

**IN THE HIGH COURT OF SOUTH AFRICA (WESTERN CAPE HIGH COURT)**

Case No: A 325/13

In the matter between:

**LEEVI ADAMS**

**Appellant**

**THE STATE**

**Respondent**

**JUDGMENT DELIVERED ON 21 OCTOBER 2013**

BOQWANA AJ

**introduction**

[1] The appellant was charged with murder and robbery with aggravating circumstances of J.P.S. {‘the deceased’}. He appeared before the K [...] Regional Court and pleaded not guilty to both charges. On 27 July 2011 he was convicted of murder and theft with the magistrate finding that an inference could not be drawn from the facts that the appellant robbed the deceased of her cell phone and two bankcards but it could be inferred that he stole the two items. He was sentenced to 15 years imprisonment for murder and two years for theft, with the latter sentence to run concurrently with the sentence in respect of the murder charge. With the leave of this Court on petition, the appellant appeals against his conviction and sentence.

**Factual background**

- [2] On the morning of 20 March 2009, the deceased was found murdered in her flatlet at H [...] old age home in K [...] by a caregiver C.D.L. She was [...] years old at the time of her death. The deceased was last seen alive by her son, J.S. who had visited her the night before. J.S. left the deceased's home at approximately 22:00 on 19 March 2009.
- [3] The deceased body was discovered by C.D.L. at approximately 09:30 whilst she was doing her rounds, checking on the elderly. When she reached the deceased fiat, she knocked but there was no response. She opened the door and found it unlocked. She found the deceased lying on her bed which was full of blood. There appeared to be no forced entry to her flat as the key was still hanging inside the lock of the door. Everything appeared to be in an orderly state, except cupboards that were opened.
- [4] A brick covered in knitted wool was found on the scene and a blue Nokia 3100 cell phone and bank cards belonging to the deceased were reportedly missing. The brick was taken to the forensic laboratory for testing. No evidence regarding the DNA test results found on this brick was led during the trial.
- [5] Investigations revealed that the deceased's phone was used with a cell phone number belonging to one Moses Muller {'Muller'}. Muller told the police that he bought the cell phone from Mirza Naseer ('Naseer') an owner of a cell phone shop known as Cell & Leather Emporium on 27 March 2009. The investigating officer, Frank Bailey {'Bailey'} visited Naseer who alleged that he had bought the cell phone from the appellant and sold it to Muller. Naseer gave Bailey a copy of the appellant's identity document. The cell phone was positively identified by the deceased's son, D.S. as the one that belonged to the deceased.
- [6] According to both Muller and Naseer there was no sim card in the phone, when it was sold to them. Forensic investigations revealed that certain transactions were made between the appellant's and deceased' cell phone. The cell phone still had the photograph of J.P.S. niece and a few telephone

numbers that he recognised. An analysis of the records from MTN revealed that there was an exchange of sim cards between the appellant's hand set and the one belonging to the deceased. An internet connection was made at various intervals during the early hours of 20 March 2009. No telephone numbers were dialed.

[7] In May 2009 the appellant was arrested on charges of murder and robbery with aggravating circumstances. The appellant admitted to have been in possession of the deceased's cell phone during the alleged period of 20 March 2009. He however denied that he murdered and robbed the deceased. His version was that the cell phone was sold to him by three coloured men whom he met outside Dungeon's Sports Bar where he had drinks at approximately 1:20 in the morning.

[8] The appellant also admitted that he had visited his girlfriend Zinzi Marco ('Marco'), who is a caregiver at H [...] old age home on the night of 19 March 2009. He however denied that he remained in her room when Marco left for her night shift. His version was that he left at the same time as Marco and proceeded to Nicole's Pub. He left Nicole's Pub at approximately 21:00 to Dungeon's Bar where he bought the Nokia cell phone from the three coloured guys.

[9] According to the appellant, these three men looked suspicious and it did cross his mind that the cell phone might be stolen. He bought it anyway with an intention to sell it later as he needed extra cash. He spent a considerable amount of time at the parking lot, trying to kill time as he waited for Marco to return from work. He went to Marco in the morning but did not stay for long because she wanted to sleep. This version was different to what the appellant had told the police in the warning statement. There were also numerous contradictions between Marco and the appellant's testimony in many respects. The trial court ultimately rejected the appellant's version as not being reasonably possibly true.

[10] It is submitted on behalf of the appellant that murder was not proved by the

state beyond a reasonable doubt and the magistrate misdirected himself when he found that that murder was proven. The state could not exclude the possibility that the deceased was killed by someone else. The appellant's counsel has however conceded that the theft conviction was correct as theft was a continuous crime.

[11] With regards to sentence, it is the appellant's submission that the magistrate misdirected himself by not taking into account the appellant's youth, the fact that he had no previous convictions in relation to the crime in question, the period of incarceration whilst awaiting trial and other personal factors. It is submitted on behalf of the appellant that he is a perfect candidate for rehabilitation.

### **Evaluation**

[12] The state's case rests on circumstantial and real evidence. The manner in which a court deals with circumstantial evidence particularly, when in a case such as the present, it is central to the disposition of the case, is by way of inferential reasoning. The two cardinal principles in this connection are:

'(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 doubt whether the inference sought to be drawn is correct.' (See **R v Biom 1939 AD 188 at 202 to 203**).

[13] Furthermore, the Court must take into account the cumulative effect of the evidence as a whole and not treat evidence in a piece-meal fashion. See **S v Reddy 1996(2) SACR 1 (A) at 10B to D**.

[14] A distinction must be made between speculation and inference which can be

reasonably drawn. In **S v Essak and another 1974 (1) SA (A), at 16D** referring to the remarks of Lord Wright in *Casweli v Poweii Duffryn Associated Collieries* (1939) 3 Ail ER 722 at p733 169 Muller, JA said the following:

'Inference must be carefully distinguished from conjecture or speculation. There can be no inference unless there are objective facts from which to infer the other facts which it is sought to establish. In some cases the other facts can be inferred with as much practical certainty as if they had been actually observed. In other cases the inference does not go beyond reasonable probability. But if there are no positive proved facts from which the inference can be made, the method of inference fails and what is left is mere speculation or conjecture.'

[15] In my view, the state was obliged to present facts from which an inference as set out in *Biom supra* could be drawn that the appellant killed and robbed the deceased. There are missing links in the state's case in my view. Apart from the proven facts that the appellant was at the old age home visiting his girlfriend on the evening of 19 March 2009 and the deceased's cell phone was in his possession on the morning of 20 March 2009 shortly before the deceased's body was found, no evidence linking him to the scene of the crime was presented; for example his being seen around the fiat of the deceased at a particular time that evening. There were no DNA test results presented to place him on the scene.

[16] In my view, the conclusion drawn by the magistrate from the proven facts was not the only reasonable inference that could be drawn from the prevailing circumstances. There was a reasonable possibility that the deceased was murdered by someone else.

[17] I am mindful of the fact that the appellant's version had inherent contradictions. The Court however does not have to believe the appellant's version inclusive of all its details, it suffices for the Court to find that the version of the accused is reasonably possibly true. Most importantly though is that the onus of proof rests on the state to prove the guilt of the accused beyond a reasonable doubt, it is not on the accused. This entails proving all the elements of the crime with which the accused is charged. This applies

even where the evidence is circumstantial. This must be done having regard to at) the evidence before the Court. The established test as set out in **S v Van der Meyden 1999 (1) SACR 447 (W) at449j-450b**, is as follows:

‘The proper test is that an accused is bound to be convicted if the evidence establishes his guilt beyond reasonable doubt, and the logical corollary is that he must be acquitted if it is reasonably possible that he might be innocent. The process of reasoning which is appropriate to the application of that test in any particular case will depend on the nature of the evidence which the court has before it. What must be borne in mind, however, is that the conclusion which is reached (whether it be to convict or to acquit) must account for all the evidence. Some of the evidence might be found to be false; some of it might be found to be unreliable; and some of it might be found to be only possibly false or unreliable, but none of it may simply be ignored.’

[18] When faced with two diametrically opposed versions the Court ought to give the accused benefit of doubt. Whilst it was proved that the appellant visited his girlfriend at H [...] the night before the body of the deceased was found and the deceased phone was in his possession, no other evidence was tendered placing him on the scene of crime on 19 or 20 March 2009. The Court cannot speculate in the absence of such evidence. In **R v Ndhlovu 1945 AD 369 at 386**, the Court stated as follows:

‘the jury should not speculate on possible existence of matters upon which there is no evidence or the existence of which cannot reasonably be inferred from the evidence.

[19] The magistrate spent a considerable amount of time pointing out the shortcomings and discrepancies found in the appellant’s version without looking at whether the elements of murder were proved by the state beyond reasonable doubt in the first instance.

[20] The Court is sympathetic to the fact that the question of who murdered the deceased still needs to be answered. I however cannot convict an accused person where such conviction is not supported by evidence, in this case there is a reasonable possibility that the deceased could have been murdered by someone else other than the appellant. Taking into account the test established on how circumstantial evidence should be treated, I am not

satisfied that the state has proved its case beyond reasonable doubt.

[21] It follows therefore that the conviction of murder cannot stand, in light of the findings on conviction, it is not necessary to deal with sentence in relation to that charge. The conviction of theft has been accepted on behalf of the appellant, in light of this, the conviction would stand. I deem the two year term of imprisonment imposed by the magistrate in relation to the theft charge to be appropriate in the circumstances, it should accordingly be left undisturbed.

[22] For these reasons the following order is made:

1. The appeal against conviction and sentence of the appellant in relation to murder is upheld and the magistrate's order in that regard is accordingly set aside and replaced with the following order;  
  
'the accused is acquitted of the murder charge'
2. Conviction and sentence on the theft charge are confirmed.

N P BOQWANA

I agree.

D M DAVIS

