

SOUTH AFRICA / JUDGMENT

Mofutsana v S (A287/2017) [2018] ZAFSHC 170 (1 November 2018)

[2018] ZAFSHC 170

COURT

Free State High Court, Bloemfontein

BEFORE

Mhlambi, M Opperman

CASE / FILE NUMBER

A287/2017

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IN THE HIGH COURT

OF SOUTH AFRICA,

FREE

STATE DIVISION, BLOEMFONTEIN

Case

number: A287/2017

In

the matter between:

RAMASELA
SOLOMON
MOFUTSANA APPELLANT
and
THE
STATE RESPONDENT
HEARD
ON: 15 OCTOBER 2018

CORAM:

MHLAMBI, J et M OPPERMAN, J

JUDGMENT

BY: M OPPERMAN, J

DELIVERED ON: 1 NOVEMBER 2018

BACKGROUND

1. Appellant appeals against his conviction and sentence.

2. He stood trial together with his wife. Counts 1 & 4 were applicable to Appellant, accused 1, only. Counts 2 & 3 related to accused 2 (the wife) only. The charges eventuated from one incident hence the manner in which they were charged. Only accused 1 lodged an appeal. The Appellant was convicted of:

2.1 Count 1: Assault and;

2.2 Count 4: “Resisting arrest”[1] as stipulated in section 67(1)(a) read with section 1 of the South African Police Services Act 68 of 1995.[2]

2.3 The detail averred in the charges is that Appellant assaulted a police officer by “striking her with open hands and pulling her.” The other charge stems from the fact that the Appellant allegedly resisted or wilfully hindered or obstructed a member in the exercise of her powers, duties or functions by “refusing to be arrested by the police officials and driving away from the scene.”

3. The sentences imposed were:

3.1 “R1000-00 (One thousand rands) or 4 (four) months imprisonment wholly suspended for a period of 5 (five) years on condition that the accused is not found guilty of assault committed within the period of suspension. (Count 1)

3.2 R1000-00 (One thousand rands) or 4 (four) months imprisonment wholly suspended for a period of 5 (five) years on condition the accused is not found guilty of the contravention of section 67(1)(a) of Act 68 of 1995 committed within the period of suspension. (Count 4)”

3.3 The Appellant was regarded fit to possess a firearm in terms of the Firearms Control Act 60 of 2000.

4. Leave to appeal was denied by the court a quo but on 30 May 2017 petition was granted in respect of both conviction and sentence on both counts.
5. An attorney on mandate of Legal Aid South Africa aided the Appellant during the trial. The matter was also brought to this court by Legal Aid South Africa.

COMMON CAUSE

6. The incident happened on the 4th of September 2016 at a petrol station. It is trite that the Appellant arrived there with his family to get fuel for his vehicle.
7. A verbal argument ensued between the Appellant and the petrol attendant. The wife of the Appellant (Accused 2) also became involved

hence counts 2 and 3; the assault and crimen injuria in relation to the petrol attendant and solely against accused 2. A police officer and her colleague that were also on the premises heard a “commotion” and walked over to render assistance. Counts 1 and 4 pertain to the incident that followed between the Appellant and the police officer.

GROUND OF APPEAL

8. The grounds of appeal started off as general and vague.[3] They were depicted in the application for leave to appeal and the petition. The Heads of Argument brought more detail and were based on the following primary issues:

8.1 “Appellant pleaded guilty and gave no explanation. He denied assaulting[4] the complainant and explained that he was authorised to depart with his vehicle, thus not resisting arrest;”

8.2 “On perusal of the record, it is clear that the altercation between appellant and witness 1 (Motena Sithebe) and ultimately between Appellant and witness 2 (Palesa Thabana) had caused a moving scene having differences between witnesses at what transpired.”

8.3 “I submit, following the evidence of Palesa Thabana, the question arises whether she was intending/going to arrest/ informing him of her intended arrest – however, did she place him under arrest? Further, did the Appellant form the intent to assault Palesa Thabana, or did he defuse the situation his wife (Accused 2) was in? The court` s finding that indeed Palesa Thabana had told him he was under arrest,

is not consistent with the evidence led.

8.4 Constable Ganare, a vital witness, was not called. This to be specifically pertaining to arrest. The plea of the Appellant is clear; Ganare had told Appellant to depart.

8.5 The emphasis that the court placed on the attitude and demeanour of the Appellant during the trial is of concern for the Appellant. She found that he has a disrespect for authority. This might have influenced the court in the direction of a conviction rather that she should have adjudicated whether the facts proved the elements of the crime.

9. Detail in the appeal against sentence is limited to strikingly inappropriate, out of proportion to the totality of mitigating factors and does not take cognisance of the factors in mitigation. The sentences should have been explicitly ordered to run concurrently according to Appellant.[5]

10. The State supported the conviction and sentence.

11. Synoptically the following issues crystallised:

11.1 The evaluation of evidence in a criminal trial,

11.2 demeanour as an assessment tool when evaluating evidence,

11.3 the absence of the evidence of a vital witness in the trial,

11.4 the issues of arrest and obstructing/resisting a member in the performance of her powers and duties and lastly;

11.5 the matter of the assault.

THE EVALUATION OF EVIDENCE

12. In *S v Trainor* 2003 (1) SACR 35 SCA,[6] Navsa JA stressed that whether it be to convict or to acquit the court must account for all the evidence, some of the evidence might be found to be false; some of it might be found to be unreliable; and some of it might be found to be only possibly false or unreliable; but none of it may simply be ignored. A conspectus of all the evidence is required. Evidence that is reliable should be weighed alongside such evidence as may be found to be false. Independently verifiable evidence, if any, should be weighed to see if it supports any of the evidence tendered. In considering whether evidence is reliable, the quality of that evidence must of necessity be evaluated, as must corroborative evidence, if any. Evidence, of course, must be evaluated against the onus on any particular issue or in respect of the case in its entirety.
13. Also, the correct approach for a court to follow with regard to a factual dispute between the evidence of state witnesses and the defense is to apply its mind not only to the merits and demerits of the state and defense witnesses, but also to the probabilities of the case. It is only after so applying its mind that a Court would be justified in reaching a conclusion as to whether the guilt of an accused has been established beyond reasonable doubt. (*Singh* 1975(1) SA 227 (N) 228G-H) The evidence must be considered as a whole, taking into consideration the following: The probabilities, the reliability and opportunity for observation of the different witnesses, the absence of an interest or bias, the inherent merit or lack thereof of the evidence itself, any inconsistencies or contradictions, corroboration, demeanor and any other relevant factor. (*Civa* 1974(3) SA 844 T)
14. The onus is on the State to prove its case beyond a reasonable doubt. If the version of the accused is reasonably possibly true after the evaluation of the evidence as a whole, the accused must receive the benefit of the doubt and go free.
15. The test for intent is subjective. This is a vital aspect to have regard for when the guilt of the Appellant on the “resisting

arrest” is evaluated. Intention or wilfully in whatever form, consists of two elements, namely a cognitive (or intellectual) and a conative (volitional or volutative) element. The cognitive element consists in the accused’s knowledge of the act, of the circumstances mentioned in the definitional elements and of the wrongfulness. The ability to realise right and wrong. The conative element consists in directing the will towards a certain act or result: The accused realises the consequences and wrongfulness of the act, reconciles himself therewith and commences to commit the act.[7]

16. The answer to the determination of the subjective mentality of the accused during the event in casu lies in the hands of the accused person. If he chooses not to avail himself thereof or is deceitful, he has only himself to blame if an adverse verdict is given. An accused's claim to the benefit of a doubt when it may be said to exist must not be derived from

speculation but must rest upon a reasonable and solid foundation created either by positive evidence and gathered from reasonable

inferences which are not in conflict with, or outweighed by, the proved facts of the case.[8]

DEMEANOR AS AN ASSESSMENT INSTRUMENT[9]

17. The court a quo described that the Appellant's demeanour showed that he has serious problems with police in general. He also clearly has an issue with authority.
18. The fact that the Appellant is an angry man with attitude issues and difficulties with authority does not make him guilty of the crime of the contravention of section 67(1)(a) of Act 68 of 1995. The elements of the crime must still be proven beyond a reasonable doubt. Demeanour as assessment instrument is: "at the best, a tricky horse to ride." [10]
19. Demeanour of witnesses can be, amongst others, described as their manner of testifying, their behaviour in the witness-box, their character and personality and the impression they create. [11]
20. It is considered real evidence in the sense that it is something that the trial court observes. The observation or evaluation is therefore in the eye of the beholder and very much subjective with the danger of error due to basic human nature. This instrument must be applied wisely by the trier of evidence. From cases such as *Medscheme Holdings (Pty) Ltd and Another v Bhamjee* 2005 (5) SA 339 (SCA) the following principles evolved as concluded by Schwikkard et al: [12]
 - (a) Demeanour, in itself, is a fallible guide to credibility and should be considered with all other factors: it is in the overall scrutiny of evidence that demeanour should be considered and then only if there are sufficient indications thereof to be significant. [13]
 - (b) The limited value of a finding on demeanour becomes even less where an interpreter is used. [14]
 - (c) The Constitutional Court has pointed out the danger of assuming that:

"all triers of fact have the ability to interpret correctly the behaviour of a witness, notwithstanding that the witness may be of a different culture, class, race or gender and someone whose life experience differs fundamentally from that of the trier of fact." [15]
 - (d) Demeanour can hardly ever be decisive in determining the outcome of a case. Demeanour is merely one factor to be taken into account: "In addition to the demeanour of the witness", said Krause J in *R v Momekela & Commandant* 1936 OPD 24, "one should be guided by the probability of his story, the reasonableness of his conduct, the manner in which he emerges from the test of his memory, the consistency of his statements and the interest he may have in the matter under enquiry."

- (e) A trial court is obviously in a better position than the court of appeal to make a finding on demeanour; and the court of appeal “must attach weight, but not excessive weight” to the trial court's finding. It is as a general rule important that a trial court should record its impression of the demeanour of a material witness.[16]

THE ABSENCE OF THE EVIDENCE OF A MATERIAL WITNESS[17]

21. The defence of the Appellant was clear from the start. Constable Ganare permitted him to leave. This vital witness was not called and there is not any explanation for this neglect.
22. It is trite that an inference can be drawn that the prosecutor was afraid that the witness would create contradictions which could impair the evidence of the single witness. (S v Teixeira 1980 (3) SA 755 (A) at 763D–764B)
23. The State ought to explain why the witness was not called or can make the witness available to the defence. The fact that the prosecutor is of the view that the witness is not reliable is in itself no reason not to draw a negative inference if the witness is not called (S v Ngxumza and Another 2001 (1) SACR 408 (Tk) at 412d–413b, R v Phiri 1958 (3) SA 161 (A)).
24. The inference is always stronger against the side on whom the onus rests. The onus is on the State to prove that the plea explanation of the Appellant that was repeated in his evidence and corroborated by later events that will be discussed later, is not reasonably possibly true. If he subjectively believed that he had the permission to leave there cannot be any possibility of him wilfully contravening section 67(1)(a).

THE ISSUE OF THE ARREST

25. The above taints the State`s case. Add to this the fact that the complainant testified that she was going to arrest Appellant; not that she is placing him under arrest and that the Appellant was allowed to drive his cousin to the place where he was to catch a ride. The explanation of the accused must be accepted. The conviction can thus not stand.[18]

THE ASSAULT CHARGE

26. The version of the State witnesses relevant to this charge is:
- 26.1 The petrol attendant testified that the police officers were also on the premises and approached them.
- 26.2 The officers then tried to talk to Appellant and his wife. Appellant then hit the female police officer on the chest.
- 26.3 The said officer went back to the police vehicle and when she returned she informed the Appellant that she “was going to arrest him.”
- 26.4 The Appellant turned around, got into the car and drove away.

26.5 The female officer testified that on the day of the incident she and a male officer were at the petrol station. They were both in uniform.

26.6 They heard a commotion and alighted from their vehicle to ascertain the problem. When they arrived: “A lady who was screaming there as though she was not satisfied about something, and it seemed if she had an altercation with one of the petrol attendants.”

26.7 She approached the lady and told her to calm down and to explain what was happening. The lady was accused two in this case.

26.8 Whilst speaking to the second accused the Appellant grabbed and pulled her by her shirt. She looked around and requested him: “not to hold her in this manner and because she is only there to ascertain as to what is happening.”

26.9 Appellant then started to scream at her that she will not speak to them. He then slapped her on her chest.

26.10 Her colleague then intervened. The Appellant did not stop and reached over the shoulder of this officer and poked her on her shoulder.

26.11 The complainant then went back to the vehicle and called for back-up. She returned and the Appellant again started to poke her.

26.12 She then informed him that she is going to arrest him. He informed her that she is “a nobody” and got back into his vehicle. She requested him to exit the vehicle but he just closed it and drove off.

27. The case for the Appellant was that:

27.1 A verbal altercation erupted between him and the petrol attendant.

27.2 By this time, he had already alighted from the car and his wife remained inside the vehicle.

27.3 A female police officer approached him. She said that she knows him, that he is a taxi driver and that he is rude. The other police officer arrived.

27.4 The female officer was shouting at him. He, the Appellant was calm all the time. He informed her not to speak to him like that in front of his children. She carried on speaking to him.

27.5 His wife opened the window of the car and told her not to speak to her husband in this manner. The other police officer arrived. He told him to leave.

27.6 His wife was in the vehicle at all times and did not insult anybody. He also did not insult or assault anybody.

28. The court a quo reasoned that the probabilities did not support that of the accused.

28.1 She pointed out that if the situation was as depicted by them, it would not have been necessary for back-up vehicles to have been involved.

28.2 The court a quo could not find any reason why two witnesses; the petrol attendant and the police officer would collude against the Appellant. The

police official indicated that she did not know the Appellant from before the incident.

28.3 If the incident occurred as was described by the accused then the consequences would have been very different.

28.4 In conclusion she found the contradictions in the evidence of the accused in itself and as compared with the evidence of the State witnesses fatal for their case.

29. The reasoning of the court was correct and caused a legitimate finding. The judgement on this charge is not a misdirection. The appeal on this charge will therefore be dismissed.

SENTENCE

30. The trial court exercised its discretion properly and the sentence is effective and proper. The court a quo measured all the factors with judicial wisdom. The sentence does serve the aims of punishment, retribution, rehabilitation and prevention effectively.

31. ORDER

31.1 The appeal on the conviction and sentence on the charge of assault (Count one) is dismissed.

31.2 The appeal against the conviction and sentence on the contravention of section 67(1)(a) of the South African Police Services Act 68 of 1995 (Count 4) is upheld.

M. OPPERMAN, J

I concur

J.J. MHLAMBI, J

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[1] According to the Charge Sheet at page v of the record.

[2]

67. Interference with members. — (1) Any person who— (a) resists or willfully hinders or obstructs a member in the exercise of his or her powers or the performance of his or her duties or functions or, in the exercise of his or her powers or the performance of his or her duties or functions by a member willfully

interferes with such member or his or her uniform or equipment or any part thereof; or

(b) in order to compel a member to perform or to abstain from performing any act in respect of the exercise of his or her powers or the performance of his or her duties or functions, or on account of such member having done or abstained from doing such an act, threatens or suggests the use of violence against, or restraint upon such member or any of his or her relatives or dependents', or threatens or suggests any injury to the property of such member or of any of his or her relatives or dependents, shall be guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding 12 months. [3] The overarching grounds of appeal as set out in the application for petition are that the court erred in making the following findings:

[2]

67. Interference with members. — (1) Any person who—

(a) resists or willfully hinders or obstructs a member in the exercise of his or her powers or the performance of his or her duties or functions or, in the exercise of his or her powers or the performance of his or her duties or functions by a member willfully

interferes with such member or his or her uniform or equipment or any part thereof; or

(b) in order to compel a member to perform or to abstain from performing any act in respect of the exercise of his or her powers or the performance of his or her duties or functions, or on account of such member having done or abstained from doing such an act, threatens or suggests the use of violence against, or restraint upon such member or any of his or her relatives or dependents', or threatens or suggests any injury to the property of such member or of any of his or her relatives or dependents, shall be guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding 12 months.

[3] The overarching grounds of appeal as set out in the application for petition are that the court erred in making the following findings:

Ad conviction: 1.1 That the State proved the guilt of the Appellant beyond a reasonable doubt; 1.2 That there are no improbabilities in the State`s version; 1.3 That the state witnesses gave evidence in a satisfactory manner; 1.4 That the evidence of the state witnesses can be criticized on matters of detail only, whereas the evidence was contrary in material respects; Ad sentence: That sentence is shockingly inappropriate and does not take cognisance of the factors in mitigation.

Ad conviction:

1.1 That the State proved the guilt of the Appellant beyond a reasonable doubt;

1.2 That there are no improbabilities in the State`s version;

1.3 That the state witnesses gave evidence in a satisfactory manner;

1.4 That the evidence of the state witnesses can be criticized on matters of detail only, whereas the evidence was contrary in material respects;

Ad sentence: That sentence is shockingly inappropriate and does not take cognisance of the factors in mitigation.

[4] Accentuation added

[5] Paragraph 4.1 Heads of Argument for the Appellant and the Application for leave to Appeal on pages 97-99.

[6] *S v Hadebe & others* 1998 (1) SACR 422; [1997] ZASCA 86 (SCA) at 426a-f. In *Hadebe* (supra) this Court enunciated the correct approach to resolving such a problem as follows at 426e-I, with reference to *Moshesi & 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 12 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.’

[7] *S v Mlambo* [1957] 4 All SA 326 (A) on 336. Snyman: <http://www.mylexisnexus.co.za/Index.aspx>. 16 April 2016.

[7] *S v Mlambo* [1957] 4 All SA 326 (A) on 336. Snyman: <http://www.mylexisnexus.co.za/Index.aspx>.

16 April 2016.

[8] S v Mlambo supra, <http://www.mylexisnexis.co.za/Index.aspx>, 16 April 2016.

[9] Schwikkard et al, Principles of Evidence at 30 4.

[10] S v Kelly 1980 (3) SA 301 (A).

[11] Cloete v Birch 1993 (2) PH F17 (E) 51.

[12] At 30.4.

[13] S v Civa 1974

(3) SA 844 (T).

[14] S v Malepane and Another 1979

(1) SA 1009 (W) 1016H-1017A, Rex v Dhlumayo and Another 1948

(2) SA 677 (A) 697 and Body Corporate of Dumbarton Oaks v Faiga [1998] ZASCA 101; 1999

(1) SA 975 (SCA).

[15] President of the Republic of South Africa and Others v South African Rugby Football Union and Others 2000

(1) SA 1 (CC) at [79].

[16] S v Mwanjekanga 1993 2 PH H54 (C). In the absence of findings on demeanour the court of appeal is in as good a position as the trial court to assess credibility. Also see S v Jochems 1991

(1) SACR 208 (A).

[17] Hiemstra, Criminal Procedure at section 208, <https://www.mylexisnexis.co.za/Index.aspx> dated 23 October 2018.

[18] Also compare the dictum in Rex v Sasa 1939 EDL 184, Rex v Mazema 1948 (2) SA 152 (E), Rex v Kleyn and Another 1937 CPD 288, REX Respondent v Wallendorf and Others Appellants 1920 AD 383.

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