

REPUBLIC OF NAMIBIA

REPORTABLE



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK
JUDGMENT

CASE NO: CA 98/2013

In the matter between:

MUTAGOB HARASEB

APPELLANT

vs

THE STATE

RESPONDENT

Neutral citation: *Haraseb v State* (CA 98/2013) [2014] NAHCMD 42 (12 February 2014)

Coram: SIBOLEKA J and MILLER AJ

Heard on: 29 November 2013

Delivered on: 12 February 2014

Flynote: Criminal Law: A prima facie case exists when the elements of the offence the accused is facing have been established, such that a reasonable

court, acting carefully may, in the absence of counter evidence, base its conviction thereon.

Summary: The appellant was seen by an eyewitness, drinking alcohol with the deceased at Kambati Bar on the evening of the incident. The witness knows both the appellant and the deceased very well from the same village. He spoke to the appellant and they shared a smoke. The appellant told him he will escort the deceased to her home. The next morning passersby found the deceased laying on her stomach in the bushes with two blood stained stones next to her. The police found some bloodstains on the appellant's sandal, and the clothes he had on the previous evening were washed during the night and hanged indoors to dry up.

Held: The appellant's election not to put his side of the story in rebuttal of this potential evidence directly implicating him was risky and unreasonable.

Held: The only inference drawn from the evidence placed before the trial court that excludes other reasonable inferences was that it is the appellant who killed the deceased. This reasoning is in accordance with the law, and the conviction is confirmed.

Held: The appeal is dismissed.

ORDER

The appeal is dismissed.

APPEAL JUDGMENT

SIBOLEKA J (MILLER AJ concurring):

[1] The appellant appeared in person before the Regional Court, Katima Mulilo on a charge of murder. He pleaded not guilty. After the trial he was convicted as charged and sentenced to 15 years imprisonment. He now appeals only against conviction.

[2] At the hearing of this appeal Ms Inonge Mainga appeared for the appellant and Mr Kumalo for the respondent. The court is indebted to both counsel's valuable arguments in this regard.

[3] By agreement between counsel the court condoned the late filing of the notice of appeal and proceeded to hear arguments on merits.

[4] The appeal is against conviction and the grounds are as follows:

“1. AD CONVICTION

1.1 The learned magistrate erred on the facts and/or the law when he relied on the shoeprint evidence on the following grounds:

1.1.1 There were no distinctive and/or unique characteristics highlighted between the shoeprint found at the scene and the appellant's sandals;

1.1.2 No photographs were taken of the shoeprint for the court to satisfy itself that it was indeed the appellant's shoeprint despite the scene having been photographed;

1.2 The learned magistrate erred on the facts and/or the law when he held that the shoeprint was followed from where the deceased died to the appellant's house when the evidence was that the shoeprint was followed up to the tarred road.

1.3 The learned magistrate erred on the facts and/or the law when he found that the appellant left with the deceased from the bar when there was no evidence tendered to support such a conclusion.”

[5] I will now discuss the evidence that was placed before the trial court by the various witnesses.

[6] Vanilo Kambonde testified he knows the appellant and they have been friends for a long period from the time he came to the area and her mother is a teacher at Martin Ndumba. He stated that he knew the deceased, he grew up in front of her and they lived together. On 8 October 2008 he was in the location of Mushashani Village. In the evening he met the deceased and the accused at Kambati Bar where they were drinking alcohol. The accused who appeared not so much drunk was standing and the deceased was sitting. The witness asked for a cigarette and the accused gave him one so that they could share. Before they parted the appellant told the witness that he will escort the elderly drunk deceased to her home so that she can rest. This witness observed that the deceased was so drunk that she was making stories and talking alone. The next day he also went to the scene and saw the deceased laying on her stomach, she had a wound on the head. The appellant and the deceased knew and were used to each other, making it appear as if they were related. During cross-examination this witness confirmed that they shared a smoke and the shoeprint he saw at the scene was that of the sandal which the appellant had on the evening of the incident.

[7] Mukendwa Andreas Mokoya testified that he is a resident of Mushashani Village together with the accused who grew up in front of him. The deceased is his aunty. On 8 October 2008 he was walking from Kamanga's place where he had supper with a friend going to Angula's Bar when he met the accused and the deceased at the sports field in the moonlight. There in the accused's presence, the deceased told the witness, she was taken home. The accused pulled the deceased and they walked away in the direction of the deceased's house. The next morning he heard about the death of the deceased. He went to the scene and on inquiry by Mafuta the village headman as to who was with the deceased

the previous evening, this witness mentioned the name of the appellant Mutagob.

[7.1] During cross-examination the appellant asked this witness the time when he saw them the previous day thereby confirming that this witness indeed saw them together. This witness said it was at 21h00 in the evening when he met them, and that the appellant had a floppy white hat, a white shirt and black trouser. The witness said the deceased was relatively drunk, but not the appellant for the reason that the latter does not take home brewed beer.

[8] Efence Kondjeni testified she is a resident of Mushashani Village. On 9 October 2008 at 06h00 early in the morning she was in the company of her friend Martha on their way to fetch water at the Prison Rehabilitation Centre. They entered the bush to relieve themselves and she was walking in front when she saw a female person laying on her stomach on the ground. At the scene she saw a blue panty and one shoe whose color she could not remember.

[9] Ludwig Mudumbi Nyambe testified he was a sergeant in the police, 15 years in service, stationed at Divundu Check Point. On the day of the incident the village headman alerted him about the death of the deceased. He went to the scene and found the body of the deceased with two bloodstained stones next to it. The deceased's right shoe and her pantie were removed, as well as a half smoked rolled US dollar note. Many people including learners were already at the scene. This officer only followed the suspect's footprint up to the tarred road. Reacting to information that was doing rounds then, he went to the accused's residence. The officer found that clothes a trouser and T-shirt the accused had on the previous day had been washed either during the night, or early in the morning. They were hanged inside the room to dry up. Inside the room where the appellant was sleeping one of the sandals was bloodstained. These sandals matched with the footprint at the scene of crime.

[9.1] During cross-examination the officer confirmed that the footprint he found at

the scene of crime matched with the sandals found in the room where the appellant was sleeping.

[10] Osbet Simata Buiswalelo testified he is a sergeant and the Unit Commander of C.I.D. at Omega and the investigation officer of the matter. On 9 October 2008 he attended to a murder scene between Mushashani Village and Divandu Prison. At the scene the body of a female person laying on her stomach was shown to him laying in a pool of blood, Sgts. Mayombi and Litava the Scene of Crime officer handed over the scene to him. He noticed two bloodstained stones next to the deceased. He also saw a blue panty, a head scarf, which he suspected to belong to the deceased, as well as a rolled half burnt US dollar note. He also saw a shoe that matched with the one the deceased had on as well as a Paulo sandal shoeprint that was followed up to the tarred road. He collected all these items as exhibits. He then transported the body of the deceased to Andara Hospital without it sustaining further injuries. He located the appellant at Martin Ndumba hostel who told him that he was not with the deceased at the time of the incident the previous night. While interrogating the accused this officer observed that he had one of the blood stained Paulo type of sandals on.

[10.1] The officer was taken inside the sleeping room where the following wet items were found hanged inside to dry up: a black trouser; T-shirt with some spots; and a white hat. There was also a pair of black sunglasses. As the officer was about to leave the room he noticed a short trouser hanging on the line outside the room. When asked why he did hang all the clothes outside on the line seeing it was not raining the accused said he wanted them to dry up inside the house. The officer arrested the appellant and seized all the items including; another T-shirt, a black tracksuit, and a pair of socks.

[10.2] During cross-examination the appellant questioned the officer how he was linked to the matter. The officer clearly pointed out that the appellant was the only person who was last seen with the deceased the night of the incident, his Paulo

sandals matched to tracks found on the scene, as well as the clothes that seemed to have been washed overnight which he hanged inside the sleeping room to dry up instead of outside on the line.

[11] Juri Yangazov testified he is a medical officer who performed the post mortem where he found that the deceased died as a result of severe head injury due to skull fracture.

[12] Sylvester Kavindja, the Scene of Crime officer confirmed finding the two bloodstained stones, and other items belonging to the deceased as well as a half smoked US dollar note at the scene. These as well as other items belonging to the appellant were photo taken.

[13] At the close of the State's case the rights of the appellant were fully explained to him. This included the fact that if he did not put his side of the story before the court the matter would be solely decided on the prosecution evidence. Despite this exercise the appellant still elected not to testify and said he had no witnesses to call.

[14] It is very clear from the evidence placed before the trial court that the Magistrate did not misdirect himself when he analyzed the circumstantial evidence and found the appellant guilty of murder with direct intent.

[15] The accused's election not to testify while facing direct implicating accusations was risky and unreasonable. The Magistrate was correctly persuaded by inferential reasoning in the absence of contradicting evidence to convict the appellant as charged.

[16] The requirements for a conviction based on inferential reasoning as set out in *R v Blom* 1939 AD 188 at 202-3 namely that: The inference sought to be drawn must be consistent with all the proven facts and ... The proved facts should be such that they exclude every reasonable inference from them save the one sought to be drawn", have been appropriately satisfied and the conviction cannot be faulted.

[17] It is my considered view that the conviction is in order and should not be tempered

with.

[18] In the result the appeal is dismissed.

A M SIBOLEKA
Judge

P J MILLER
Acting Judge

APPEARANCES

APPELLANT:

Ms I Mainga
Directorate of Legal Aid

RESPONDENT:

Mr P S Kumalo
Office of the Prosecutor-General, Windhoek