



'Reportable'

SUMMARY

CASE NO.: CC 15/2010

IN THE HIGH COURT OF NAMIBIA

In the matter between:

THE STATE and JOHANNES KANDJENGO

PARKER J

2011 June16

Criminal procedure - Evidence – Witnesses – Lack of consistency between State witnesses on certain aspects – Court finding that the lack of consistency must not by that fact alone lead to an adverse finding on their credibility.

Held, while consistent evidence by several witnesses may be a strong indication that their story is a credible one; the converse is not true.

Held, further that it is not conclusive that lack of consistency between witnesses affords any basis for an adverse finding on their credibility.

IN THE HIGH COURT OF NAMIBIA

In the matter between:

THE STATE

and

JOHANNES KANDJENGO

Accused

CORAM: PARKER J

Heard on: 2011 April 11 – 13; 2011 May 12

Delivered on: 2011 June 16

JUDGMENT

PARKER J: [1] The accused is charged with one count of murder, read with provisions of the Combating of Domestic Violence Act, 2003 (Act No. 4 of 2003). The indictment charges that 'upon or about 4 September 2008 and at or near Wanaheda in the district of Windhoek the accused did unlawfully and intentionally kill Johanna Peingeshiwa Mandume, an adult female person'. Ms Ndlovu represents the State, and Mr Coetzee the accused.

[2] The accused pleaded not guilty to the charge. The State adduced evidence of nine witnesses. The evidence of Ms Foibe Ndevatila Haimbodi, Ms Fransina Mwiila Kongendunge and Pastor Sam Amoomo are particularly

significant as I shall demonstrate shortly because their evidence concerns the 'present continuous' of the assault alleged in the indictment of the deceased by the accused which resulted in the death of the deceased. The accused testified on his own behalf and did not call any witness to testify on his behalf.

[3] From the evidence, I find that prior to her death the deceased and the accused were involved in a romantic relationship which came to an end some six months prior to the deceased's death. The summary of substantial facts which the State sought to prove by evidence were these: In the afternoon of Thursday, 4 September 2008 in the opening space outside a shebeen in Wanaheda, Windhoek district, the accused hit the deceased with a plank (Exh 1) and at least two stones (Exh 2 and Exh 3) on her face and head. The deceased died at the scene due to severe head injuries.

[4] Foibe's evidence is substantially the following. On the fateful day, Foibe, Fransina and Saima (she has relocated to one of the regions in northern Namibia and she did not give evidence) were in a shebeen run by Foibe where she was selling traditional brew. The accused had come to the shebeen and he took two drinks in the company of the three ladies for some 30 minutes. Thereafter, the deceased also came into the shebeen. This is confirmed in material respects by the accused in his testimony. It is also the evidence of Foibe that she did not see the deceased and the accused talking to each other. She testified that the deceased went outside to speak to Fransina. The accused also went outside thereafter. The next thing Foibe saw was the accused person holding the plank (Exh 1) in his hand; and she also saw accused hit the deceased twice with the plank, felling her. Whereupon, the accused sat on the back of the deceased and hit her with some stones. In her examination-in-chief-evidence Foibe testified that

the accused hit the deceased with one small stone at a spot facing the opened door of the shebeen; and while sitting on her the back of the deceased, as the deceased lay face-down on the ground, the accused picked up a bigger stone and hit the back of the head of the deceased. However, in her cross-examination-evidence Foibe had testified that after the accused had hit the deceased with the first stone at the spot facing the opened door of the shebeen, the accused dragged the deceased along the ground to the side of the shebeen (or shack) where the accused took a bigger stone and sat on the back of the deceased as she lay face-down on the ground and hit her three times on her head – this time with the bigger stone.

[5] Before dealing with Fransina's evidence, I note that considering the structure of the shebeen (i.e. 'the shack') and where the door of the shack was placed, as emerged from the evidence, and the spot where Foibe says the first assault took place, I find that it is possibly true that while in the hall of the shack, Foibe saw what was going on in her view through the opened door because there would be a commotion there. Thus, I find that it is possibly true that Foibe saw the assault on the deceased with a plank and the first assault with the stone or stones but not any other attack that occurred at the spot on the side of the shack. It is rather the testimony of Fransina that sheds greater light on the series of assaults on the deceased by the accused – with the plank and the stones – because, and this is significant, Fransina was outside the hall of the shack in the company of the deceased, as I have found previously.

[6] Fransina's evidence is essentially the following. She left the hall of the shebeen to go out to speak on her mobile phone. She had left Foibe, Saima and the accused in the hall of the shack. The deceased went inside the hall of the

shack, collected an empty 'glass' (i.e. a plastic container for drinking with) from Foibe and thereafter went to join Fransina, who, as I have said, was talking on her mobile phone outside the hall of the shack. This piece of evidence is confirmed by the accused in his testimony. Fransina testified further that the accused emerged from inside the hall of the shack, collected a plank (from a pile of planks stacked behind the shack) and hit the deceased with the plank. The accused's first aim did not get the deceased but got Fransina on one of her fingers because she was standing between the deceased. It was the second blow that hit the deceased's arm, felling her. The accused thereafter hit the deceased with a stone once on her head, dragged the deceased along the ground to the side of the shack, and for the second time hit the deceased with a bigger stone on her head several times.

[7] As I have said previously regarding the plank assault outside the hall of the shack; Foibe's evidence is strengthened corroboratively by the evidence of Fransina who was standing by the deceased and not only saw the plank assault, but also she herself was a victim of that plank assault, as aforesaid. And that weighty evidence stood undemolished at the close of the State's case.

[8] In his submission, Mr Coetzee pointed it out to the Court what counsel characterized as contradictions between the testimony of Foibe and that of Fransina. The first concerns the assaults at the spot facing the door of the shack and at the spot on the side of the shack. I have already treated this aspect previously. The second is that Foibe testified that the accused sat on the back of the deceased as she lay face-down on the ground and hit her with a bigger stone. Fransina on the other hand testified that the accused was standing when he hit the deceased with a bigger stone on her head. Consequently, Mr Coetzee

submitted that the 'contradictions are fatal to the State's case'. Counsel then called on the Court to reject the testimonies of Fransina and Foibe on that score. With respect, I reject Mr Coetzee's submission as baseless. Indeed, Mr Coetzee was merely repeating the argument which is often advanced in court that, because witnesses' accounts disagree, they lack veracity.

[9] Where several witnesses give consistent testimony, that may be a strong indication that their story is a credible one; but the coincidences in their stories could also be that 'either the testimony is true, or the coincidences are the result of concert and conspiracy (Prof. Starkie, *A Practical Treatise of the Law of Evidence and Digest of Proofs in Civil and Criminal Proceedings*, 2nd edn: p. 520)'. Thus, while consistent evidence by several witnesses may be a strong indication that their story is a credible one; the converse is not true. Accordingly, it is not conclusive that lack of consistency between witnesses affords any basis for an adverse finding on their credibility, as Mr Coetzee invited the Court to find in the instant case.

[10] Indeed, in the instant case, a suspicion of concert and conspiracy would not have been ruled out, if there was complete unanimity in every particular of the testimonies of Foibe and Fransina, if it is remembered that there were two instances of the stone assaults – one at a spot facing the door of the shack and the other at a spot on the side of the shack, away from the door. Thus, as I have said more than once, while Foibe could only see what was in her view through the opened door of the shack, Fransina was standing next to the deceased before she was felled by the blow delivered by the accused with the plank, as I have found previously, and she witnessed all the assaults on the deceased, and at close quarters.

[11] It follows that Mr Coetzee's argument based only on a list of contradictions between the testimonies of Foibe and Fransina leads nowhere so far as veracity is concerned. Such argument must go further, and show that Foibe or Fransina is not telling the truth: Mr Coetzee's argument does not go so far. In this regard, it must be remembered, as I have found previously, two different – though contemporaneous – instances of assaults by stones took place, and whether during one of them the accused was standing or sitting on the deceased cannot in any way weaken the cogency of the evidence for the State. So will the discrepancies in the separate evidence of Foibe and Fransina in the witness box and their individual statements to the Police *ipso facto* draw an adverse finding as to the credibility of those witnesses. In this regard, this Court said in *Fritz Herman v The State* Case No. CA 27/05 (judgment delivered on 16 February 2009) (Unreported at p. 3, par (6), '... a statement made by a person in court and subjected to cross-examination carries more weight than a statement made by that person *ex-curia*'. This, in my opinion, is particularly so where the maker of the statement makes the statement in a language other than English and it is translated into English by a police official whose knowledge of English is, with respect, anything but good, as in the present case.

[12] In this regard, I now direct my attention to the testimony of another State witness, Pastor Sam Amoomo. Pastor Amoomo was the boyfriend of the deceased some seven months prior to the death of the deceased; which period coincides with the time of the break-up of the relationship between the deceased and the accused, Pastor Sam Amoomo replacing the accused in the deceased's heart and affections. This finding is significant as, in my opinion, it underlines the motive of the accused assaulting the deceased: he was consumed with jealousy.

The deceased and Pastor Sam were planning to travel to the northern part of the country to introduce each other to their respective families. Indeed, it was from Pastor Sam's house that the deceased had left to go to the shebeen on that fateful day in order to collect 'a glass' from Foibe at the shebeen, which I mentioned previously.

[13] While sleeping, Pastor Sam heard a woman screaming, 'Sam! Sam! Johanna (i.e. the deceased) is being killed!' Upon hearing the screams, Pastor Sam woke up from his slumber and proceeded to the place where people had gathered. Pastor Sam testified further that as he was approaching where the crowd was, 'I saw the accused sitting on the deceased and beating her with a stone'. The exchange following upon this testimony is equally crucial and relevant:

Ms Ndlovu: Now, where did you see the deceased; where was the deceased when you ran out to the crowd?

Pastor Sam: I find the deceased lying. There is a shack where she was; the deceased was lying. This shack is facing the east; then the deceased was facing the western direction.'

[14] As respects this piece of testimony, Mr Coetzee submitted that the accused could not have seen what was going on at a distance which Pastor Sam estimated to be between the front-door of the Court and the entrance to Shoprite; a distance of about 200 m. With respect, Mr Coetzee misses the point. To start with, Mr Coetzee did not lead any evidence in cross-examination or at all to establish the strength or weakness of the eyesight of Pastor Sam. Second, the distance of 200 m was only an estimation; so was the witness's estimation of the

distance between the front-door of the Court and the entrance of Shoprite. What is relevant is that Pastor Sam saw that the deceased was facing the western direction; and this observation was not contradicted. *A fortiori*, there is this crucial point, namely that Pastor Sam's going towards the scene of crime was anything but fortuitous. He was summoned, as I have found previously, by the screams of a woman that told him that the deceased (his girlfriend) was being killed. Pastor Sam went towards the scene but, according to him, the deceased was already dead, and there was nothing he could do to rescue her; and so Pastor Sam turned round and went back to his house to sleep with a disturbed mind as his 'heart was destroyed'.

[15] Another crucial and relevant piece of evidence is Fransina's testimony, which was also not discredited, that while the accused was sitting on the back of the deceased as the deceased lay face-down on the ground, she (Fransina) tried to intervene to stop the accused's assault on the deceased. The accused barked at her that anybody who had a death wish should intervene. Another equally relevant and crucial evidence of Fransina which was also not destroyed was the one in which Fransina described the spine-chilling and macabre way in which the accused hit the deceased repeatedly on her head with a stone, as he sat on the deceased who lay face-down on the ground, until the deceased drew in her last breath, making a horrifyingly groaning sound, and then gave up the ghost.

[16] In the face of all these crucial and relevant evidence, it cannot seriously be argued that the woman who was being killed was not the deceased? How can it be seriously argued that Pastor Sam's testimony that he saw the accused sitting on the deceased and hitting her with a stone cannot be true. As far as I am concerned; it matters the least whether, from the evidence of Foibe, Fransina and

Pastor Sam, it is not established whether the stone the accused used was as small as a fist or a big one, whether the accused picked up the big stone from the ground as he sat on the deceased at the spot on the side of the shack and beat the deceased with it, or whether the accused picked up the stone from the spot facing the door of the shebeen where the first assault took place, or whether one, two, three or more stones were used by the accused in the assault of the deceased, or whether he hit the deceased with a stone or stones while he was standing or sitting on the deceased. In any event that is not the case of the accused, that is, as to the number and sizes of the stones used and the position he assumed in relation to the deceased when he assaulted her. The case of the accused is that he never assaulted the deceased in the manner testified by the State witnesses or at all; and I now proceed to look at the accused's testimony.

[17] Upon arriving at the shebeen, the accused sent an sms text-message to the deceased in which he asked her to return a mobile phone he had given her when they were in the relationship of boyfriend-and-girlfriend. According to the deceased, the sms text-message he received in reply were words to this effect: 'Regarding the phone you must go and ask your mother.' Without a doubt, the accused was not happy with that sms text-message. The deceased and Fransina were outside, as I have mentioned previously. The accused followed them outside and when he asked the deceased if she had sent the aforementioned sms text-message, the deceased's response, according to the accused, was, 'Are you ashamed'. Then he reached into his pocket in order to take out the mobile phone from his pocket in order to show the sms text-message to the deceased. While his hand was in his pocket, the deceased slapped him on his face with the back of her right hand; and 'she quickly went backwards', took a plank 'which was lying somewhere on the ground', and 'attempting to beat me with this plank'. He and

the deceased wrestled over the plank. At one point the deceased, who was shorter than the accused, tried about three times to lift the accused up, and in so doing she slipped and fell on the ground with the accused falling on top of the deceased. According to the accused, he saw that the deceased had hit her head on a stone when she fell on the ground, and the resultant wound was bleeding. He went to his shack to fetch a face-towel and bandage in order to clean and bandage the wound. On his way back towards the scene of crime where a crowd had gathered, as aforementioned, he was accosted and instructed to climb into a police squad-vehicle; and from there he was taken to the police station.

[18] On the correct approach as to the weighing of evidence where a court is presented with two versions that are mutually destructive to each other, this Court, relying on authorities, stated as follows in *Fritz Herman v The State* supra at para [4]:

‘... it has been held in a long line of cases (e.g. *S v Singh* 1975 (1) SA 227(N); *S v Ipeleng* 1993 (2) SACR 185 (T); *S v Appelgrein* 1995 NR 118; *S v Engelbrecht* 2001 NR 224; and *S v Petrus* 1995 NR 105) that where in evidence a Court is presented with two versions that are mutually destructive to each other, the Court must apply its mind not only to the merits and demerits of the evidence of the State and the defence witnesses but also to the probabilities of the case. It is only after so applying its mind that a court would be justified in reaching a conclusion as to whether the guilt of an accused has been established beyond reasonable doubt. The central principle enunciated in those cases is echoed materially by this Court (*per* Shivute, J (as he then was)) in *Mashale Paulus Malapane v The State* Case No. CA 58/2001 (Unreported) in the following passage at pp 9-10):

The correct approach to the evidence in a criminal trial is that all the evidence, not only a part of it, is to be taken into account when determining the guilt or innocence of an accused. The test is well

put in *S v Van der Meyden* 1999 (1) SACR 447 at 449J-450A-B (quoted with approval in *S v Van Aswegen* 2001 (2) SACR 97 (SCA at 101D-E):

“The proper test is that an accused is bound to be convicted if the evidence establishes his guilty beyond reasonable doubt, and the logical corollary is that he must be acquitted if it is possible that he might be innocent. The process of reasoning which is appropriate to the application of that test in any particular case will depend on the nature of the evidence which the Court has before it. What must be borne in mind, however, is that the conclusion which is reached (whether it be to convict or to acquit) must account for all the evidence. Some of the evidence might be found to be false; some of it might be found to be unreliable; and some of it might be found to be only possibly false or unreliable; but none of it may simply be ignored.”

[19] Having applied my mind not only to the merits and demerits of the evidence of the State and defence witness (i.e. the accused) and also to the probabilities of the case and not ignoring any piece of evidence placed before the Court, I come to the following conclusions on the facts. Fransina, as she stood outside the shack with the deceased, did not see the deceased and the accused in any conversation. This appears to be confirmed by the accused's own testimony that when the deceased entered the shack she greeted all those there and ignored the accused. Furthermore, the accused testified, as aforesaid, that he reached into his pocket in order to take out his mobile phone for the sole purpose of showing the aforementioned sms text-message to the deceased; whereupon the deceased slapped him. That could also not possibly be true. He had already asked the deceased if she had sent the sms text-message and the deceased had responded with, 'Are you not ashamed?' What then would have been the purpose of the accused showing the selfsame sms text-message to the deceased.

[20] Additionally, why would the deceased out of the blue, without any provocation, attempt to hit the accused with a plank which happened to be lying on the ground near her. It was rather the accused who had a motive to assault the deceased. To start with, the deceased had sent an sms text-message to the accused, making a reference to the accused's mother. Second, when the accused asked the deceased to confirm whether she had sent the said message, the accused did not get a polite answer from the deceased, rather, the deceased responded rudely, 'Are you ashamed?' Besides, there is the uncontroverted evidence of Fransina that while outside with the deceased she did not see the accused and deceased in any conversation. Furthermore, she described how the accused picked up the plank from a pile of planks that was stacked at the back of the shack, and how she herself had been hit by the plank which the accused swung at the deceased because she was standing between the deceased and the accused when the accused delivered the first blow at the deceased with the plank; and it was only the second blow that caught the deceased, felling her. In all this it must be remembered that the evidence of Fransina and Foibe was that they were in 'good relationship' with both the accused and the deceased, and that in their eyes the accused was a good person as they had never seen him behave in the manner he did behave on the fateful day. What is more; I find their evidence to be credible in material respects. They gave their evidence in a forthright manner; and above all, they did not give me the impression that they were bent on telling lies in court in order to get the accused punished. As I have said previously, they had no axe to grind with the accused; otherwise they would have said bad things about him. On the contrary, they testified that they knew him to be a good person and so they were surprised he assaulted the deceased in the manner I have found previously. Thus, I do not find that Foibe and Fransina have interests or

bias adverse to the accused and motives for giving false evidence against the accused. I have already treated the apparent contradictions in their individual testimonies; and I have concluded that those contradictions do not establish that Foibe and Fransina lied on oath in the witness-box. Having considered all the evidence, leaving nothing out, I find their evidence to be trustworthy, relevant and weighty and I am satisfied that the truth has been told (see *S v Sauls and Others* 1981 (3) SA 172 (A) at 180E-G). On this point I accept the submission of Ms Ndlovu thereanent. The evidence of Pastor Sam Amoomo stands in the same boat as that of Foibe and Fransina. He described what he saw, and it is my view that he spoke the truth, considering all the conspectus of evidence, particularly the evidence of Fransina, who was present at the spot and witnessed all the assaults – from the beginning to the tragic end.

[21] On the other hand, I have already found that the evidence of the accused cannot possibly be true as respects his testimony that it was the deceased who slapped him and who picked up a plank from the ground in an attempt to hit him with it and his testimony about the wrestling with the deceased over the plank and the deceased falling down and hitting his head on a stone that happened to be lying just where she fell down. In this regard I find it credible and cogent the evidence of Dr Kavandje, the medical doctor who gave his expert opinion based on the medical post-mortem report on the deceased prepared by the late Dr Shangula, another doctor who, naturally, could not testify in the Court.

[22] It was Dr Kavandje's evidence that from the post-mortem report, the deceased had received four blows – all to her head. As Ms Ndlovu submitted, if the deceased fell on the ground and hit her head on one stone, she would not have received four different wounds on different parts of her head, that is, the

back, the top and the right side. This medical evidence – which stood unchallenged at the close of the hearing of evidence – goes to support Fransina’s and Pastor Sam’s evidence that he saw the accused hitting the deceased repeatedly. What is more; it was Dr Kavandje’s medical opinion that the wounds sustained by the deceased is consistent with the victim having been hit with a blunt object, and that the two stones (Exh 2 and Exh 3) and the plank (Exh 1) that were shown to him in court could have been used in the assault; and *a fortiori*, Dr Kavandje testified that in his medical opinion the injuries to the head suffered by the deceased are not consistent with a wound that one would sustain when one falls down and bumped one’s head on a single stone lying on the ground. I accept this undisputed medical opinion as weighty and, above all, in accordance with human experience.

[23] For the foregoing reasoning and conclusions which are based on my applying my mind not only to the merits and demerits of the evidence of the State witnesses and the evidence of the accused and also to the probabilities of the case and also based on my taking into account every piece of evidence adduced before the Court, I must say that, the conclusions converge on only one reasonable finding, namely, that the accused had a direct intention to kill the deceased and he succeeded in doing so in the horrific and chilling manner described by Fransina. Consequently, I find that the State has proved beyond reasonable doubt that the accused had the required and necessary direct intention to kill the deceased. It is my judgment, therefore, that the accused acted with *dolus directus* and he is guilty of the offence charged.

[24] In the result –

Mr Johannes Kandjengo, I find you guilty of murder as charged, and that you acted with *dolus directus*.

PARKER J

COUNSEL ON BEHALF OF THE STATE:

Ms E N Ndlovu

Instructed by:

Office of the
Prosecutor-General

COUNSEL ON BEHALF OF THE ACCUSED:

Mr E E Coetzee

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