

SOUTH AFRICA / JUDGMENT

Koester v S (CA&R174/2016) [2017] ZAECHGC 49 (25 April 2017)

[2017] ZAECHGC 49

COURT

Eastern Cape High Court, Grahamstown

BEFORE

Bloem, Malusi, Molony

CASE / FILE NUMBER

CA&R174/2016

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IN THE

HIGH COURT OF SOUTH AFRICA

EASTERN

CAPE DIVISION, GRAHAMSTOWN

CASE

NO. CA & R 174/2016

In the

matter between:

ANGELO
KOESTER
Appellant
and
THE
STATE
Respondent
APPEAL

JUDGMENT

Bloem J.

- [1] The appellant was charged with murder before Rugunanan AJ. He pleaded not guilty. At the conclusion of the trial he was convicted as charged and sentenced to 18 years' imprisonment. He was also declared unfit to possess a firearm. The appellant sought and was granted leave by the court a quo to appeal to this court against conviction only.

- [2] The undisputed facts are that John van Rensburg is the appellant's father who lives in Bedford. He earns a living by doing masonry work and erecting fences. He worked in a team of four persons fixing fences. The appellant was the leader of the team. The other two members of the team were Llewellyn, his other son, and Patrick, his sister's son. During October 2015 the team worked on a farm Bulkraal in the district of Cookhouse. The farm owner provided accommodation to the team. On Friday, 2 October 2015 Mr van Rensburg left the farm to go home at Bedford. The other members of the team remained behind. On Saturday, 3 October 2015 the appellant and Belinda Oliver, his girlfriend (with whom he lived as husband and wife), visited him in Bedford. Mr van Rensburg and the appellant consumed rumba, a mixture of rum and Coke, while Ms Olivier consumed some wine. Shortly before sunset the appellant and his girlfriend left. Mr van Rensburg assumed that they returned to the farm.
- [3] On Monday, 5 October 2015 Mr van Rensburg returned to the farm between 07h00 and 0800. The farmer's gardener occupied the cottage which members of the team had occupied the previous week. Another cottage had been allocated to them on another portion of the farm. Ms Olivier, who was in bed in the newly allocated cottage for most of the day, died. Jan de Beer, a forensic pathologist, testified that on 9 October 2015 he conducted a post-mortem examination on the body of Ms Olivier, the deceased. During the course of the examination he noted that she sustained a fractured neck, fractured left hip, multiple bruises on her body and a contusion on her scalp. He concluded that the cause of death was the head injury which was caused by blunt force, like the flat side of a spade. A displaced vertebra caused injury to the deceased's spinal column. Dr de Beer testified that death might have occurred hours after the application of considerable force on the deceased and not immediately.
- [4] The issue before the court a quo was the identity of the deceased's killer. The state alleged that she was killed by the appellant. The latter denied that he killed the deceased. The court a quo found that the state proved beyond reasonable doubt that the appellant was the killer and rejected his version. The appellant appeals against that finding.
- [5] Mr van Rensburg testified that upon his arrival on the farm on that Monday morning he went to the house of Thozamile Patrick Sam, nicknamed Bheza. The appellant later joined Mr van Rensburg, Bheza and his wife, Nosithembela Mtsofeni, at Bheza's house. He had a bottle of wine. The appellant said that they should consume the wine for his girlfriend's pain because he had a fight with her and hit her with the flat side of a spade. Ms Mtsofeni asked the appellant whether his girlfriend was injured. He said that she was not injured. Mr van Rensburg, Bheza, the appellant and Ms Mtsofeni consumed the wine that the appellant took to Bheza's house.
- [6] Mr van Rensburg and the appellant walked to their cottage in which Ms Olivier was lying. He observed a spade and other tools used by the team in the appellant's room. He also observed Ms Olivier lying on her back in bed covered with blankets. She had a scratch mark in the region of her ear. At her request he made her a cool drink. In the appellant's absence Mr van Rensburg asked Ms Olivier what was wrong with her whereupon she responded that the

appellant hit her with the flat side of a spade. When the appellant entered the cottage he prepared food for the three of them. Although food was dished for her Ms Olivier did not eat. Mr van Rensburg and his son went to sleep after they had eaten. The appellant woke up before 10h00 and said that he was going to borrow money to pay for transport so that Ms Olivier could receive medical attention.

- [7] Mr van Rensburg walked with the appellant to the moneylender. The appellant borrowed R200.00 and bought a bottle of wine for his father. The appellant left while Mr van Rensburg remained behind at the moneylender's place where he consumed alcohol with two other men. Later that day Mr van Rensburg went to Bheza's house. From there he went to Ms Olivier.

She complained about stomach ache. He went to look for a particular herb to give to her. Upon his return he discovered

that Ms Olivier had died. Mr van Rensburg went to Bheza for assistance. Later the police arrived at the cottage with the appellant in the police van. He asked his father whether the deceased had died which Mr van Rensburg confirmed.

- [8] Ms Mtsofeni's evidence and that of her husband, Bheza, is generally the same as that of Mr van Rensburg insofar as they

experienced the same events on the Monday. Ms Mtsofeni testified that she and Bheza occupied a cottage which is not too far

from the cottage initially occupied by the team. She testified that the appellant, Mr van Rensburg and Bheza were drinking beer at her house from about 08h00 on the Monday morning. In the mornings she used to see smoke lingering from the cottage initially occupied by the team. However she did not see smoke that morning. While he was having beer at her house Ms Mtsofeni asked the appellant why there was no smoke coming from that cottage that morning. He said that he did not hit the deceased too hard with a spade. He asked Ms Mtsofeni not to be angry with him. She noted that the appellant shivered when reporting the assault on the deceased to her. He held a jug of beer with both hands. During the course of the conversation the jug was dropped. She left the cottage to gather wood. She did not see the appellant again on that day. Later that evening Mr van Rensburg went to their cottage and told them that it appeared that Ms Olivier had passed away and that he required assistance from Bheza to contact the police.

- [9] Bheza testified that he woke up at about 05h00 on the Monday. The appellant arrived at his house at about 06h00 because the farm owner wanted to see them. The two of them drank traditional beer from a jug. Ms Mtsofeni asked the appellant where the deceased was because she did not see smoke coming from their cottage that morning. The appellant said that Ms Mtsofeni should not be angry with him because he hit her (his girlfriend) with a spade – but did not hit very hard. Bheza testified that as soon as his wife enquired about the deceased, the appellant shivered and dropped the jug. Bheza picked up the jug, poured more beer in it and they consumed it. The two males then went to the farm owner's house. After

their meeting with the farm owner Bheza and the appellant went to a moneylender where the appellant borrowed money and bought a bottle of wine. He said that he intended to use the money to get medical assistance for his girlfriend. Mr van Rensburg arrived. The three of them had drinks whereafter they proceeded to Bheza's house where they consumed beer. Mr van Rensburg and the appellant left. Bheza thought that the appellant was going to Bedford to buy medication for his girlfriend because he had hit her. At about 20h00 on that Monday Mr van Rensburg arrived at Bheza's house and requested him to assist in calling the police because the appellant's girlfriend had died. The police were called. Bheza and his wife accompanied Mr van Rensburg to the cottage in which the deceased's body was lying.

- [10] The appellant denied that he assaulted his girlfriend, that he caused her death or that he admitted to assaulting her. He testified that he and his girlfriend left the farm on the Saturday for Bedford where he visited his father. He consumed alcohol with his father. After that he and his girlfriend visited his grandmother where they spent the night. They returned to the farm on the Sunday. On the Monday morning he and his girlfriend went to Bheza's house where his girlfriend asked Ms Mtsofeni for beer. The appellant left for the farm owner's house where a prayer service was in progress upon his arrival. After the service he spoke to the farm owner. He went to the workshop where tractors are kept. At the workshop he met Bheza for the first time on that day. The two of them proceeded to the house of a moneylender where he borrowed R200.00 and bought wine. The money was borrowed so that he could fetch the other team members in Bedford. He could get the loan money only that afternoon when the lender's wife returned from work. He and Bheza went to the cottage where they met up with his father. While Bheza was handing a jug containing beer to the appellant, the

jug fell to the ground. He apologised to Bheza. The three men then consumed the wine that the appellant had. Bheza requested the appellant and his father to take a horse and saddle along. The horse was to be released somewhere on the lands. Upon their arrival at the cottage where they stayed, the appellant entered but Mr van Rensburg proceeded on horseback to release the horse onto the lands. His girlfriend was sitting on a chair and doing needlework. Upon his father's return the two of them had wine while his girlfriend had cool drink. At about 11h00 the appellant and his father returned to the moneylender where he was given R200.00. He bought a bottle of wine. After handing it over to his father he left for Bedford. He was arrested that evening at his grandmother's home in Bedford.

- [11] The appellant testified that there was a conspiracy against him. According to him, Bheza and his wife conspired to give false evidence against him because approximately three months before the death of Ms Olivier, their son, Charles, was involved in a fight with Llewellyn, the appellant's brother. The appellant testified that he intervened. Since that fight Bheza and Ms Mtsofeni have been angry at him. Regarding his father, he testified that they never had a good relationship, that his father never regarded him as his son – hence their different surnames and his father did not like the idea that he was the leader of the team. The court a quo dismissed the appellant's conspiracy theory. It found that, on the evidence, Mr van

Rensburg had no reason to dislike his son. To the contrary, they socialised and had drinks together,

Mr van Rensburg appreciated the fact that the appellant procured work for him and that Mr van Rensburg had no reason to falsely implicate his son. I agree with the finding that the appellant's conspiracy theory, that the above state witnesses had an ulterior motive to give evidence against him, is unfounded. His evidence in that regard was, in my view, correctly rejected.

[12] Despite the absence of an eye witness account of how the deceased sustained the injuries which ultimately caused her death, the court a quo convicted the appellant of murder because of what the deceased said to Mr van Rensburg, what he said in reply to Ms Mtsofeni's question about no smoke coming from the cottage that morning and circumstantial evidence.

[13] In terms of section 3 of the Law of Evidence Amendment Act[1] the trial court admitted Mr van Rensburg's hearsay evidence to the effect that he was told by the deceased that the appellant hit her with the flat side of a spade. After analysing each of the factors specified in section 3 (1) (c) of the Law of Evidence Amendment Act against the background of the facts of this case, the court a quo was of the opinion that it was in the interest of justice to admit that hearsay evidence. Although there is a general attack on the trial court's acceptance of the evidence of Mr van Rensburg, Ms Mtsofeni and Bheza, it is striking that there is no specific attack on the admission of the hearsay evidence. Amongst the factors considered by the court a quo before the hearsay evidence was accepted was that it must have been very difficult for Mr van Rensburg to have given incriminating evidence against his son, that he created a good impression in the witness box "despite imperfections in his evidence in peripheral respects", that there was no indication that he could have prompted the deceased on what to say, that he got along very well with the deceased whom he knew for a long time and was concerned about her condition, that it was unlikely that the deceased would falsely implicate the appellant, that it was unlikely that she would have forgotten events or would have been mistaken about the identity of her assailant and the instrument used or how it was used. There is, in my view, no basis upon which this court should interfere with the finding of the court a quo to accept the hearsay evidence.

[14] Regarding the alleged admission made extra-judicially by the appellant to Ms Mtsofeni, the court a quo found that the appellant

voluntarily informed her that he hit the deceased with a spade, albeit not too hard. The court found that there is an element

of uniformity in what Mr van Rensburg, Ms Mtsofeni and Bheza said in this regard. It found that the inconsistencies in their

versions did not mean that their evidence should be disregarded entirely. It was found that the three state witnesses were "not sophisticated persons and the peripheral imperfections in their evidence, as correctly contended by counsel for the State, are a reflection of their honesty. The

witnesses presented their evidence in a confident and unbiased manner. It is thus accepted that in so far as the material aspects of their evidence traverses the admission relied upon by the State, they were reliable and credible". On the other hand, the appellant was found to be an unimpressive witness "and all indications are that he was dishonest and evasive". Once again, the acceptance by the court a quo of the admission made extra-judicially cannot be faulted.

- [15] The main submission made by Mr Geldenhuys, counsel for the appellant, was that the conduct of Mr van Rensburg, Ms Mtsofeni and Bheza was improbable if it is accepted that the appellant admitted to them that he hit the deceased with a spade. He submitted that none of them either berated him for what he had done or took any further measures to ascertain her condition after the admission. Mr Geldenhuys submitted that this is a factor that the court a quo should have taken into account, but failed to do so.
- [16] Mr Engelbrecht, counsel for the state, submitted that the appellant's attack on the conviction is directed solely at the court a quo's credibility findings. He submitted that an appeal court has limited powers to overturn a trial court's credibility findings and that not every error made by a witness affects his or her credibility. The court a quo made the credibility findings referred to above in respect of the three state witnesses and the appellant.
- [17] Once a trial court has made credibility findings, an appeal court should be deferential and slow to interfere with such findings unless it is convinced on a conspectus of all the evidence that the trial court was clearly wrong.[2]
- [18] Insofar as it was submitted that the three state witnesses adopted an indifferent attitude towards the appellant's alleged admission that he hit his girlfriend with a spade, in my view that submission is not based on the evidence. All three state witnesses testified that when the appellant reported the assault to them, he made them understand that it was not serious, that he said at approximately 10h00 on the Monday that he would make arrangements for his girlfriend to receive medical attention, that he went to the moneylender and that money was ultimately lent to him that same afternoon.
- [19] Mr van Rensburg testified that, because of what the appellant said, he did not think that Ms Oliver was seriously injured. It was only when he saw her that he realised that she might require assistance because she could not get out of bed. Ms Mtsofeni also testified that the appellant said that the assault on Ms Olivier was not serious. Prior to the Monday she had never spoken to Ms Oliver, was not used to visiting the appellant's cottage and did not deem it necessary to visit Ms Olivier after the appellant had told her that he had assaulted her by using a spade. Bheza testified that he was not shocked to learn that the appellant had assaulted his girlfriend because he was used to the appellant assaulting her. In any event, he did not think that Ms Oliver was seriously injured because the appellant said that he was going to Bedford to purchase medicine. He testified that if the appellant knew that his girlfriend was seriously injured he would have expected him to summon an ambulance instead of wasting time to purchase medicine in Bedford.

- [20] In my view the above version of the three state witnesses is plausible. It does not lie in the appellant's mouth to criticise them for their alleged indifferent attitude after he had informed them that he hit his girlfriend with a spade but, so he told them, that she was not seriously injured. There is accordingly no merit in the submission that the version of the three state witnesses should be rejected because it is allegedly improbable.
- [21] Regarding the contradictions, the state's case is that, when the appellant said that he hit his girlfriend by using a spade, he was shaking and the jug, which he had in his hands, dropped. However, it is unclear when, in relation to the dropping of the jug, the appellant made the admission.
- [22] Mr Geldenhuys referred to the contradiction between the evidence of Ms Mtsofeni and Bheza as to when the jug was dropped. Ms Mtsofeni testified that the jug was dropped after the appellant had made the admission. Bheza's evidence was that he gave the jug, with beer in it, to the appellant. His wife asked the appellant where Ms Olivier was. The appellant dropped the jug because he was shivering. It was only after the jug had been dropped that he made the admission.
- [23] A further criticism levelled against Bheza's evidence was that it was only late during his evidence that Bheza testified that he heard a woman screaming from the cottage that Ms Olivier and the members of the team shared and that the appellant had a history of assaulting his girlfriend. Mr Geldenhuys submitted that the inference could be drawn that Bheza did not previously give that information to the authorities and that he was adding to and adapting his evidence. It is correct that Bheza did not give the above evidence when he gave evidence-in-chief. Bheza confirmed under cross-examination that he referred to the screams in his original statement to the police. This was not challenged in cross-examination. Mr Geldenhuys sought to submit that this part of Bheza's evidence was so crucial that his leaving it out in evidence-in-chief remained significant. I do not agree with that submission because the reason for Bheza giving that evidence only under cross-examination is that he was not led to give that evidence in chief. That evidence was extracted from him only during cross-examination.
- [24] Another contradiction upon which reliance was placed by Mr Geldenhuys was that Ms Mtsofeni testified that, until the death of Ms Olivier, the two of them did not have a conversation other than the occasional exchange of greetings, whereas Bheza testified that the two ladies used to meet from time to time to talk about "woman issues". Mr Geldenhuys submitted that the above contradiction is indicative of Ms Mtsofeni's attempt to evade answering questions about her failure to act on the alleged admission made by the appellant.
- [25] In this regard Nestadt JA said the following in *S v Mkohle*[3]:

“Contradictions per se do not lead to the rejection of a witness' evidence. As Nicholas J, as he then was, observed in S v Oosthuizen 1982 (3) SA 571 (T) at 576B-C, they may simply be indicative of an error. And (at 576G-H) it is stated that not every error made by a witness affects

his credibility; in each case the trier of fact has to make an evaluation; taking into account such matters as the nature of the

contradictions, their number and importance, and their bearing on other parts of the witness' evidence. Williamson J obviously did this. In my view, no fault can be found with his conclusion that what inconsistencies and differences there were, were 'of a relatively minor nature and the sort of thing to be expected from honest but imperfect recollection, observation and reconstruction'. One could add that, if anything, the contradictions point away from the conspiracy relied on.”

[26] In my view the above contradictions are not material. They do not relate to any aspect relevant to the killing of the deceased. They relate to side issues, namely whether Ms Mtsofeni and Ms Olivier conversed during the latter's lifetime and the precise time when the jug was dropped in Bheza's house. The court a quo correctly found that the exact moment in the conversation between the appellant and Ms Mtsofeni as to when the jug was dropped is irrelevant, considering that it is common cause that the jug was dropped (but for a different reason on the appellant's version). There are indeed a few contradictions between the evidence of the three state witnesses, all of them on aspects which are immaterial. The existence of those contradictions point away from the conspiracy theory relied upon by the appellant, which theory was correctly rejected by the court a quo.

[27] In all the circumstances, the finding by the court a quo that the state proved its case beyond reasonable doubt, cannot be disturbed. That finding was based on the acceptance of the evidence of the state witnesses and the rejection of the appellant's version assessed against the totality of the evidence.[4] That finding was, with respect, correctly made. The appeal has no merit and must accordingly fail.

[28] In the result, the appeal against conviction is dismissed.

G H BLOEM

Judge of the High Court

Malusi J,

I agree

T MALUSI

Molony AJ,

N MOLONY

Acting Judge of the High Court

For the appellant:

Adv D P Geldenhuys of the Grahamstown Justice Centre, Grahamstown.

For the state:

Adv J P J Engelbrecht of the office of the Deputy Director of Public Prosecutions, Grahamstown.

Date of hearing:

18 April 2017

Date of delivery of the judgment:

25 April 2017

[1] The Law of Evidence Amendment Act, 1988 (Act No. 45 of 1988).

[2] S v Pistorius 2014 (2) SACR 314 (SCA) at 322a-b.

[3] S v Mkhle 1990 (1) SACR 95 (A) at 98f-h referred to in S v Pistorius (supra) at 321a-b.

[4] S v van der Meyden 1999 (2) SA 79 (W) at 80H-81C.

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