

SOUTH AFRICA / JUDGMENT

Jantjies v S (A299/23) [2024] ZAGPPHC 1349 (6 December 2024)

[2024] ZAGPPHC 1349**COURT**

North Gauteng High Court, Pretoria

BEFORE

Matsemela, Phahlane

CASE / FILE NUMBER

A299/23

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Source record**IN****THE HIGH COURT OF SOUTH AFRICA****GAUTENG****DIVISION, PRETORIA****CASE****NUMBER: A299/23****DATE:**

06 December 2024

JANTJIES

JOHANNES MDLULI

APPELLANT

V

THE

STATE

RESPONDENT

FLYNOTES:

Criminal Procedure-statements whether confession or admission-court a qou correct in finding that the statements are admissions-
circumstantial evidence-whether sufficient to prove guilt of the appellant-court a qou correct in accepting the circumstantial evidence- appeal is dismissed.

JUDGMENT

MATSEMELA AJ: (PHAHLANE J, concurring)

- [1] On the 8 August 2023 the Appellant was convicted in the Magistrate Court for the district of Merafong held at Oberholzer on one count of murder read with the provisions of Section 51(1) or (2) of the Criminal Procedure Act 105 of 1977. The allegations were that on or about the 23 August 2020 at Khutsong the Appellant did intentionally and unlawfully kill one Sonnyboy Aubrey Phungula (the deceased). He was sentenced to 10 years imprisonment.
- [2] The appeal is against the conviction only.
- [3] The state called six (6) witnesses. However, I would deal with evidence of the 4 (four) witnesses which I think are of relevance for this appeal.
- [4] Gustav Modise (Gustav) testified that on the 8 August 2020 at about 22H00, he was with Banyana, Happy, Pringle and the deceased at Thapelo tavern. The appellant was also with them at the tavern.
- [5] They left the tavern to go to their homes. The appellant left with them. The appellant was walking in front of them.
- [6] On their way to their homes, the deceased took a short cut which went through the Appellant's house. Happy, Banyana and himself also took a short cut. The shortcut that they took is on the house next door to the house of the appellant. They waited for the deceased to appear on the other side however he did not appear. They then went to their respective homes.
- [7] He went to his home to get a reflector jacket. He is working as a security at the nearby church hence the reflector jacket. On his way to work he went inside Monati Zone tavern. He wanted a lit for his cigarette. He sat down and bought one beer.
- [8] Before he can finish his beer Susan came and shouted at him saying that the person that he was with has passed on. The person that he was with is Aubrey (deceased).
- [9] He, Cater and the others proceeded to the place where the body of the deceased was lying. After he identified the body, he then went to call the deceased's wife and the deceased's best friend Vusi Simelane (Vusi).
- [10] They tried to reason as to how did this happen. They looked at everyone who was nearby the vicinity and/or who could have been with the deceased before his death especially those who were in his company at the tavern. They wanted to sit down with them, and I suppose the intention was to interrogate them.

- [11] Everybody who was with the deceased before his death was accounted for except for the appellant. They reported the matter to detective Kekane and started to look for the appellant. They did not find him that night.
- [12] In the morning when he woke up, they (Happy and Banyana) started to look for the appellant again. They found the appellant at his home. He was seated in the salon. On their arrival the appellant asked them as to why they were making noise last night. The appellant looked frightened. Gustav responded by saying that they were making noise because they were looking for him.
- [13] He noticed blood stains on the left side of appellant's jacket. He also noticed blood stains in his fingertips. He realised that there will not be able to manage him and they called detective Kekane. Detective Kekane told them to guard the appellant so that he could not run away. They then left the appellant in the salon to go and call Vusi Simelane (Vusi). When they came back after five minutes with Vusi the appellant was gone.
- [14] As they were looking for him, they managed to get the cell phone number of his best friend Chappies. They phoned Chappies who informed them that the appellant is gambling at Extension 4. They went to extension 4 and they could not find him.
- [15] As they were walking, he spotted the appellant jumping the bridge which separates extension 4 (four) and extension 5 (five). He was the first person to meet the appellant. The first words to come out of the mouth of the appellant was that "I did a mistake". As they were walking along, the appellant did proceed and said that he and the deceased fought over cigarette. The deceased assaulted him with an open hand and he stabbed the deceased with a knife.
- [16] They took the appellant to where the deceased was staying. Inside the house there was family members of the deceased and outside there was a presence of members of the community. He was never assaulted in his presence. Detective Kekana arrived. As he was approaching the appellant went out to go to detective Kekana, he ultimately ran away. Members of the community chased him. They apprehended and assaulted him.
- [17] Constance Mashabane (Mashabane) testified that the father of the deceased is a friend of her brother. On the day in question at about 3H00 AM she received a call from Ivania Lungu. She informed her that the deceased has been killed. She woke up her son who took her where the deceased was staying.
- [18] At about 12H30 the three boys came into the house. One of the boys was the Appellant. The Appellant then told her that he killed the deceased. The deceased wanted some cigarette, and he told him that it was late. The deceased assaulted him with an open hand. The Appellant went to his home to fetch a knife. No one assaulted the appellant in her presence.

- [19] Piet Vusi Simelane testified that he was awoken by Gustav who told him that the deceased had been stabbed. They went to the dumping site and found the body of the deceased with a stab wound on the neck. They went to the Appellants' place and saw blood trail from the gate to the dumping site. This motivated them to go and look for the Appellant. After looking for the Appellant at several places they finally located him on the bridge the next day.
- [20] He asked him as to what transpired between him and the deceased. He apologised for killing the deceased and said he made a mistake. The Appellant said they had a quarrel, and he fought back. They took the Appellant to the deceased's home. They told the family of the deceased that the appellant confessed to them for killing the deceased. There was a lady who attempted to assault the appellant. Chaos erupted when the appellant was taken outside the house. Members of the community chased the appellant.
- [21] Sergeant Kekana testified that on the day in question was on a stand-by. He received a call from the police station that he must attend a murder scene at Extension 5. Upon arrival at the scene, he found a corpse wearing a cap. This corpse looked like it was put there because it did not look like that the person was attacked and fell. Even the cap was still with him on the head. He saw only one wound and it was on the neck of the deceased.
- [22] Later he received a call around 2H00 PM from Constance who is the family member of the deceased. Constance informed him that they had found the person who stabbed the deceased and gave him the address. She requested him to come urgently as the community was in uproar and wanted to take the law into their hands.
- [23] Upon arrival at the place of the deceased he saw blood on the hands and the top of the Appellant. He did not conduct DNA to prove that the was that of the deceased. The top the Appellant was wearing also had blood stains.
- [24] He arrested the Appellant and took him to the police station. He then took him to hospital where he received medical attention. When they came back from the hospital interviewed him about the knife which was used in killing the deceased. The Appellant told him that he took it not far from where the remains of the deceased were. He took him to where the corpse was found and showed him where threw the knife. He did explain his rights before they went to point out. They could not
get that knife because the grass was tall.
- [25] During the interview with the Appellant told him that on the day in question he saw the deceased knocking at the neighbour's door. He only offered to knock on his behalf.

- [26] Sgt Kekana read into the record the statement of Sibusiso Soshe who was now deceased. The paragraph which is of importance is the one in which he stated that in the morning (after the incident) Sibusiso Soshe he was going to work as usual. As he was passing the Appellants' yard, he noticed at the Appellants' house substance that looked like blood on the door, walls and dropped on the ground. It looked like somebody was dragging something. The state closed its case.
- [27] The appellant testified in his defence. He testified that he stays in Extension (5) five. There is an open space next to his home which is used as a dumping site. At the time of the incident his home was not fenced and people would use the yard as a short cut. On the day in question at about 22H00, he was at Thapelo Park Tavern. He bought (2) two beers. He never saw the state witnesses at the tavern.
- He did not ask anyone about cigarettes. When he left, he looked back and did not see anybody.
- [28] He went home, got R500 cash and went to Sam's place which is also a tavern. He bought a beer and cigarettes and remained there until 8H00 the next morning. On his way home he met Gustavo, Vusi and the girls. Gustav and Vusi confronted him with allegations that he killed someone and that the police were looking for him. They requested him to accompany them to the house of the deceased.
- [29] Upon arrival he was introduced as the person whom they were looking for. A certain lady asked him, why he killed Aubrey. Banyana went out to call his mother. The lady assaulted him with open hands and threw a vase at him.
- [30] Gustavo blew a whistle. The community came and assaulted him. He ran away.
- [31] The police arrived and arrested him. Sgt Kekana later took him to the hospital. The police came to his cell and took him to where the deceased was found. They did not take him to point the knife. While on the same trip his grandmother brought him home warmer clothes and gave his ID book to the police. He never made any admissions to Sgt Kekana.
- [32] They took to him to the magistrate that winks. He did not go there to confess but to tell the truth.

CONFESSION OR ADMISSION

- [22] In his Heads of Argument, counsel for the Appellant argued that the confessions made to Mr Gustuv, Mr Simelane and the family of the deceased was not made freely and voluntarily. The first question to answer is whether indeed these statements were a confession.
- [23] Section 217 of the Criminal Procedure Act 51 of 1977 provides that a confession shall be done before a Magistrate or Peace Officer and be reduced in writing and these statements were not. The court a qou correctly found that these statements were admissions and not a confession.

[24] Section 219 A of the Criminal Procedure Act 51 of 1977 deals with the admissibility of admission by an accused and provides as follows:

- (1) Evidence of any admission made extra-judicially by any person in relation to the commission of an offence shall, if such admission

does not constitute a confession of that offence and is proved to have been voluntarily made by that person, be admissible in evidence

against him at criminal proceedings relating to that offence

[25] Having said that, the second question to answer is whether these statements were made freely and voluntarily Section 35 of the Constitution provides as follows:

"35. Arrested, detained and accused persons.-

- (i) Everyone who is arrested for allegedly committing an offence has the right-
- (a) to remain silent;
- (b) to be informed promptly-
- (i) of the right to remain silent; and
- (ii) of the consequences of not remaining silent;
- (c) not to be compelled to make any confession or admission that could be used in! evidence against that person;
- (5) Evidence obtained in a manner that violates any right in the Bill of Rights must be excluded if the admission of that evidence would render the trial unfair or otherwise be detrimental to
- [26] It was an issue in the court a qou as to whether the Appellant made those admissions. The appellant denied having made those statements. On several occasions it was put to the state witnesses that the appellant denies having made those admissions. It was put to Sgt Kekana that apart from denying to have made those admissions the appellant also denies to have made a point out. This part of the evidence by the state was never broken down.
- [27] The Appellant cannot deny to have made those statements and in the same breath say that they were not made freely and voluntarily. How else would the above state witnesses know about the cigarette, the quarrel and the knife if the Appellant did not mention it to them. The court a qou quite correctly made a finding that indeed the appellant made those statements. Having made a finding that the Appellant made those admissions and the court a qou therefore, could not deal with the issue of free and voluntariness of those admissions.

CIRCUMSTANTIAL EVIDENCE

- [28] Counsel for the Appellant argues further in his Heads of Argument that there were no eye-witnesses who actually saw the killing of the deceased by the Appellant. Hence, the State has relied to a certain extent on circumstantial evidence, the testimony and version of the accused, in order to prove the allegations against the Appellant. Whether the circumstantial evidence was enough to convict the Appellant.
- [29] Counsel for the Appellant argued further that the version of the state was both highly improbable as well as not credible because there are contradictions in their versions of the events.
- [30] I am of the view that the court a quo was dealing with two mutually destructive versions. How the courts are resolving two irreconcilable, mutually destructive factual versions is trite. It is a well-established doctrine in our law. The court a quo had to resolve the disputed issues, by making a finding on the credibility of the various factual witnesses, their reliability, and the probabilities. Having assessed the credibility, reliability, and probabilities, it then, determined whether the party burdened with the onus of proof has succeeded in discharging it. See Stellenbosch Farmers' Winery Group Ltd and another v Martell & Cie SA and others para 5, (427/01) [2002] ZASCA 98.
- [31] The court a quo did not per se convict the Appellant on circumstantial evidence. It considered the probabilities.
- [32] Gustav testified that the Appellant told him he was at Thapelo tavern. The other key witnesses put the Appellant around 22H00 at Thapelo tavern on the day of the incident. Mr Gustav would not have known that the appellant was at Thapelo tavern unless the appellant told him so.
- [33] Gustav testified further that while they were looking for the appellant, they found him at the salon. The appellant was wearing the same clothes as yesterday except for the shoes. He noticed that there were blood stains on the left side of the jacket of the appellant and finger nails. The existence of blood stains was corroborated by other state witnesses He then called Seargent Kekana, who said they must keep an eye on him. He left the salon and when he came back after five minutes the appellant was gone. Gustav made a good impression to the court a quo and it accepted his evidence as probable. I agree.
- [34] The state witnesses corroborated each other in all material respects. I will now deal with the corroboration regarding the admissions made by the appellant. Gustav, Seargent Kekane, Simelane and Constance Mashabane testified that the appellant admitted to them the following when questioned:
- (a) He started by apologising and said what he did was a mistake. It was not his intension.
 - (b) He and the deceased had a quarrel about cigarettes.
 - (c) The deceased slapped him.

(d) He went home to get a knife.

[35] There was a part of Mashabane testimony which contradicted the testimony of other witnesses. For an example he should have seen that the members of the public are assaulting the appellant. However, for some reason he did not mention it to the court. The court a quo was of the view that this contradiction is immaterial. I agree.

[36] Simelane also made a good impression to the court a quo. He conceded that the appellant was assaulted by members of the public. This part of his testimony actually shows that he was not conspiring with the other witnesses against the appellant. He testified that he is the one who told the members of the public that the appellant is the one that killed the deceased. He took responsibility of what he did himself. Under cross examination he was asked whether he knew that other people phoned the police. He immediately revealed that he was not sure.

[37] Mashabane testified that the appellant spoke about the cigarette at the neighbour's house. She could not have had this information from anyone else but the appellant. Her evidence was to some extent corroborated by Sergeant Kekana. She was never broken down under cross examination. She testified that she is the one who protected the appellant from the members of the public.

[38] Sgt Kekana testified that at some point he allowed the grandmother of the appellant to give him warmer clothes. He even took him to hospital to get medical attention. This would not be the actions of the person conspiring with other state witnesses against the appellant. He conceded that he was inexperienced insofar as the homicide cases are concerned.

[39] It is quite clear that the court a quo, and quite correctly so, accepted the evidence of the State witnesses. In my view, there existed valid grounds for doing so in that they were credible witnesses. Their versions of events are reasonably possibly true.

[40] I agree with the court a quo's finding that the Appellant's version of events was not reasonably possibly true. I am of the view that the appellant's version is a pure fabrication. He lied to the trial court. The court a quo was correct in rejecting his version.

[41] The Appellant in his own version tells the court a quo that during his detention, before his first appearance he was taken to the magistrate that winks for a confession. He wanted to tell the magistrate the truth. This was denied by Sergeant Kekana. I agree with the court a quo's view that it is not probable that a suspect will be brought before the magistrate without an indication that he wished to confess. Only those suspects who indicated that they wished to confess are brought before the magistrate for a confession. If the appellant told the police that he knew nothing there will no use to bring him before the magistrate.

- [42] In his evidence in chief the appellant exaggerated his problem of not being able to use his hands. He denied that he would be able to hold a knife. However, under cross examination he conceded that he would be able to carry a water bucket. Later on, he even conceded that he can hold a knife but cannot use it.
- [43] The appellant was confronted under cross examination as to why the state witnesses know about their cigarette. He responded by saying that the state witnesses were conspiring against him. If the state witnesses were conspiring against him, why would certain parts of their evidence differ. The court a quo was correct in rejecting his conspiracy theory.
- [44] Having said that I should emphasise that the court of appeal should consider an appeal as set out in *R v Dhlumayo* 1948 (2) SA 677 (A) 696. When an appeal is lodged against a trial court's findings, the Court of Appeal, takes into account the fact that the trial court was in a more favourable position than itself to form a judgment. The court a quo, was able to observe the witnesses during their evidence in chief and questioning, from the beginning to the end. Therefore, the Appeal Court must assume that the trial court's findings are correct. Under normal circumstances a Court of Appeal will accept those findings unless there is some indication that a mistake was made. See *S v Tshoko* 1988 (1) SA 139 (A).
- [45] The court a quo has weighed all the elements that points towards the guilt of the accused against those which are indicative of his innocence. It has taken into account taking proper account strength and weaknesses, probabilities and improbabilities on both sides. Having done so, it found that the balance of probabilities weighs in favour of the State to the exclusion of any reasonable doubt of the accused's guilt. The court a quo therefore concluded that the only reasonable inference to be drawn from all the evidence before it, which included circumstantial and viva voce evidence, is that the appellant killed the deceased during the period 25 - 27 November 2017, by stabbing him with a knife. This decision cannot be faulted.

[46] In my view, the appeal against conviction cannot succeed.

[47] Accordingly, I make the following order:

1. The appellant's appeal against the conviction is hereby dismissed.
2. The conviction of the appellant by the court a quo is hereby confirmed.

MOLEFE MATSEMELA

ACTING JUDGE OF THE GAUTENG HIGH COURT,

PRETORIA

I agree

PD.PHAHLANE

JUDGE OF THE GAUTENG HIGH COURT,

This judgment was handed down electronically by circulation to the parties' legal representatives by email. The date and time for

hand-down is deemed to be 10h00 on 5 November 2024

Appearances:

Counsel for the Appellant: Mr S Moeng

Instructed by:

Legal Aid South Africa

Counsel for the Respondent: Adv GP Harmzen

Instructed by:

Director of Public Prosecutions

Date Heard:

03 September 2024

Date of Judgment: 06 December 2024

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Prepared on 12 October 2026 · Esheria