

SOUTH AFRICA / JUDGMENT

Mailula v S (A70/2017) [2017] ZAGPJHC 226 (17 August 2017) [2017] ZAGPJHC 226

COURT

South Gauteng High Court, Johannesburg

BEFORE

Opperman, Francis

CASE / FILE NUMBER

A70/2017

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REPUBLIC

OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

DIVISION, JOHANNESBURG

CASE

NUMBER: A70/2017

Not

reportable

Not

of interest to other judges

Revised.

17/8/2017

In

the matter between:

MAILULA,
LESLEY
THAPELO APPELLANT
versus
THE
STATE RESPONDENT

JUDGMENT

OPPERMAN J

Introduction

- [1] The Appellant, together with Mr Thulani Mabuza his co-accused (accused 1 in the court a quo), appeared in the Regional Court for the Division of Gauteng held at Germiston on a charge of murder of Benedict Mabuza (the deceased), which had occurred between 15 and 17 July 2011, at or near Edenvale, read with the provisions of Sections 51(2), 52(2), 52A and 52B of the Criminal Law Amendment Act 10 of 1997.
- [2] On 6 July 2012, the Appellant and accused 1 pleaded not guilty. On 2 March 2015, they were both convicted and on 12 March 2015, sentenced to nineteen (19) years imprisonment each.
- [3] On 9 July 2015, they applied for leave to appeal against both their convictions and sentences in terms of Section 309B of the Criminal Procedure Act 51 of 1977 (the CPA), which applications were dismissed.
- [4] The Appellant petitioned the Judge President and leave to appeal against both his conviction and sentence to the Gauteng Local Division, Johannesburg was granted. The Appellant was legally represented throughout the proceedings

The gist of the allegations against the appellant

- [5] The state contended that on the 15th of July 2011 and at about 18h00, the appellant (accused 2 in the court a quo) and accused 1, assaulted the deceased (Mr Otis Benedict Mabuza, the first cousin of accused 1) by kicking him with metal tipped shoes and by beating him with a belt which conduct caused his death.

Nature of the evidence

- [6] The state called 3 witnesses – Dumisane Sithole (an eye-witness), Nkosinathi Zwelakhe Mbuisa (an eye-witness) and constable Adolite Agreement Mashaba (SAPS). The evidence relating to the identification of the deceased and the cause of death was admitted. A photo album of the crime scene accompanied by an affidavit and a key to the photo album was also admitted.
- [7] A statement by Dr. J. G. Pieterse in terms of Sections 212 (4) and
- (8) of the CPA inclusive of his findings in respect of a post mortem examination which was conducted by him on the deceased on 19 July 2011, confirming that the cause of death was subdural and subarachnoid heamorrhaging, was received as evidence. He recorded, in respect of the external appearance of the body and condition of the limbs the following: Multiple stamped abrasions on the deceased's face and forehead, a 3 cm laceration in the right parietal region, a 1 cm laceration below the left eye, a 4 cm laceration behind the left

ear, a 3 cm laceration in the left parietal region, a 3 cm laceration in the left occipital region, bruising with grazed abrasions over the back, small stamped abrasions on his right hand, right forearm, right elbow, right hip and left hand. In respect of the deceased's head and neck he recorded: 'Intracranial contents: Right sided subdural haemorrhage. Bilateral subarachnoid haemorrhages.'

- [8] Of considerable significance is the fact that the report does not indicate when the death occurred. It records that the death occurred

'as informed', on 17 July 2011.

The common cause facts

- [9] The common cause facts as they unfolded during the trial can be summarised as follows: The deceased, accused 1 and one Madely, resided at a property in Edenvale (the property). On Friday, 15 July 2011 and between 15h00 and 18h00, the appellant, accused 1, one Elvis (who has since passed away), one Small and the deceased, were drinking alcohol. An argument broke out between accused 1 and the deceased about computers which the deceased was alleged to have stolen. The extent and nature of the assaults which followed as well as who the aggressor was, is in dispute. On Sunday 17 July 2011, accused 1 found the deceased lying next to the dustbin in the back yard of the property and called the police.

State's witnesses

- [10] The state called Mr Sithole who testified that his friend, the second state witness Mr Mbuiza, had requested him to go to accused 1 as he owed Mr Mbuiza money. Upon arrival he witnessed accused 1 kicking the deceased and the appellant beating him with a belt. Accused 1 was wearing steel tipped boots. There were some female onlookers who requested them to intervene. Mr Sithole asked them to leave the deceased alone and requested them to call an ambulance. The deceased asked Mr Sithole to help him. The following day (Saturday the 16th of July 2011) when he and Mr Mbuiza bumped into accused 1 he was asked where the deceased was. They were told that he had gone to his brother in Alex. During cross-examination Mr Sithole revealed that the deceased and accused 1 used to approach Mr Mbuiza for money, who appears to have been a money lender of sorts. Mr Mbuiza also testified.

Defence witnesses

- [11] Both the appellant and accused 1 testified. Accused 1 explained that on 15 July 2017, he was with the deceased, the appellant, Elvis and one Small, drinking alcohol when an argument broke out between him and the deceased about stolen computers. They started pushing one another which developed into punching. The fight did not last very long. During this time they also kicked one another. The deceased had started the fight. Elvis and the appellant then stopped the fight. The appellant held onto the deceased and Elvis held accused 1. Accused 1 denied that he was wearing black steel tipped boots. He testified that he was wearing brown Boss shoes. After the fight the two state witnesses arrived and Mr Mbuiza

asked accused 1 about the money he owed him. Mr Sithole asked the deceased about the money he owed Mr Sithole which was between R300 and R500 and that it was three months overdue. Both accused 1 and the deceased agreed that they would meet Mr Mbuiza and Mr Sithole later that evening at the tavern to pay their debts after they had drawn the money from the ATM. At that stage their salaries had not yet been deposited. The appellant left with Elvis and accused 1 left with Small. At the tavern accused 1 met Vusi and Molife Seabonga who enquired about the whereabouts of the deceased as they too were owed money by him. Accused 1 told them that the deceased was at home. They left and did not return to the tavern that evening. Accused 1 left the tavern at about midnight. When he arrived home he found the deceased sitting on the front porch. It was dark. He asked him where Madely was and why he was sitting outside. He did not answer. Accused 1 assumed he was still angry. According to accused 1 he was alive. Accused 1 knocked on the door. There was no response and he then climbed through a broken window. He slept and the next morning he found Madely preparing breakfast. They had breakfast together. He left to go buy cigarettes

and to go to the ATM to see whether his salary had been deposited. On his way home he met the two state witnesses and Mr Mbuiza asked him about the money. He said that his salary had still not been deposited. Mr Mbuiza then enquired about the deceased and he explained that he had last seen him the day before. He and Madely made arrangements for the house keys to be hidden under a mat. He then went to the tavern and returned at about 21h00 when Madely opened the door for him. He slept. The following morning he assisted Madely in cleaning the house. When he took the bin outside, he found the deceased lying on the ground. He went to his employer Gift. They both returned and he thereafter contacted the police.

[12] The appellant testified that on 15 July 2011 he, accused 1, Elvis, the deceased and Small were drinking alcohol at the property when an argument ensued between accused 1 and the deceased about stolen computers. They started pushing one another. The deceased then punched accused 1 with clenched fists and accused 1 retaliated with fists. Accused 1 fell and the deceased was on top of accused

1. Elvis and the appellant then pulled the deceased off accused 1. As he let go of the deceased, he slapped the appellant. The appellant then slapped him back on the left side of his head. The deceased was bleeding from his nose and went to the tap to wash his face. The appellant noticed a cut on the deceased's upper lip. They then started drinking again and the two state witnesses arrived. Accused 1 went to Mr Sithole to speak to him. Mr Mbuiza called the deceased and asked him about money he owed him and which had been owing for about three months. The deceased undertook to go to the ATM machine to see whether his salary had been paid into his bank account. The deceased didn't have his bankcard with him but undertook to get it, draw the money and meet Mr Mbuiza at Makatin's Tavern. The appellant went to the tavern with accused 1, one Skumbuso and Elvis. They left the deceased behind and that was the last time he saw him. He explained that he was arrested during the evening of 18 July 2011 at Makatin's Tavern.

Misdirection

[13] In *S v Hadebe*, 1997 (2) SACR 641 the court re-emphasised the following principles:

"Before considering these submissions it would be as well to recall yet again that there are well-established principles governing the hearing of appeals against findings of fact. In short, in the absence of demonstrable and material misdirection by the trial Court, its findings of fact are presumed to be correct and will only be disregarded if the recorded evidence shows them to be clearly wrong. The reasons why this deference is shown by appellate Courts to factual findings of the trial court are so well known that restatement is unnecessary.

[14] The difficulty in this matter is that the learned magistrate drew conclusions without setting out or stating the facts upon which he so based his findings. He found:

‘The plea explanation versions conversed with state witness, evidence in defence and any responses from accused 1 taken together were found to be both unreasonable and improbable, and so rejected.’

[15] In *Rex v Difford* 1937 AD 370 at 373 the court remarked as follows:

"It is equally clear that no onus rests on the accused to convince the court of the truth of any explanation he gives. If he gives an explanation, even if that explanation be improbable, the court is not entitled to convict unless it is satisfied, not only that the explanation is improbable, but that beyond any reasonable doubt it is false. If there is any reasonable possibility of his explanation being true, then he is entitled to his acquittal, and I turn at once to consider what his explanation is."

[16] These sentiments have been stated in our law reports repeatedly. In *S v Shackell* 2001 (4) SA 1 (SCA) at para [30] Brandt AJA (as he then was) put the matter in relation to inherent probabilities as follows:

"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. On my reading of the judgment of the Court a quo its reasoning lacks this final and crucial step. On this final enquiry I consider the answer to be that, notwithstanding certain improbabilities in the appellant's version, the reasonable possibility remains that the substance thereof may be true." (own emphasis)

[17] To reject a version a court can thus not simply find that the version is both unreasonable and improbable. If it does so the court's

reasoning 'lacks this final and crucial step' being to find that it cannot be reasonably possibly true. Unfortunately, the learned magistrate neither articulated the

improbabilities he found to have existed nor did he identify the facts which he considered unreasonable. This then the misdirection

entitling this court to reconsider the facts and legal conclusions.

- [18] The learned magistrate found that there were contradictions between the state witnesses and then found, without identifying them, that they (the unidentified contradictions) are ‘of less substantial nature and effect on the main issues’.
- [19] It should be born in mind that it is common cause that an assault on the deceased occurred on the 15th of July 2017. What is in dispute is the severity and the nature of the such assaults. That being so, what the witnesses saw in relation to these events is of crucial importance. Mr Sithole suggested that a belt ie that which is used to keep trousers up, was used by the appellant to beat the deceased. Mr Mbuiza testified that a starter motor belt was used. If witnessing the same assault, one wonders how they can describe the assault weapon so differently? Mr Sithole testified that the deceased’s trousers were pulled down and that his buttocks were exposed. Mr Mbuiza disputed this saying that his trousers were only pulled down slightly and that one could just see the deceased’s pubic hair but not his genitals. Mr Sithole had testified that there was a crowd standing around including some women whereas Mr Mbuiza said there were no people at the time of the assault. Mr Sithole conceded that he and Mr Mbuiza had met with accused 1 the following day. Mr Mbuiza denied this. Why was Mr Mbuiza denying this?

- [20] The weapons used ie the steel tipped boots and the belt, was not mentioned in either witnesses statements taken shortly after the

murder (the first statements). The boots described would not evidently have steel tips. They were simply described as black boots.

This addition ie that they bore steel tips, appears to have been suggested to them to explain the lacerations on the deceased. This inference is supported by the evidence of Mr Mbuiza in respect of the taking of the second statement – he said that he and Mr Sithole were together when the second statements were taken. This is highly irregular and appears to have been appreciated by those taking the second statements as the one statement is dated 21 March 2014 and the other 1 April 2014.

- [21] There is no evidence before the court that kicking with ordinary shoes could cause the injuries sustained by the deceased which would have potentially lain the foundation to consider whether the bounds of self defence had been exceeded.
- [22] That aside, both state witnesses were asked whether it was possible that the deceased could have been assaulted later that Friday evening or on Saturday. Mr Sithole said he did not know as he was no longer there (referring to the property) and Mr Mbuiza said that it was possible. In the face of these concessions, the state did not call Madely, the woman who stayed at the property. What, if anything, did she see? Did she see the deceased on the porch Friday evening? Did any other people arrive on Saturday looking for him? When last did she see him? Could she confirm or dispute accused 1’s version? It might well be said that the court a quo was duty bound (in terms of section 186 of the CPA) to call Madely and failed to

do so.

[23] The State's case rests on circumstantial evidence. Courts, where a case is based on circumstantial evidence, are guided when determining the issues, by well-known principles of logic set out in the case of *R v Blom* 1939 AD 188 at 202-203. These are that:

"(1) The inference sought to be drawn must be consistent with all the proved facts. If it is not, the inference cannot be drawn.

(2) The proved facts should be such that they exclude every reasonable inference from them save the one sought to be drawn. If they do not exclude other reasonable inferences, then there must be a doubt whether the inference sought to be drawn is correct".

[24] In my view, the court a quo was wrong in respect of both enquiries. There is no evidence to suggest that the brown Boss shoes could have caused the injuries found on the deceased. Indeed, there is no evidence before the court to marry either the state witnesses' account of the assaults to the injuries found on the deceased or to marry the appellant's account of the injuries inflicted upon the deceased. The time period between the witnessed assault and the recovery of the body was also simply too long. If the post mortem report had concluded that the death had occurred Friday evening, the position might have been different. However, it did not. It records that the death occurred 'as informed', on 17 July 2011. In addition, there were other people looking for the deceased as he owed them money they include Vusi and Molife Seabonga who enquired about the deceased's whereabouts at the tavern, left and then did not return to the tavern that evening. Mr Mbuiza himself, who denied seeing accused 1 on Saturday. Why did he deny the encounter with accused 1 when both Mr Sithole and the appellant conceded that it had occurred?

[25] All of this aside, the court did not have to reject the evidence of the state witnesses in order to acquit the appellant.

[26] In *S v Kubeka* 1982

(1) SA 534 (SCA) at 537E - F Slomowitz AJ summarised the correct approach as follows:

"The accused's evidence did not impress me. It contained various unsatisfactory features. I mention only some of them.....Whether I subjectively disbelieve him is, however, not the test. I need not even reject the State case in order to acquit him. It is enough that he contradicts other acceptable evidence. I am bound to acquit him if there exists a reasonable possibility that his evidence may be true. Such is the nature of the onus on the State."

[27] This must of course be read with the following principles in mind as well, as enunciated in *S v Hadebe*, (supra) at p 645 I where Marais JA quotes with approval from *Moshephi and Others v R* (1980 – 1984) LAC 57 at 59F-H:

"The question for determination is whether, in the light of all the evidence adduced at the trial, the guilt of the appellants was established beyond reasonable doubt. The breaking down of a body of evidence into its component parts is obviously a useful aid to a proper understanding and

evaluation of it. But, in doing so, one must guard against a tendency to focus too intently upon the separate and individual parts of what is, after all, a mosaic of proof. Doubts about one aspect of the evidence led in a trial may arise when that aspect is viewed in isolation. Those doubts may be set at rest when it is evaluated again together with all the other available evidence. That is not to say that a broad and indulgent approach is appropriate when evaluating evidence. Far from it. There is no substitute for a detailed and critical, examination of each and every component in a body of evidence. But, once that has been done, it is necessary to step back a pace and consider the mosaic as a whole. If that is not done, one may fail to see the wood for the trees.”

[28] The court a quo was required to reject the version of the appellant by finding that his version was not reasonably possibly true. This it failed to do. Having regard to the conspectus of all the evidence and considering ‘the mosaic as a whole’, I am not able to reject the version of the appellant by finding that his version is not reasonably possibly true and I therefore find that he acted in self defence when he slapped the deceased.

[29] I accordingly make the following order:

29.1. The appeal is upheld.

29.2. The conviction and sentence is set aside.

29.3. The Office of the Director of Public Prosecutions is to make a copy of this judgment available to Thulani Mabuza, accused number 1 in the court a quo.

I OPPERMAN

Judge of the High Court

Gauteng Division, Johannesburg

I agree

R FRANCIS

Acting Judge of the High Court

Heard: 10 August 2017

Judgment

delivered: 18 August 2017

Appearances:

For the Appellant: Adv R Xaba

Legal Aid SA

For the Respondent: Adv D Barnard

Office of the Director of Public Prosecutions

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