ANESH RAM v STATE (AAU0087 of 2010)

COURT OF APPEAL — CRIMINAL JURISDICTION

MADIGAN JA

30 August, 11, 21 September 2012

Criminal Law — appeals — appeal against conviction and sentence — whether trial judge erred — circumstantial evidence — accomplice evidence — media coverage — joint enterprise — sentence — Court of Appeal Act s 21(1)(c).

The applicant was convicted of murder and sentenced to the mandatory term of life imprisonment with a minimum to be served of twenty years. Subsequently, he applied for leave to appeal both the conviction and the minimum term of imprisonment.

Held –

(1) The circumstantial evidence in the case was overwhelming. It was open to the assessors to find him guilty on the circumstantial evidence, which they did and their verdict is quite justifiable.

(2) The last person to see the accused and the unconscious victim together was not an accomplice to the murder. There is no evidence that she was part of the accused's plan, and no evidence that she did anything to assist the accused in the murder. Hence, it was not necessary to address the assessors on accomplice evidence.

(3) The Judge did not specifically mention any media coverage in his summing up but he gave a very serious direction and covered what could be gleaned from the media.

(4) During summing up, the Judge had not crossed any boundaries of unfairness but it was a difficult case and it needed very careful explanation which the Judge did. The assessors were quite clearly reminded of the accused's alibi.

(5) Aside from the accused's argument that the accused should be "all in or all out" having no merit, the State did not run this case on joint enterprise.

(6) Premeditated killings attract a minimum term in the region of twenty years. The killing was not only premeditated but committed against a much younger former wife to whose unconscious body indignities were inflicted before death.

Timoci Ravurabota (16 Nov 11), applied.

Application for leave to appeal both conviction and sentence refused.

B.T. Ravuniwa for the Applicant.

S. Vodokisolomone for the State.

[1] Madigan JA. On the 5th October 2010 this applicant was convicted of murder in the High Court after a trial before Judge and assessors. He was sentenced to the mandatory term of life imprisonment with a minimum to be served of twenty years.

[2] The applicant applies for leave to appeal both the conviction and the minimum term of imprisonment.

[3] The facts of this case were that the applicant had been married to one Zoya Bibi. At the time he was 28 years old and Bibi only 16. They had a very volatile relationship and separated after only 9 months. Bibi worked as a prostitute and the applicant sent death threats to her through her friends. On the 8th June 2008 he organized a drinking party near a creek and invited others, including the six men accused of murder and rape jointly with the applicant, along with him and

a few girls including Bibi. At some stage, an argument ensued and the applicant hit Bibi with a beer bottle, knocking her unconscious. He then allegedly raped her, followed by the co-accused. He later got a cane knife and forced one of the females present, Emma, to cut off Bibi's nipples and hand. Emma refused and resisted however the applicant threatened to kill her. Under duress, she complied. The others then left the scene and subsequently Emma left, leaving the applicant and an unconscious Bibi. Eight days later Bibi's body was found floating near the site of the drinking party. A pathologist found that she had been manually strangled before being thrown in the creek.

[4] Seven, including the applicant, were charged with rape and murder. His co-accused were found to have no case to answer on the murder. The assessors returned with a verdict of guilty of murder against the applicant and not guilty for all his co-accused on the on the count of rape.

[5] The applicant relies on three grounds of appeal against conviction which he seeks leave to argue before the Full Court. They are:

> (i) that the leaned trial Judge erred in law and fact in referring this matter to the assessors for determination when under all the circumstances of the case it was unsafe and unsatisfactory to do so.
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> (ii) that the learned trial Judge erred in law and in fact in not adequately directing/misdirecting the assessors on law regarding the accomplice evidence and evidence given in exchange for immunity from prosecution.
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> (iii) that the learned trial Judge erred in law and in fact in not adequately directing the assessors to disregard all the media reports including TV coverage that existed before the trial and during the trial of the appellant.
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> (iv) that the learned trial Judge erred in law and in fact in not adequately directing that the prosecution evidence before the Court demonstrated that there were serious doubts in the prosecution case and as such the benefit of doubt ought to have been given to the appellant.

[6] The first ground is patently nebulous: nothing is particularized and as such it is not a proper ground of appeal. When developing the ground orally however, Counsel for the applicant argued that because nobody had seen the applicant strangle the deceased and throw her in the river then the case should never have gone to the assessors. He submits that there is no direct evidence whatsoever implicating the applicant in Bibi's death.

[7] This ground of appeal as argued before me is misapprehended. The case was run by the prosecution on circumstantial evidence and the circumstantial evidence is overwhelming. The applicant had already told others that Bibi would die if she 'goes' with other men and he is left alone with her unconscious late one night. Eight days later she is found strangled in the river. It was open to the assessors to find him guilty on the circumstantial evidence: they did and their verdict is quite justifiable.

[8] This ground of appeal, if it is a ground, is unarguable.

[9] The trial Judge was alive to the issue of accomplice evidence and was properly of the view that Emma, who was the last person to see the accused and the unconscious victim together, was not an accomplice to the murder. There is no evidence that she was part of the accused's plan; and no evidence that she did anything to assist the accused in the murder. She did cut the nipples and hand of the victim but this was done unwillingly and under threat and there is no evidence that these actions were even a contributory cause of death.

[10] The evidence of Emma, not being an accomplice, does not lead to the necessity for the trial Judge to address the assessors at all on accomplice evidence and its ramifications.

[11] The learned Judge did not specifically mention any media coverage in his summing up but he did say this (paragraph 6):

> '*Your decision must be based exclusively upon the evidence which you have heard in this Court, and upon nothing else. You must disregard anything you might have heard about this case outside of this courtroom. You must decide the facts without prejudice or sympathy, to either the accused's or the victim. Your duty is to find the facts based on the evidence, and to apply the law to those facts, without fear, favour or ill will.*'

[12] This is a very serious direction and obviously covers what could be gleaned from the media. There are no authorities which say that assessors have to be addressed specifically on coverage by different elements of the media but the usual practice is for a Judge to mention it in his or her opening remarks when assessors are sworn.

[13] Given such a strong direction, the 'media ground' is unarguable.

[14] Counsel argues that the assessors were not appraised of the 'serious doubts in the prosecution case.'

[15] Counsel at the hearing did not develop this point but the written submissions refer to the need for a balanced summing up and for the Judge to stay out of the 'factual arena.' The learned Judge did, as he should have, tell the panel that the facts were a matter for them alone and that they could ignore his opinion on the facts.

[16] Often when looking at a summing up it may appear to be unbalanced for the very reason that at trial there has been a lot of prosecution evidence and very little defence evidence. In this case, the learned Judge delivered a strong summing up to assist the assessors to understand circumstantial evidence and to point out the strands of evidence that made up those circumstances that the State relied upon.

[17] At the end of his rehearsal of the State evidence he said this (paragraph 49):

> '*These are the inferences of facts the State is inviting you, as assessors and judges of fact, to conclude after considering the circumstantial evidences offered to you by the State. Whether or not you accept the State's invitation, is a matter for you.*'

[18] He quite clearly pointed out yet again that it was all a matter for them (and not him). The Judge had not crossed any boundaries of unfairness here but it was a difficult case and it needed very careful explanation which the Judge did. The assessors were quite clearly reminded of the accused's alibi.

[19] Although it was not a ground of appeal, Counsel at this hearing was at pains to stress that the State in running this case on the basis of joint enterprise and with his 5 co-accused being found not guilty, then logically he should have been acquitted as well. His point is that they should be 'all in or all out.'

[20] Apart from this point having no merit whatsoever, the State did not run this case on joint enterprise. His co-accused being acquitted at the end of the Prosecution case for reasons not disclosed leaves the applicant facing the murder charge alone. The co-accused had left the party when the victim was still alive, leaving the applicant there alone with her. His presence along with the circumstances of the gathering including his prior threats of death led to an overwhelming circumstantial case without any need to rely on joint enterprise.

[21] None of the grounds raised against conviction can be made out and therefore leave to appeal against conviction is refused.

Sentence

[22] A sentence fixed in law cannot be appealed pursuant to s 21(1)(c) of the Court of Appeal Act, however minimum terms can be appealed if leave is given.

[23] The learned trial Judge was of the view that this murder was particularly abhorrent given the following factors:

1. The accused attitude and disrespect for the deceased's life.
2. The numerous complaints of assaults to the Police for him assaulted the deceased earlier.
3. The death threats and plan to kill her.
4. The knocking of her unconscious with a beer bottle.
5. The cutting off of her nipples and hand before death.
6. The throwing of the body in the river.
7. No signs of remorse on the part of the accused.

[24] The 20 year minimum period in these circumstances is lenient. In the case of *Timoci Ravurabota* (16 Nov 11) Marshall J noted that premeditated killings attract a minimum term in the region of twenty years.

[25] This killing was not only premeditated but committed against a much younger former wife to whose unconscious body indignities were inflicted before death.

[26] An appeal against this minimum term is completely unarguable and leave to appeal is refused.

[27] The application for leave to appeal both conviction and sentence is refused.

Application refused.