

SOUTH AFRICA / JUDGMENT

Cassim v S (CA148/2016) [2017] ZAECHGC 123 (28 November 2017) [2017] ZAECHGC 123

COURT

Eastern Cape High Court, Grahamstown

BEFORE

J.D. Pickering, N.G. Beshe, G.G. Goosen

CASE / FILE NUMBER

CA148/2016

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IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE DIVISION, GRAHAMSTOWN)

Case no: CA148/2016

Date heard: 20 November 2017

Date delivered: 28 November 2017

In the matter between

HASSEN CASSIM

Appellant

vs

THE STATE

Respondent

JUDGMENT

PICKERING J:

- [1] Steven Harry lived in a semi-detached house in Van Duren Street, Gelvandale, Port Elizabeth. His immediate neighbours were a married couple Veronique Sybil Adonis and Damian Norman Sheldon Adonis. The Adonis's had a tempestuous relationship.

Between 22h30 and 23h00 on the night of Sunday, 29 December 2013 Harry heard sounds of an altercation between them. Mrs. Adonis was screaming saying “no Trompie”, Trompie being the nickname of Mr. Adonis. Thereafter, at approximately midnight, he heard Mr. Adonis calling for help, saying that his wife was dead. Harry and other neighbours proceeded to the Adonis’ house. He shouted for Adonis who replied that the front door was locked from the outside. He told Harry to call the ambulance because his wife was dead. Harry went out of the yard and telephoned the police on their toll free number. Just then a police van appeared. The policeman told Harry that he was on his way to another scene but he would return. When he did return the backdoor was forced open and Adonis was discovered lying in the passage.

[2] The policeman concerned, namely Warrant Officer Van Wyk, was on patrol duty in Van Duren Street at approximately 00h50 when he was stopped by Harry who informed him of the screaming and shouting that he had heard emanating from the Adonis house. He attended briefly to another complaint and then proceeded to the Adonis house at approximately 00h55. He confirmed that the front door was locked and that he forced open the back door. Inside the house he found Adonis lying on the floor of the passage next to the kitchen. His hands were tied up and there was wire tied around his neck. He was covered in blood. Adonis reported what had happened. He told Van Wyk to go a particular room where his wife was, saying that she had been seriously injured. Van Wyk proceeded to this room where he found Mrs. Adonis lying on a mat. Her hands were tied up and she had stab wounds on her neck. She was already dead. Van Wyk then called the ambulance as well as the detectives and photographers.

[3] Thereafter a post-mortem examination was performed upon the body of Mrs. Adonis, a woman aged 28 years. The chief findings of the district surgeon, Dr. Mgobo, who performed the post-mortem were as follows:

“1. Multiple stab wounds on the left side of the neck ranging between 0,5cm to 1cm in length.

2. Entrance bruising of the neck structures from left to right.
3. Incised left jugular vein and left carotid artery.
4. 500ml blood right chest cavity.
5. Pale internal organs.”

[4] The cause of death was determined to be “stab neck”. There were in all sixteen stab wounds on the left side of the neck.

[5] Adonis was examined at Livingstone Hospital by Dr. Olowu at 04h05 the same night. Dr. Olowu recorded his findings on form J88, Exhibit Q. It was recorded that there were multiple stab wounds, over ten, to his body.

[6] In consequence of certain investigations the appellant was arrested. He appeared in the High Court, Port Elizabeth, before Malusi J, charged with the murder of Veronique Adonis (count 1), the attempted murder of Damian Adonis (count 2) and robbery with aggravating circumstances in respect of a Volkswagen Golf motor vehicle, No [C...] the property of Mr. and Mrs. Adonis (count 3). He pleaded not guilty to these charges, his defence being disclosed as that of an alibi. At the conclusion of the trial, however, he was convicted as charged and sentenced to an effective term of imprisonment of 22 years. With the leave of the court a quo he now appeals to the Full Bench of this Division against his convictions only.

[7] Denzil Hendricks, a resident of Gelvandale and a long-time friend of Adonis visited Adonis at the latter's house at approximately

22h15 on the night of 29 December 2013. On his arrival Adonis was sitting on the stoep of the house. The appellant was sitting next to him. Hendricks knew the appellant who had asked him on at least three occasions in the recent past as to the whereabouts of Adonis. Hendricks then entered the house to speak to the deceased who was in the middle room. Deceased told him that she wanted to go to the beach "mos nou" but that Adonis had refused to hand over the keys to their car. At some stage two unknown coloured men arrived at the house. According to Hendricks they looked at him in a threatening way without speaking, causing him to feel uneasy. He left for a nightclub. On his way back home in the early hours of the morning he saw a number of police motor vehicles in the yard of the Adonis house and he heard later that the deceased had been killed.

[8] At approximately 02h00 on the night of 30 December 2013 Henrico Barnard was in bed with his girlfriend Ashara Jacobs at his father's house in Despatch when he heard a knock on the door. He opened the door and saw appellant together with two coloured men outside. Appellant asked him if they could park a white Golf motor vehicle which was standing outside in the street in his yard until the following morning. He agreed and the motor vehicle was driven into his yard whereafter the appellant and the two coloured males left. Later that morning at approximately 10h00 the appellant returned with the two coloured men to check on the motor vehicle and appellant told him that he was on his way to Port Elizabeth and that he would collect the vehicle later. On 31 December 2013 the police arrived and arrested him for possession of a stolen motor vehicle. He confirmed that he had initially told the police on his arrest that the vehicle had been brought to his yard by an unknown black male. After his detention he told the police that it was in fact the appellant who had brought the motor vehicle. It was common cause at the trial that this motor vehicle was the property of Mr. and Mrs. Adonis.

[9] Barnard's girlfriend, Ashara Jacobs, confirmed that she was with him on the night in question. She stated that someone had arrived in the early hours of the morning and had spoken to Barnard outside. She did not know who this person was. Barnard then came back to bed and they went to sleep. When she got up in the morning she saw a white Volkswagen Golf motor vehicle standing in the yard. Barnard told her that appellant was the owner

thereof. At approximately 10am the appellant, whom she knew, arrived at the house in the company of two coloured males. Appellant asked Barnard if he could leave the car in the yard and fetch it later as he was going to Port Elizabeth. Barnard agreed. In the event, appellant did not return and the car remained in the yard until the police arrived the following day. Barnard was arrested and the car was removed.

- [10] The evidence of Barnard and Jacobs concerning the arrival of the police and the confiscation of the car was confirmed by Warrant

Officer Middelkamp.

- [11] It is also common cause that fingerprints identified as belonging to the appellant were lifted from the inside of the Volkswagen Golf and from inside the house of Adonis
- [12] Dr. Olowu who examined Adonis at Livingstone Hospital also testified. He stated that he found twelve stab wounds of Adonis's hands, chest and head. He also had a collapsed left lung. He stated that the injuries suffered by Adonis were serious injuries which were potentially fatal. He stated further that in his opinion these injuries could not be self inflicted, as was suggested by the defence at the trial, because they were deep and the position of the wounds especially the ones on the back and on the head militated against self infliction.
- [13] It was also common cause that prior to the commencement of the trial Adonis was fatally shot on 9 March 2014. In these circumstances the State applied in terms of the Law of Evidence Amendment Act 45 of 1988 for the admission into evidence of two affidavits made by Adonis. Despite objection to the admission thereof the learned Judge was of the view that it was in the interests of justice to admit the hearsay evidence as contained in these two affidavits.

In these affidavits Adonis stated that on the afternoon of 29 December 2013 appellant visited him. At that stage his wife was sleeping in the bedroom. Appellant asked him about money that Adonis owed him to which he replied that he did not have any money. After a while appellant stated that he wanted to leave and Adonis walked with him for a distance before turning back towards home. He thereafter went to buy some cigarettes. As he was walking out of the shop on the way to his house he saw appellant standing next to his car. Appellant told him that he had been dropped off and the man he was waiting for was going to return. Appellant and Adonis then went to sit on the stoep of his house again. While they were sitting there Denzel Hendricks arrived. Thereafter two unknown men also arrived. At some stage appellant and the two unknown men said that they were going to leave. Adonis went into the house and closed the door. Two minutes later there was another knock on the door and Adonis opened it and saw appellant and the two men outside. Adonis then made certain allegations concerning the actions of appellant and the unknown men. Thereafter they left and Adonis heard his Volkswagen Golf motor vehicle starting up.

- [14] In his testimony appellant stated that he knew both the deceased and Adonis. He met Adonis in 2004 when they shared a cell for approximately six months at St. Albans prison. After appellant was released from custody in 2012 Adonis came to visit him on a few occasions. They were, however, not friends but merely acquaintances. At some stage before Adonis's marriage Adonis had borrowed the sum of R1 000,00 from him.
- [15] On 29 December 2013, sometime after Adonis's marriage, appellant visited Adonis at his house at approximately 6 pm.

According to him this was not a planned visit. He had been visiting his mother and had decided whilst taking a stroll to see if Adonis was at home.

- [16] Adonis was at home and they had a general conversation in the course of which Adonis told him that he and his wife had had an argument and that she was sleeping. At some stage two ladies arrived to collect their clothing. They left after approximately ten minutes. Once they had left Adonis asked appellant whether he could not help him with the purchase of some beers from a house down the street. He helped him purchase the twelve beers.
- [17] After some further conversation concerning a computer Adonis told him that there was something wrong with his Volkswagen Golf motor vehicle. According to appellant he had experience of mechanical problems relating to motor vehicles. He stated that he accompanied Adonis to the vehicle. Adonis told him that the doors could not open with the car keys and he had to climb through the boot of the vehicle in order to open the side doors thereof. Once the doors were open he assisted Adonis to push the car forward and backwards to check what the problem was. It was during the course of this that his fingerprints came to be on the car. Thereafter he left. At that stage the sun was about to set. From there he went to the house of a friend, Aubrey Lottering, and asked him for a lift to Despatch. Aubrey took him to Despatch where he arrived, ate food and went to sleep at approximately 22h00.
- [18] He denied therefore that he had been present at 22h00 at the Adonis residence as testified to by Denzil Hendricks. He denied also that he had arrived with the Golf at the residence of Barnard in the early hours of the morning. He stated that he had only once had any contact with him when he had asked him for his father's phone number. He had never met Ashara Jacobs at all. He denied that he had stabbed or assaulted the deceased and Adonis. He alleged that Adonis had falsely implicated him in his affidavit because of an incident which had occurred during the time that they were in prison and in respect of which Adonis bore a grudge against him.

[19] In a bail application brought after his arrest appellant stated in an affidavit read out in court in his presence by his then attorney, Mr. Griebenouw, and in his own evidence, that on 27 December 2013 he had visited the house of Adonis and that it was on this date that he had agreed to assist Adonis with his motor vehicle. In this regard appellant had stated in his evidence that he told Adonis “that on Sunday [30 December] I will visit my mother’s place and then he can bring his car there ...”

[20] Questioned under cross-examination about the contradiction between his evidence at the bail application and his evidence at the trial he stated:

“The reason for that was as I have said Mr. Griebenouw already handed in the affidavits of the evidence that he said he drafted up so time of the bail the magistrate asked me if I am going to withdraw the evidence or what I am going to do so I informed the magistrate that no, we are just going to proceed with the bail so I never knew that I was to withdraw the affidavits of that statement and only, during the bail application where everything was sorted out and the case was re-opened for the bail, then only I found out that Mr. Griebenouw had made a statement according to myself.”

[21] It was then pointed out to him that in fact he well knew what was in the statements because it had been read into the record by Mr. Griebenouw in his presence. To this he replied:

“Yes as I have said he read it in the record but that is not with my knowledge. He is the lawyer that were paid to represent me in court so I left him to do the bail.”

[22] He then stated he was “not educated to that level so I do not do not know what happens in court.”

[23] The aforementioned Aubrey Lottering testified on behalf of the defence that on a particular Sunday in December 2013 he had fetched the appellant from his house at approximately 12 noon and had dropped him off at his parental home in Gelvandale. At approximately 22h45 appellant had arrived at his house and requested to be given a lift back to Despatch. He agreed to take him there and dropped him off at his house in Despatch. Whilst he conceded that he did not recall the date of that particular Sunday he stated that he knew that the appellant was arrested the following day.

[24] In *S v Leve* 2011 (1) SACR 87 (E) Jones J, with Liebenberg and Van Zyl JJ concurring, stated as follows at paragraph 8:

*“[8] The fundamental rule to be applied by a court of appeal is that, while the appellant is entitled to a re-hearing because otherwise the right of appeal becomes illusory, a court of appeal is not at liberty to depart from the trial court’s findings of fact and credibility unless they are vitiated by irregularity or unless an examination of the record of evidence reveals that those findings are patently wrong. The trial court’s findings of fact and credibility are presumed to be correct because the trial court, and not the court of appeal, has had the advantage of seeing and hearing the witnesses and is in the best position to determine where the truth lies. See the well-known cases of *Rex v Dhlumayo* 1948*

(2) SA 677 (A) 705 and the passages which follow; *S v Hadebe* 1997

(2) SACR 641 SCA 645; and S v Francis 1991

(1) SACR 198 (A) 204C-F. These principles are no less applicable in cases involving the application of a cautionary rule. If the trial judge does not misdirect himself on the facts or the law in relation to the application of a cautionary rule but instead demonstrably subjects the evidence to careful scrutiny, a court of appeal will not readily depart from his conclusions.”

[25] Malusi J was fully alive to the fact that in respect of the presence of the appellant at the Adonis house at 22h00 on 29 December 2013 Hendricks was a single witness whose evidence accordingly had to be approached with caution. Having done so he was of the view, however, that Hendricks was a credible witness whose evidence was “clear and acceptable.” The learned Judge also fully appreciated the fact that Barnard and Jacobs were in certain respects single witnesses. He was satisfied, however, that they too were both credible witnesses.

[26] With regard to the contents of the two affidavits attested to by Adonis implicating the appellant, the learned Judge stated that he accepted the version contained therein only in so far as it was corroborated by other evidence. Accordingly he accepted that appellant had been at Adonis’ house with two coloured males as was also stated by Hendricks. He accepted further that appellant had robbed Adonis of the motor vehicle.

[27] The learned Judge stated that, as opposed to the credible evidence adduced by the State, appellant’s evidence was not only improbable but was also a clear fabrication in certain respects. He stated that appellant’s evidence of a cordial relationship with Adonis was at odds with the relationship that the appellant himself characterised as being merely that of an acquaintance and that in this regard the evidence of Hendricks, that Adonis and appellant sat in stony silence, was more probable. It was also, so the learned Judge stated, highly improbable, in the light of the frosty relations between Adonis and appellant, that appellant would have offered to repair Adonis’ motor vehicle. In any event, as pointed out by the learned Judge the appellant’s version of the events on 29 December 2013 was at odds with his prior testimony that Adonis bore a grudge against him. Furthermore, his version of the events of 29 December was in complete contradiction of the version contained in his affidavit at the bail application. His evidence as to why there was such a contradiction was also entirely improbable and a clear fabrication.

[28] The learned Judge found also that the evidence of Lottering did not provide corroboration for the appellant’s evidence as Lottering was not certain on which particular Sunday the events concerning which he testified had occurred.

[29] The learned Judge concluded his judgment as follows:

“I accept Adonis’ version as contained in his affidavit only in so far as it is corroborated by other evidence. I accept that the accused was at his house with two coloured males. I accept that the accused entered the front door of his house and closed the door behind him. I accept that the accused robbed him

of his motor vehicle. Dr. Alo corroborates Adonis that the injuries on him were not self inflicted. An appraisal of all the evidence leads to the conclusion that the only reasonable inference to be drawn is that the accused and the two unknown coloured males killed Mrs. Adonis and attempted to kill Adonis. Any other inference is at odds with the available evidence and thus must be rejected.”

[30] It was submitted that the learned Judge had erred in admitting the affidavits of Adonis, even to the limited extent, he did. I am not persuaded that he did so err.

[31] In *S v Ndhlovu and Others* 2002 (2) SACR 325 (SCA) the issue of the admissibility of hearsay evidence in terms of section 3 of the Law of Evidence Amendment Act 45 of 1988 was considered. The head note thereof which correctly reflects what was said in the judgment reads as follows at 328 e-g:

“‘Probative value’ means value for purposes of proof. This means not only, ‘what will the hearsay evidence prove if admitted?’, but ‘will it do so reliably?’ Further, ‘prejudice’ in s 3 clearly means procedural prejudice to the party against whom the hearsay is tendered. It envisages the fact that the party against whom the hearsay is tendered cannot cross-examine the original declarant. That prejudice is always present when hearsay is admitted. It must be weighed against the reliability of the hearsay in deciding whether, despite the inevitable prejudice, the interest of justice require its admission. The suggestion that the prejudice in question might include the disadvantage ensuing from the hearsay being accorded its just evidential weight once admitted must be discountenanced. Where the interests of justice require the admission of the hearsay, the provision does not require the absence of all prejudice.”

[32] See too *S v Molimi* [2008] ZACC 2; 2008 (2) SACR 76 (CC) in which it was stressed that the preconditions laid down in s 3 of the Act were designed to ensure that hearsay evidence was received only if the interests of justice so required. The trial court had to have regard to all the factors mentioned in s 3(1)(c) and had to be careful to ensure respect for an accused’s fair trial rights.

[33] In the present matter it is clear in my view that Malusi J did consider all relevant factors and that he was at pains to respect

appellant’s fair trial rights, only accepting such parts of the affidavit of Adonis as were corroborated by other evidence. His finding that the interests of justice required the admission of the hearsay evidence cannot be faulted.

[34] I am not in any way persuaded that Malusi J misdirected himself in relation to the application of the cautionary rule. It is clear, in my view, that he subjected the evidence of the single witnesses to careful scrutiny. There is, in my view, no reason to depart from these conclusions as to the credibility of those witnesses.

[35] Against the State evidence must be contrasted the false evidence of appellant. I am aware of what was stated in *S v Mtsweni* 1985

(1) SA 590 (A) the English head note of which reads as follows:

“Although the untruthful evidence or denial of an accused is of importance when it comes to a drawing of conclusions and the determination of guilt, caution must be exercised against attaching too much weight thereto. The conclusion that, because an accused is untruthful, therefore is probably guilty must especially guarded against. Untruthful evidence or a false statement does not always justify the most extreme conclusion. The weight to be attached thereto must be related to the circumstances of each case. In considering false testimony by the accused, the following matter should, inter alia, be taken into account:

- (a) the nature, extent and materiality of the lies and whether they necessarily point to a realisation of guilt;
- (b) the accused’s age, level of development and cultural and social background and standing insofar as they might provide an explanation for his lies;
- (c) possible reasons why people might turn to lying, eg. because, in a given case, lying might sound more acceptable than the truth;
- (d) a tendency which might arise in some people to deny the truth out of fear of being held to being involved in a crime, or because

they fear that an admission of their involvement in an incident or crime, however trivial the involvement, would lead to the danger of an inference of participation and guilt out of proportion to the truth.”

[36] In the present matter appellant is an adult mature man of the world. He has lied about the circumstances in which he came to work on Adonis’ car. He has lied about his presence at the house on the night in question in the company of the two unknown men. His denial that he met Barnard at 2am whilst in possession of Adonis’ car, a mere two hours after the death of the deceased, was clearly false. So too was his denial that he had met Ashara Jacobs the following morning at approximately 10am in connection with the car.

[37] These lies are material and point ineluctably to a realisation of guilt on the part of the appellant.

[38] In *S v Reddy and Others* 1996 (2) SACR 1 (A) the following was stated at 8c – g:

*“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 *Rex v Blom* 1939 AD 188 at 202–203 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.’”

[39] Having regard thereto I am of the view that Malusi J correctly concluded that the only reasonable inference consistent with the totality of all the proved facts and which excluded any other reasonable inference is that the appellant murdered the deceased and attempted to murder Adonis and thereafter robbed Adonis of the motor vehicle.

[40] In coming to this conclusion I have not lost sight of the fact that Malusi J erred in finding that the keys of the vehicle were found in the possession of appellant. However, as was submitted by Mr. Canary, who appeared for the State, the mosaic of the evidence as a whole, disregarding this finding, still points directly to the guilt of appellant.

[41] In my view therefore appellant was correctly convicted as charged.

[42] Accordingly the appeal against the convictions is dismissed.

J.D. PICKERING

JUDGE OF THE HIGH COURT

I agree,

N.G. BESHE

G.G. GOOSEN

Appearing on behalf of Appellant: Adv. Coertzen

Instructed by: Legal Aid South Africa

Appearing on behalf of Respondent: Mr. Canary

Instructed by: Director of Public Prosecutions

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