

SOUTH AFRICA / JUDGMENT

Moepi v S (A08/2021) [2023] ZAMPMHC 23 (23 June 2023)

[2023] ZAMPMHC 23**COURT**

Middelburg High Court, Mpumalanga

BEFORE

MT Mankge, MBG Langa

CASE / FILE NUMBER

A08/2021

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Source record**IN****THE HIGH COURT OF SOUTH AFRICA****MPUMALANGA****DIVISION, MIDDELBURG LOCAL SEAT****Appeal****Case Number: A08/2021****Lower****Court number: SHG65/16****(1)****REPORTABLE: NO****(2)****OF INTEREST TO OTHER JUDGES: NO****(3)****REVISED****DATE:**

23/06/2023

In

the matter between:

JOSEPH

MOEPI

APPELLANT

And

THE

STATE

RESPONDENT

JUDGMENT

Mankge J:

Introduction

- [1] On 04 August 2017 the appellant was convicted of one count of Murder “in terms of the provisions of section 51 (2) of the Criminal Law Amendment Act”. The State’s allegation was that in November 2015, he killed one Hans Louw a male person. The appeal is serving before us, pursuant to a petition that was granted by this court as per Mphahlele DJP and Bam AJ on 17 February 2021.
- [2] The record of the proceedings was incomplete for the longest time, and only until recently in May 2023, this record was corrected, this is the reason why this appeal has delayed to this date. I thought it is necessary that it should be recorded from the outset, so that Mr. Moepi (the appellant) understands the delay in his appeal.

Facts

before the court a quo

- [3] The facts that led to the conviction are briefly that the police visited the scene of murder at Driefontein farm, and a body of a deceased male person which was in a mud house was pointed to them by the owner of the farm in question. The police then observed a body with one stab wound. Whilst the police were still at the farm, an appellant who was identified as the owner of the room in question was taken for questioning after the police observed blood on the appellant’s shoe. The appellant was later arrested for a murder of the deceased and charged as enunciated above.
- [4] Before the evidence was led, the appellant made admissions in terms of section 220 of Act 51 of 1977, admitting the date and place of incident, the conveyance of the body from the scene of crime, the contents of the post-mortem and as well as the deceased cause of death.

The evidence

- [5] The evidence before the trial court established through the evidence of one Constable Maluleka who attended the scene of murder that after the dead body was discovered in a certain room (of a mud house) the appellant showed up whilst the police were still in the scene. Maluleka’s evidence established further that, the appellant confirmed to them that the other room which was slightly opened belonged to him. Maluleka’s testimony also established that in the said room they found a knife and a trouser which were full of blood. When Maluleka spoke to the appellant he noticed that there was blood spot on one of his shoes and on the top that he was wearing. The appellant was later arrested.

[6] The evidence of the police officer from the Local Criminal Record Center, Warrant Officer Antoncich, was briefly that, he conducted crime scene investigations at the scene of this murder at Driefontein farm. He later compiled a phot album of 12 photos. His testimony was that he observed a plastic bag containing a knife which had blood, he

also found a pair of trouser which also contained blood, as well as the shoe and shirt sleeve that had blood also. He took swabs from the shoe and the shirt, he sealed the evidence in an evidence bag and handed everything to Warrant Officer Vermaak. He checked the exhibits and confirmed that they were sealed before handing them over to Vermaak.

[7] After Warrant Officer Antoncich's evidence a trial within a trial was ordered by the court, when there was an objection from the defence on the evidence that the State wanted to lead. The defence's objection was basically that the appellant did not make the confession, he was just caused to sign a document which its contents were unknown to him, and that his Constitutional rights were not explained to him. I do not deem it necessary to burden this judgment with the evidence of a trial within-a-trial, A: it is contained in the record of the proceedings, and B: the trial chose to deal thoroughly with the reasons for its ruling of a trial within-a-trial in its main judgment, having made on a brief ruling after a trial-within-a trial itself.

[8] In its main judgement the trial court, gave its reasons as follows for accepting the appellant's confession statement: that the appellants denied making a statement and that his rights were not explained to him. The court ruled that, in terms of Exhibit "E" the court was satisfied that the rights were explained to the appellant. The court concluded that the message that was supposed to be conveyed to the accused with regards to the appellant's rights to silent and his right to legal representation was explained, and that there was no harm done with regard to this statement. On the contents of the statement the trial court, found that the appellant was a poor witness in a trial within-a-trial, it also found that appellant was not assaulted or placed under duress. It finally found that it was not true that the appellant was just made to sign the statement. The record demonstrates that in terms of Exhibit "H" ("the confession") the appellant was telling the story of how he stabbed the deceased once on his chest with a knife, and how he observed the deceased bleeding after he stabbed him.

[9] After the evidence of the trial within a trial, the court ruled the said confession as admissible. The trial proceeded to the main trial the State calling another police officer who was also a witness from a Local Criminal Record Center, who testified that she was an exhibit clerk who received the exhibits containing a knife, one pair

of trousers, swabbing evidence collection kit containing two swab which both were sealed. She put them in a safe until she delivered

them by hand at Forensic Science Laboratory in Pretoria. She had kept them where only he had access and that when she delivered the exhibits they were still sealed. After her evidence defence admitted contents of exhibit “I” and “J”.

[10] The contents of exhibit “I” and “J” was briefly in terms of section 212 of Act 51 of 1977, it was made by Warrant officer Reynolds in respect of a knife, the trouser, appellant’s shoe, appellant’s shirt (sleeve) that were found at the appellant’s room in relation to the Reference sample LOUW HANS (“deceased’s blood”). The conclusion on both these exhibits was that, the DNA results from the said items that were found in the appellant’s room matches the DNA results from reference sample “LOUW HANS”.

[11] After the evidence on a trial within a trial the State proceeded to close its case. The defence also closed its case, without leading any evidence.

Grounds for this appeal

[12] The Appellant is appealing his conviction and he ask this court to consider:

- Whether the court erred in finding that the respondent has proved the chain of evidence beyond reasonable doubt.
- Whether the court a quo erred in finding that, after listening to the evidence in a trial within a trial that the admission statement made by the appellant is admissible
- Whether the trial court incorrectly evaluated the evidence and erred in finding that the respondent has proved its case beyond reasonable doubt as the admission statement raises self-defense
- Whether the court erred in its reasoning that because the appellant did not raise self-defense after his plea, it cannot later be raised;
- Whether the trial court incorrectly evaluated the circumstantial evidence and accordingly erred in finding that the only inescapable reasonable inference which can be drawn on the facts is that the appellant murdered the deceased and the appellant has no justification for his actions;
- The trial court erred in finding that there was prima facie evidence which necessitated him to testify in his defence in light of the fact that the state led no evidence to rebut the self-defense.

Discussion

[13] On the first ground of appeal. The state evidence by Vermaak was clear that, the exhibit was given to him by the police officer who obtained them from the scene, and that she received them in its sealed form, she kept it safe until she delivered same to Forensic Science Laboratory in its sealed form, after which the defence also admitted the contents of these exhibits.

- [14] From above chronicle, it is clear that these exhibits were received sealed and that they contained amongst others, evidence the clothes that were found in the appellant's room with blood on it. The evidence was that it matched with the blood samples obtained from Louw (whom the appellant admitted was the deceased).
- [15] In my view this chain was challenged through the cross-examination of Vermaak only, but even in that cross-examination the defence only challenged the numbering of the exhibits, which in my view was explained in a satisfactory manner by Vermaak. From the record it is also noted that the cross-examination of Vermaak did not in any way suggest that the exhibits were not sealed or interfered with in any manner, in my view the state with Vermaak's evidence together with exhibit "I" and "J" proved its case beyond reasonable doubt on the chain of evidence, any suggestion by the defence that the appeal court must question a trial court's finding on this point is baseless and on this reason alone this ground stand to fail.
- [16] I now turn to consider the second ground of appeal. Looking at trial court's finding on the trial within a trial on the statement (confession statement), it is clear that the court found the appellant to have failed in making out a case of objecting to the statement. The trial court found him to be a poor witness as compared to the evidence of the three police officers who testified that the appellant's rights were explained and he gave the statement without any undue duress. The appeal court's function on appeal is clear in terms of the case law, "if not broken don't fix it".
- [17] I am inclined to agree with the Magistrate in her credibility findings and cannot fault her in her evaluation of the evidence. In *S v Leve*[1], the court of appeal set out the following approach, that I find befitting to this ground of appeal, and which I align myself with:
- "The fundamental rule to be applied by a court of appeal is that, while the appellant is entitled to a rehearing, because otherwise the right of appeal becomes illusory, a court of appeal is not at liberty to depart from the trial court's findings of fact and credibility, unless they are vitiated by irregularity, or unless an examination of the record of evidence reveals that those findings are patently wrong. The trial court's findings of fact and credibility are presumed to be correct, because the trial court, and not the court of appeal, has had the advantage of seeing and hearing the witnesses, and is in the best position to determine where the truth lies." I find therefore that trial court's reasoning on this point cannot be faltered, on this ground also the appeal stands to fail,*
- [18] On the third ground of appeal. When the record is considered, it is clear from the trial court's finding that, the court acknowledged the fact that the appellant denied knowledge of the shoe and the knife that was found in his room. The court in its judgement emphasized on the clothes that the accused was wearing on his arrest, (which is the shoe and his shirt sleeve) that these items were also found with blood stains, and upon being examined at the laboratory, the blood matched the reference sample of the deceased. From this alone it is clear that with or without the trouser and knife that was denied by the accused, the court still found that the clothes that were worn by the appellant on his arrest was enough to

conclude that there is no other reasonable inference that can be drawn except that the appellant is the one who killed the deceased.

- [19] The trial court applied the principle in *R v Blom* thoroughly before arriving at this conclusion. I therefore find that its final conclusion cannot be faltered.
- [20] On the point on Self-defense. The appellant for the first time during closing arguments they argued self-defense, but it is clear that this was a new thing altogether, this was not raised during the plea stage, neither was it proposed to the state witnesses during their cross-examination. The trial court found as follows on self-defense: (which I also find myself in agreement with) “The defence made submissions to the effect that as the court admitted a statement in which the accused gives a version which carries the accused version of self-defense then the court must find that on that statement the

accused acted in self-defense, and that therefore not guilty but then this has a negative impact on the defence case because then why did the defence not play open cards with the court from the beginning? The statement has not been tested, how does the court weigh it in favour of the accused if the accused also made attempts to distance himself from it? . . . the accused cannot on the other hand deny the identity of the person who was killed at the same time plead self-defence”. . . according to the court the accused was simply clutching straws” (Own emphasis underlined).

- [21] I find myself constrained to add on the above reasoning by the trial court as follows: the appellant having denied that the shoe and shirt he was wearing (that was observed by Maluleka to be having blood), and now on appeal cry self defence, is problematic. It is not clear why this appeal court should consider issues which were not properly ventilated in the trial, but only raised after the evidence was concluded only at the closing arguments. Not a single one of the state witnesses was challenged with “self defence” throughout the trial it is clear that the appellant was only attempting to disassociate himself with everything.
- [22] The only place which indicate a conceivable self-defense is Exhibit “H” (the confession”). This exhibit remained the only evidence which demonstrated how the deceased was attacked by the appellant. In my view if the appellant wanted to raise the attack on him by the deceased as a self-defense, he would have simple done so at any stage of the proceedings. But for wisdom known only to him this was not done. It is also evident in the trial record that the appellant chose to exercise his right to remain silent, after the close of the State case.
- [23] The appellant elected to close his case with the overwhelming evidence against him (in the form of exhibit “H”). The record reveals that the appellant did not even attempt to apply for the re-opening of its case to lead evidence in rebuttal. This avenue was still open to the appellant based on a 1938 principle in *Oosthuizen v Stanley*[2]. A principle that has been confirmed by a number of case law in the current times. This principle basically state that, if new evidence is discovered after a party had closed his case, the court will, in its discretion allow new evidence to be led late in rebuttal by a party.

- [24] The defence in my view should have used this route in the trial court, and not wait to come and argue this self-defense point in the appeal court. The trial court would have used its general discretion whether it grant such an application or not. this would have given this court a better standpoint on the alleged self-defense.
- [25] In *R v Gani*[3] on appeal Schreiner J at 107-109 stated the following which I find apposite “The trial court has a wide discretion in regard to allowing the calling of evidence after the close of a party’s case. . . the discretion must be judicially exercised . . . a trial court must be accorded all proper powers to control the length to which parties should be permitted to go in investigating matter of a subordinate nature on the fringe of a case. . .”(Own emphasis underlined).
- [26] The appellant denied itself an opportunity to explore its defence. It is clear that the trial court could not have exercise any of its powers of allowing the defence to explore its alleged self-defense without an application from the appellant. I appreciate why the trial reached a conclusion on this point that, the self-defense (which was only raised on closing arguments) had “a negative impact on the defence case”, as the appellant “failed to play open cards with the court from the beginning”.
- [27] Accordingly, the grounds of appeal based on ‘self-defense’ stands to fail on the basis of the above alone.
- [28] On the point whether the court erred in its reasoning that because the appellant did not raise self-defense after his plea, it cannot later be raised, I have already traversed on this above when I was considering self-defense. In my view the conclusion on the point of self-defense that I have considered above is also applicable to this ground of appeal. The finding of the trial court, vis-à-vis the appellant’s approach (of raising self defence only at closing argument stage) cannot be faltered.
- [29] On the fifth ground of appeal, on the trial court’s consideration of circumstantial evidence. The trial court correctly applied the cardinal rules of logic as detailed in *R v Blom*. The trial considered the inferences to be drawn against what the evidence of the State proved, the trial court in fact, took time in its judgment to list all the facts proven by the State evidence, after that exercise the court highlighted why it is arriving at “a reasonable conclusion that the accused is the person who killed the deceased”. It also considered the reasons why it concluded that there is no other reasonable inference that can be drawn except that the appellant is the one who killed the deceased. I therefore find that its final conclusion, on circumstantial evidence cannot be faltered.

- [30] The trial court also considered that the evidence from forensic science laboratory which entered the evidence through Section 212 statements, the court found that they were formally admitted by the defence, the trial court found that, the evidence so admitted became a prima facie proof of the facts established after the examination and concluded that the blood on the shoe and the sleeve the accused matched the deceased blood. The court also considered that these exhibits were in sealed bags.
- [31] The trial court also considered that, the appellant gave only evidence of a bare denial despite all the allegations against him. The court was also alive to the fact that the appellant's failure to testify, should not be counted against him, highlighting that he was well within his rights to do so. However, the court considered the totality of the evidence, including the bare denial by the appellant and concluded that the appellant had been "clutching straws". I respectfully agree.

Conclusion

- [32] I have found that each of the challenges brought by the appellant are without merit and should therefore fail. There is no fault or misdirection on the part of the trial court on all the points that were raised by the appellant for the purposes of this appeal, both on conviction. The trial court correctly found that the state successfully proved beyond reasonable doubt that the appellant killed the deceased.

- [33] In the result the following order is made:

The appeal against conviction is dismissed.

MT MANKGE

JUDGE OF THE HIGH COURT,

MIDDELBURG

I agree

MBG LANGA

DATE OF HEARING: 28 April 2023

DATE OF JUDGMENT: 23 June 2023

Appearances:

For the Appellant: Legal Aid South Africa, Nelspruit Justice C, Mpumalanga For the Respondent: Advocate LTG Motheogane, DPP's Office, Middelburg, Mpumalanga.

[1] 2011 (1) SACR 87 (ECG).

[2] 1938 AD 323

[3] 1958 (1) SA 102 (A).

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