IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

4/9/14

CASE NO: A318/2014

In the matter between:

KLAAS MOKGELE Appellant

and

(1) REPORTABLE: ~~YES~~ / NO

(2) OF INTEREST TO OTHER JUDGES: ~~YES~~ / NO

01/09/14
DATE

SIGNATURE

THE STATE Respondent

JUDGMENT

Tuchten J:

1 The appellant was convicted in a regional court of committing the crimes of murder, rape and robbery with aggravating circumstances. The charges all related to the murder, sexual violation and deprivation of property of the deceased, in life a young woman aged between 20 and 30. The facts prove show, incontestably, that the deceased had been strangled, after which her body was then hidden in a storm water pipe. The body of the deceased was sexually violated. But the evidence does not show whether this violation took place while she

was still alive. Her cellphone was shortly after her death sold by the appellant to a third person.

2 The appellant's defence that he had neither had sexual intercourse with the deceased nor murdered her. In his evidence he explained the possession of the cellphone by saying that he picked it up from the ground near where the body of the deceased was, coincidentally according to the appellant, concealed. The court below disbelieved the appellant and convicted him, as I have explained, as charged. The appellant was sentenced to life imprisonment for the murder, life imprisonment for the rape and ten years imprisonment for the robbery. The court below ordered that the sentences all run concurrently. The appellant appeals to this court against his convictions only, leave in this regard having been granted by the court below.

3 The insurmountable difficulty in the case for the appellant is that from a blood test carried out on the appellant during his trial, with the concurrence of his legal representative, it was proved that the appellant's DNA was found in the vulva of the deceased. This fact demonstrates, beyond any reasonable doubt, that the appellant had sexual intercourse with the deceased. The denial of the appellant that he had sexual intercourse with the deceased was therefore rightly rejected as not being reasonably possibly true.

4 It was submitted by counsel for the appellant in his heads of argument that the inference of consensual sexual intercourse could not be excluded as a reasonable possibility. The evidence before the court below showed that the deceased was severely assaulted before she was murdered. Her body was dressed before it was hidden in the storm water pipe. In the absence of credible evidence from the appellant, the suggestion that the deceased consented to sexual intercourse and then was murdered afterward is so far fetched that it must be rejected as not reasonably possibly true. This conclusion is reinforced by the false denial of the appellant that had sexual intercourse with the deceased.

5 The irresistible, and only reasonable, inferences are that the person who sexually violated the deceased murdered her as well and tried to hide her body in the storm water pipe. But counsel for the appellant submitted that it was not established that the deceased was alive when she was so violated.

6 Counsel for the state submitted that the question whether the deceased was alive when her body was violated was not ventilated before the court below and that this factor, coupled with the untruthful evidence given by the appellant, ought to result in a positive finding that the deceased was alive when her body was violated. I cannot

agree with this submission. The onus rests on the state. The inference that the deceased was alive when her body was violated is not the only reasonable inference. In these circumstances, the appellant ought to have been convicted of attempted rape. *S v W* 1976 1 SA 1 A.

7 That leaves the robbery charge for consideration. The appellant's version that he picked the cellphone up innocently from the vicinity where the body of the deceased was found was not reasonably possibly true. The court below correctly evaluated and rejected the evidence of the appellant to this effect in the light, firstly, of his dishonest denial of sexual intercourse with the deceased and, secondly, of his change of versions during evidence in relation to where he allegedly found the cellphone. In my view, however, despite the false denials by the appellant, the state did not prove that the appellant used violence or the threat of violence to deprive the deceased of her cellphone. The inference that the violence which the appellant was proved to have used to murder the deceased also extended to the deprivation of the cellphone is not the only reasonable inference. There is a reasonable possibility that the appellant formed the intention to steal the cellphone only after the deceased was dead. It follows that the conviction of robbery must be altered to theft.

8 These conclusions require us to consider appropriate sentences for the crimes of attempted rape and theft. The minimum sentence regime imposed under Act 105 of 1977 are not applicable in the cases of attempts as opposed to completed offences. In my view the appellant should be sentenced to 10 years imprisonment for the attempted rape and 7 years imprisonment for the theft of the cellphone. This will however not have any practical effect on the sentence which the appellant must serve.

9 I make the following order.

1 The appeal against the conviction of the appellant on count 1, the charge of murder, is dismissed.

2 The appeal against the conviction on count 2, the charge of rape, is upheld and the verdict of the court below is altered to read that on count 2 the appellant is convicted of attempted rape.

3 The appeal against the conviction on count 3, the charge of robbery, is upheld and the verdict of the court below is altered to read that on count 3 the appellant is convicted of theft.

4 The sentence of life imprisonment for murder is confirmed. The sentence on count 2 is altered to read that the appellant is sentenced to 10 years imprisonment for attempted rape. The

sentence on count 3 is altered to read that the appellant is sentenced to 5 years imprisonment for theft.

It is directed that all three sentences shall run concurrently as from 5 March 2014, the date upon which the appellant was sentenced in the court below.

NB Tuchten
Judge of the High Court
1 September 2014

I agree.

DS Fourie
Judge of the High Court
1 September 2014

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