[1] **SAFLII Note:** Certain personal/private details of parties or witnesses have been redacted from this document in compliance with the law and SAFLII Policy

IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

Case No A330/13

In the matter between:

WILLEM FILLIEKS Appellant
(Accused No 2 in the court a quo)

and

THE STATE Respondent

Court: GRIESEL, MEER & SAMELA JJ

Heard: 27 January 2014

Delivered: 11 February 2014

JUDGMENT

SAMELA J:

[2] The appellant (as the erstwhile accused 2) and two co-accused appeared in the Worcester Regional Court on charges of murder, rape

and indecent assault. They all pleaded not guilty. After evidence was led, they were all found guilty of murder, whereas accused no 3 was also convicted of indecent assault. The matter was thereupon referred to the High Court for sentencing in terms of s 52(1) of Act 105 of 1977, where the convictions were confirmed by Hlophe JP. The appellant was sentenced to 18 years imprisonment. With the leave of the court a quo, he now appeals against his conviction.

Factual background

[3] From the record of the regional court proceedings, the following facts are common cause: During the evening of the 24 February 2004, the appellant was a passenger in a motor vehicle driven by accused 1. In the motor vehicle there were also accused 3, one Jerome (accused 1's cousin) and three females. The female passengers were the deceased, E… W… and J….. A…..., both of whom became State witnesses.

[4] The motor vehicle was driven to a deserted area on the outskirts of Worcester where accused 1 informed the others that they were looking for dagga, which had been hidden there on a previous occasion. The motor vehicle was stopped in the vicinity of a dam where they all got out. The appellant together with his two co-accused walked up the dam wall where they stood talking for approximately 5 to 10 minutes. They returned to the vehicle. Accused 3 called the deceased, put his arm around her neck and she willingly accompanied him in the direction of the dam. Approximately five minutes later, the appellant followed them. These three were out of sight, whilst the rest of the group waited at the motor vehicle.

[5] After approximately 15 to 20 minutes, the group at the vehicle heard the deceased calling in distress: 'Eina, my kop!' She also called accused 1's name, 'Niel, Niel, Niel'. Accused 1 got out of the motor vehicle and walked in the direction of the dam. After approximately 10 to 15 minutes he returned to the motor vehicle. His clothes were wet. A short while later, the appellant and accused 3 also returned to the motor vehicle. Their clothes were also wet ('sopnat'). The deceased did not return to the motor vehicle. The group thereupon left the scene and drove back to Worcester. When one of the females enquired as to the whereabouts of the deceased, accused 1 abruptly informed them: 'enigeen wat praat, gaan ook verdwyn'.

[6] Some two weeks later the body of the deceased was discovered in the dam amongst the reeds after E…… W…. had reported the matter to the police and pointed out the scene to them. There was a 7cm gaping wound on the left of the neck, posterior, with maggot infestation. Due to decomposition of the body, Dr Erasmus, the pathologist who conducted the post-mortem, was unable to determine whether the cause of the deceased's death was the wound on the neck or drowning.

[7] None of the state witnesses observed what took place in the vicinity of the dam. It is thus apparent that the State was unable to present any direct evidence as to the commission of the crime, relying only on circumstantial evidence. The appellant and his co-accused did not give evidence, although each of them made exculpatory statements to the police, incriminating one or more of their co-accused.

Legal principles

[8] In drawing inferences from the circumstantial evidence the court was required to apply the well known test in *R v Blom* 1939 AD 188 at 202-203.

[9] The doctrine of common purpose has been summarised by Snyman,[1] as follows:

'1. If two or more people, having a common purpose to commit a crime, act together in order to achieve that purpose, the conduct of each of them in the execution of that purpose is imputed to the others.

2. In a charge of having committed a crime which involves the causing of a certain result (such as murder), the conduct imputed includes the causing of such result.

. . .

4. A finding that a person acted together with one or more other persons in a common purpose is not dependent upon proof of a prior conspiracy. Such a finding may be inferred from the conduct of a person or persons.

. . .

5. A finding that a person acted together with one or more other persons in a common purpose may be based upon the first-mentioned person's active association in the execution of the common purpose. However, in a charge of murder this rule applies only if the active association took place while the deceased was still alive and a mortal wound or mortal wounds had been inflicted by the person or persons with whose conduct such first-mentioned person associated himself.'

[10] Regarding *prima facie* evidence, the court in *Ex parte Minister of Justice: In Re R v Jacobson & Levy*,[2] said:

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[1] CR Snyman, *Criminal Law* 5ed at 264-265.

'"*Prima facie*" evidence in its more usual sense, is used to mean *prima facie* proof of an issue the burden of proving which is upon the party giving that evidence. In the absence of further evidence from the other side, the *prima facie* proof becomes conclusive and the party giving it discharge his *onus*. If the party, on whom lies the burden of proof, goes as far as he reasonably can in producing evidence and that evidence "calls for an answer" then, in such case, he has produced *prima facie* proof, and, in the absence of an answer from the other side, it becomes conclusive proof and he completely discharges his *onus* of proof'.

[11] Regarding the failure of an accused to rebut a *prima facie* case, the Supreme Court of Appeal, in *S v Boesak*,[3] held:

'But one of the main and acknowledged instances where it can be said that a *prima facie* case becomes conclusive in the absence of rebuttal is where it lies exclusively within the power of the other party to show what the true facts were and he or she fails to give an acceptable explanation.'

[12] On further appeal to the Constitutional Court,[4] Langa DP, writing for a unanimous court, followed a similar approach:

'The fact that an accused person is under no obligation to testify does not mean that there are no consequences attaching to a decision to remain silent during the trial. If there is evidence calling for an answer, and an accused person chooses to remain silent in the face of such evidence, a court may well be entitled to conclude that the evidence is sufficient in the absence of an explanation to prove the guilt of the accused. Whether such a conclusion is justified will depend on the weight of the evidence. What is stated above is consistent with the remarks of Madala J, writing for the Court, in *Osman and Another v Attorney-General, Transvaal*[5], when he said

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[2] 1931 AD 466 at 478-9.
[3] 2000 (3) SA 381 (SCA) para 47.
[4] *S v Boesak* [2000] ZACC 25; 2001 (1) BCLR 36; 2001 (1) SA 912 para 24.
[5] 1998 (11) BCLR 1362 (CC); 1998 (4) SA 1224 (CC).

the following:

> "Our legal system is an adversarial one. 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. The fact that an accused has to make such an election is not a breach of the right to silence. If the right to silence were to be so interpreted, it would destroy the fundamental nature of our adversarial system of criminal justice."[6]

Discussion

[13] I am of the view that the State succeeded in producing sufficient evidence to establish a *prima facie* case. On the facts found proved by the regional magistrate, it was common cause that the appellant and his two co-accused had walked to the dam wall where they stood talking for approximately 5 to 10 minutes, after which accused 3 disappeared with the deceased in the direction of the dam. In the absence of contradictory evidence, we agree with the finding of the regional magistrate that the only inference to be drawn is that the three accused discussed and planned the sequence of events which followed immediately thereafter and which led to the murdering of the deceased. It seems to us that the discussion which took place at the dam wall was correctly found by the regional magistrate to constitute a common purpose to carry out the plan. The conduct of the appellant and his co-accused in talking at the dam; accused 3 disappearing with the deceased; the appellant following them; the distress screams by the deceased requesting assistance from accused 1; the appellant placing himself on the scene while the deceased was

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[6] Id at para 22.

alive and the stabbing of the deceased; all this conduct makes it perfectly clear that there was a common purpose amongst the accused to kill the deceased.

[14] The ball was therefore in appellant's court to answer the overwhelming evidence against him. The appellant, on the other hand, was at risk as he failed to produce evidence that rebut the State's case. The appellant, though not constitutionally compelled to give evidence in rebuttal of the prosecution's case, put himself at a disadvantage. In short, he had a case to answer. Consequently, I am of the view that the appellant ran the risk that, absent any rebuttal, the state's case was sufficient to prove the elements of the offence.

[15] I am of the view that the regional magistrate correctly applied the common purpose doctrine principles as well as the circumstantial evidence principles. Looking at the totality of the evidence produced in this matter, I am unable to find any fault with the regional magistrate convicting the appellant, nor with the confirmation of such conviction by the court a quo.

Order

[16] For the reasons set out above, the appeal is DISMISSED.

M I SAMELA
Judge of the High Court

GRIESEL J: I agree. It is so ordered.

B M GRIESEL
Judge of the High Court

MEER J: I agree.

Y S MEER
Judge of the High Court