

SOUTH AFRICA / JUDGMENT

Msebenzi v S (A722/15) [2017] ZAGPPHC 470 (27 June 2017)

[2017] ZAGPPHC 470

COURT

North Gauteng High Court, Pretoria

BEFORE

Tlhapi, N B Tuchten

CASE / FILE NUMBER

A722/15

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HIGH

COURT OF SOUTH AFRICA

(GAUTENG

DIVISION, PRETORIA)

CASE

NUMBER: A722/15

NOT

REPORTABLE

NOT

OF INTEREST TO OTHER JUDGES

REVISED

In

the matter between:

NHLAPO,
ALFRED
MSEBENZI Appellant
and
THE
STATE Respondent

JUDGMENT**TLHAPI J**

[1] The appellant appeared before the Regional Court sitting in Standerton. He was convicted and sentenced to imprisonment in respect

of the following charges:

1. Arson; (sentenced to 15 years imprisonment);
2. Murder; (sentenced to 10 years imprisonment);
3. Assault with intent to do grievous bodily Harm; (sentenced to 2 years imprisonment);

Charges 4, 5 and 6 of Attempted Murder each, were taken together for purposes of sentence; (sentenced to 7 years imprisonment);

The sentences in counts 2, 3, 4, 5 and 6 were to run concurrently with the sentence of 15 years in count;

The Appellant petitioned the Judge President of this Court and he was granted leave to appeal his convictions and sentences.

BACKGROUND

[2] For convenience the witnesses shall be referred to by their first names. Ms Nomfundo Malinga ('Nomfundo'), Ms Pinky Malinga ('Pinky') and Mr Thulani Malinga ('Thulani') were siblings. They resided with their mother and three young children in a house normally referred to as a 'shack' near Sakhile, Mpumalanga. The deceased in count 2 was Pinky's four year old daughter. The house made of corrugated iron consisted of two bedrooms, a kitchen and dining room. There were two entrances to the house, that is, from the kitchen and the dining room. The Appellant resided with the family because he was in a relationship with Nomfundo

[3] On the morning of 12 December 2008 Nomfundo, who was pregnant at the time, went to the local clinic for treatment. She returned home during the late afternoon at about 16H30. The appellant expressed his displeasure at her late coming despite her explanation that there were many patients at the clinic that day. She testified that he was a jealous lover and he did not seem to believe her and there was an argument. He left to see some neighbours and on his return at about 22h00 he found her asleep. The appellant resumed the argument and he twisted her arm while she was seated on the bed in their bedroom. She screamed out in pain and Pinky came to the rescue and advised her to move to their mother's bedroom.

[4] Nomfundo moved to her mother's bedroom and slept on the floor. She testified that the Appellant was angry and she heard him say that he was going to leave because she left him to sleep alone in her parental home. Although she did not see him leave, she assumed that

he had left via the kitchen entrance because she heard the door bang. Her sister slept on the bed with the children. She fell asleep. She was later awoken by a smell of smoke and this was about thirty minutes after she had heard the banging of the door. She raised the alarm and together with Pinky they fled the house through the dining room door. It was only when she was outside that she realized the house was on fire. She was accompanied back into the house by Pinkie to awaken Thulani and the children. Pinky carried two of the children out of the house and forgot the deceased who was left sleeping on the bed. They called on the neighbours for assistance and summoned the police and fire brigade.

- [5] When the police arrived she heard Pinky inform them that the Appellant was responsible for the fire. It was also at that point

that she realised that the deceased had not been rescued when she saw Pinky crying. She did not see the Appellant even after the arrival of the police. The Magistrate followed with these questions:

HOF: "... het die huis dalk nie self aan die brand geraak nie daar by die kombuis? Was daar miskien 'n vuur of gas of iets? -Eaelagbare in die kamer ons het 'n kers gelig, maar ons het elektrisiteit was ons nou TV kyk daar in die kamer, .. Nee, daar waar die brand begin het daar in die kombuis is (Jaar iets wat die brand self kon laat ontstaan het? - Edelagbare, die vuur het begin in my karmar, daar waar ek geslaap het. In die kombuis daar was niks gewees nie Nou was daar 'n kers of iets gewees - Dit is korrek, edelagbare, ons het die kers daar gelig, want die extension daar ons gebruik dit vir die TV So wat die hof wit weet is kan dit wees dat die huis dalk van selfaan die brand geraak het soos 'n gordyn wat oor die kers waai en aan die brand raak of die kers wat omval of wat-. Dit kon gebeur het dat die kers miskien of die vloer geval want daar was tapyt of die vloer gewees....die carpet Goed, die regte Afrikaanse word is eintlik tapyt maar ons praat van 'n mat met ander woorde iets want kan brand- dit is korrek"

- [6] Pinky testified that the Appellant had spent the day at home taking care of the children. In the evening he went to visit a neighbour and they had some liquor. He returned and at about 22H00 she heard Nomfundo screaming in bedroom. She went to investigate and when she opened the bedroom door, she found the Appellant on top of Nomfundo, twisting her arm with one hand and with his other hand he was grabbing her neck. She demanded that Appellant hand over Thulani's phone and she left with Nomfundo to their mother's bedroom. They took a couch and put it against the door to prevent the Appellant from entering. Although she did not have sight of the inside of Nomfundo's bedroom she could hear the Appellant talking to himself. He said was going to take a blanket and put it against the door of the room in which they were; that he was going to take his and Nomfundo's clothes, place them on the bed and burn them, and that if Nomfundo still loved him they would both start afresh to buy new clothing.
- [7] She testified that she leaned against the couch and peeped through an opening in the door. She saw the Appellant near the stove and thought he was lighting a cigarette. When he turned around towards his and Nomfundo's bedroom she saw that he was holding a piece of

paper which he had lit at the stove. She pleaded with the Appellant not to burn the house that was built for them by their father but to rather wait for their mother who was still at work. The Appellant then said he did not want to hear any noise from a dog that will shout. Nomfundo also asked him not to burn them while they were in the house and the respondent by saying he was 'looking after the fire', he was old enough to look after the fire. She saw the Appellant open the door and the flame was high.

- [8] They could smell that something was burning. Nomfundo woke up and they fled the house. Thulani slept with the other children in the dining room. She went into the house to wake up the children and she carried the seven month old baby out and as she went out the main switch exploded. During cross-examination she disputed Nomfundo's version that the Appellant was not responsible for the fire and that the fire was caused by a candle that had fallen. She disputed the Appellant's version put to her, that he did not assault Nomfundo and that he had left after Nomfundo told him that she was going to sleep in her mother's bedroom. She testified that no candle was lit on that day in Nomfundo's bedroom.
- [9] Thulani corroborated Pinky's version of the assault on Nomfundo, on the argument and on how the fire was caused. He slept in the dining room and heard the Appellant talking to himself that he was going to destroy and burn his and Nomfundo's clothing and that if they tried to stop him, he was going to kill them. When he left the house after the fire he saw the Appellant standing next to the house with arms folded. He further corroborated Mandia Maphisa on how the appellant fled the scene. He too disputed Nomfundo's version which absolved the Appellant. He denied that he was influenced by the police to give a false testimony against the appellant. He testified that it was the Appellant's father who told him to testify that his version was made up by the police.
- [10] Mandia Mapisa a neighbour testified that when he went out to assist he encountered the Appellant inside the premises of the victims home. He enquired from the Appellant what happened and he did not give any explanation, instead the appellant scaled the fence and fled.
- [11] Mr Tanjekwayo, a police officer arrived at the scene and found that a corrugated iron house had burnt down. He interviewed a woman on the scene who informed him that there was someone who had died in the house. She reported further that she knew who had caused the fire, that it was the Appellant who had a relationship with her sister. The Appellant was not present at the time. While he took down statements he noticed people fighting nearby in the dark. He found a group of people who wanted to assault the Appellant. He removed the Appellant from the group, introduced himself as a police officer and enquired from him what happened. The Appellant told him that he was sorry that he fled, that it was a mistake and that. The members of the community and the family wanted to assault the Appellant. He instructed some of the police officers to take Appellant away. He also informed the Appellant that he was going to be charged.

- [12] The Appellant testified that Nomfundo was pregnant. He had an argument with her after he had enquired why she had arrived home late from the clinic. Nomfundo was making a lot of noise and was aggressive. She accused him of shouting at her and she complained of experiencing some pains. Pinky came into their room to enquire what was happening. Nomfundo told him that she was moving to her mother's bedroom and he responded by informing her that if she did so, he was going to leave because he was not going to sleep in her parental home alone. He left the house to go to a friend's place and on the way he realised that he had left his permit behind. He had to fetch the permit because he would not gain entry to his workplace without it.
- [13] When he was 30 metres from Nomfundo's house he saw many people and flames. The police were present and they approached him and accused him of causing the fire and they arrested him. He denied having told police officer that he was responsible for the fire and that it was a mistake. He also testified that Thulani was influenced by a policeman to testify on the contents of a written statement in order to have him convicted. He denied having caused the fire. Most of the things in the house belonged to him and he was still paying for some.

He did not enjoy a good relationship with Pinky due to a past incident and she wanted to cause trouble for him. He knew Mandla Mapisa as a neighbour and he denied talking to him. He alleged that Mandla would say anything to support his girlfriend.

- [14] The grounds of appeal are dealt with in Mr Du Plessis Heads of Argument, he submits that the court a quo:

1. erred in finding that there was sufficient evidence to convict the Appellant and by relying on Pinky's evidence and rejecting Nomfundo's evidence of the first state witness and that Pinky was not fully corroborated by the Thulani;
2. erred in convicting the Appellant on count 3 where the complainant (Nomfundo) had alleged that she had only been involved in an argument with the Appellant and that he had not assaulted her; the court had erred in rejecting her evidence.
3. erred in not finding that the Appellant's evidence was reasonable possibly true;
4. erred in relying on the evidence of the police officer who testified that he had rescued the Appellant from the mob and by rejecting appellant's evidence that
5. he was never apprehended by the mob. The evidence of the police officer should be rejected in that the Appellant was not warned of his rights;

- [15] It is trite that the State bears the onus to prove its case beyond a reasonable doubt and on the other side of the coin an accused bears no onus to prove his innocence. In its analyses of evidence, a trial court considers the strength and weaknesses, the probabilities and

improbabilities of both the versions of the state and defence. The court must satisfy itself that the balance weighs heavily in favour of the state so as to exclude any reasonable doubt of an accused person's guilt; *S v Chabalala* 2003 (1) SACR 134 (SCA) at 139i -140a. If an accused person's evidence is reasonably possibly true he or she is entitled to an acquittal.

Furthermore the court is obliged to pronounce of the of the credibility of the witnesses relied upon and where necessary, also apply the cautionary rules applicable in dealing with the evidence of certain witnesses.

- [16] A Court of appeal has limited powers to interfere with the findings of fact of a trial court and, would only do so where it is convinced on "adequate grounds that the trial Court was wrong In accepting the evidence -a reasonable doubt will not suffice to justify interference with its findings. Bearing in mind the advantage which a trial Court has of seeing, hearing and appraising a witness, it is only in exceptional cases that the Court of appeal will be entitled to if1terfere with a trial Courts evaluation of oral testimony." *S v Francis* 1991(1) SACR 198 (A) 198j-199a.
- [17] I turn now to deal with the analysis of the evidence by the trial court. The learned magistrate rejected part of Nomfundo's evidence where he found that she seemed to protect the appellant, on the gravity of the assault and on the cause of the fire. He also expressed caution in dealing with Pinky's evidence because she had lost a child. He however found that there was corroboration in the evidence of Nomfundo, Pinky and Thulani on the events that preceded the fire. Pinky and Thulani corroborated each other on how the appellant started the fire and his utterances. Thulani and Mandla Nkosi corroborated each other on the conduct of the appellant before he fled the premises. The learned magistrate found Pinky and Thulani to be credible witnesses.
- [18] Count 1. Arson: The magistrate took the following into account:
1. Contrary to what Nomfundo testified that the Appellant left the house, Pinky and Nomfundo testified that he never left. Although Pinky and Thulani did not have full view of Nomfundo's bedroom as they peeped from the positions they had occupied, Pinky who was in her mother's bedroom and Thulani in the dining room, they heard Appellant talking to himself. He said that he was going to place his and Nomfundo's clothes on the bed and set them alight; he warned them not to utter a word or try to stop him, otherwise he would kill them; they were able to see how he proceeded to the stove in the kitchen where he lit a paper and moved to the bedroom.
 2. After they had managed to get out of the house Thulani testified that he saw the Appellant standing near the house and in the premises with his arms folded. He heard their neighbour Mandla Maphisa ask the Appellant what happened and the Appellant fled by scaling the fence. This incident was confirmed by the neighbour.

In the judgement the learned magistrate questioned the Appellant's conduct, of how as man of the house he stood watching as the home of his loved one and her family was engulfed in flames.

Certain questions were put to Nomfundon by the learned magistrate in trying to find out from her what the cause of the fire could have been. The suggestion that the fire could have been caused by a candle was correctly rejected in the judgment. Nomfundo testified that she was asleep when the appellant arrived home at about 22h00 to resume the argument. She did not testify that a candle was lit at the time and Pinky and Thulani denied that a candle was lit or that it could have been the cause of the fire.

[19] Count 2 Murder and Count 4, 5, Sof attempted murder: The Appellant warned them not to stop him, he would kill them, they were warned not to say a word. Pinky testified that everyone was scared because the Appellant said he was destroying he was killing. She begged him not to burn the house their father had built for them, rather wait for their mother to return from work. Nomfundo also begged him not to burn them in the house. Pinky and Thulani denied that a candle was lit.

[20] Count 3, Assault with intent to do grievous bodily harm: The judgement reflects that the magistrate took into account that the Appellant had an argument with Nomfundo. The conviction was based on the testimony of Nomfundo, Pinky and Thulani. Pinky testified that besides the twisting of Nomfundo's arm his other hand was on Nomfundo's throat and he wanted to throttle her. Thulani testified that he also saw the Appellant slapping Nomfundo with open hand. I am of the view that the evidence does not prove that Nomfundo suffered serious injury as a result of the assault. The learned magistrate misdirected himself in this regard and should have convicted the appellant of common assault, which is a competent verdict as provided for in section 266 of the Criminal Procedure Act 51 of 1977. I would therefore recommend that the conviction be set aside.

[21] It is appropriate to quote from the transcribed record some of the reasons given in the judgement for rejecting part of Nomfundo's evidence and reasons for the conviction.

Page 102 line 20 -25; Page 103 lines 2-9

"Dit is vir die hof duidelik dat beskuldigde nog steeds 'n baie sterk houvas het oor heirdie vrou wat sy vry meisie is. Sy kom sowaar en kom beskerm hom hier in die hof. Onder andere se sy dit is dalk 'n kers wat die plek aan die brand kon steek. Die mense het krag in die huis hoekom sou hulle kers gebruik?"

Page 103 lines 2-9; lines 17-18 and 25, Page 104 lines 1-3 and lines 9-10

"Die hof het beskuldigde gevra hy rook nie so hy het nie vuurhoutjies of iets by hom gehad nie, so hoekom hy die stoof aan die brand moet steek om vuur te kry om papier aan die brand te kry.

Die bank is voor die deur gesit sodat beskuldigde haar nie verder in die hande kon kry

Hy rand haar aan, hy steek haar huis, haar klere, haar familie se goed aan die brand as gevolg van sy optrede 'n kind dood. En tog beskerm sy hom nog steeds. Die hof is versigtig met haar getuienis,

...sy het nie geloer soos haar sussie om te sien wat doen beskuldigde heel tyd nie"

[22] It is my view that the evidence of the police officer should not have been considered in the judgement, as an admission by the Appellant to having caused the fire. It was not established during his testimony whether the rights of the appellant were properly explained at the crime scene. Furthermore, the jurisdictional requirements for admissibility of the admission, whether such informal admission was freely and voluntarily made was not established by the court. Having said that,

[23] I am of the view that the evidence of the other witnesses does discharge the onus on the state of proof beyond a reasonable doubt. The appellant acted with *dolus eventualis* by his utterances and by his conduct displayed in the premises of the house while the house was on fire prove that he reconciled himself with the consequences of his conduct.

[24] Having found that in respect of Count 3 a conviction of Common Assault was appropriate, I would recommend that the sentence be set aside and to be substituted with a lesser sentence. In as far as the remaining

sentences were concerned, I am of the view that learned magistrate took into account the appellant's personal circumstances, the gravity of the offences, the conduct of the appellant of not acting responsibly towards the family, which included women and children. The learned magistrate did show mercy by ordering some of the sentences to run concurrently with the sentence in court 1. There was in my view no misdirection in his consideration and imposition of sentence. The sentence imposed by the court *a quo* should be confirmed.

[25] In the result the following order is granted:

1. The appeal on conviction and sentence in respect of the Assault with Intent to do Grievous Bodily Harm is upheld and the conviction and sentence are set aside and is substituted with a conviction of Common Assault and the following sentence is imposed:

The accused is sentenced to a term of imprisonment of 3 months which is wholly suspended.

2. The appeal on conviction and sentence in respect of counts 1, 2, 4, 5 and 6 are dismissed and the convictions and the sentences imposed by the court below are confirmed.

TLHAPI VV

(JUDGE OF THE HIGH COURT)

I agree,

N B TUCHTEN

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