



CASE NO.: CC 23/2010

IN THE HIGH COURT OF NAMIBIA

In the matter between:

THE STATE

and

FRANS BASSON

CORAM: DAMASEB, JP.

Heard on: **27 – 29 JUNE 2011**

Delivered on: **30 JUNE 2011**

JUDGMENT

DAMASEB, JP:

The charges

[1] The accused is charged with the murder¹ of the woman (Irene Matlatla) with whom he was in a domestic relationship (count 1);

¹Which is the unlawful and intentional killing of another person.

assault with intent to cause grievous bodily harm² on a man (Viasco Rodney Heinrich) he found with the deceased just before he allegedly assaulted her (count 2); and defeating or obstructing the course of justice (count 3). In respect of the latter two offences, it is alleged that he stabbed Viasco with a knife on the leg and that he discarded the knife so as to defeat the course of justice. I entered pleas of not guilty in respect of all three counts; and in respect of the g.b.h charge after questioning him in terms of s.112 (1) (b) of the CPA.³ As regards the murder charge and that of defeating the ends of justice, I had questioned him in terms of s.115 of the CPA after he had entered pleas of not guilty.

The issue defined

[2] The real issue that falls for decision is whether the accused killed the deceased or whether Viasco Heinrich did (hereafter 'Viasco' as he was commonly referred to in the evidence): that is because the accused, while admitting that he stabbed Viasco with a knife because he found the latter having caused harm to the deceased, alleges that it was Viasco that assaulted the deceased.

²Grievous bodily harm is harm which interferes with health or is harm that is serious as opposed to superficial.

³Act 51 of 1977.

Admissions in terms of s.220 of the CPA

[3] The accused made several admissions in terms of s.220 of the CPA: That the deceased is Irene Matlatla. Her age and that she died; the date of birth of the deceased and that her body was not injured during transportation; the admissibility and contents of the post-mortem report; the contents and admissibility of his warning statement to the police; the contents of the photo plan. (In error I had put to him also that he admitted the key to the plan and measurements while he did not⁴); the proceedings in the Lower Court; that he and the deceased were in a domestic relationship; and that he found Viasco and the deceased in his (accused's home) on the 1st or 2nd August 2009.

The Post-Mortem Findings

[4] According to the post-mortem report, the death of Irene Matlatla resulted from multiple injuries as follows: liver rupture; right kidney rupture; depressed skull fracture with brain contusion; pelvic fracture; internal bleeding and severe blood loss. The post-mortem report also records the following external injuries: deep facial abrasions; facial swelling; multiple scalp lacerations; hair pulled out in some areas of the scalp; and multiple scratch abrasions on the trunk and hips.

⁴That much was conceded by Ms Wantenaar for the State.

[5] Dr Gwinyai Kandenge who conducted the post-mortem on the deceased testified and confirmed the contents of the post-mortem report.

The State's eye-witness evidence

[6] The first eye witness called by the State was Mr Andreas Jars, a 71 year-old man who lives in a house made of corrugated iron sheet neighbouring the accused. The admitted photo plan shows that the accused, Jars and Jankies (next witness) lived very close to each other in corrugated iron sheet homes. Jars testified that on or about 2 August 2009 in the early morning hours, the deceased came into his home looking for a place to spend the night. He refused but she insisted. He then pushed her away and she fell to the ground and a few moments later, the accused came looking for the deceased. Upon Jars pointing out to him where the deceased was, the accused dragged the deceased away. According to Jars, she was being dragged while on the ground. The accused dragged the deceased to near a drum and when he saw Jars, dragged her further on and then placed her near a wall. Jars' testimony is that although he did not observe the accused beat the deceased, he could hear her scream. He demanded then that they leave his place whereupon the accused dragged the deceased closer to the home of a neighbour. Jars could not tell if someone else was present with the accused and the deceased.

[7] The second eye-witness was Piet Jankies. According to Jankies, in the afternoon (about 13hrs) of 1 August 2009 upon his return from work, he saw the accused, the deceased and one Viasco sitting outside the home of the deceased. He observed the accused send Viasco on an errand to buy tobacco and when Viasco returned, the accused had left home having walked in the same direction that Viasco had gone. In the meantime Viasco returned and when the accused returned, he started fighting Viasco. The two were engaged in a scuffle and the accused wrestled Viasco down to the ground. Viasco then rose and ran away limping. According to Jankies, thereafter the accused entered his house and started to fight the deceased. During the fight, Jankies testified, the accused stated that the deceased and Viasco had a sexual relationship. He also testified that he heard the sound of beating and the deceased begging for the beating to end. According to Jankies, that fight ended before sunset. It was after 19h30 that evening that his wife woke him and reported a fight taking place. When he awoke, the deceased ran past his house and into the house of Andries Jars. He could hear Jars chase the deceased out of his house. He then saw the accused pass by his house and move towards Jar's house. After Jars chased the accused away, he saw the accused drag the deceased while holding her by the arm. While the deceased lay on the ground, Jankies testified, the accused lifted a big stone and hurled it at the deceased in the general area below her left armpit and the hip.

[8] At some stage the duo found themselves outside the home of Jars- and peeping out of a hole in the corrugated open sheet wall of his home - Jankies testified that he saw the accused lift the big stone with both hands just above his head and throw it on the deceased who was then lying on the ground with her head on her right arm with the left side of her body exposed.

[9] The rock, which was thrown at the deceased repeatedly (about 20 times he said), kept landing on the left part of the deceased's body. Jankies testified that he asked the accused if he realised that he would kill the deceased and was challenged by the accused to come out and to also be killed (or words to that effect). In cross-examination, it was put to Jankies that not only did the alleged fight with Viasco during the day not take place, but that the accused never assaulted the deceased in the manner testified by Jankies. The alleged death threat against Jankies was also denied. It was also put to Jankies that the only fight between the accused and Viasco was at night. The witness was also told in cross-examination that the accused never dragged the deceased from Jar's home or at any stage. The witness stuck to his version.

Rodney Viasco Heinrich

[10] The third eye witness called by the State is one Viasco Rodney Heinrich. This is the man that the accused says assaulted the

deceased. Viasco testified that he had been in the company of the accused and the deceased from early on the 1st of August 2009. They had been drinking. At some point the party (later accompanied by two other females) went to a shebeen where they had drinks but returned to the accused's place. Late in the evening that day, the accused and Viasco went to a bar called *Peaceful Shebeen* and then to a gambling house where they had drinks and or gambled. Whilst there, the accused had asked him to go and buy tobacco but he never returned and instead went to the accused's home where he found the deceased lying on the bed and the two of them smoked some of the tobacco he had brought along. While he was seated on the bed next to the deceased, the accused came and demanded to know what he (Viasco) was doing there and suggested that he had sexual contact with the deceased. A fight then ensued and the accused stabbed him on the leg and he ran away. He denied either having sex with the deceased or assaulting her. Viasco disavowed Jankies' version about events at the home of the accused in the afternoon of 1 August relating to he being sent on an errand to buy tobacco and the fight with the accused and the stabbing early that day. Those things only took place much later at night and Jankies could not have been privy to the tobacco errand as it took place at the gambling house where he had not been present.

[11] Viasco was confronted in cross-examination with a statement he made to the police in which he states that early in the morning after the events at the accused's home where he got stabbed, he returned to the same place as he had been previously told by the accused, so they could smoke dagga together. It is not quite clear to me what counsel for the accused sought to demonstrate by referring to this. It is trite that contradictions between a police statement and a witness' testimony must not be exaggerated. The contradiction should be carefully examined before a determination can be made that because of the contradiction, the witness's testimony is worthless.⁵ I find nothing of significance in the witness statement by Viasco to the police as far as his reliability as a witness is concerned. If anything, it shows that (i) at no stage was he considered a suspect in the murder of the deceased and (ii) that he seemed not to harbour any guilty knowledge as he was prepared to return to the very place he is supposed to have assaulted and raped the deceased⁶; and to confront the accused about the stabbing, without being accused by either the accused or the deceased that he had assaulted or raped the deceased.

⁵*S v Govender and Others* 2006 (1) SACR 322 at 325a-j; *S v Mafaladiso en Andere* 2003 (1) SACR 583 (SCA) at 593e-594h.

⁶ Which corroborates the fact that the accused never mentioned to anyone that Viasco was the author of the deceased's injuries.

The defence evidence

[12] The accused testified on his own behalf. The material part of his evidence is that he never at any stage on 1 August 2009 assaulted the deceased. He confirmed that when he left the gambling place where Viasco had left him, he went home and found Viasco inside the home hiding behind the door, while the deceased lay on the ground. He testified that he suspected Viasco – and accused him of assaulting his girlfriend - and for that reason attacked him and in the process stabbed him with a knife. Viasco then ran away and he chased after him and upon his return found that the deceased was not at home. He then heard a neighbour, Jars, chase someone out of his home, and concluded that it must be the deceased and went there to investigate. When he came at Jars' house, the latter pointed out the deceased to him and he held her around the chest and carried her home while her feet were dragging in the ground. He did that, he said, because the deceased was heavy. They came home and spent the night and in the morning the deceased told him that she had been assaulted and raped by Viasco. He offered to take her to the clinic but she refused and he thereupon called his mother and informed her about the condition of the deceased. The next moment the police arrived and the deceased was taken to the clinic and he was arrested for the death of the deceased.

Analysis

[13] There is an unexplained and curious conflict in the evidence of two State witnesses (Jankies and Viasco) concerning events in the early afternoon of 1 August 2009: Jankies testified that Viasco had been stabbed by the accused in the afternoon after the latter had accused Viasco of a sexual relationship with the deceased. Viasco vehemently denied that to be the case. He was adamant that he was stabbed much later - either at night on 1 August or in the early hours of the next morning - when the accused had returned from the gambling place where Viasco and the accused had been earlier that night.

[14] Given that Viasco has the incentive to lie to save himself, I approach his evidence with caution. Considering that Jankies obviously lied about events in the early afternoon of 1 August, can I accept his version about seeing the assault on the deceased by the accused with a stone? In addition, Jankies is a single witness as to the stoning of the deceased and his testimony too must be approached with caution.

[15] The accused, who chose to testify on his own behalf, is under no obligation to prove his innocence: He is entitled to an acquittal if his version of events is reasonably possibly true. In order to accept the version put forward by the accused, in opposition to the State's case which holds him responsible for the assault on the deceased, I must find

that Viasco returned from the gambling place to the accused's place, assaulted the deceased inside the home with a heavy object, had sex with her and remained there until the accused returned. To convict the accused I must be satisfied that his version is demonstrably false or inherently so improbable as to be rejected as false: *S v Munyai* 1986(4) SA 712 (V) at 714I – 715A and 715F-G; *S v Shaanika*, 1999 NR 247 at 252A-I.

[16] It has been established beyond doubt that the accused's evidence is at odds with:

- (i) His instructions to counsel put to Viasco; and
- (ii) His warning statement to the police.

He had, through his instructions to counsel, admitted that he found the deceased having a sexual act with Viasco. He later sought to retract that when he realised that it was at odds with the suggestion that Viasco raped the deceased or assaulted her.

[17] He stated the following in the warning statement, which he admitted in terms of s.220 of the CPA: When Viasco left him at the gambling house and had not returned he was:

“disturbed by something and I decided to go home. The door was close end when I opened it my girlfriend was laying down on the

ground ... Then Viasco was just sitting down next to my girlfriend in darkness ... I observed that my girlfriend's trouser was one leg off the trouser undressed from her ... She was also naked on her lower body and she did not have her panty on ... When I saw that ... I started to fight Viasco ... Later [the deceased] got up. She heard what I was asking Viasco and if she was aware of or not, then she ran out to that old man's home ... I went to get her out from Andries Jar's house. Then is when I fought with her. She did not want to return home and I then dragged her. We came at home and came to sleep." [My underlining for emphasis)

Nowhere in this statement does the accused say that Viasco assaulted the deceased or that he saw injuries on her when he came home.

[18] The accused testified under oath that when he returned home, he found Viasco inside his house, hiding behind the door and that the deceased lay on the ground half naked. After a fight between him and Viasco, the latter ran away pursued by the accused who, upon his return, did not find the deceased at home. Why would the deceased run away from home in the meantime, if Viasco was the person who assaulted her and the accused posed no threat to her? The injuries sustained by the deceased are so severe and so obvious that they could not reasonably possibly have escaped the attention of the accused when he entered the home. His version is that he saw a cut on the deceased's head and a "bit of blood". That cannot be reasonably possibly true. I have looked at the admitted pictures of the deceased's

face and they tell a story of a severely injured woman in the face and on the head that could not reasonably possibly have escaped anyone who set sight on her.

[19] The deceased's face is entirely covered in blood and is heavily bruised. This woman must have been in severe pain when the accused saw her – on the assumption that she was assaulted by Viasco. The accused would have noticed *that* immediately and it defies human experience that she would have run away from her home when her live-in boyfriend had just arrived, to go and look for shelter somewhere else. The only reasonable and possible inference I can draw on these facts is that the deceased had not been assaulted by Viasco before the accused arrived but that she considered the accused as *the* threat. The accused's version that he saw injuries on the deceased when he entered the home and concluded that Viasco caused them, is, therefore, not reasonably possibly true.

[20] On questioning by the Court, the accused stated that between his arrival at home from the gambling house and when the deceased was taken to the clinic in the morning, he and the deceased never parted company: she remained in his presence throughout. The evidence of Jars is that the accused came to his home and left with the deceased, dragging her. She was screaming, suggesting that she was the subject

of some painful experience. The body of the deceased, according to the medical evidence, had multiple bruises. The photos introduced in evidence and depicting the area where the offence is alleged to have taken place is very rocky. Jankies testified that he observed a fight in the home of the accused. He could hear the deceased begging to be left alone. Jankies also testified that he saw the accused repeatedly throw a big stone at the body of the deceased. He also saw her being dragged about by the accused.

[21] The injuries described by the doctor and noticeable from the pictures of the deceased's body are consistent with being caused by a rock. To crown it all, the accused showed no concern whatsoever for the bad condition in which the deceased was – especially if one has regard to the fact that he says it was not he, but Viasco, who caused these terrible injuries to the deceased. By his own admission, he had not, until his appearance in Court, told anyone that it was Viasco who had assaulted the deceased.

[22] Viasco made no allegation implicating the accused in the assault against the deceased; save for exonerating himself. Importantly, such contradictions as there are in the evidence of the State witnesses relate to matters that are immaterial and demonstrates to me the absence of

collusion between them to falsely incriminate the accused. As regards the lies told by Jankies, I remind myself that:

'It is a well accepted rule of evidence that the mere fact that a witness is a liar does not mean that all his evidence must be disbelieved – liars tell the truth sometimes': *S v Millar* 1972 (1) SA 427 (RA) at 429A-B.⁷

[23] The accused denied dragging the deceased or assaulting her. Both Jars and Jankies were firm in their evidence that the accused dragged the deceased. I am unable to find any motive – and none has been suggested – why these two witnesses would fabricate the evidence about the accused acting towards the deceased in the way they said he did.

[24] Although Jankies is a single witness as to the stoning of the deceased by the accused, his evidence is corroborated by the following:

- (i) The medical evidence as to the location of the injuries to the kidney (The evidence of Jankies as to the location on the deceased's body where the accused landed the heavy rock is consistent with the admitted medical evidence) ; and
- (ii) Jars' evidence that he saw the deceased being dragged by the accused;
- (iii) The accused's own admission to the police that he fought the deceased and dragged her when she refused to return home;

⁷Approved in *S v Mbuli* 2003 (1) SACR 97 (SCA) at 106c [37].

- (iv) The fact that the accused had not after the incident mentioned to anyone (including the police) that Viasco had assaulted the deceased.

[25] Although Viasco denied a sexual act with the deceased on the fateful day, his admission during the trial that he, without the accused's knowledge, left for the latter's home and placed himself in the presence of the deceased, who seems to have been intoxicated at the time, raises the very strong inference that he engaged in a sexual act with the deceased by the time the accused returned home. The accused had through his counsel, put to Viasco that the latter found him either having (or having had) consensual sex with the deceased. That admission⁸ on the part of the accused, in my view, negatives any suggestion that Viasco was the one who perpetrated the very brutal assault on the deceased that ultimately led to her death.

[26] The conduct of the accused at the time he found the deceased with Viasco, and afterwards, points to the fact that he, not Viasco, attacked the deceased. In the first place, the accused's explanation that he stabbed Viasco because the latter had assaulted the deceased is not reasonably possibly true. By his own admission, no such assault was reported to him by the deceased or was admitted by Viasco. How could he then conclude that Viasco had injured the deceased?

⁸S v *Gouws*, 1968 (4) SA 354 (GN) and S v *Gape* 1993 (2) SACR 92 (CK)

[27] Given the severity of the injuries inflicted on the deceased, would the accused have done nothing to immediately secure medical attention for the deceased, or summon the help of law enforcement? I think not! The accused's conduct from the moment he met the deceased with Viasco, until the deceased was taken to the clinic, proves beyond reasonable doubt that he, not Viasco, perpetrated the vicious assault on the deceased. I am satisfied that the accused's version that Viasco assaulted Irene Matlatla, causing her death, is demonstrably false.

Count 1: murder

[28] I am satisfied beyond reasonable doubt that:

- a) Viasco did not assault the deceased;
- b) The accused assaulted the deceased after Viasco ran away;
- c) The accused perpetrated the assault on the deceased with a big stone, causing her the injuries shown in the post-mortem report and the photos showing the dead body of Irene Matlatla;
- d) Those injuries were the cause of the death of Irene Matlatla;
and
- e) That at the time he stoned the deceased, the accused knew that doing so would result in the death of the deceased.

[29] Ms Wantenaar for the State argued that the accused must be found guilty of murder with *dolus directus*⁹ for the following reasons:

- (i) He chose to use a big rock and repeatedly hurled it at the deceased
- (ii) He made his intent clear when upon being told by Jankies to stop the assault, he warned Jankies that he would suffer the same fate if he came out
- (iii) He was unconcerned about the well-being of the deceased after the assault and made no effort to get her medical attention.

[30] I am persuaded by this reasoning. The accused assaulted the deceased using a 30cm in length and 50cm in height rock and thus causing her very serious injuries that resulted in her death. The sheer number of times he threw the rock at her, and the size of the rock used to inflict the injuries, lead me to the inescapable conclusion that the accused must have realised that he would cause the Irene Matlatla's death. I wish to add this: the disregard for the well-being of the deceased by the accused was so serious as demonstrated by the fact

⁹Actual intent exists where the accused commits the unlawful act (in this case the assault) meaning to kill the victim who then dies. For a recent exposition of *dolus eventualis* by this Court, see: *State v Paul Taseb and 7 Others* CR 85/2010 delivered on 9 November 2010, per Van Niekerk J, Botes AJ concurring at p.6 para [4].

that he dragged her around like a piece of chattel on a very rough terrain as amply demonstrated by the abrasions on her body shown in the post-mortem pictures.

Count 2: Grievous bodily harm

[31] I have found that Viasco had not assaulted the deceased. What troubles me is: what was Viasco doing at the accused's home at the time? He left the accused in the gambling house and went to the accused's house where he knew the deceased was – probably drunk. That he went to the accused's home in order to take advantage of the deceased while she was drunk, is not a fanciful possibility. The accused, however, stated in Court that he did not find Viasco perpetrating a sexual act on the deceased. He in all probability only suspected that a sexual act took place between the deceased and Viasco, and given his actions towards the deceased subsequently, he seemed subjectively to have laboured under the belief that she was a willing participant in it.

[32] I am satisfied therefore – and so beyond reasonable doubt - that at the time the accused stabbed Viasco, he was not acting in defence either of himself or the deceased. Accordingly, he is also guilty of Count 2.

Count 3: defeating or obstructing the course of justice

[33] On Count 3 the State led no evidence as to how the okapi knife had been found. Ms Wantenaar for the State submitted that the State does not seek a conviction in respect of count 3. The State failed to prove Count 3 against the accused and he is acquitted in respect of that charge.

DAMASEB, JP

ON BEHALF OF THE STATE

MRS B WANTENAAR

Instructed by:

OFFICE OF THE PROSECUTOR-GENERAL

ON BEHALF OF ACCUSED

MS T MBOME

Instructed by:

DIRECTORATE OF LEGAL AID