

SOUTH AFRICA / JUDGMENT

Khumalo v S (A199/2019) [2019] ZAGPPHC 1067 (29 November 2019)

[2019] ZAGPPHC 1067

COURT

North Gauteng High Court, Pretoria

BEFORE

N.E Nkosi, Sardiwalla

CASE / FILE NUMBER

A199/2019

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IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

(1) REPORTABLE: YES / NO

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

(3) REVISED

Case no: A199/2019

29/11/2019

In the matter between: -

THOKOZANE KHUMALO

Appellant

and

THE STATE

Respondent

JUDGMENT

N.E NKOSI (AJ)

[1] The Appellant was convicted of murder in the Regional Court, Oberholzer, on the 10th of May 2017 and sentenced to 15 years imprisonment. His application for leave to appeal against the conviction and sentence was refused. On petition, leave to appeal against the conviction only, was granted.

- [2] His appeal is based on three grounds and he seeks the court to determine whether:
- (a) evidence was properly evaluated by the Magistrate.
 - (b) the Magistrate should have accepted the evidence of a single witness; and
 - (c) on the proven facts, the Appellant had the intention to kill the deceased.
- [3] The state called three witness who all testified in support of its case. Ms. Twanambi was the first to testify regarding the incident which caused the deceased's injuries. The two police officers, Mr. Mutangwa and Mr. Mabilitala, testified about the Appellant's arrest and what transpired at the scene after the deceased was discovered lying on his back injured and breathing heavily. The state also handed in the postmortem report compiled by Dr. Julian David Jakobson on the 2nd of August 2016 and an affidavit, deposed to by Mr. Mpho E.I Marahemi, a forensic officer, in terms of Section 212 of the Criminal Procedure Act 51 of 1977 which confirmed that the deceased body was identified and that it did not sustain any further injuries. These exhibits were accepted into evidence uncontested. The Appellant testified on his behalf and did not call any witnesses.
- [4] I shall not repeat the evidence because it was ably and extensively dealt with by Mr. Steyn, the presiding magistrate, in his judgement. Where necessary I shall refer to the evidence in order to substantiate a particular submission or finding.
- [5] Mr. Steyn dealt with the evidence of Ms. Twanambi first and later considered the evidence of the Appellant. He carefully pointed out facts which are common cause and those which are in contrast. He also dealt with probabilities and inconsistencies in the evidence of Ms. Twanambi and the Appellant. At all times he was aware that the evidence of Ms. Twanambi and the Appellant were to a material extent irreconcilable. I cannot find fault in the manner in which he evaluated the entire evidence.
- [6] It is common cause that, the deceased and the Appellant were at a feast at Xhosa Dam, Masasani Crossroad; there was an altercation between the two; there were people carrying knopkieries at the dance that night; the deceased died later that night; the cause of death was a head injury; and the Appellant was arrested the next morning of the incident.
- [7] The postmortem report indicates that the head injury is the cause of death. Among other injuries sustained by the deceased were, a fracture of the skull, bruises and abrasion to the right forearm indicating possible defence wounds, swollen orbit to the left and right, bruises to the right shoulder and several bruises to the facial area.
- [8] A closer analysis of the injuries indicates that, the attack came from the front and the deceased was facing his assailant. The abrasion and bruises to the right forearm suggest that the deceased was in a defensive mode. These facts are corroborated by Ms. Twanambi's evidence that the Appellant hit the deceased with a kirie, pushed him into a corner and further assaulted him. I find it improbable that the deceased was carrying a kirie or that he assaulted the Appellant because Ms Twanambi testified that she did not see any injuries on

the Appellant at the time of the deceased's attack. If there were any, she would have mentioned such fact in light of the credible nature of her testimony and also confirmed that the Appellant's wound was covered in a cloth to prevent bleeding. Her evidence was very clear and without single shred of ambiguity or bias. In my view Mr. Steyn was correct in finding her a credible witness.

- [9] The Appellant admitted that he had a fight with the deceased that night, which took place inside the hall. Ms Twanambi pointed out the Appellant to the police the next morning. She would not have been able to do so if she was not in the hall and did not witness the fight. The Appellant may not have noticed Ms Twanambi sitting in the hall but Ms Twanambi was indeed in the hall and saw the attack from where she was seated, which was about eight (8) meters away. The Appellant's evidence is characterized by contradictions and improbabilities to an extent that the court was correct in rejecting it.

In the matter of Agnes Mashegoanyana Manala v The State^[1] Makgoba JP referred with approval to the decision in S v Francis^[2] wherein it was held that:

"The powers of a Court of appeal to interfere with the findings of fact of a trial Court are limited. In the absence of any misdirection the trial Court's conclusion, including its acceptance of a witness' evidence is presumed to be correct. In order to

succeed on appeal, the Appellant must therefore convince the Court of appeal on adequate grounds that the trial Court was wrong in accepting the witness' evidence – a reasonable doubt will not suffice to justify interference with its findings. Bearing in mind the advantage which a trial Court has in seeing, hearing and appraising a witness, it is only in exceptional cases that the Court of appeal will be entitled to interfere with a trial Court's evaluation of oral testimony".

- [10] In Van Willing and Another v the State^[3] the court referring to S v Nkosi^[4] said:

"It is appropriate to reiterate the approach of a court of appeal regarding the factual and credibility findings of the court below as set out in R v Dhlumayo & Another 1948 (2) SA 677 (A). The court of appeal must keep in mind that the trial court saw the witnesses and could observe and assess their conduct. If there was no misdirection as to the facts, the point of departure is that the trial court's findings were correct".

The court of appeal will only reject the findings of the trial court if it is convinced that the findings were erroneous, if there is doubts, the findings of the trial court must stand. In the circumstances I cannot find that the court a quo erred in its evaluation of the evidence.

- [11] It is so that Ms Twanambi is a single witness regarding the incident of assault and later the identification of the Appellant, which lead to the arrest. Cautionary rules must apply as stated in R v Mokoena^[5] where the court said that the evidence of a single witness to bring about a conviction, it must be satisfactory in all material respects. In S v Saul^[6] and Others the court said that "the cautionary rule referred to by De Villiers JP in 1932 may be a guide to a right decision but it does not mean 'that the appeal must succeed if any criticism, however slender of the witness' evidence were well founded".

The court further stated that the cautionary rule does not replace common sense. The evidence of Ms Twanambi was indeed satisfactory in all material respects and was correctly relied upon. Her evidence remained consistent and probable throughout her cross examination.

She never exaggerated. She conceded that she never went outside after the assault and could not have seen what happened to the deceased when the appellant left the hall and went outside.

[12] The deceased was assaulted with a kirie, pushed into a corner and assaulted again. He bled heavily and died of the head injury, with his skull fractured. There is no doubt that the Appellant had the intention to kill the deceased. He did not hit him once but repeatedly with the kirie, a dangerous weapon capable of inflicting fatal injuries. Having regard to my findings on grounds of appeal raised by the Appellant, it is clear that none of them were upheld and therefore the appeal cannot succeed.

13. It is ordered that:

13.1 The appeal is dismissed.

NE NKOSI, AJ

Acting judge of the

Gauteng Division of the

High Court

I agree

SARDIWALLA, J Judge

of the

Gauteng division of the High Court

Date of Hearing : 06 November 2019

Date of Judgement : December 2019

For the Plaintiff : Mr. R Du Plessis

Instructed by : Legal Aid South Africa

For the Defendant : Adv. A Fourie

Instructed by : The Director of Public Prosecutions

[1] Agnes Mashegoanyana Manala v The State A38/2017 (17/1/2019) (unreported) at para [7].

[2] S v Francis 1991(1) SACR 198 (A) at 204.

[3] Van Willing and Another v The State (109/2014) [2015] ZASCA 52 (27 March 2015) at para [4].

[4] S v Nkosi 1993 (1) SACR 709 (A) at 711 E-G.

[5] R v Mokoena 1932 OPD 79 at 80.

[6] S v Saul and Others 1981 (3) SA 172 (A) at 180E-H.

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