

SOUTH AFRICA / JUDGMENT

## Moloi v S (A24/2017) [2017] ZAFSHC 87 (25 May 2017) [2017] ZAFSHC 87

COURT

Free State High Court, Bloemfontein

BEFORE

Lekale, Naidoo

CASE / FILE NUMBER

A24/2017

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IN

THE HIGH COURT OF SOUTH AFRICA,

FREE

STATE DIVISION, BLOEMFONTEIN

Appeal

number: A24/2017

In

the matter between:

MALEFETSANE

ISAAC

MOLOI Appellant

and

THE

STATE Respondent

CORAM:

LEKALE, J et NAIDOO, J

HEARD

ON: 15 MAY 2017

### JUDGMENT

BY: LEKALE, J

DELIVERED ON: 25 MAY 2017

SUMMARY: Criminal law – Magistrate’s acceptance of evidence of single witness as satisfactory in all material respects not shown to be wrong on adequate grounds. Appellant’s version correctly found by trial court to be false beyond reasonable doubt. Conviction on murder charge and sentence confirmed.

[1] On 29 April 2016 the appellant, who was legally represented, was sentenced to 20 years imprisonment after he was convicted of murder by the Regional Court at Welkom. He feels aggrieved by the conviction and now approaches us on appeal against the same with leave of the trial court.

[2] On returning the guilty verdict the trial court accepted, as satisfactory in all material respects, the evidence of the single

witness who identified the appellant as the perpetrator in the murder of his (the witness) brother. The court below found no shortcomings,

defects or contradictions in his evidence and was satisfied that the truth had been told. The trial court, further, found the appellant’s version to the effect that the witness was implicating him falsely because they belonged to rival gangs inherently improbable and rejected it as false beyond reasonable doubt.

[3] On the papers and in argument before us the appellant, through Mr Makhene, contends, *inter alia*, that the trial court erred in accepting the evidence of the state and in rejecting his evidence and that of his mother as not reasonably

possibly true. In his view there were many factors which could easily have influenced the making of an honest, but mistaken identification

such as the juxtaposition of the deceased and his assailants, visibility, the opportunity to observe and inadmissible hearsay evidence as to the identity of the culprit.

[4] The State, on its part, supports the conviction and submits, through Ms Moroka, to, *inter alia*, the effect that the trial court correctly accepted the evidence of its single witness as satisfactory in all material respects insofar as he had known the appellant for many years as at the fateful morning .

[5] The State’s case, as accepted by the trial court, was based on the evidence of a single witness, one Thabang Phillip Phakela, who testified to, *inter alia*, the effect that he was at the tavern at Meloding Virginia around 3:00 in the morning enjoying beer when he was alerted to an incident involving his younger brother, the deceased, in the street. He followed the information and went out to the street where he saw the appellant and two other people fighting the deceased. Visibility was clear as flood lights were on some 100m from the scene. He was about 14 to 15 metres from the scene when he saw the appellant stab the deceased with a knife at the back of his head. He knew the appellant and had known him for more than 12 years as at the date of the incident. When the appellant and his companions saw him they ran away and he gave chase all in vain. He went back to the deceased who was

following him and eventually called an ambulance as the deceased was injured. The deceased confirmed that the appellant had stabbed him. He had no problems with the appellant before the incident. He could not recall the appellant's dress code on the fateful morning and had seen him two days before the incident. He saw the appellant's face. He is a member of Scorpion gang while the appellant belongs to Portuguese gang.

- [6] The appellant raised an alibi in his defence and maintained that he was sleeping at his parental home at the relevant time as he was on parole. He, further, called his mother who confirmed, in evidence, that as he was on parole and under house arrest at the relevant time he could not leave the house without the permission of correctional officers. She, however, conceded that she would not have heard when the appellant left the house at night if she was asleep. She could, in fact, not testify as to the exact whereabouts of the appellant the morning in question and only assumed that he was home as he was under house arrest.
- [7] The trial court's acceptance of oral evidence and its conclusions thereon are presumed to be correct until and unless they are shown to be clearly wrong (See *S v Francis and Others* 1991 (1) SACR 198 (A)).
- [8] When evaluating evidence the trial court adopts a holistic approach by considering available evidence in its entirety and has regard to probabilities. (See *S v Guess* 1976(4) SA 715(A) @ 718E-H).
- [9] The application of cautionary rules to the evidence of a single witness in essence requires the court to satisfy itself that despite the defects or shortcomings or contradictions in such evidence the truth has been told. (See *S v Sauls and Others* 1981(3) SA 180 (A))
- [10] It was not in real dispute before the court below that visibility was good on the part of the State's witness at the scene of the crime even though the defence's opinion was that the said witness' evidence in this regard was difficult to believe. It was, further, clear, as correctly and effectively found by the trial court, that the state's sole witness and the appellant knew each other as at the date of the crime insofar as they belonged to rival gangs. It was, furthermore, not in dispute that the deceased was the said witness' brother.
- [11] The real issue for determination by the court a quo was whether or not the State's witness was able to identify and recognise the deceased's assailant regard being had to the lateness of the hour, his state of sobriety, juxtaposition of the deceased and his assailant when the fatal blow was delivered and the distance between the witness and the assailant at the critical moment.
- [12] In my judgment there is nothing before us to suggest that the trial court was wrong in accepting the evidence of the state and in concluding that the appellant's version was inherently improbable and false beyond reasonable doubt. It is clear from the record that the state's witness managed to answer the relevant questions clearly and logically as correctly found by the court below. In this regard his version that he was not drunk despite having consumed half of seven quarts (750ml) of Hansa beer was not challenged. He

explained that both the appellant and the deceased were facing him when he witnessed the fatal blow. His undisputed version was, further, that the deceased was shorter than the appellant. Visibility was good to allow him to see and recognise all the people involved in the altercation.

[13] It is, further, apparent ex facie the record that the trial court applied caution when dealing with the relevant evidence and when it, inter alia, found that the State's evidence was not exaggerated. In this regard it can be noted that the witness stated that he did not witness how the deceased sustained the injury on his arm and he only learnt the identity of the assailant responsible for the same from the deceased. In my view if he was determined to implicate the appellant falsely he would simply have maintained that he also saw the appellant inflict the relevant injury. The court below, further, had regard to probabilities when it rejected the appellant's version as false.

[14] In my view the conviction cannot be faulted, as correctly submitted for the State. The same applies to the sentence insofar as the appellant sought to assail it in the notice

of appeal. In this regard it should, inter alia, be noted that he was a repeat offender who was on parole for a similar offence when he committed the offence in the instant matter.

#### ORDER

[15] In the result the appeal fails.

[16] The conviction and sentence are confirmed.

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L.J. LEKALE, J

I concur

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S. NAIDOO, J

On behalf of appellant: Mr JS Makhene

Instructed by: Bloemfontein Justice Centre

Bloemfontein

On behalf of respondent: Adv. MMM Moroka

Instructed by: Office of Director of Public Prosecutions

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Prepared on 12 October 2026 · Esheria