



CASE NO.: CC 26/2010

REPORTABLE

IN THE HIGH COURT OF NAMIBIA

In the matter between:

THE STATE

versus

JEREMIAS SWARTBOOI

CORAM: MILLER, AJ

Heard: 01 August 2011

Delivered on: 04 August 2011

JUDGMENT:

MILLER, AJ: [1] The Accused according to the Indictment is a 38 year old male who is charged with three crimes, the first being the murder of the deceased Dorothea Kooitjie, a 2 year old

girl. Secondly with the assault of the Deceased's mother Elizabeth Kooitjie and thirdly with defeating or obstructing or attempting to defeat or obstruct the course of justice.

[2] The later charge arises from the fact that according to the State Witnesses after the events which led to the first charge having been committed, the Accused gave instructions that the blood be washed from his vehicle and according to the State, that was done in an attempt to conceal essential evidence.

[3] The Accused pleaded not guilty to all the charges. He indicated that the nature of his defence was that he did not assault the deceased or the deceased's mother. He also denied that he had given any instructions that his vehicle be washed after the alleged offences had been committed.

[4] The State was represented by Mr Eixab and Mr Coetzee represented the Accused throughout the proceedings.

[5] At the close of the evidence, the State conceded that the assault upon the mother of the deceased Elizabeth Kooitjie was not established and I need to say nothing more about that.

[6] The state's pre-trial memorandum, the accused's reply thereto, as well as the post-mortem report which was compiled by Doctor Gwinyai Kadenge were admitted and are Exhibits A, B and C respectively.

[7] The charges all arise from certain events which took place during September 2009, the 19th of September to be exact. At that stage, the mother of the deceased Elizabeth Kooitjie and the accused were boyfriend and girlfriend. The accused was not the biological father of the deceased.

[8] On the day in question, being the 19th of September and in the afternoon, the accused arrived at the residence of Elizabeth Kooitjie in his vehicle. What transpired thereafter is in dispute in some respects. I will deal first with the evidence of Elizabeth Kooitjie.

[9] According to her, when the accused arrived there, she was busy washing the deceased. The accused took the deceased and placed her in his vehicle. Before the accused drove off, Elizabeth Kooitjie also joined the accused and the deceased in the vehicle, whereupon the three of them departed. Elizabeth Kooitjie occupied the front passenger seat and the deceased was

seated on her lap. According to her, during the course of the journey, the accused wanted to beat the deceased. Some sort of a struggle ensued between the accused and Elizabeth Kooitjie, in the sense that, Elizabeth Kooitjie attempted to prevent the accused from removing the deceased from her lap. As matter turned out, the accused managed to take the deceased from Elizabeth Kooitjie where up he placed the deceased on his lap. The deceased was placed on his lap facing the accused whereupon the accused placed his left hand on the throat of the deceased and pushed her against the steering wheel. According to her this went on for about an hour. I am not certain that her estimation of one hour is correct, but it would appear from her evidence that this incident went on for sometime. After a while, the accused brought the vehicle to a stand still in the veld. He thereupon alighted with the deceased and placed the deceased on the luggage compartment of the vehicle. Elizabeth also alighted according to her and once more a struggle ensued over the possession of the child. During the course of this struggle, the deceased fell from the luggage compartment and to the ground. According to her the accused thereupon placed the deceased back onto the luggage compartment and struck her with an open hand. This caused the deceased once more to fall to the ground. According to her the accused thereupon

proceeded to kick the deceased until the deceased fell underneath the vehicle. The accused thereupon pulled the deceased from underneath the vehicle and once more boarded the vehicle. The accused again held the deceased in the position I had previously described. The journey then continued.

[10] During the course of this journey, the accused threw the deceased towards the back of the vehicle. In the process the deceased ended up in the foot well between the front and rear seats of the vehicle. The deceased remained there if I understood the witness correctly. The witness according to her testimony noted that the deceased was becoming weak as she put it. The journey continued until they reached the cattle post of one Willem Kinda.

[11] According to her, once they arrived there, the accused requested one David Kooitjie to wash the vehicle. According to her, there were blood stains on the bonnet as she put it and windscreen of the vehicle.

[12] The deceased was at that stage still bleeding from the mouth and the head. David Kinda took the deceased and washed her whereupon the deceased was placed in the room of

Willem Kinda. The deceased was at that stage unconscious and breathing slightly. After a while, the accused, Elizabeth Kooitjie, the deceased and one Godfried Lukas, once more boarded the vehicle and the journey then continued until they once more reached the residence of Elizabeth Kooitjie. The deceased was placed on a bed inside the house, but passed away shortly thereafter. The police were then summoned who arrived and arrested the accused.

[13] According to Doctor Kadenge who performed the post-mortem report, the assault perpetrated upon the deceased resulted in a cervical spine fracture and spinal cord injury at C2 level of the spine which according to the doctor is in the region of the neck. Doctor Kadenge also noted lesser injuries consisting of swelling and bruising to the face as well as a superficial laceration of the scalp. Doctor Kadenge's evidence is to the effect that, the injury to the spinal cord, would result in the ultimate paralysis of the respiratory and heart muscles and that caused the death of the deceased. That those were the injuries sustained and that they resulted in the death of the deceased, is not disputed.

[14] The evidence of Elizabeth Kooitjie is in part corroborated by the evidence of David Kooitjie. He confirms the evidence of Elizabeth that the accused had instructed him to wash the blood from the vehicle which he did. He also says that he was told by the accused that he, the accused, had slapped the deceased.

[15] Her evidence is further corroborated by the evidence of Godfried Lukas. He testifies that the accused told him that he had slapped the deceased very hard. According to him, the accused did not mention how many times he had slapped the deceased nor did he give any reason for that.

[16] There is a slight discrepancy between the evidence of David Kooitjie and the Witness Godfried Lukas, as to the condition of the deceased at the time the accused arrived at David Kinda's post. According to David Kooitjie when the deceased was removed from the vehicle she was no longer able to stand. Godfried Lukas however, testified that he saw the deceased standing next to the vehicle after it had arrived at David Kinda's post. I will deal with that discrepancy in due course.

[17] I turn to summarise the version presented by the accused who testified in his own defence. He confirms that he had arrived at Elizabeth's residence and that himself Elizabeth and the deceased boarded the vehicle and drove off. According to him the deceased was sitting in the foot well in front of the left front seat. The deceased he said, refused to sit on the lap of her mother, which annoyed Elizabeth Kooitjie. The deceased was thereupon assaulted by Elizabeth Kooitjie with a plastic shoe which had a hard surface. The deceased according to him was struck with the shoe on the face and the left side of her body. According to him, this assault lasted for approximately two minutes. At some stage, according to him he turned off the road and stopped in the veld in order to collect firewood. Elizabeth Kooitjie and the deceased thereupon alighted from the vehicle. He remained seated in the vehicle fiddling with the wiring of the car in order to switch off the engine. He saw the deceased and Elizabeth Kooitjie at the rear of the vehicle. He thereupon heard the deceased crying and found her lying on the ground. Elizabeth Kooitjie was at that stage coming from some bushes in the vicinity where apparently she had gone to relieve herself. He noticed that the deceased was injured on the left ear, mouth and head and bleeding from her ears and mouth. He said he

thereupon decided that the deceased should be taken to hospital.

[17] They all boarded the vehicle again and drove further to the post of Willem Kinda. On the way he used some cloths to clean the wounds of the deceased. When he arrived at the post of Willem Kinda, the Accused wandered off and engaged in a conversation with Godfried Lukas concerning the purchase of goats. He then noticed that David Kooitjie was in the process of washing his vehicle. He confirms that he thereupon returned to Elizabeth Kooitjie's house together with Elizabeth, the deceased and Godfried.

[18] Once he arrived there, he spoke to Willem Kinda requesting petrol so that the deceased could be taken to hospital. According to him, Willem Kinda said he only had a little fuel, but he, Willem Kinda would phone the hospital. The accused thereupon drove off again to take Godfried to the latter's grandmother's house. It was only once he returned that Willem Kinda according to him took his vehicle that is the Accused's vehicle, and drove off to phone the police. He denies that he perpetrated any assault upon the deceased.

[19] The proper approach to adopt in assessing the evidence of the witnesses was formulated in ***The State versus Karsten Engelbrecht***, a judgment written by Mtambanengwe J as he then was, in which judgment Maritz J as he then was concurred. Mtambanengwe J adopted the remarks of James JP in ***State versus Singh 1975 (1) SA 227N-228***. I quote the following passage from James JP's judgment:-

"The proper approach in a case such as this for the Court to apply its mind not only to the merits and the demerits of the State and the Defence Witness but also to the probabilities of the case. It is only after so applying its mind that a Court will be justified in reaching a conclusion as to whether the guilt of an Accused has been established beyond or reasonable doubt".

[20] It is also apparent from this judgment, that it is not permissible to approach the case on the basis that because the Court is satisfied as to the reliability and credibility of the state witnesses, that therefore the evidence of the accused for that reasons stands to be rejected.

[21] As far as the Witness Elizabeth Kooitjie is concerned, I was impressed with her demeanour and the manner in which she gave her evidence. Her evidence reflects an objective narration of the events as she described them. She gave her evidence in

a satisfactory manner and remain unshaken in cross-examination. Her evidence received support from the evidence of David Kooitjie and Godfried Lukas in respects that I have mentioned. The discrepancies mentioned earlier does not detract from their evidence.

[22] As far as the evidence of Abram Kootjie and Godfried Lukas are concerned, their evidence strikes me as reliable. Neither of them would have any inclination or reason to implicate the accused falsely. I do not consider that the evidence of the witness Caroline Kruger takes the State's case any further and I will consequently not deal with that evidence.

[23] The fact that I make these findings regarding credibility or otherwise of the state witnesses is by no means as I have indicated, the end of the matter.

[24] These findings at the end of the day, does not mean per se that the evidence of the accused is false beyond reasonable doubt. The correct approach will be to assess the evidence of the accused in the light of all the evidence, the probabilities of the case and the circumstances surrounding the case.

[25] The evidence of the accused is in some material respects inconsistent, in some respects improbable and in other respects his evidence does not correspond with the manner he conducted himself on the day in question.

[26] It was put to Elizabeth Kooitjie during her cross-examination that once the vehicle had come to a stand still in the veld where the accused ostensibly wanted to collect wood, the accused had occupied himself by tying his shoe laces and hence did not alight from the vehicle at the time the deceased fell from the luggage compartment of the vehicle. When he came to give evidence, this version changed and the accused testified that he was occupying himself fiddling with the wires of the vehicle in order to switch off the engine. It was put to Elizabeth Kooitjie during cross-examination that the reason for her annoyance with the deceased was caused by the fact that the deceased has not been washed. During his own evidence, this version changed and he testified that Elizabeth Kooitjie became annoyed because the deceased did not want to sit on her lap. He later testified that Elizabeth Kooitjie did not advance any reason as to why she assaulted the deceased. Remarkably he did not tell anybody, that Elizabeth had assaulted the deceased on the way nor did he tell the police according to him.

[27] I have mentioned the improbabilities in the evidence of the accused. According to his evidence he became very concerned about the well being of the deceased following the assault upon by Elizabeth Kooitjie.

[28] It is apparent from his own testimony that despite his concerned he took no steps to either have the deceased taken to hospital, or summon assistance from anybody to treat the deceased. He whiled away his time at Willem Kinda's post discussing the purchase of goats. He thereupon drove back to Elizabeth Kooitjie's house and despite apparently knowing that the vehicle would be needed to go and phone the hospital, he saw fit to drive off with Godfried to the latter's grandmother's house. His evidence that David Kooitjie proceeded to wash his vehicle without being requested to do so is most improbable. David Kooitjie had nothing to lose or gain, by washing or not washing the vehicle.

[28] His evidence as to how the deceased happened to be on the luggage compartment of the vehicle is equally improbable. If indeed, Elizabeth Kooitjie had a need to go and relieve herself, the probabilities are that she would either left the deceased in

the vehicle where the accused was or would have taken the deceased with her to where she was going to relief herself. There will be no reason for Elizabeth Kooitjie to leave the deceased unattended on the luggage compartment of the vehicle. It is in my view a weak and futile attempt to provide some explanation for the injuries that the deceased had sustained in the process.

[29] Considering all the evidence in its totality and taking into account the probabilities of the case and weighing up the evidence of the accused against that of the other witnesses and the circumstances surrounding the case, I am satisfied that the evidence of the accused is false beyond reasonable doubt and stands to be rejected for that reason.

[30] In the result the accused is found guilty on Count 1, of the crime of murder. To this I add that as far as the intention to kill is an element of this conviction, I do not find that he had the direct intention to kill the deceased. I am satisfied, however, that the accused foresaw the possibility that his assault upon the deceased might cause her death but he proceeded with the assault reckless of whether death would ensue or not. The accused is acquitted on Count 2 that is the charge of assault

upon Elizabeth Kooitjie. The accused is convicted on Count 3 of attempting to defeat or obstruct the course of justice.

MILLER, AJ

ON BEHALF OF THE STATE

MR

EIXAB

Instructed by:

OFFICE OF THE PROSECUTOR

GENERAL

ON BEHALF OF ACCUSED

COETZEE

Instructed by:

AID

MR

DIRECTORATE OF LEGAL