

SOUTH AFRICA / JUDGMENT

S v Olyn (K/S4/2010) [2014] ZANCHC 13 (6 November 2014)

[2014] ZANCHC 13**COURT**

Northern Cape High Court, Kimberley

BEFORE

Pakati

CASE / FILE NUMBER

K/S4/2010

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IN THE HIGH COURT OF SOUTH AFRICA

(NORTHERN CAPE HIGH COURT, KIMBERLEY)

Case No: K/S4/2010

Delivered on: 06 NOVEMBER 2014

THE STATE

V

JAMES OLYN

JUDGMENT

PAKATI J

- [1] The accused, Mr James Olyn, a 24 year old male and farm labourer, is arraigned on three charges: In count 1 he is alleged to have raped the deceased, L..... V..... In count 2 he faces a charge of robbery with aggravating circumstances and in count 3 he is charged with murder read with s 51 (1) of the Criminal Law Amendment Act, 105 of 1997. The allegations are that he had sexual intercourse with the deceased without her consent, robbed her of her cell phone and murdered her. These incidents are alleged to have taken place on Saturday, 07 September 2013 at or near Hopetown. The deceased, a 21 year old female, lived with her father, Mr H..... L....., in S..... L.... in Steynsville.

- [2] The accused is represented by Mr J Cloete on the instructions of the Legal Aid South Africa. He pleaded not guilty and denied all the charges. He admitted having had consensual sexual intercourse with the deceased for the payment of R100-00. He further admitted having possessed the deceased's cell phone but claimed that the deceased pawned it for R200-00 to him.
- [3] On Saturday 07 September 2013 during the day Mr W..... M..... was in the company of the deceased on the farm, Vergesig, in Hopetown. Between 14h00 and 15h00 Mr Tom M..... the deceased's boyfriend, drove away with the deceased in his motor vehicle. Mr M.... stated that he had a secret love relationship with the deceased. Later that afternoon he made an arrangement to meet the deceased but she never turned up. His last telephonic conversation with her was between 16h00-17h00. The cell phone records (Exhibit "H") indicated that he spoke to the deceased at 18h33. That same afternoon Mr M..... and the deceased's father searched for the deceased but could not find her. Mr M..... tried to call her again but her phone was switched off. He also sent sms messages which were not responded to. He heard the following day that the deceased had died.
- [4] Mr L..... testified that during weekends the deceased visited her uncle on the farm. During the late afternoon of 07 September 2013, a Saturday, the deceased was home with him. At some stage Mr L..... went to the soccer field to watch a match. Upon his return the deceased was not home but she returned around 17h00. She then visited her mother and returned around 17h45. She took his black leather jacket and left. She phoned him at 18h06 that afternoon asking him not to tell Mr M..... her boyfriend, of her whereabouts. That was the last time he spoke to her.
- [5] Mr L..... Corroborated the evidence of Mr M..... that around 20h20 or 20h30 they proceeded to the farm, Vergesig, in search of the deceased. Mr L..... tried to phone the deceased on her cell phone but it was switched off. Around 22h10 the deceased's mother (her name and surname remained undisclosed), phoned Mr L..... enquiring after the whereabouts of the deceased. The following day a certain Mr Andrew called Mr L..... and informed him that the deceased's body was discovered in the river.
- [6] When the deceased left home the previous day she was slightly under the influence of alcohol. She was wearing a green top and a white pair of jeans and her father's black leather jacket. She had R300-00 in her possession. She wore a Plaster of Paris on one of her arms. Mr L..... knew of the deceased's love relationship with Mr M..... and Mr M..... but not the accused.
- [7] Mr M..... corroborated the evidence of Mr M..... that he had a love relationship with the deceased. He added that they have a six year old child. He stays with his wife in Hopetown. He confirmed that he drove with the deceased in his car from Vergesig Farm to Hopetown on 07 September 2013 and took her to her parental home in Steynsville. He then proceeded to the soccer field where he remained until 19h25. After the match he returned to the deceased's parental home but found no-one. He tried to contact her telephonically around

19h30 but her phone was switched off. He left for his home.

- [8] The following day the deceased's father informed Mr M..... of her death. Mr M..... did not know that Mr M..... had a love relationship with the deceased. The deceased was unemployed but he gave her money for the maintenance of their child. When he left the deceased at her parental home she was sober.
- [9] Mr K..... S....., 69 years old, proceeded to the river on Sunday morning of 08 September 2013 at 09h00 to catch fish. He noticed a body floating in the water; which was later identified as that of the deceased. It appeared to him that the deceased was already dead. He immediately reported the matter to the police.
- [10] Sgt Martin Potgieter of the South African Police Services (SAPS) attached to Hopetown Visible Policing visited the scene on 08 September 2013 at about 09h00 in the company of W/O Storey and Mr Swarts. Mr Swarts led them to the spot where he discovered the deceased. Sgt Potgieter confirmed that the deceased was already dead. Five metres away from the deceased's body was a white pair of trousers and a black lady's panty also afloat at a distance of about a metre from the river bank. Sgt Potgieter removed the body from the water. The lower body was naked and around her feet was a black pair of ski pants tying the ankles together. He found a used condom and a condom wrapper at points A and B on photo 2 (Exhibit "A"). Not far from this point he noticed a small heap of soil which looked like a spot where wrestling took place. It appeared that someone was kicking the soil with his/her heels lying on his/her back. No foot/shoe prints were found on the scene due to the fact that the area is stony. The black leather jacket was never recovered.
- [11] Sgt Potgieter stated that Steynsville is about two kilometres from the scene described in para 10 (above). No dwelling houses surround the crime scene. The nearest farm house is at Vergesig which is about five kilometres away. The area is secluded and not regularly used by the community members, a few fish there.
- [12] Const Ambrose Struiss, the investigating officer, testified that according to the cell phone records the sim card of Ms Ruwenda Mouton, the accused's girlfriend, was inserted in the deceased's cell phone the day after the incident. This information was confirmed by Ms Mouton when she testified. She informed Const Struiss that the accused had her cell phone. In the initial stages of the investigation a certain Mr Johannes Smeer was arrested in connection with the murder of the deceased but charges were later withdrawn against him due to lack of sufficient evidence.
- [13] On 18 October 2013 Const Struiss and Lt Christofel De Koker arrested the accused on a farm outside Upington. On 19 October 2013 Lt De Koker interviewed him in connection with the information regarding the deceased's cell phone and sim card. He also enquired if he had any knowledge of the body of the deceased that was found in the river. The accused denied knowledge of the incident. On Monday 21 October 2013 the accused was taken to a magistrate to make a statement. Before the magistrate he intimated that he wished to exercise his right to legal representation. Lt De Koker corroborated the evidence of Const

Struis on aspects in respect of which they were in each other's company.

- [14] Const Struiss testified further that the deceased's cell phone and sim card were never recovered. Cell phone records from the period 15 to 22 September 2013 show that a sim card with number 071 792 3594 was used in the deceased's handset. On enquiries made at Home Affairs Department Const Struiss was informed that that sim card belonged to a foreign national who owned a passport only as a form of identification. He could not be located. The DNA results found in the used condom picked up from the scene matched that of the accused.
- [15] According to Const Struiss the walking distance between Ruby's Tavern in Steynsville and the crime scene is 3131 meters. This walk took him 50 minutes of robust walking. From the crime scene to Hopetown the distance is 3130 meters. He walked 930 meters along the footpath from the scene to the tarred road (N12). There is a place not far from the scene where bricks are fabricated. The workers remain there until 17h00. No bricks are made during weekends.
- [16] A clear picture of the crime scene is contained in Exhibit "A" compiled by Mr Gomotsegang Moss. It shows exactly where the deceased, the used condom and condom wrapper were found. It also shows the "wrestle marks" visible in photos 2, 5 and 7 close to where the deceased was found. Exhibit "B" is an aerial photo showing point "C" as the crime scene. From this photo one can clearly see Ruby's Tavern, the tarred road that runs from Hopetown to Kimberley (N12), the tarred road to Douglas at the top left of the photo and the footpath to the crime scene. The sewerage dam is also visible close to the river.
- [17] Mr Barnard, for the State, made an application for the admissibility of a statement made by the accused to Lt Christofel De Koker on 19 October 2013. I found that the accused's constitutional rights to fair trial (s 35 (3)) were infringed and that it was not in the interests of justice to admit such statement. I therefore excluded it.
- [18] Ms Mouton, the accused's girlfriend, testified that she lived with the accused in Hopetown before his arrest. She was pregnant with his child. After 07 September 2013 she noticed that the accused had a strange cell phone in his possession. She asked him whose cell phone it was. He told her not to ask questions and never told her whose cell phone it was. She and the accused came to know about the death of the deceased on Sunday 08 September 2013. Before that the accused told her nothing.
- [19] After the accused's arrest Ms Mouton visited him in Hopetown Prison twice. Exhibit "L" indicates her visits on 25 February 2014 and 01 April 2014. Initially the accused told her nothing about what happened on the Saturday evening although she had asked him. He told her for the first time on her last visit in prison (01/04/2014) after she had again asked him. He told her that he was with the deceased the night in question. He stated that the deceased had asked him to accompany her. Some unknown people chased them. The deceased's cell phone fell in the process and he picked it up. The deceased asked him to keep it. At the river they sat and chatted. They had consensual sexual intercourse. Thereafter the people who

had chased them earlier were still pursuing them. He fled from the scene leaving the deceased there. When the accused told her this she already had information that the accused's DNA was found on the scene.

- [20] When it was put to Ms Mouton by Mr Cloete during cross examination that in her police statement she never mentioned that the accused told her that the deceased's cell phone fell and he picked it up, she could not explain why this was not contained in her statement. She later said that the accused did not tell her about it. She explained that she was confused about the cell phone and was under the impression that she had told the investigating officer and the State Adv, Mr Barnard, about it. This discrepancy is not material because it is common cause that the accused was in possession of the cell phone. The probabilities in the case will dictate how he came in possession of the deceased's cell phone.
- [21] Dr Lemainé Fouché, who performed the autopsy, testified that the deceased's upper eyelid and left ear lobe had tissue destruction due to the fact that the body was found in the water. This kind of injury was sustained after death had occurred. The deceased also had an abrasion on the right side of the neck due to tangential trauma and a bruise on the left side of the neck caused by blunt trauma. According to her this could be consistent with a blow with a bat which would cause small vessels to burst and blood leaking into the surrounding tissue causing reddish discoloration of the skin that she found on the left side of the neck. The deceased also had a 'washer woman's hand appearance.' She explained that this takes place when a woman does washing or stays in the water for long and the skin colour turns pale. This, according to her, fits in with the body that was found in the river.
- [22] Regarding the deceased's genitalia Dr Fouché noted thus:

"There is a bruise, 3mm in diameter at 18:00 on the posterior fouchette as well as the fossa navicularis. There is an abrasion, 2mm in diameter just left of the bruise on the posterior foschette. The uterus has a multiparous os. The uterus is of normal size and endometrium is in a proliferative phase. Both ovaries have small cysts."

In Dr Fouché's opinion the above injury was consistent with lubricated penetration (possibly with consent) due to the position and size of the injuries. She specifically did not rule out non-consensual sexual intercourse. She explained that if a woman lies still these kinds of injuries are possible as the position during sexual intercourse has an effect on the injuries sustained.

- [23] The doctor recorded the chief post-mortem findings as follows:

"The body of an adult coloured female with post-mortem tissue destruction due to aquatic activity, an abrasion on the right side of the neck and a bruise on the left side of the neck with haemorrhages in all the underlying muscles on the left side of the neck. There are haemorrhages around both the superior horns of the thyroid cartilage and the hyoid bone, left and right as well as a haemorrhage in the submandibular salivary gland on the left. The brain is swollen with flattened gyri and bilateral herniations. Both lungs are congested and there are petechial haemorrhages on the anterior and posterior surfaces of the heart. There are bruises on the posterior fouchette and fossa navicularis as well as a small abrasion on the posterior fouchette, just left of the bruise."

Dr Fouché concluded that the cause of death was manual strangulation.

That concluded the State case.

[24] The accused testified that on the Saturday afternoon of 07 September 2013 he drank beer with the deceased at Ruby's Tavern. After about five to six minutes the deceased asked him for R100-00 in return for sex. They went to the river. The deceased spread the black leather jacket that she had on and lied on it. They had consensual sexual intercourse. Thereafter they walked to the tavern. Before they reached the tavern the deceased remembered that she had forgotten the black leather jacket. When he offered to fetch it she said she would take it on her way to the farm, Vergesig. Upon arrival at the tavern the deceased asked the accused for R200-00 for which she would pawn her cell phone until the end of the month. He then gave her the R200-00 and retained her cell phone. When the deceased handed the cell phone over to him she removed her sim card. He left the deceased in the tavern around 18h00 to 19h00. He denied raping the deceased. He further denied robbing her of her cell phone and killing her. He denied that he told Ms Mouton about some men who chased them.

[25] The accused testified that he knew the deceased very well through her family. He drank liquor with her regularly. He did not have a love relationship with her. They never had sexual intercourse before the evening in question. When the deceased arrived at the tavern he (the accused) was reasonably under the influence of alcohol. The deceased appeared to be sober even though she had taken some alcohol.

[26] The following facts are common cause or undisputed or found to have been proved:

26.1 That the deceased's father, Mr Lodewyk, had given the deceased R300-00 before the deceased left at 17h45;

26.2 That the accused and the deceased were at Ruby's Tavern during the evening of 07 September 2013;

26.3 That the accused had sexual intercourse with the deceased at the scene of crime, a secluded area;

26.4 That a used condom and a condom wrapper were found at the scene and the accused's DNA was found in the used condom;

26.5 That the crime scene is 3.1km away from Steynsville (Ruby's Tavern) and 3km away from Hopetown;

26.6 That the deceased had her cell phone with her that afternoon and evening;

26.7 That struggle marks were found on the scene that looked like someone kicking the ground with his/her heels while lying on his/her back close to where the condom and condom wrapper were found;

26.8 That at some stage during 07 September 2013 the accused assumed possession of the deceased's cell phone;

26.9 That the accused inserted Ms Mouton's sim card in the deceased's cell phone. He made two calls from the said cell phone on 08 and 09 September 2013 in that manipulated form;

26.10 That the deceased's cell phone, sim card and a black leather jacket were never recovered. The accused had knowledge of all three of these items;

26.11 That the deceased's body was discovered in the river on 08 September 2013 close to where the struggle took place and the condom and wrapper were found;

26.12 That the deceased was beaten and strangled to death; and

26.13 That in the veld across the road from Ruby's Tavern there was no lighting up to the spot at the river.

The crisp issue to be determined is the identity of the perpetrator.

[27] The accused explained in evidence that he lost the deceased's cell phone in a tavern on 15 September 2013 whilst drunk. At one stage he said he had it in his hand though it was switched off. He later changed his version and said he placed it inside his torn pocket by mistake got lost as a result. He did not investigate its loss or even let the deceased know that her phone was lost. He inserted his sim card in this cell phone before it got lost. Instead another sim card with number 071 797 3594 was already inserted in the afternoon of 15 September 2013 until 22 September 2013. This sim card was used in the deceased's cell phone from 14h46 on 15 September 2013 and made 15 calls up till 18h43. The accused knew nothing about these calls. He maintained that his sim card with number 078 868 8166 was inserted in the deceased's cell phone when he lost it. This cannot be true and is not consistent with the cell phone records. If the cell phone got lost as he alleged then whoever picked it up was expected to insert his/her sim card which is not the case. His story that the cell phone got lost is not credible. He must have thrown it away.

[28] The record of proceedings is clear about a number of issues that went unexplained by the accused of which two are significant. Firstly, his failure to explain why he walked 3km to have consensual sexual intercourse when on his own version there were no people in the area along the footpath that they followed. He admitted that he could just have crossed the tarred road (the N12) close to Ruby's Tavern and had sexual intercourse there. He said: "I do not have a reason why we walked so far to have consensual sex." Secondly, it is highly improbable that someone else went to the same place where he had sexual intercourse with the deceased and killed her the same night at such an isolated area. He came up with a fabricated story that the deceased forgot her black leather jacket at the scene to suggest that she was killed by someone else. He stated that the deceased took it off in order to protect her back as she was lying on her back. When his explanation could not stand up to scrutiny under cross-examination he explained that the deceased had informed him that her boyfriend was looking for her thereby suggesting that he could be the culprit. In my view

that is an afterthought on the part of the accused. On his own version he testified that no motor vehicles drive on that footpath and Mr Makumane was driving a motor vehicle that day. It is also strange that when the deceased's body was found the lower body was naked and her feet tied together with a ski pants and her pair of jeans lying around. Yet the accused gave the impression that he had foreplay and kissed the deceased before they had consensual sexual intercourse.

[29] In this case, the State tendered evidence that is circumstantial in nature to prove its case. No-one witnessed the alleged rape, robbery and murder of the deceased. In *S v REDDY AND OTHERS* 1996 (2) SACR 1 (A) at 8c-g Zulman AJA held:

"In assessing circumstantial evidence one needs to be careful not to approach such evidence upon a piece-meal basis and to subject each individual piece of evidence to a consideration of whether it excludes the reasonable possibility that the explanation given by an accused is true. The evidence needs to be considered in its totality. It is only then that one can apply the oft-quoted dictum in R v BLOM 1939 AD 188 at 202-3, where reference is made to two cardinal rules of logic which cannot be ignored. These are, firstly, that the inference sought to be drawn must be consistent with all the proved facts and, secondly, the proved facts should be such 'that they exclude every reasonable inference from them save the one sought to be drawn.' The matter is well put in the following remarks of Davis AJA in R v DE VILLIERS 1944 AD 493 at 508-9:

"The court must not take each circumstance separately and give the accused the benefit of any reasonable doubt as to the inference to be drawn from each one so taken. It must carefully weigh the cumulative effect of all of them together, and it is only after it has done so that the accused is entitled to the benefit of any reasonable doubt which it may have as to whether the inference of guilt is the only inference which can reasonably be drawn. To put the matter in another way; the Crown must satisfy the Court, not that each separate fact is inconsistent with the innocence of the accused, but that the evidence as a whole is beyond reasonable doubt inconsistent with such innocence."

[30] See also *S v NTSELE* 1998 (2) SACR 178 (SCA) at 180e-f where Eksteen JA held:

"...[W]hen a Court was dealing with circumstantial evidence, as in the present matter, the Court was not required to consider every fragment of evidence individually to determine how much weight it had to be afforded. It was the cumulative impression, which all the fragments made collectively, that had to be considered to determine whether the accused's guilt had been established beyond reasonable doubt."

[31] Mr Cloete, on behalf of the accused, argued that the accused's version is the only version and the State did not lead evidence to the contrary. He relied on the case of *S v V* 2000 (1) SACR 453 (SCA) at 455a-b where Zulman JA pronounced:

"It is trite that there is no obligation upon an accused person, where the State bears the onus, 'to convince the court.' If his version is reasonably possibly true he is entitled to his acquittal even though his explanation is improbable. A court is not entitled to convict unless it is satisfied not only that the explanation is improbable but that beyond reasonable doubt it is false."

[32] The State has to prove all the elements of murder. In particular an intention to murder and that the accused did not have or raise a valid defence. In *S v PHALLO AND OTHERS* 1999 (2) SACR 558 (SCA) Olivier JA referred with approval to the case of *R v MLAMBO* 1957 (4) SA 727 (A) at 738A-C where Malan JA enunciated:

“In my opinion there is no obligation upon the Crown to close every avenue of escape which may be said to be open to an accused. It is sufficient for 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.

An accused's claim to the benefit of a doubt when it may be said to exist must not be derived from speculation but must rest upon a reasonable and solid foundation created either by positive evidence or gathered from reasonable inferences which are not in conflict with, or outweighed by, the proved facts of the case.”

[33] The accused was a poor witness. His version was full of improbabilities and inconsistencies and cannot be reasonably possibly true. The evidence showed that he was a dishonest witness who made up his evidence as he went along. He admitted having sexual intercourse with the deceased on the scene of crime. He has thus placed himself on the crime spot. He further admitted being in possession of the deceased's cell phone. He was not honest as to how he acquired and parted with it. The proved facts clearly show that the deceased could not have handed it over voluntarily to him. His DNA found on the used condom, the struggle marks and how the deceased's legs were tied together is evidence that he had sexual intercourse with her without her consent. The doctor did not rule out non-consensual intercourse. It should be remembered that when the doctor gave her opinion she did not have all the information regarding the manner in which the deceased was found. The deceased could never have chosen to return to the river alone at night when she could have done so in the company of the man with whom she had just had consensual sexual intercourse.

[34] Having regard to the evidence in totality and the analysis set out above I am satisfied that the State proved its case beyond reasonable doubt that the accused raped the deceased; robbed her of her cell phone and murdered her with the direct intent to do so.

The following verdicts are returned:

1. On count 1: (Rape) The accused is found guilty of having had sexual intercourse with the deceased, L.... V..... without her consent.
2. On count 2: (Robbery with aggravating circumstances) the accused is found guilty of robbery with aggravating circumstances.
3. On count 3: (Murder) The accused is found guilty of murder of L..... V..... with *dolus directus* as a form of intent.

BM PAKATI

JUDGE

On Behalf of the State: ADV T BARNARD

Instructed by: DIRECTOR OF PUBLIC PROSECUTOR

On Behalf of the Accused: ADV J CLOETE

Instructed by: LEGAL AID BOARD-KIMBERLEY

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Prepared on 9 October 2026 · Esheria