

SOUTH AFRICA / JUDGMENT

Mahabo v S (A88/2020) [2020]

ZAFSHC 223 (21 September 2020)

[2020] ZAFSHC 223

COURT

Free State High Court, Bloemfontein

BEFORE

Daffue, Opperman

CASE / FILE NUMBER

A88/2020

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IN

THE HIGH COURT OF SOUTH AFRICA

FREE

STATE PROVINCIAL DIVISION

Appeal

Case No.: A88/2020

In the matter between:

TSHIDISO
SHADRACK
MAHABO
Appellant
and
THE
STATE
Respondent

Coram:

Daffue , J et
Opperman, J
Date

of appeal: 14

September 2020. The matter was adjudicated on the Heads of Argument
as agreed by the parties and authorised by the Court

Delivered:

The judgment was handed down
electronically by circulation to the parties' legal
representatives by email and release to SAFLII
on 21 September 2020.

The date and time for hand-down is deemed to be 21 September 2020 at
11h00

Summary:	Appeal - single witness – circumstantial evidence - failure of accused to testify ORDER On appeal against conviction and sentence by Regional Court Magistrate, Mr Ludidi, Welkom Regional Court, Free State on 29 October 2019 and 15 January 2020 respectively. Leave to appeal was refused by the court a quo (Court a quo case no.: RC 160/2018, A09/2020). The accused petitioned this court and on 7 May 2020 leave to appeal was granted and against conviction as well as sentence (P54/2020).
Orders:	(1) The appeal is upheld. (2) The conviction and sentence are set aside.

JUDGMENT

Opperman, J (Daffue, J concurring)

I

Introduction

- [1] On 16 December 2016 the deceased was stabbed outside Johnny’s Tavern in Welkom. He died on the same day just as he was admitted into hospital but not before he allegedly made a dying declaration to his girlfriend (“M”). She is the only person that heard the declaration. The dying statement was disallowed as inadmissible hearsay evidence. The presiding magistrate
- (a) accepted that the evidence of “M,” a single witness, was satisfactory in all material aspects, (b) that the circumstantial evidence pointed to the Appellant as the perpetrator and (c) apparently made a negative deduction of the Appellant’s failure to testify. Consequently, Appellant was convicted on a charge of murder and sentenced to fifteen years’ imprisonment.
- [2] It is common cause that the circumstances surrounding the stabbing are not known. The tavern was busy and everybody consumed alcohol, including “M”, the deceased and his friends. Appellant was part of the group. Normal conversations were the order of the day. At a stage “M” went to the ladies’ bathroom. She had to wait her turn for a while. After about 15 minutes she returned to the tavern, only to find the deceased, covered in blood, returning from outside. An ambulance was summonsed and she accompanied the seriously injured deceased to the hospital. He passed on that same night.

She did not see the Appellant after returning from the bathroom. No further evidence was tendered by the State. Immediately

after the State closed its case, Appellant did the same.

[3] I pause to note that the Supreme Court of Appeal reiterated on 31 July 2020 in *A M and another v MEC Health, Western Cape* (1258/2018) [2020] ZASCA 89 that findings of a court a quo are only overturned if there is a clear misdirection or the trial court's findings are clearly wrong.

[4] Counsel for the Respondent, Advocate R. Hoffman, with ethical grace and correctly so, did not support the conviction and I quote:

“Respectfully it is submitted that the guilt of the Appellant was not proven beyond reasonable doubt and that the appeal against the conviction and sentence should be upheld by this Honourable court.”[1]

[5] The concession by the State should conclude the judgment, but I deem it prudent to briefly remark on the manner in which the trial was conducted and the dire consequences it poses for the administration of justice. A clearly heartbroken “M” was put through a protracted traumatic time in the witness doc. The matter was continuously postponed during her testimony. Courts must ensure that trials be fair to both the accused and the witnesses and realise that lower courts are at the coalface of the justice system. It is imperative to install trust and not cause trauma and injustice.[2]

[6] The trial consisted of:

1. The plea of not guilty by the Appellant at which time he made no plea explanation. It came to light later that he denied being the perpetrator.
2. The evidence of “M” in the State's case.
3. The evidence of the emergency care practitioner that was part of the team that treated the deceased at the scene and transported him to the hospital. This witness was called by the Court after he invoked section 186 of the Criminal Procedure Act 51 of 1977 (CPA). This evidence is irrelevant for adjudication of the appeal as the court a quo disallowed the deceased's dying statement as inadmissible hearsay evidence.
4. As mentioned, the Appellant did not testify in his defence and closed his case immediately after that of the State.

[7] The case turns on the following issues:

1. The veracity of the single witness, “M”;
2. the principles in law to be regarded when circumstantial evidence is adjudicated; and
3. the effect of the silence of the Appellant in response to the State's case.

II The veracity of the evidence of the single witness, “M”

- [8] The court a quo held “M” was a trustworthy witness who “did not lie” and that her evidence was satisfactory in all material aspects. She was not an eyewitness and could not assist the court a quo to what transpired the particular night. It is unnecessary to consider the witness’ evidence in any detail, save to say that I am not satisfied that her version is the truth in all respects. She contradicted herself several times pertaining to when and where the alleged dying statements were made to her.
- [9] The court a quo could not convict the Appellant based on “M” evidence. It accepted that and consequently considered circumstantial evidence.

III The test in evaluating circumstantial evidence[3]

- [10] The test is well-known and although the court a quo referred to the correct authority, it failed to consider the test and misdirected itself. It is meaningless to quote the two cardinal rules of logic mentioned in *S v Blom*, but then ignore them when the proven facts are considered. In order to convict, the court a quo had to infer, having considered the proven facts, that the Appellant unlawfully and intentionally killed the deceased. Such inference to be drawn must be consistent with the proven facts and if not, the inference cannot be drawn. Furthermore, the proven facts must exclude every reasonable inference from them, save the one to be drawn.
- [11] Insofar as the State conceded that the appeal should succeed, it is deemed unnecessary to labour the point and I shall restrain myself by briefly mentioning a few aspects. The group of people consisting of the Appellant, the deceased and some of their friends were enjoying themselves in the tavern. There were no signs of animosity. “M” went to the bathroom and stayed away for about 15 minutes. When she came back, she met the injured deceased who was returning from outside. There is no evidence of any dispute between the deceased and anyone, particularly the Appellant. There is no indication where the Appellant and the other patrons and friends of the deceased were immediately before, during and after the deceased was injured. The perpetrator could be anyone of a number of people, even someone that was never inside the tavern that night. The identities of the deceased’s friends and the witness’ friend, who were present in the tavern that night, were known to the State *ex facie* the record, but none of the available witnesses were called to testify. Mr Van der Merwe did not even deem it necessary to rely on this aspect, bearing in mind the incorrect application of the test in respect of circumstantial evidence, but it might be mentioned that a negative deduction should have been made against the State for its failure to call available witnesses, especially where the only witness could not provide direct evidence.[4]
- [12] In conclusion, the wrong application of the test pertaining to circumstantial evidence is such that the appeal must succeed.

IV The effect of the silence of the accused in response to the State’s case

[13] The court a quo misdirected himself on the law in this instance as well. The research and findings of Schmidt, CWH[5] on the issue and with reference to case law is on point and correct: “The wording of section 35(3)(h) of the present Constitution is identical to that of section 25(3)(c) of its predecessor and the judge’s remarks in Brown are therefore equally applicable to the provisions of section 35(3)(h). It seems clear, now, that the presiding officer, by virtue of the constitutional provision, has to avert his gaze, so to speak, from the accused’s failure to give evidence (which may also be termed the accused’s exercise of his constitutional right to remain silent) and to focus purely on the evidence placed before the court. If the state has indeed established a prima facie case, ordinary logic is applied and the accused loses.” (Accentuation added)

“It stands to reason that failure to give evidence does not shift the burden of proof. ...that elements of the crime and of the accused’s involvement cannot be inferred merely from his failure to give evidence – lacunae in the state’s case cannot be supplemented – yet this failure can convert the state’s prima facie proof into conclusive proof. Ultimately the court must still decide on the basis of all the evidence whether there has been proof beyond reasonable doubt.”

V

Conclusion

[14] The single witness did not pass muster, but even if her evidence is accepted, the Appellant could not have been convicted based on the test applicable to circumstantial evidence. There was not any evidence against the Appellant at the end of the State’s case and the words of the Honourable Judge in *Lubaxa v S 2001 (2) SACR 703 (SCA)* ring true:

*“Clearly a person ought not to be prosecuted in the absence of a minimum of evidence upon which he might be convicted, merely in the expectation that at some stage he might incriminate himself. That is recognised by the common law principle that there should be ‘reasonable and probable’ cause to believe that the accused is guilty of an offence before a prosecution is initiated (*Beckenstrater v Rottcher and Theunissen 1955 (1) SA 129 (A) at 135C-E*), and the constitutional protection afforded to dignity and personal freedom (s 10 and s 12) seems to reinforce it. It ought to follow that if a prosecution is not to be commenced without that minimum of evidence, so too should it cease when the evidence finally falls below that threshold.”*

[15]

ORDERS

(1) The appeal against conviction and sentence is upheld.

M. OPPERMAN, J

I concur

J DAFFUE, J

APPEARANCES

On behalf of Appellant

Mr P van der Merwe

Legal Aid South Africa

Bloemfontein

On behalf of Respondent

Advocate R Hoffman

Office of the Director Public Prosecutions: Free State

[1] Respondent's Heads of Argument at paragraph 11.

[2] The incident happened on 16 December 2016, the Appellant pleaded on 27 September 2018 and the matter was only finalised on 15 January

2020. "M" testified on 27 September 2018, 28 February 2019, 7 March 2019 and 29 October 2019 and thus on four occasions over a period in excess of a year.

[3] S v Blom 1939 AD 188 at pp 202-3

[4] S v Texeira 1980 (3) SA 755 (AD) at pp 763D – 765C

[5] Law of Evidence Last Updated in July 2020 at 3.2.4.2., <https://www.mylexisnexis.co.za/Index.aspx> on 16 September 2020. Osman v Attorney-General, Transvaal

[1998] ZACC 14; 1998 (2) SACR 493 (CC).

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