JAN KATARI v THE STATE

CASE NO. CA 124/2004

2005/06/16

Maritz, J. *et* Manyarara, A.J.

CRIMINAL PROCEDURE

S 84(1) of CPA – purpose of – to inform accused of the case (s)he will be required to meet - failure to mention date in charge – time not of the essence to the crime - sufficient for prosecutor to state that date unknown to prosecution – no prejudice arising

Prosecutions - absence of complainant – criminal conduct strikes at the individual and collective rights and values of society – State, being public body in which society has chosen to organise and regulate themselves, is charged with the duty to protect society and its members against criminal conduct by investigating, prosecuting and punishing those who do what is forbidden by law – discharge of that duty is assisted by but not dependent on a complainant to set the law in motion

CASE NO. CA124/2004

IN THE HIGH COURT OF NAMIBIA

In the matter between:

JAN KATARI **APPELLANT**

versus

THE STATE

RESPONDENT

CORAM**:** MARITZ, J. *et* MANYARARA, A.J.

Heard on: 2005.02.25

Delivered on: 2005.06.16

APPEAL JUDGMENT

MARITZ, J: The appellant was the second of two accused charged before the regional magistrate with the murder of Dawid Abusema.

Both the accused entered pleas of not guilty. Accused no. 1 was discharged in terms of s. 174 of the Criminal Procedure Act, 1977, at the close of the State's case but the appellant was subsequently convicted of the crime of assault with intent to do grievous bodily harm and sentenced to the payment of a fine of N$3 000-00 or, in default of payment, 3 years imprisonment of which N$1 000-00 or 1 year imprisonment was suspended for 5 years on condition that the appellant would not be convicted of the crime of assault with intent to do grievous bodily harm committed during the period of suspension. The appellant appeals against both conviction and sentence.

Mr Kasuto, who appeared for the appellant during his trial and on appeal, strenuously contended that the conviction should be set aside (a) because the charge was defective in that it did not contain any allegation as to the date on which the assault had allegedly taken place; (b) because there is no evidence that any person had laid a complaint against the appellant with the Namibian Police; (c) because there was no evidence that the alleged assault had caused the death of the deceased; (d) because the magistrate had erred in finding that the only reasonable inference which could be drawn from the circumstantial evidence produced by the State had been that the appellant was guilty of the crime and that she had erred in accepting the evidence of a single witness which has been

contradictory. Hence, there was not sufficient evidence to prove the appellant guilt beyond a reasonable doubt. I shall hereunder deal with the arguments advanced *seriatim.*

The prosecution alleges that the crime was committed "upon or about or during 2001 (exact date unknown) at or near the Farm Hintza in the district of Gobabis". Whilst clear evidence exists that the deceased passed away on 4 November 2001 and that an autopsy was conducted on 6 November 2001, it is apparent from the record of proceedings why the State was not in a position to allege with any degree of certainty the date on - or even the month during - which the offence had been committed: the only State witness who had witnessed the assault on the deceased, Maria Abusema, was a San-speaking illiterate woman uninformed about the notion of dates. She led her unhurried day to day life in blissful ignorance of the exigencies and demands of time. She was uninformed about the length of a month and the best she could proffer was that the incident had occurred some time towards the beginning of the year 2001.

Section 84(1) of the Criminal Procedure Act, 1977 (the "Code"), requires that a criminal charge –

> "shall set forth the relevant offence in such manner and with such particulars as to the time and place at which the offence is alleged to have been committed and the person, if any, against whom ... in respect of which the offence is alleged to have been committed, as may be reasonably sufficient to inform the accused of the nature of the charge."

The purpose of this section is to inform an accused of the case which he or she will have to meet so that he or she knows which allegations to answer to and to prepare a defence, if any. See: *S v Rosenthal*, 1980(1) SA 65(A) at 89E-G; *S v Cooper & Others*, 1976(2) SA 875(D) at 885(H). Unless the date or time is a material element of the offence as contemplated in sections 92 and 93 of the Code, it is unlikely that an accused will be prejudiced if those particulars are omitted from the charge, provided of course, that the other particulars are sufficient to adequately inform him or her of the case he or she will be required to answer to.

It is probably for that reason that Section 84(2) of the Code expressly provides that "where any of the particulars referred to in subsection (1) are unknown to the prosecutor it shall be sufficient to state that fact in the charge" – as the prosecutor has done in this instance. I have no doubt that the appellant was not prejudiced by the prosecution's inability to define the date on which the offence had been committed with more specificity. The appellant was represented during his trial by Mr Kasuto. Towards the end of Ms

Abusema's cross-examination, he not only put to her the events which, according to his instructions, had happened that day, but also informed her that both the accused would "say that the incident (had taken) place on 9 August 2001". The witness did not dispute the proposition.

Given the provisions of s. 84(2) of the Code, I am of the view that time was not of the essence to either the crime on which the appellant was arraigned or any competent verdict thereon as contemplated in Section 258 of the Code and that, in the absence of any prejudice to the appellant, this ground of attack advanced by Mr Kasuto cannot be sustained.

The second ground can be disposed of briefly. In order to secure a conviction of the crime of assault with intent to do grievous bodily harm, it was not necessary for the prosecution to adduce any evidence that the alleged assault had caused the death of the deceased, as Mr Kasuto contends. Section 258(b) of the Code provides for such a competent verdict if "the evidence on a charge of murder ... does not prove the offence of murder". It is clear that the same assault which the prosecution alleged had caused the death of the deceased also constituted the factual basis upon which the magistrate eventually convicted the appellant of assault with intent to do grievous bodily harm. The facts underlying that

conviction did not refer to any other assault than the one contemplated in the charge sheet. The reason for the appellant's conviction on a competent verdict instead of on the charge of murder was simply because the prosecution could not prove a *nexus* between the assault and the eventual death of the deceased beyond reasonable doubt – a task which proved to be virtually impossible given the inability of the State's only witness to attach a particular date to the assault. For these reasons, this ground too, is without merit.

I find counsel's argument that, in the absence of a complainant, the appellant should not have been convicted, difficult to comprehend. Criminal conduct, in whatever form it presents itself, strikes at the individual or collective rights or values of society and therefore, the State, being the public body in which society has chosen to organise and regulate themselves, is charged with the duty to protect society and its members against such conduct by investigating, prosecuting and punishing those who do what is forbidden by law. The discharge of that duty is normally assisted by, but not dependent on, a complainant to set the law in motion.

This is especially true when the most fundamental of all rights, the right to life, is violated. Thus the State imposed a statutory duty sanctionable by punishment on "any person who has reason to

believe that a person has died an unnatural death" to report such death to a member of the police unless he or she has reason to believe that such a report has or will be made by another person (Section 2 (1) of the Inquests Act, 1993) and provided for extensive medical, investigative and judicial mechanisms to examine the cause or causes of an unnatural death of a person; to investigate the circumstances surrounding such a death and to determine whether the death was brought about by any act or omission involving an offence on the part of any person and if so, the prosecution and punishment of such a person. If the State, represented by the Prosecutor-General (see: Article 88(2)(a) of the Constitution) is unable to prove that the deceased has been murdered by the accused, but that a lesser crime has been committed by the accused in relation to the deceased, a Court is nevertheless competent to convict the accused of such a lesser crime in terms of s. 258 of the Code.

Whether the State succeeded to prove the commission of the offence of assault with intent to do grievous bodily harm beyond reasonable doubt falls to be considered with regard to the evidence in this case and it is to that issue which I now turn to.

Ms Abusema was the sister of the deceased and the live-in partner of Accused no. 1. The deceased, who was working on another farm,

visited her and others on the Farm Hintza that fateful Sunday. She was sleeping at home when she was awakened by an argument between the deceased and her boyfriend in the neighbouring house of the appellant. The argument apparently concerned her and when she went to investigate, she found the deceased with a knife in his hand threatening her boyfriend and the appellant that he would stab them "if they don't stop". She intervened and managed to calm the deceased down. After the deceased had closed the knife and put it away in his pocket, she took him to the house where she cohabited with her boyfriend. There she persuaded the deceased to leave the other two alone and to return to his place of employment.

As the deceased was leaving the house, the appellant, who stood on the outside behind a door, struck the deceased on his head with a panga. The deceased, in an apparent attempt to prevent a continuation of the attack, grabbed hold of the blade of the panga and a struggle ensued. In the course of the struggle the appellant was cut on his hand as he fought to retain possession of the panga. He eventually managed to throw the deceased on the ground, where the deceased was further assaulted by her boyfriend. She intervened and persuaded the appellant and her boyfriend to leave the deceased, who was by then already unconscious, alone. She tried to revive the deceased by washing his face with water and "pumping" his arms.

When he regained consciousness, the deceased sat up and she bandaged the open wound with her scarf. She later assisted him to get up and accompanied him on his bicycle during the return journey to the farm where he was employed. The injury was so serious that he could not go to work the next day. She stayed with him and only returned the day thereafter.

Counsel for the appellant took issue with the picture of the events which she had painted to the Court. She responded to his questions with remarkable consistency. She did not contradict her evidence given in main and, in an attempt to discredit her, counsel eventually pointed out that her evidence was inconsistent in two respects with the first statement she had given to the police. According to the statement, she had stated to the police that the deceased left the farm on horseback (instead of on a bicycle) and that, whilst the deceased was lying on the ground, he was kicked (instead of jumped on) by her boyfriend. She denied that she had said anything, other than that what she had testified to, to the police.

The apparent inconsistencies were clarified under re-examination: the Police Officer who had taken her first statement had difficulty to communicate with her in her language. This was corroborated by the evidence of Detective Sergeant Gikabura. He testified that, due

to language difficulties, they had been instructed by the prosecutor to retake her statement. That was eventually done by Warrant Officer Windstaan who could understand the language. The witness also denied that the police officer, who had taken the first statement, had read it to her before she had signed it.

Although appellant's counsel alluded during cross-examination to the possibility that the appellant would testify in his own defence, the appellant eventually elected not to do so. He closed his case without presenting any evidence in rebuttal of the prosecution's case. It is trite that an accused cannot be compelled to give evidence against himself (Article 12(1)(f) of the Namibian Constitution) and has the right to be presumed innocent until proven guilty according to law, (Article 12(1)(d) of the Constitution). The entrenchments of those rights do not mean that an accused's election to remain silent in the face of incriminating evidence against him is without consequence in the overall assessment of the evidence by the Court. In *Osman & Another v Attorney-General*, Transvaal 1998(2) SACR 493(CC), Madala J said the following in this regard (at page 501B-D):

> "[22.] 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 relief the prosecution of its duty to

> prove guilt beyond a 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."

He cited the remarks made by Naidu, AJ in *S v Sidzija & Others*, 1995(12) BCLR 1626 (Dk) at 1648I to 1649B with approval:

> "The right ... means no more that an accused person has the right of election whether or not to say anything during the plea proceedings or during the stage when he may testify in his defence. The exercise of this right like the exercise of any other must involve the appreciation of the risks which may confront any person who has to make an election. Inasmuch as skilful cross-examination could present obvious dangers to an accused should he elect to testify, there is no sound basis for reasoning that, if he elects to remain silent, no inference can be drawn against him."

When the State has established a *prima facie* case against an accused which remains uncontradicted, the Court may, unless the accused's silence is reasonably explicable on other grounds, in appropriate circumstances conclude that the *prima facie* evidence has become conclusive of his or her guilt (See: *S v Scholtz,* 1996(2) SACR 40 (NC)).

I accept that the onus remained throughout on the prosecution to establish the appellant's guilt beyond reasonable doubt. The evidence of Ms Abusema, albeit that of a single witness, was clear and satisfactory in all respects and, as such, constituted a strong *prima facie* case of the appellant's unlawful assault on the person of the deceased. It called for an answer and, without rebuttal, became conclusive of the appellant's guilt (see also: *S v Tusani & Others,* 2002 SACR 468(TD) at 481A).

The partly suspended sentence of a fine which the regional magistrate imposed, seems to be rather lenient given the prevalence of the crime and the seriousness of the injury sustained by the deceased. If this Court would have considered the imposition of a sentence as a court of first instance, it is likely that it would have imposed a considerably more severe sentence. I did not understand counsel for the appellant to press the appeal on sentence during argument and I find no reason for the imposition of a lesser sentence.

In the premises the appeal is dismissed.

____

MARITZ, J.

I concur.

____
MANYARARA, AJ.