Bib

349/89
N v H

JEREMIA HLAKOTSA and MARTHA RABODILA v THE STATE

SMALBERGER, JA

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

JEREMIA HLAKOTSA	First Appellant
MARTHA RABODILA	Second Appellant

and

THE STATE

CORAM:	**SMALBERGER, VIVIER, et STEYN, JJA**
HEARD:	**14 NOVEMBER 1989**
DELIVERED:	**20 November 1989**

J U D G M E N T

SMALBERGER, JA:-

On 23 October 1985 the body of Katrina Skhosana ("the deceased") was discovered in the Vaal River near Vanderbijlpark. The body was in an advanced stage of decomposition. The deceased was practically naked. Her head was covered with a

blanket which was tied with a rope around her neck. There was a second rope around her neck, to the end of which was attached a concrete kilometre-stone. A later post-mortem examination established that the deceased had died as a result of strangulation.

Arising out of the deceased's death the two appellants appeared before WEYERS, J, and two assessors in the Vereeniging Circuit Local Division on a charge of murder. The first appellant and the deceased had been married to each other for a number of years; the second appellant is the first appellant's lover. Initially a third accused, one Mbele, was also charged with the two appellants. However, the charge was withdrawn against him and he later testified on behalf of the State. Both appellants were convicted of murder - in the case of the second appellant by a majority decision. The court was also divided on the

...../3

question of whether extenuating circumstances were present in the case of the first appellant. By a majority decision none were found. In the case of the second appellant the court was unanimously of the view that extenuating circumstances were present. In the result the first appellant was sentenced to death and the second appellant to 10 years imprisonment. With leave of the judge a quo the first appellant now appeals against the finding that there were no extenuating circumstances and the sentence of death imposed upon him, while the second appellant appeals against her conviction only.

The evidence established that on 14 October 1985 the deceased left the house she had previously shared with the first appellant and went to her sister-in-law, Mrs Jane Skhosana. She took with her clothes, curtains and bed linen. It appears that she was

intent on leaving the first appellant. There had for some time prior to that been disharmony in their marriage, and the first appellant had formed a liaison with the second appellant. That evening the first appellant arrived at Mrs Skhosana's house accompanied by a uniformed policeman. The purpose of their visit was to retrieve the curtains and bed linen which the deceased had removed from the house. Later that night the first appellant put in a further appearance. On this occasion he was accompanied by Mbele, who at the time was a member of the police force. The deceased was already in bed. She got up, dressed, and after wrapping a blanket around herself, left with the first appellant and Mbele. They drove off in the first appellant's bakkie. The second appellant was also a passenger in the bakkie. It is common cause that later that same night the deceased was strangled

...../5

and her weighted body thrown into the Vaal River.

The appellants and Mbele are the only persons who can testify to the events immediately preceding the deceased's death. All three gave evidence at the trial. Their respective versions of what occurred differ materially. A brief resume of their evidence will suffice. According to Mbele, when they left Mrs Skhosana's house he asked the first appellant to take him home. He claims he dozed off in the bakkie. When he woke up he discovered they were driving in the direction of the Vaal Barrage. At a certain point the first appellant stopped and told Mbele to get off saying that he "wanted to talk to these two women". The appellants and the deceased then drove off leaving Mbele standing at the roadside. The appellants returned on foot some time later. Mbele accompanied them to where the bakkie was parked. He noticed the

...../6

deceased lying in the back of the bakkie. She was dead. The first appellant told Mbele to help pick up the deceased. Mbele claims he refused to do so. The appellants between them managed to take the deceased's body to the river's edge. There a rope was tied to the deceased's neck. The other end of the rope was tied to a kilometre-stone. The appellants threw the deceased into the river. Mbele heaved the stone in after the first appellant had threatened him with a gun and instructed him to do so. According to Mbele, even though he was armed at the time, he was in mortal fear of the first appellant.

The first appellant claimed that the deceased had been killed at the instigation and insistence of the second appellant. She had expressed the fear that the deceased might harm her, and had said they must "kill her before she kills us". He alleged that on

...../7

the evening of her death the deceased, at Mrs Skhosana's house, had threatened to kill both appellants. In a statement made by him to Lt Corbett of the South African police shortly after his arrest, the admissibility of which was unsuccessfully challenged at the trial, the first appellant said the following:

> "Sy (the second appellant) het gesê sy is bang vir Katrina (the deceased). Sy het gesê ons moet vir Katrina doodmaak. Ek en Martha en 'n swartman Mbele het toe met my kar na Katrina se plek gegaan. Mbele het vir Katrina gaan roep. Sy het na die kar gekom en ingeklim. Ons het alvier in kar gery en ek het toe stilgehou. Ek en Martha het toe uitgeklim en ent van die kar af gaan praat. Sy het gesê ons moet vir Katrina doodmaak en haar lyk in die rivier gaan gooi. Ons het toe weer na die kar gegaan en gery. Ek het op die Randfonteinpad stilgehou en ek en Martha het groot klippe in die kar se kattebak gelaai. Ek het toe gery tot by die brug oor die Vaalrivier op die Parys pad. Daar het ek stilgehou. Ek en Martha het uigeklim. Ek het vir Katrina geroep. Sy het gekom. Mbele het by die kar gebly. Dit was ongeveer middernag. Ek en Martha

...../8

> het vir Katrina vasgegryp en ek het haar met 'n stuk tou wat ek vir die doel saam met my gehad het, verwurg. Ek het haar bly verwurg tot sy dood was. Ons het toe die klippe aan haar vasgemaak. Martha het Katrina se bloes, romp en skoene uitgetrek het dit vir haar gevat."

At the trial, while admitting that he participated in the killing of the deceased, the first appellant deviated from his statement in a number of material respects. The most important departure related to his denial in evidence that he alone had strangled the deceased. He claimed that he and the second appellant had tied a rope around the deceased's neck and had then both proceeded to strangle her, this having occurred on the advice of Mbele. He persisted throughout that the second appellant had influenced him and caused him to act as he did. In his own words, "Everything that I did I was told or directed by her, No 2 accused."

...../9

The second appellant made a statement to Capt de Beer shortly after her arrest. The admissibility of the statement was not contested at the trial. Concerning the events which occurred after she left Mrs Skhosana's house she said the following:

> "Ons het toe gery na die Ou Goue Hoofweg. Jerimiah (the first appellant) het nie gesê waarheen hy gaan nie. Buite Evaton het ons by die Ou Goue Hoofweg stilgehou, Jerimiah het bestuur. Jerimiah het alleen uitgeklim en met 'n klip so groot soos twee saakdossiere teruggekeer. Ek het vir Jerimiah gevra wat hy met die klip gaan maak. Hy het net geantwoord dat hy al baie moeilikheid (gehad het) met Katrina (the deceased), op daardie stadium was Katrina dood kalm. Ons het weer verder in die rigting van Vanderbijlpark gery. By bome het Jerimiah stilgehou, Jerimiah en die polisieman het in die donker uitgeklim, Jerimiah het aan Katrina gesê om uit te klim. Ek het in die motor bly sit. Die drie het toe tussen die bome ingeloop. Die polisieman het Katrina se linkerarm vasgehou en Jerimiah het haar regterarm vasgehou. Katrina het baie gehuil maar haar nie baie verset nie. Jerimiah het, nadat sy uitgeklim het die klip langs die kar neergesit. Na ongeveer 30 minute het Jerimiah en die polisieman teruggekeer.

...../10

> Jerimiah en die polisieman het weer na die bome teruggekeer, Jerimiah het die klip gedra. Na ongeveer 15 minute het hulle weer teruggekeer. Jerimiah het die klere wat Katrina aangehad het by hom gehad. Ek het vir Katrina nie gesien nie. Jerimiah het aan my gevra of ek die klere wil hê. Ek het aan hom gesê dat dit te groot is."

By and large the second appellant stuck to this version when giving evidence at the trial, although certain discrepancies and improbabilities emerged from her evidence during the course of cross-examination.

It will be convenient to consider the second appellant's appeal against her conviction first. The reasons for convicting the second appellant were expressed as follows by the judge a quo in his judgment:

> "The majority of the court holds the view that in the light of the evidence, as I have summarised it, that no 2 accused's presence throughout all the material times, her participation in all the material activities, her sharing in the spoils, the clothing of the deceased, those facts together with the

> evidence as it was given and mindful of the dangers of the evidence of Mbele and of the evidence of no 1 accused, that nonetheless it has been established beyond reasonable doubt that accused no 2 was a party to a common purpose to murder the deceased and must therefore be found guilty."

On her own evidence the second appellant could not be convicted of any offence. Her mere presence at or near the scene of the deceased's death is in itself insufficient to establish that she was party to a common purpose to kill the deceased. To say that she shared in the spoils because the deceased's clothes were offered to her by the first appellant is to overstate the position. Her guilt can only be established by the acceptance of the evidence of Mbele and the first appellant concerning her involvement, and the rejection of her own evidence as not reasonably possibly true. Mbele was found to be an unreliable witness on whose uncorroborated testimony it

would be dangerous to convict anyone. He was an accomplice to boot, with a motive to implicate others falsely. He clearly tried to exculpate himself throughout. Certain aspects of his evidence were inherently improbable and unworthy of belief. In my view no reliance can be placed on any material aspect of his evidence. It is no wonder that the trial judge refused to grant him a discharge from prosecution at the end of the trial.

The first appellant was found to be "an evasive, slippery, unreliable and false witness". He appears to be a man with a strong and forceful personality. On his own evidence he was not one to take instructions from a woman. This renders his evidence that the second appellant was the planner, instigator and driving force behind the deceased's death, and that it was she who persuaded and virtually

...../13

obliged him to act as he did, inherently improbable. Apart from other shortcomings in his evidence there is the material discrepancy, previously alluded to, whether the second appellant assisted him in strangling the deceased, or whether he did so alone. The first appellant's evidence, insofar as he sought to implicate the second appellant, is clearly not worthy of credence, and falls to be rejected. Both Mbele and the first appellant were such poor witnesses that the evidence of one could not serve to corroborate the other.

Despite the fact that the second appellant was found not to be a "particularly impressive" witness, and despite other shortcomings in her evidence, there was no justification for rejecting her evidence as not reasonably possibly true. One can even go so far as to say that her version of what

occurred is probably true. It is certainly inherently more probable than the versions put forward by Mbele and the first appellant. The probabilities point strongly to the active participation of the two men, Mbele and the first appellant, in the killing of the deceased, rather than to any involvement on the part of the second appellant.

In the result the second appellant's appeal against her conviction must succeed.

I turn now to consider the first appellant's appeal against the finding that there were no extenuating circumstances present in his case. The onus was on him to establish the existence of such circumstances on the requisite balance of probabilities. It has repeatedly been emphasized that in relation to such a finding this Court's powers on appeal are circumscribed. It can only interfere

...../15

with the trial court's finding if it is vitiated by misdirection or irregularity, or the conclusion reached was one to which no reasonable court could have come.

Counsel for the first appellant referred to four factors which he contended either individually or cumulatively amounted to extenuation. The first related to the deceased's alleged threat to kill the appellants, and the first appellant's claim that he had acted throughout subject to the influence and persuasion of the second appellant. The only person who testified to the alleged threat was the first appellant. On his evidence it must have been uttered in the presence and hearing of Mrs Skhosana. She never testified thereto, nor was she cross-examined thereon. The evidence in fact indicates that the deceased still loved the first appellant, despite the way he had treated her. The probabilities are

against her having threatened the appellants. The first appellant's unconfirmed evidence that she did so cannot be accepted. The further contention that the first appellant acted under the influence of the second appellant, which was the foundation of the first appellant's case in the court a quo, was rejected by the trial court as not in keeping with the first appellant's personality and the overwhelming probabilities. It has not been shown that the trial court misdirected itself in any way in coming to this conclusion.

The second factor advanced was the deceased's alleged infidelity. Assuming she had been unfaithful (a matter open to doubt), her infidelity occurred after the first appellant had already commenced his relationship with the second appellant. What is, however, of greater significance is the fact that it

...../17

was never at any stage contended by the first appellant in evidence that the deceased's infidelity caused him to act as he did, nor do the probabilities suggest this to have been the case.

The third consideration mentioned was that the first appellant had smoked dagga earlier on the day in question. This was according to the second appellant - the first appellant's own evidence in this regard was extremely vague and unconvincing. The trial court held that the first appellant had failed to establish that any dagga he had smoked had influenced his conduct. This finding cannot be faulted, particularly when regard is had to the planned and calculated way in which the first appellant acted.

Finally, it was argued that the first appellant had been angered by the removal from his house of the curtains and bed linen. Even assuming

...../18

that he was angry initially, the items concerned were returned to him, and it is unlikely that he would have remained angry thereafter, or that his anger would have caused him to kill the deceased. Once again the first appellant himself never claimed this to have been a reason for his killing the deceased.

None of the factors mentioned, individually or cumulatively, constitute extentuating circumstances in the present matter for the reasons given. Nor are there any other considerations that appear from the record which can serve to diminish the first appellant's moral blameworthiness. The trial court has not been shown to have misdirected itself in any way, and it certainly cannot be said that its conclusion was one to which no reasonable court could have come. In the result the first appellant's appeal must fail.

...../19

The following order is made:

(a) The appeal of the first appellant is dismissed.

(b) The appeal of the second appellant succeeds, and her conviction and sentence are set aside.

J W SMALBERGER
JUDGE OF APPEAL

VIVIER, JA)
) CONCUR
STEYN, JA)