

SOUTH AFRICA / JUDGMENT

Dlamini v S (A134/2016) [2016] ZAFSHC 184 (20 October 2016) [2016] ZAFSHC 184

COURT

Free State High Court, Bloemfontein

BEFORE

Daffue, Gela

CASE / FILE NUMBER

A134/2016

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IN

THE HIGH COURT OF SOUTH AFRICA,

FREE

STATE DIVISION, BLOEMFONTEIN

Case

No.: A134/2016

In

the matter between:

PHUMLA
ROBERT DLAMINI
Appellant
and
THE
STATE
Respondent

CORAM:

DAFFUE,
J et
GELA, AJ

JUDGMENT

BY: DAFFUE, J

HEARD ON: 10 OCTOBER 2016

DELIVERED ON: 20 OCTOBER 2016

I

INTRODUCTION

[1] On 29 March 2016 the appellant was convicted in the regional court on a charge of murder and sentenced to 15 years' imprisonment.

[2] On 26 April 2016 leave to appeal against conviction was granted by the court a quo.

II TWO IRRECONCILABLE VERSIONS

[3] The court a quo was confronted with two mutually destructive and irreconcilable versions. The State's version was provided by the only State witness, Mr Mandla Tokisa (herein later referred to as "Mandla" as in the court a quo) and the other version was put forward by the appellant.

[4] Both men are self-confessed criminals and I shall elaborate on this infra. On 9 April 2014 both, together with seven of their cohorts, were on their way in a Toyota Quantum minibus ("Quantum") to the Saaiplaas Goldmine plant in the district of Virginia. The deceased, one Thabiso James Johnnie, referred to in the evidence as "Vuysile", was part of the group. The driver of the Quantum was one Questa.

[5] Mandla's version is as follows:

He knew the deceased and appellant as well as the driver, Questa, well. He forgot the names of the other occupants of the Quantum. They were on their way to the Saaiplaas plant in order "to get inside the plant so that we can take the gold". In order to achieve this they had to rely on their "connections". He denied that they were on their way to rob or steal, but members of the group were armed with firearms to protect them.

[6] Although Mandla could not remember the names of the other occupants, he denied that he had a friend named Thabo and that this person had accompanied them. Questa and the appellant were the architects of the operation.

[7] After they had picked him up, the Quantum stopped at appellant's house where after appellant went into the house and came back with a bag from which he took out two firearms. He handed one firearm to the deceased and kept the other. However on his version some of the other occupants were also in possession of firearms.

- [8] At a stage, as they were approaching the plant, an altercation broke out between appellant and Questa, the driver, apparently because appellant had called the mine security. Appellant, being excessively under the influence of alcohol, became angry. He did not want to proceed with the operation and instructed all his cohorts to hand over their firearms to him, he being seated in front in the co-driver's seat.
- [9] The deceased handed over his firearm, but kept the magazine thereof and refused to hand same over. Appellant alighted from the vehicle which had become stationery at that stage, opened the sliding door and fired two shots towards the chest of the deceased who was sitting in the third row from the front. The others ran away. Appellant dragged the deceased out of the Quantum at which stage Mandla went to the driver's seat and drove off, but after a short while the vehicle's engine cut out. Mandla heard three further gunshots being fired and Questa saying to the appellant that "you have just killed him". Hereafter Questa went to the Quantum and drove off.
- [10] Mandla testified that three people, the driver, one Sotho person and he, were not in possession of firearms during this trip.

Appellant asked him and Questa after the shooting to tell the deceased's sister that he was killed by mine security.

- [11] Mandla denied appellant's version put to him that there was an argument between him, Thabo and the deceased during the trip about money owing by the deceased to them and that they threatened to use their firearms, whereupon appellant asked the driver to stop the Quantum, but a shot was fired whilst the vehicle was still moving and before appellant could intervene.

- [12] Appellant's version is as follows:

He, Mandla and the others were known to each other as they were involved in the same industry or as he put it: "We are doing the same work, all of us." Questa and he were the organisers and he regarded the deceased as a close friend.

- [13] That day three of the group carried firearms, to wit the deceased, Mandla and Thabo. He testified about the quarrel between Mandla and the deceased about cheating in respect of an earlier robbery, that he tried to calm them down, but to no avail where after he requested the driver to pull off the road after he had heard and seen firearms being cocked by Mandla and Thabo. A shot went off and before he could reach the sliding door of the Quantum a second shot was fired. People ran into the veld and he followed them. The next day he heard from Questa that Mandla had shot the deceased. He denied that he was under the influence of alcohol and stated that he was a teetotaler since 2004.

- [14] The prosecutor put it to him during cross-examination that Questa could not be traced to testify on behalf of the State, but appellant responded that Questa's address was known to the State and that the previous prosecutor actually had telephonic contact with him during a previous court appearance in February 2015.

III GROUNDS OF APPEAL

- [15] The grounds of appeal can be summarised as follows, i.e.:

- (a) That the court a quo erred in accepting the evidence of Mandla and rejecting the evidence of appellant as false beyond reasonable doubt and that the court a quo failed to apply the necessary caution in respect of the evidence of Mandla.
- (b) Furthermore the court erred in finding that the evidence of Mandla, he being a single witness, was clear and satisfactory in all material respects.
- (c) In the heads of argument prepared by Mr Kambi on behalf of appellant which were adopted with approval by Ms Kruger during oral argument

much was said about the incorrect approach by the court a quo in its evaluation of the evidence and I shall deal with that once I have considered the relevant legal principles.

IV APPLICABLE LEGAL PRINCIPLES

- [16] It is an established principle that where an appeal is lodged against a trial court's findings of fact the court of appeal must take into account that that court was in a more favourable position than itself to form a judgment. Even when inferences from proven facts are in issue the court a quo may also be in a more favourable position than the court of appeal, because it is better able to judge what is probable or improbable in the light of its observations of witnesses who have appeared before it. Therefore if there are no misdirections on fact a court of appeal assumes that the court a quo's findings are correct and will accept these findings, unless it is convinced that these are wrong. See *R v Dhlumayo and Another* 1948 (2) SA 677 (AD) at 705-6. Therefore in order to interfere with the court a quo's judgment it has to be established that there were misdirections of fact, either where reasons on their face are unsatisfactory or where the record shows them to be such. See also *S v Monyane and Others* 2008 (1) SACR 543 (SCA) at para [15] where the SCA stated that it is only in exceptional cases that it would be entitled to interfere with the trial court's evaluation of oral evidence.
- [17] The advantages which a trial court enjoys should not be over-emphasised "lest the appellant's right to appeal becomes illusionary", as mentioned in *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* 2000 (1) SA 1 (CC) at para [79].

[18] It is acceptable in evaluating the evidence in totality to consider the inherent probabilities and the following dictum by Heher AJA, as he then was, in *S v Chabalala* 2003 (1) SACR 134 (SCA) at para [15] is apposite: “The correct approach is to weigh up all the elements which point towards the guilt of the accused against all those which are indicative of his innocence, taking proper account of inherent strengths and weaknesses, probabilities and improbabilities on both sides and,

having done so, to decide whether the balance weighs so heavily in favour of the State as to exclude any reasonable doubt about the accused’s guilt.”

[19] An accused’s version cannot be rejected merely because it is improbable. It can only be rejected on the basis of the inherent probabilities if it can be said to be so improbable that it cannot reasonably possibly be true. See *S v Shackell* 2001 (2) SACR 185 (SCA) at para [30] which I quote:

“It is a trite principle that in criminal proceedings the prosecution must prove its case beyond reasonable doubt and that a mere

preponderance of probabilities is not enough. Equally trite is the observation that, in view of this standard of proof in a criminal case, a court does not have to be convinced that every detail of an accused’s version is true. If the accused’s version is reasonably possibly true in substance the court must decide the matter on the acceptance of that version. Of course it is permissible to test the accused’s version against the inherent probabilities. But it cannot be rejected merely because it is improbable; it can only be rejected on the basis of inherent probabilities if it can be said to be so improbable that it cannot reasonably possibly be true.”

See also *Olawale v The State*

[2010] 1 All SA 451 (SCA) at para [13].

[20] Section 208 of the Criminal Procedure Act, 51 of 1977 provides that an accused may be convicted of any offence on the single evidence of any competent witness. When it comes to the consideration of the credibility of a single witness a trial court should weigh the evidence of the single witness and consider its merits and demerits and having done so, should decide whether it is satisfied that the truth has been told, despite any shortcomings, contradictions or defects in the evidence. See *S v Sauls and Others* 1981 (3) SA 172 (AD) at 180E-G.

[21] The failure to call an available witness may not be without consequences, especially where the State relies on the evidence of a single witness. The failure by the State to call such further witness may in particular circumstances justify the inference that, in the prosecutor’s opinion, such evidence might possibly give rise to contradictions which could reflect adversely on the credibility and reliability of the single State witness. See *S v Teixeira* 1980 (3) SA 755 (AD) at 764A – B.

[22] The evidence of other witnesses that should be approached with caution are accomplices. In casu Mandla was not an accomplice in respect of the murder charge, but clearly part of a group of criminals on the verge of illegally

obtaining gold from the Saaiplaas plant to such an extent that they clearly intended to either steal or rob. They were even armed with firearms to protect themselves. The cautionary rule was comprehensively formulated in *R v Ncanana* 1948 (4) SA 399 (AD) at 405. See also *S v Francis* 1991

(1) SACR 198 (AD) at 205F. Caution in dealing with the version of an accomplice is imperative. An accomplice may have a motive to lie about an innocent accused. Courts are generally looking for corroboration which may even be found in the evidence of another

accomplice, provided the latter is a reliable witness, or some other objective evidence or other assurance that the evidence of the accomplice is reliable. In the absence of corroboration or some other assurance as to the reliability of the evidence, the court evaluating the evidence should appreciate the peculiar danger inherent in the evidence of the accomplice. Acceptance of the accomplice's version and rejection of the accused's version is only permissible if the merits of the accomplice and the demerits of the accused as witnesses are beyond question.

[23] Bearing in mind the court a quo's evaluation of the evidence it is necessary to refer also to the following case law. In *S v Ipeling* 1993 (2) SACR 185 (T) Mahomed J (as he then was) stated as follows at 189c – d:

"It is dangerous to convict an accused person on the basis that he cannot advance any reasons why the State witnesses would falsely implicate him. The accused has no onus to provide any such explanation. The true reason why a State witness seeks to give the testimony he does is often unknown to the accused and sometimes unknowable. Many factors influence prosecution witnesses in insidious ways. They often seek to curry favour with their supervisors; they sometimes need to placate and impress police officers, and on other occasions they nurse secret ambitions and grudges unknown to the accused. It is for these reasons that the Courts have repeatedly warned against the danger of the approach which asks: 'Why should the State witnesses have falsely implicated the accused?' "

[24] The above dictum by Mahomed J has been quoted with approval in *S v BM* 2014 (2) SACR 23 (SCA) at para [25] and Wallis JA, writing for a unanimous bench, found as follows at para [27]:

"In this case both the magistrate and the court below adopted an incorrect approach to the consideration of the evidence. In

effect they held that the inability of Mr BM, to advance a plausible reason for SM fabricating these allegations, meant that her evidence had to be accepted and his rejected. That was incorrect and came close to placing an onus on Mr BM to prove his innocence. The proper approach was to evaluate both versions against the inherent probabilities, taking account of all the evidence. If, after undertaking that exercise, it appeared that his version could reasonably possibly be true, even if it were improbable or in some respects untruthful, he was entitled to be acquitted."

V EVALUATION OF THE JUDGMENT OF THE COURT A QUO

[25] In view of the authorities referred to the court a quo should at least have asked itself the following questions:

1. Is there a substantial balance of inherent probabilities supporting the version of the State.
2. Are the merits of the State's case so clearly superior to the demerits of the accused's case as to justify a finding of guilt beyond reasonable doubt?
3. Is there an adequate explanation why Questa was not called to testify on behalf of the State?

I shall refer to these aspects again infra.

[26] I am in agreement with appellant's legal representative that the court a quo adopted a skewed approach in analysing the evidence in that contradictions, inconsistencies and improbabilities in the State's case were not criticised, whilst the same generosity was not shown to the evidence of appellant. If I apply the same reasoning of the court a quo, I find it extremely improbable that appellant, standing at the open sliding door, would be able to shoot at and actually hit the deceased in the chest area in so far as the deceased was sitting in the third row of the Quantum and bearing in mind the presence of other occupants. However, this is not the most important aspect of the evaluation to be undertaken.

[27] Appellant and Questa were the commanders and organisers of the illegal operation. There is in my view just no logical

explanation why a heavily intoxicated commander would proceed with an illegal operation as Mandla wanted the court a quo to believe. Furthermore, there is also no logical explanation as to why the operation was called off at such a late stage of the proceedings and why that would cause Questa and the appellant to become involved in a heated argument. Even if it was necessary to call off the operation at a late stage, there was no reason for appellant to instruct his cohorts to hand over their firearms to him. Surely, he could have informed them that due to circumstances beyond their control it would be dangerous to proceed with the operation whilst the firearms could be collected once the group arrived at appellant's home. The argument about the magazine not being handed over to appellant is far-fetched and improbable. I cannot think of any conceivable reason why the deceased would have kept the magazine of a firearm apparently belonging to the appellant.

[28] It is common cause that the cohorts have been involved in similar operations previously and there was no reason to reject the version of appellant that he overheard an argument between Thabo and Mandla on the one hand and the deceased on the other, the deceased being accused of cheating in not handing over money to which these two people were entitled according to them. Appellant's

version that he tried to calm them down, but notwithstanding that, firearms were cocked whereupon first one shot and then later a second shot was fired, cannot be rejected as not reasonably possibly true.

[29] The court a quo asked the following question which was the wrong question to ask:

“The question now is why then does Mandla choose to incriminate the very man who was trying to bring peace amongst them. This also does not make sense.”

Obviously it was appellant’s version that he tried to restore peace and not Mandla’s version. I referred to relevant case law above and wish to make it clear that the approach that accused persons are necessarily guilty because complainants have no apparent motive to implicate them falsely and accused are unable to suggest one, is fraught with danger. However, in casu, there was a very important motive for Mandla to falsely implicate appellant which was not considered at all by the court a quo. I wish to quote verbatim the following from the cross-examination of appellant:

“The same gentleman I asked you earlier about. Now the question is if you were so close to Mandla why would he falsely implicate you to be the person who so brutally shot and murdered the deceased with six bullets for that matter? ...

Because he had already said lies? because I am here.

Yes, but I am saying why would he lie about you because you were getting along well with him? ... The reason why he did that, it is because I said to him man, you should know that if we bury this one you will be buried as well.

...

Why did you say that to him? ... Because I was not happy that he shot my friend.

Yes, Questa had already informed me that he shot.”

[30] It is evident that Mandla decided that attack would be the best form of defence and that is why he indicated in his police statement that appellant was the culprit and he continued with this form of attack during the trial. There was no reason why Mandla would blame any of the other cohorts as they apparently did not incriminate him, but appellant did. The court a quo indicated that “(T)here are various reasons why other witnesses were not called for and one of the reasons can be that there is some intimidation or they do not want to testify”. This is speculation and has never been properly explored. The prosecutor (not the one that appeared during the first appearances) did not provide a convincing reason for not calling Questa. There is no reason to doubt the version of appellant that the previous prosecutor was in telephonic conversation with Questa at a previous occasion and in the absence of any evidence led by the investigating officer in this regard, the court a quo could have found that the State had failed to call Questa as the prosecutor knew that Questa was not prepared to corroborate the

version of Mandla. I refer in this regard to Teixeira supra. However it is not even necessary for us to go as far as the court in Teixeira and to insist that a negative deduction be made from the failure to call Questa.

[31] I am also of the view that, bearing in mind the totality of the evidence, Mandla lied when he tried to indicate that it was the first time that he took part in such an illegal operation. I quote verbatim from his cross-examination:

“You still haven’t answered my question. My question was: It was not the first time that you had been involved in this kind of a plan, yes or no will do? ... No, it was the first time. It never happened this way.”

[32] The court a quo indicated that it was evident from Mandla’s evidence that it was not disputed that appellant demanded the firearms from the people in the Quantum when he decided to halt the operation. It is correct that it was not specifically put to Mandla that his version in that regard was false, but again, the cross-examination must be seen in its totality. The court a quo clearly misdirected itself in this regard. Not only did Mandla contradict himself by indicating that the instruction was that “all the people that were inside the Quantum ... they must hand in all those guns ... all of them, even the Sotho speaking people they handed over their guns”. Later on Mandla testified that three of them were not in possession of firearms, to wit he, Questa, the driver, and one Sotho man. Even if this contradiction is ignored, it is clear that the detailed version of appellant put to Mandla is such that Mandla’s version pertaining to the demand to hand over firearms was seriously attacked.

[33] The court a quo made an issue of the fact that, bearing in mind the number of people in the Quantum, it would be impossible for somebody in the

co-driver’s seat such as appellant to see who cocked their firearms if these people were sitting in the third row from the

front. There is nothing in the record to indicate whether the people cocking the firearms were doing so at shoulder height, or in any other manner.

[34] In considering the evidence and the reasons of the court a quo, I am mindful of the fact that there were also certain improbabilities in the version of appellant. For example, he testified that he was not in possession of a firearm and that only three people were in possession of firearms, to wit the deceased, Mandla and Thabo. I got the distinct impression from this evidence that he tried to put as much distance as possible between him and any firearm in order to disprove that he shot at the deceased as testified to by Mandla and eventually killed him.

[35] In the final analysis the court a quo failed to ask itself the questions referred to above and if those questions were asked and properly answered, it would have come to the conclusion that appellant ought to be acquitted. There were no inherent probabilities supporting the version of Mandla. The fact that it was admitted that the deceased was killed and that it was common cause that he was part of the group of cohorts are neutral factors and nothing

more. Secondly when considering the merits and the demerits of the two versions - the two mutually destructive and irreconcilable versions – it is evident that the court a quo accepted the version of Mandla without any critical analysis thereof, but considered the version of appellant with a magnifying glass in order to find improbabilities justifying the finding the court a quo arrived at. It could not be said that the merits of the State’s case was clearly superior to the demerits of the defence case as to justify a finding of guilty beyond reasonable doubt. Lastly, the issue of corroboration and the failure to call Questa were improperly considered. The court a quo did not appreciate the danger of relying on the uncorroborated version of Mandla as an accomplice and failed to treat his version with the caution that was expected in the circumstances, especially in so far as it was even suggested, although half-heartedly, that appellant had an option to call the occupants as defence witnesses. However, as indicated supra, it is not even necessary to find that the court a quo erred in not making a negative deduction against the State for the failure to call Questa. The testimony of Mandla, a single witness whose version was not corroborated and whose evidence also did not pass the test laid down in Sauls (evidence of a single witness) and Francis (evidence of an accomplice) could not be relied upon for a conviction in casu. Appellant’s version was not so improbable that a finding could be made that it was not reasonably possibly true.

VI

CONCLUSION

[36] Having considered the judgment of the court a quo and the arguments on behalf of the parties and again after evaluating the evidence afresh, I conclude that the court a quo erred in finding that the State had proven its case beyond reasonable doubt.

VII ORDER

[37] The appeal succeeds and the conviction and sentence are set aside.

J.P. DAFFUE, J

I concur.

GELA, AJ

On behalf of the appellant: Ms Kruger

Instructed by:

Justice Centre

BLOEMFONTEIN

On behalf of the respondent:

Adv. M. Strauss

Director: Public Prosecutions

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Prepared on 11 October 2026 · Esheria