

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

Case No: CC 18/2016

THE STATE

v

WILLEM FREDDY EKSTEEN

Neutral citation: *S v Eksteen* (CC18/2016) [2018] NAHCMD 43 (26 February 2018)

Coram: USIKU, J

Heard: 26 April 2017; 04 – 08 September 2017; 11 September 2017; 10 –12 October 2017

Delivered: 26 February 2018

Flynote: Criminal Procedure – Evidence – Circumstantial evidence – Inference to be drawn from circumstantial evidence – Such inference must be consistent with proven facts – Inference must exclude any other inference – In determining the guilt or the innocence of an accused person the ultimate requirement is proof beyond reasonable doubt and this depends upon appraisal of the totality of the facts.

Summary: The accused was charged with the crime of murder after the deceased's body was discovered in their bedroom on the morning of 22 September 2014. The deceased and the accused were involved in a domestic relationship and had a child together. It was reported to the police that the deceased committed suicide by hanging herself from the roof of their bedroom. There were no eye witnesses to the actual hanging and as such the state's case is based on circumstantial evidence.

Held that a court should only convict on circumstantial evidence if the inference sought to be drawn is consistent with the proven facts, and that the proven facts exclude every reasonable inference from them save the one to be drawn. Accused was the only person who shared the room with the deceased on the evening in question. Medical evidence by the doctor who conducted post-mortem examination on the deceased's body concluded that the deceased could not have committed suicide by hanging herself under the circumstances.

Held that the accused is liable for the death of the deceased – Deceased strangled.

ORDER

Accused found guilty of murder in the form of *dolus eventualis* and accordingly convicted as charged.

JUDGMENT

USIKU J:

[1] The accused was charged with the crime of murder in that on or about 21 and 22 September and at or near Aroab in the district of Keetmanshoop, the accused did unlawfully and intentionally kill Janetta Babiep, a 19 year old female person.

[2] The summary of substantial facts are that at some time prior to her death the deceased and the accused were involved in a domestic relationship in that they were involved in an actual or perceived intimate or romantic relationship and they have a child together.

[3] On Sunday, 21 September 2014, the accused arrived on farm Warmfontein in the district of Aroab to take up employment on this farm after he had requested the farm owner to employ him. This was also the farm where the deceased resided. On

the evening of 21 September 2014, the accused and the deceased shared a bedroom and during the late night hours of 21 September 2014 or the early morning hours of Monday 22 September 2014 the accused killed the deceased by strangling her with a piece of rope and the deceased died on the scene as a result thereof. He pleaded not guilty to the charge and denied his involvement in the commission of the offence.

[4] Mr Engelbrecht appears for the accused whilst Ms Shikerete represents the state.

[5] The alleged incident of murder in which the deceased, then aged 19 years, was committed on farm Warmfontein between 21 and 22 September 2014. It is common cause that the accused arrived on the said farm in the afternoon of 21 September 2014 after he was brought there by the farm owners from Aroab town. It is also not in dispute that the deceased and the accused were involved in a domestic relationship from which a child was born.

[6] It is further common cause that from the time the accused arrived on the farm he was in the company of the deceased and that they had visited a neighbouring farm and then returned to farm Warmfontein, whereafter, they had retired to bed. The evidence of the state witnesses is that accused and the deceased went to bed upon their return from the neighbouring farm.

[7] The deceased's brother Paulus Johannes Babiep also known as Pieter testified that he worked on farm Warmfontein as a labourer for about eight months until September 2014. The deceased resided on the farm for about two months prior to her death. She would help out the owner of the farm by taking care of small livestock. He knew the accused as the deceased's boyfriend with whom she had a child. Accused arrived on the farm after he had sent him a text message informing him that he was looking for employment.

[8] After he and the accused arrived on the farm on 21 September 2014, they met the deceased. The deceased appeared normal. Upon their arrival, he accompanied the accused to the farm owner's house in order to be given his rations. The farm owner explained to the accused what was expected of him as a farm

worker. A room was then provided to him but the accused opted to share a room with the deceased. According to Pieter, the deceased was in a jovial mood, she baked and offered them coffee as they sat together at the fire place and chat. All went well as the deceased prepared food which all of them ate. The deceased and the accused thereafter left for a nearby farm as he remained. They did not consume any alcohol.

[9] Pieter testified further that after the deceased and the accused left for the nearby farm, he retired to bed as he was to visit another farm with his employer the next day. According to him, the deceased and accused returned late and he could hear them playing music although he did not speak to them. During that evening whilst sleeping, his colleague Derick came and woke him up, informing him that there was something on the roof of their room as he had been sleeping outside. He then decided to get his bedding and shifted inside the room. They thereafter again slept.

[10] At about 5h00 am, Pieter was awoken by the accused who requested him to go and see how the deceased had hanged herself. He went into the room and saw the deceased laying on the bed. Because it was a bit dark, he lit a match to enable him to see clearly. He noticed the deceased's body on the bed with a rope around the neck which was fastened to the foot of the bed. He did not observe any other rope inside the room. He left the room in order to alert his co-farm worker Steyn, whom he invited to come and see what had transpired. Mr Steyn saw the deceased and alerted Mr Lensing the farm owner. Pieter confirmed that he was questioned by Sergeant Frederiks as to whom the deceased had spent the night, to which he informed him that accused had spent the night with the deceased. According to the witness, accused when questioned by the police in his presence admitted to have been responsible for the deceased's death.

[11] Mr Gideon Lensing testified that after being informed by his farm labourer Pieter about a person who wanted to work as a farm labourer he collected the accused at Aroab on 21 September 2014. They drove back to the farm the same day. The next morning of 22 September at about 5h00 am, he received a call from one of his farm workers informing him about the deceased's death. He visited the room where he observed the deceased laying on the bed with a rope around her

neck and the other rope fastened to the foot of the same bed. The deceased's brother, Pieter, appeared to be very heart broken at the time, whilst the accused looked very nervous. He called in the police.

[12] Ms Elize Lensing confirmed what her husband had testified about how they had picked up the accused and brought him on their farm on 21 September 2014. According to her, the deceased was normal and was a friendly lady. She knew the deceased for about two months after she arrived on the farm to visit her brother, Pieter who worked for them. She also confirmed her husband having been called in the early morning of 22 September 2014 by one of the farm workers. She did not visit the scene.

[13] Mr Derik Van Shalkwyk testified that he was employed on farm Warmfontein and came to know both the accused and the deceased as co-workers. He saw the deceased and the accused on 21 September 2014 as they were busy playing music before they retired to bed. The deceased appeared normal and acted normally.

[14] Mr Andreas Van Schalkwyk another farm worker testified that he knew the deceased. He only came to know the accused on 21 September 2014, when he arrived on the farm. He worked with the accused on that date, whereafter they were each given their food rations. He also saw the deceased on that date and she appeared normal and friendly. Andreas confirmed to have been woken up by the deceased's brother Pieter who informed him about the deceased's death. He went to investigate and found the deceased laying on the bed with her arms by her side and a rope around her neck. He then questioned the accused about what happened and called the farm owner. He did not observe a 20 litre container inside the room where the deceased body lay on the bed.

[15] Cecilia Witbooi the wife of Mr Andreas also testified. During the time of the incident, she resided on farm Warmfontein where she did part-time jobs. She knew accused from Aroab through his mother. She also knew the deceased who had been on the farm for some months. She describe the deceased as a very jolly person who was full of love. She confirmed the arrival of the accused on the farm on 21 September 2014. Furthermore, that the next morning at around 5h00 am, she and her husband were awakened by the deceased's brother, Pieter. He informed them

about the deceased's death. She then went to the deceased's room and observed her laying dead on the bed.

[16] Mr Avril Jossop also testified that he knew the deceased who was his niece. They had spent the entire weekend together before she died. The deceased appeared normal, and was in good moods after accused and the deceased had visited him on the Sunday afternoon. They left his place in a friendly mood joking and laughing. During their visit, the deceased had informed him that she was no longer in a relationship with the accused.

[17] Sergeant Charto Roberto Frederik testified that he is a detective sergeant at the Keetmanshoop police station. On 22 September 2014 whilst on duty, he was called out to attend to an alleged suicide scene at farm Warmfontein. He arrived on the farm and was directed by the farm owner to a room. He met the deceased's brother who then pointed out the deceased to him. He observed the deceased covered in a blanket. There was a nylon rope around her neck and another rope fastened on the foot of the bed. According to the witness, he immediately suspected foul play because he has never come across such a suicide scene. He looked up in the roof and did not see any rope hanging from there or anywhere else.

[18] Having made these observations, he questioned the deceased's brother about whom the deceased had spent that night with. He was informed that the deceased had spent that night with the accused. The witness approached the accused and questioned him whether he had indeed spend the night with the deceased, which the accused confirmed. He then questioned the accused about what had happened to which the latter responded by saying 'I did it'. According to the witness, he then stopped the accused not to say anything further and warned him about his legal rights. Accused thereafter opted to remain silent. Photos of the scene were taken and a Photo plan was later on compiled.

[19] Although sergeant Frederik claimed to have informed the accused person about his legal rights at the time, the defence denied that such rights were explained and as a result, a trial-within-a-trial was held in order to determine whether the accused had made the statements freely and voluntarily. The court further had to determine whether the accused had been assaulted, threatened, forced and or

influenced to make such statements and or admissions. There were further claims by the defence that during the alleged confession, accused had been coached on what answers to give to the magistrate during the taking of the confession on 23 September 2014 at the Magistrates' Court, Keetmanshoop.

[20] During the trial-within-a-trial sergeant Frederik testified that he met the accused for the first time on 22 September 2014 at farm Warmfontein, after he had been called out to attend to an alleged suicide. Having observed the deceased laying on a single bed, he immediately suspected foul play. The witness further testified that he questioned the accused about what had happened and the latter made certain admissions. At that point in time he had not yet explained the accused's rights not to incriminate himself.

[21] Another witness Warrant Talliaard testified that whilst in the company of Chief Inspector Kawanda on their way to farm Warmfontein they met sergeant Frederik who handed over the accused to them. He introduced himself to the accused as a police officer. At the time the accused sat on the back of the police van. Accused then made certain admissions and allegedly offered to go and give his story to the magistrate. They drove back to the Keetmanshoop Magistrate Court with the accused. The witness testified further that he had not explained the accused's rights prior to the latter making the alleged admissions to him. More specifically he had not informed the accused about his right not to incriminate himself and the consequences thereof, should he opt to give a confession.

[22] At Keetmanshoop he left the accused with Inspector Kawanda who went to search for a magistrate at the Keetmanshoop Magistrate office. A magistrate however could not be found and accused was taken to hospital for an examination, whereafter they drove back to Aroab. The next day accused was driven back to Keetmanshoop Magistrate Court in order to give a confession. He did not explain the accused's rights on this second occasion.

[23] Mr Shapumba, the magistrate at the time for the district of Keetmanshoop testified that he was approached by Inspector Kawanda on 23 September 2014 who had brought in a suspect for a confession. He explained the warning as contained in the pro-forma which is used for the purposes of confessions after he had introduced

himself to the accused as a magistrate. Accused remained in the office and the interpreter, Ms Shiindi, interpreted from English to Afrikaans and vice versa. The Chief Inspector who had brought in the accused also remained in the office throughout the recording of the confession. Ms Shiindi confirmed that she interpreted to the accused from English to Afrikaans and vice versa. She also confirmed that Chief Inspector Kawanda had sat in the magistrate's chambers throughout the recording of the confession from the accused.

[24] Another interpreter Ms Sabrina Rodges Alberto also testified that she came to know the accused when he appeared before court on 24 September 2014 on a charge of murder. According to her, she was the official interpreter in English to Afrikaans whilst Mr Shapumba presided over the accused's case. Accused's right to legal representation was explained by the magistrate whereafter she interpreted it to him in the Afrikaans language, which accused understood well. The accused was specifically asked how he intends to proceed and his response was that he will conduct his own defence. When advised to engage the services of a private lawyer or alternatively that he could apply for a legal aid lawyer he persisted that he would conduct his own defence.

[25] The witness having translated the accused's rights, the presiding officer went on to further explaining to the accused the seriousness of the offence he was facing and opined that it could be better for him to get a legal representative instead of him representing himself. All explanations were translated by the interpreter to the accused and he still opted to conduct his own defence. Accused confirmed to have understood the charges after they were translated to him from English to Afrikaans and offered a plea of guilty.

[26] According to the witness, as there were other several matters to be attended to by the presiding magistrate, the case was postponed to the next day, 25 September 2014 for questioning in terms of section 112 (1) B of Act 51 of 1977 by the same presiding magistrate.

[27] Accused on his part also testified during the trial-within-a-trial and alleged to have been assaulted, threatened and that he had been coached on what to answer to questions posed by the presiding magistrate during the recording of the

confession. His rights were never explained to him by either sergeant Frederik or warrant officer Talliaard and not even by the presiding magistrate.

[28] Having heard the evidence during the trial-within-a-trial, it was alluded to by sergeant Frederik that he did not explain the accused's rights prior to him making the admissions as such those admissions were ruled inadmissible in evidence. Secondly warrant officer Talliaard also conceded that he did not fully explain the accused's right not to incriminate himself prior to him taking the warning statement. As such the warning statement recorded from the accused by the police was also ruled inadmissible in evidence. The section 119 were, however, ruled admissible in evidence as these were recorded after the presiding magistrate had duly explained the accused's legal rights as confirmed by Ms Alberto who at the time acted as an official interpreter during the court proceedings.

[29] Having considered the evidence during the trial-within-a-trial I now wish to consider the evidence in the main trial as a whole.

[30] It is common cause that the state's case is based altogether on circumstantial evidence. It is also trite law that a court should only convict on circumstantial evidence if the inference sought to be drawn is consistent with the proved facts and the proved facts exclude every reasonable inference from them save the one to be drawn.¹

[31] Accused testified that he and the deceased were involved in a domestic relationship and had a child together, who was being looked after by his mother. Further, that during September 2014, he worked with his father on a farm whilst the deceased was helping out at farm Warmfontein where her brother was employed. According to him they used to communicate by phone and it was then that the deceased informed him about a job opportunity on farm Warmfontein. She advised him to speak to the farm owner. Arrangements were made with the farm owner and accused arrived on farm Warmfontein after he had been picked up by the farm owners.

¹ See State v Ditshabue (CC 26/2012) [2013] NAHCMD 261 (20 September 2013).

[32] Upon arrival on the farm he met the deceased and there were no problems between them. He denied to have had any problem with the deceased at the time. He could not have gone to the farm if there were issues between him and the deceased. Accused further testified that he went to the farm because the deceased was longing to see him. Upon arrival they spend time together that afternoon, whereafter they visited a neighbouring farm, returned and went to bed. They made love. Accused claimed in his testimony that whilst they were making love, the deceased informed him that she no longer wanted to live and she had a desire to go to a far place, or words to that effect. When he questioned her to explain what she meant, she did not offer any explanation. They fell asleep.

[33] During the early morning hours, he woke up and realised that the deceased was no longer in bed with him. He lit a candle in order to investigate her whereabouts. He then noticed a 20 litre bucket, and as he lifted his head, saw the deceased's body hanging from the roof. He got frightened and decided to stand up one leg on the bucket and the other leg on the bed in order to see if the deceased was still alive. He then cut the rope as he thought that the deceased was still alive, got her and laid her down on the bed. He panicked. He claims to have been still able to carry the deceased's body on his own. He further testified that he took the rope that was hanging in the air from the roof and tied it to the bed in order to create an impression that the deceased had committed suicide on the bed. He did so because he did not want people to think that he had killed the deceased himself. He then went to call the deceased's brother and told him what had transpired.

[34] In their submissions, the state relied on the doctor's evidence. The doctor who conducted the post-mortem examination on the body of the deceased, testified that the deceased could not have committed suicide by hanging herself as claimed by the accused. The reason being that there was no ascending gab, traction was not applied and nothing was pulled on one side or another side upwards. The mode of death was a neck strangulation by a rope which was applied around the neck, tightening it thereby depriving the brain of the supply of blood and oxygen, which had prevented air entry. It was further confirmed by the doctor that the marks below the lower jaw were acquired as a result of some extra force being applied which could not have been done by a person committing suicide by himself or herself.

[35] Reference was also made with regard to the knot which was fixed thereby allowing no movement at all. The doctor thus excluded the possibility of the deceased having hanged herself, having regard to the pattern of the strangulation furrow as well as the position of the rope.

[36] Moving to the other evidence presented before court, there is no dispute that the deceased and the accused had shared a single bed during the night of the incident prior to the time the deceased's body was discovered dead. It is also common cause that it was the accused who first reported the deceased's death claiming that she had committed suicide. If the deceased had indeed committed suicide through hanging as claimed by the accused, why was it necessary for him to completely change the scenery? This court is yet not satisfied that those claimed changes (i.e. the moving of the deceased's body to the bed) could have been brought about by the accused alone, it could clearly not have been possible to do so alone taking into account the dead weight of the body without him seeking assistance from the people who occupied rooms within the vicinity of their room where the deceased's body was discovered. It is improbable that the deceased's body was hanging from the roof. Accused's explanation on that score is clearly false and must be rejected by this court.

[37] It is trite law that when dealing with circumstantial evidence, as in the present case, the court must not consider every component in the body of evidence separately and individually in determining what weight should be accorded to it. It is the cumulative effect of all the evidence together that has to be considered whether the accused's guilt has been proven beyond reasonable doubt.

[38] In *S v Hadebe and Other*² it was stated:

'Doubts about one aspect of the evidence led in a trial may arise when that aspect is viewed in isolation, but those doubts may be set at rest when it is evaluated again together with all the other available evidence.'

[39] In casu, when one considers the evidence of the doctor who conducted the post-mortem examination on the deceased's body, the fact that the deceased and

² *S v Hadebe and Others* 1998 ISACR 422 SCA at 426 E – G.

accused shared a single bed that evening, but the latter could not hear anything as the deceased went about her claimed suicide by hanging herself, and his conduct after he had allegedly discovered the suicide in addition to his claim of having changed the scenery, before alerting other people, clearly goes to show that he had something to hide concerning the death of the deceased.

[40] Although the state's case is indeed based on circumstantial evidence, it is still not allowed for the court to consider such evidence to be less compelling than direct evidence or evidence of an eye witness. The state is thus bound and is obliged to prove the accused's guilt beyond reasonable doubt. Accused had conceded at a later stage to having strangled the deceased, which resulted in her death. The expert evidence led is that minimum force could have been applied to the neck of the deceased. Strangulation was as a result of external force having been applied on the deceased's neck which could not have been done by the deceased herself. Accused was the only person who shared the single bed with the deceased during that evening. Accused ought to have foreseen that by applying such force to the neck, a vulnerable part of a human body would result in death but nevertheless continued to do so as a result of which the deceased died. In *S v Emerald Cerelda Mommses*³, where Mainga JA (with Shivute CJ and Smuth JA concurring) citing from *R v Mlambo*⁴, where the following was said:

'There is no obligation upon the crown to produce evidence by means of which such a high degree of probability is raised that the ordinary reasonable man, after mature consideration, comes to the conclusion that there exists no reasonable doubt, that an accused has committed the crime charged. He must in other words, be morally certain of the guilt of the accused.'

[41] Having carefully considered the totality of the evidence presented, this court has no doubt that the accused is guilty of the offence of murder in the form of *dolus eventualis*. He is accordingly convicted as charged.

³ *S v Emerald Cerelda Mommses* Case no CA 12/2014 held on 11 March 2016 and delivered on 8 June 2016.

⁴ *R v Mlambo* 1957 4SA 727 AD at 738 A.

D N USIKU

Judge

APPEARANCES

STATE:

Ms Shikerete

Of Office of the Prosecutor-General, Windhoek

ACCUSED:

Mr Engelbrecht

Instructed by Directorate of Legal Aid, Windhoek