstances does the sentence induce any sense of shock in me.

There is however one aspect to which in my view the magistrate failed to give proper weight and that was the period

spent by the appellant awaiting trial. He was arrested immediately after the murder and never obtained bail with the result that when he was convicted he had already spent four and a half years in custody.

The record reveals a sorry tale of proceedings which commenced in the Regional Court in February 2007 and which where punctuated by numerous postponements until they reached a conclusion two and a half years later. Many of these postponements were at the instance of the State and related to its difficulties in procuring DNA evidence. It is correct, as the magistrate observed, that approximately a year's worth of the postponements were attributable to delays on the part of the defence.

Be that as it may, such a lengthy awaiting trial period was unacceptable. It reflects poorly on the administration of justice and must be guarded against. A similar situation was encountered by the Supreme Court of Appeal in S v Vilikazi 2009(1) SACR 552 when Nugent, JA stated as follows in paragraph 60:

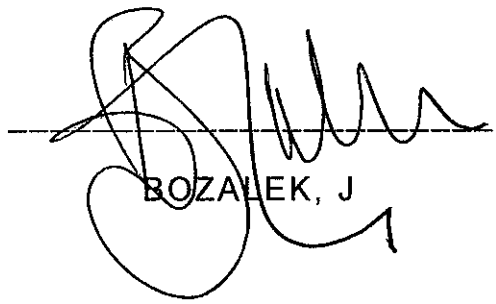
> "There is one further consideration that must be brought to account, the appellant was arrested on the day the offence was committed and has been

incarcerated ever since. At the time he was sentenced he had accordingly been in prison for just over two years. Whilst a good reason might exist for denying bail to a person who is charged with a serious crime, it seems to me that if he or she is not promptly brought to trial it would be most unjust if the period of imprisonment whilst awaiting trial is not then brought into account in any custodial sentence that is imposed. In the circumstances, I intend ordering that the sentence, which for purposes of considering parole is a sentence of 15 years imprisonment commencing on the date that the Appellant was sentenced, is to expire two years earlier than would ordinarily have been the case."

The effect of the order made by the Court was thus to fix the expiry date of the appellant's sentence at two years before the date when it would ordinarily have expired.

I consider that it would be appropriate to make a similar order in the present case but not for the full period spent by the appellant awaiting trial since that would favour him over other accused persons who could often spend up to 18 months in custody awaiting trial.

In the result I would dismiss the appeal against conviction and sentence but order that three years are to be deducted from the appellant's sentence of 20 years imprisonment when calculating the date upon which his sentence is to expire.



BOZALEK, J

I agree.

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MANTAME, AJ

It is so ordered.

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BOZALEK, J