

SOUTH AFRICA / JUDGMENT

Nkala v S (A276/2017) [2018] ZAGPJHC 116 (17 April 2018) [2018] ZAGPJHC 116

COURT

South Gauteng High Court, Johannesburg

BEFORE

Dosio, Msimeki

CASE / FILE NUMBER

A276/2017

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IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

LOCAL DIVISION, JOHANNESBURG

CASE

NUMBER :A276/2017

In

the matter between:

NKALA
RALPH
STANLEY
APPELLANT
and
THE
STATE
RESPONDENT

JUDGMENT

DOSIO AJ:

INTRODUCTION

- [1] The appellant was indicted on four counts in the South Gauteng High Court. Count 1 was a charge of housebreaking with intent to commit robbery. Count 2 was a charge of robbery with aggravating circumstances, read with the provisions of section 51 (1) of Act 105 of 1997. Count 3 and 4 were charges of murder. He was found guilty on counts 2, 3 and 4. In respect of count 2 he was sentenced to 15 years imprisonment, and in respect of count 3 and 4, he was sentenced to life imprisonment on each count.
- [2] The appellant was legally represented throughout his trial.
- [3] An application for leave to appeal was granted in respect of conviction only and was refused on sentence.

AD CONVICTION

- [4] It is trite law that the onus rests on the State to prove the guilt of the accused beyond reasonable doubt. If his version is reasonably possibly true, he must be acquitted.
- [5] The salient facts of this case may be summarised as follows;

Ms M. B. and her daughter Ms G. P. resided in a townhouse unit situated at [...] B. H. M., Bedfordview ("the complex"). On the 30th of July 2013, the appellant was employed at this complex as a gardener and had access to the complex and the guardroom. It was the respondent's case that on the 30th of July 2013, the appellant entered the house of the deceased during the day and robbed and murdered both deceased. According to the post-mortem report the cause of death of both deceased was manual strangulation. The deceased G. P.'s hands, were bound with a pair of black handcuffs and her ankles were bound together with a shoelace. The bodies of the deceased were found that evening by the security personnel and members of the body corporate. The CCTV cameras to the premises were turned off and the handcuffs issued to the appellant were missing. The appellant could not be reached telephonically and failed to return to the complex and never informed his employer of his whereabouts. The appellant was arrested on the 24th of January 2015.

- [6] Subsequent to his arrest, the appellant deposed to a confession and made certain admissions about his involvement in the crime. He also participated in a formal pointing out to the police. The court a quo convicted the appellant on the basis of circumstantial evidence, his confession and the pointing out. The respondent called fourteen witnesses. The most important witnesses are Mr Abrahams, Mr Sibande and the investigating officer, warrant officer Raletsemo. Their evidence may be summarised as follows;

- [7] Mohammed Abrahams testified that at the time of the incident he was the chairman of the Body Corporate of the complex. The appellant, who was the gardener, was entitled to annual leave of four weeks. The appellant had completed three weeks of his leave a month before the incident. On the day of the incident, the appellant had received his salary and his usual working hours were between 08:00 and 17:00. The Body Corporate had issued him with safety boots, which were lace tied. In the guardhouse there were handcuffs, and keys of the complex. The guard house was only accessible through a pin code, which the appellant had. The shoe laces of the safety boots in question were black with yellow stripes. On the day of the incident, he arrived at work around 17h20. He noticed that the tools which the appellant used were left outside. This was completely out of the norm. A security guard of the complex, called Thami Sibanda came to him at 18h00 and reported to him that there was something out of the ordinary at unit 8, as the lights were off, and the gates and door of the unit were open. He went to the unit in the company of Thami Sibanda, Mr Naylor and Mr Bharath. Inside the house the bodies of the deceased were seen lying in the bathroom. After this incident, he never heard from the appellant and even though attempts were made to contact the appellant, his phone remained switched off. An inspection of the perimeter revealed that there was no security breach.
- [8] Thami Sibanda testified that he worked as a security guard at the complex in question and he was on duty on the day of the incident. He ended the previous shift at 06h00 that morning and resumed his shift at 18h00. He found the occurrence book and the key for the handcuffs in the guard room. The handcuffs of the complex were however missing. He handed the occurrence book and the handcuff keys to the investigating officer, warrant officer Raletsemo. He confirmed that on day in question, when he knocked off at 06h00, the CCTV cameras were all working. When he reported on duty that evening, and whilst patrolling, he noticed that the unit in question was dark and the door was open. He then accompanied Mr Abrahams, Mr Bharath and Mr Rowland to the said unit. He was shown exhibit 2, and he confirmed that it was the handcuffs missing from the guard house. He then tested the key which unlocked the handcuffs.
- [9] Patrick Raletsemo, who is the investigating officer, testified that whilst investigating this matter, and almost 2 years after the incident, he received information from an informer, that the appellant could be found in Berea. He followed that information which led to the subsequent arrest of the appellant on the 24th of April 2015. The appellant was explained his constitutional rights. The appellant then volunteered certain information that he did not commit the offence on his own, but that he was with one Talente Mpofo. This gave rise to the subsequent making of a confession as well as the pointing out. He denied that the appellant was assaulted prior to the confession and the pointing out taking place.
- [10] The confession was made to lieutenant colonel Muhlari on the 24th of April 2015 and the pointing out was made on the 25th of April 2015 to lieutenant colonel Mkwwebula. Lieutenant colonel Mkwwebula only saw injuries to both hands of the appellant, which the appellant told her were caused by the handcuffs.

[11] The appellant testified in his own defence and did not call any other witness. He confirmed that on the 30th of July 2013 he was employed at the complex as a gardener and was present at work on that day. He had made prior arrangements between

himself and his employer that when he got paid he would take his annual leave to sort out his clearance certificate. He arrived at work at 07h50 and at 09h00 he received a text message from his sister indicating that his salary had been paid. He then approached Mr Bharath who authorised his leave. He went to the guardhouse, changed his clothes and knocked off at 10h00. He testified that he saw both deceased the previous day. He could not remember whether he had packed away his tools before he left on the day in question. He never used the handcuffs and they were always kept in a drawer in the guardhouse. He refuted the claims that he tampered with the CCTV cameras. He never returned to the said complex after the 30th of July 2013. He confirmed participating in a pointing out as the police requested him to show them where he was working and where the deceased stayed. During cross examination the appellant was unable to inform the Court a quo, as to what happened to the handcuffs and why the CCTV stopped recording after he entered the guardhouse.

[12] In considering the judgment of the Court a quo, this Court has been mindful that 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 reveals that those findings are patently

wrong.[1]

[13] It is common cause that there was no sign of forced entry at the unit of the deceased, hence the acquittal on count 1. Counsel for the appellant argued that there is no direct evidence linking the appellant to the crimes in question and that the Court a quo erred in drawing as the only reasonable inference that the appellant robbed and murdered both deceased.

[14] The appellant's counsel contended further that the Court a quo misdirected itself in that;

- (i) The appellant's version that he left the residence at 10h00 was an aspect of his defence which remained unchallenged;
- (ii) The witness Mr Bharath never testified;
- (iii) The appellant maintained that it was unclear where the deceased were killed;
- (iv) The till slips ought to have been tendered as evidence;
- (v) The Court a quo gave insufficient consideration to the evidence of Thami Sibanda who found it unusual that the unit of the deceased was in darkness and that the doors of the unit were open. Counsel further contended it was strange that this witness found the keys of the handcuffs inside the guardhouse and that Thami Sibanda could possibly himself have been responsible for the offence that occurred.

(vi) The evidence regarding the pointing out should not have been received as the photos were not presented. It was further the appellant's contention that the appellant's version ought to have been believed as he was told what to say.

(vii) The appellant's failure to return back to work was not material to his guilt and his explanation in this regard was reasonably possibly true.

(viii) Had the appellant gone to the deceased's house on the day in question and assisted them, his fingerprints would have been littered everywhere in the house.

There was also no CCTV footage presented which would have assisted the Court a quo.

[15] In regard to the points raised by the appellant's counsel, this Court would like to remark as follows;

- i. Mr Abrahams stated that people saw the appellant running down the road at 15h00, therefore the appellant's version of leaving at 10h00 is not entirely correct.

In addition, the CCTV cameras were switched off at 12h30 shortly after the appellant was seen entering the guardhouse. The appellant, together with the security guard, Thami Sibanda, were the only ones who had the access codes to enter the guard room. Due to Thami Sibanda not being present, it must have been the appellant who switched the cameras off.

- ii. The fact that Mr Bharath did not testify, does not take the matter any further. In fact, if Mr Bharath knew that the appellant was taking leave, he would not have allowed Mr Abrahams and Mr Sibande to search endlessly for the appellant inside the complex, fearing that he too (the appellant) could also have been injured.

Instead, Mr Bharath would have told Mr Abrahams that the appellant was paid, had taken his leave and had gone to Zimbabwe. It was the appellant who should have called Mr Bharath, to confirm that he had gone on leave with Mr Bharath's knowledge and approval, yet the appellant did not request to call him.

- iii. The appellant's lack of knowledge where the deceased were killed is nonsensical.

It is the appellant, out of his own volition, who decided to tell lieutenant colonel Mkwabula that he wanted to point out the house

where he and his friend Talente robbed two white women.[2] Even though he does not mention that he killed them, mention is made in the confession to lieutenant colonel Muhlari, that after shoelaces were used to tie up both deceased, they were both put in the toilet.

- iv. In respect of the till slips not having been handed in, this would not have taken the case any further.

- v. There is no basis to suggest that Thami Sibanda was involved in this matter, and no such version was ever put to this witness during

cross-examination. When he left the complex at 06h00 the cameras were working and the handcuffs were in the guard room. There is no motive for Thami Sibanda to falsely implicate the appellant, and no such motive was ever put to him during cross-examination. He, together with Mr Abrahams, searched the premises of the complex after discovering the bodies of the two deceased. They feared that the appellant himself might have been injured. If Mr Sibande was involved, he would have disposed of the keys to the handcuffs and the safety boots which contained the ligatures found on the deceased.

vi. This Court agrees with the appellant's counsel that the lack of photos in the pointing out is problematic, however, the contents of the actual form, namely, exhibit "H", where the appellant was asked "Do you know why you are brought to me, and if so, why?" the appellant answered "Yes, to show you the house where me and my friend Talente robbed 2 white woman". This answer cannot be overlooked or under stated. There is no way that lieutenant colonel Mkwebula would have known that the appellant

had gone with his friend "Talente" to rob the two deceased. It is clear this version was given by the appellant out of his own volition and was made freely and voluntarily. The injuries he had to his wrists were caused by the handcuffs and were not inflicted on him. The version of the appellant that he was told what to point out and where the deceased resided, was correctly rejected by the Court a quo as not being reasonably possibly true. The oral evidence of the pointing out was credible and reliable. The Court a quo cannot be criticized for admitting the pointing out without the photographs, as a plausible explanation was furnished, namely, that the memory card utilized, was faulty.

vii. The failure of the appellant to return to work is extremely material. According to his version, he was on leave, yet he did not return for almost two years without any explanation. When he departed that day, he left the work utensils in disarray. He did not pack them away adjacent to the guardroom, which was the usual practice, and he didn't tell Mr Bharath that he was leaving. The actions of the appellant on the day of the incident are not those of a person who was taking leave, in fact, they were the actions of someone who left in a great hurry. When the appellant was arrested, he was found hiding on a balcony in between the mattress and the wall. This is confirmed by warrant officer Raletsemo[3] and constable Maluleke.[4] The failure to return to work for two years after the 30th of July 2013 and the manner in which he was arrested, was correctly considered by the Court a quo as extremely suspect and the Court a quo correctly rejected the appellant's version as not being reasonably possibly true.

viii. Regarding the fact that no fingerprints were lifted, this is not material, as the appellant often went into the house to assist with off-loading groceries from the deceased's motor vehicle and taking them into the house. His fingerprints would in any event have been found inside the unit of the deceased. The fact that no CCTV footage was presented is simply because the appellant switched the cameras off at 12h30. He was the only person at that time of day who had the access code, accordingly, the Court a quo correctly concluded that he had switched the CCTV cameras off.

[16] The circumstantial evidence upon which the Court a quo based its findings is the following;

i. The ligature/ shoelace:

The deceased was discovered tied with a similar shoelace which the appellant wore in his safety boots. The witness Mr Abrahams confirmed

this.[5]

ii. The handcuffs:

The handcuffs issued to the appellant were missing from the guardhouse. One of the deceased was discovered bound with handcuffs and the keys found in the guard room unlocked these handcuffs. This is conclusive proof they were the handcuffs of the body corporate. The record in the occurrence book also conclusively proved that the appellant was in possession of handcuffs on the day of the incident.

iii. Failure to pack away the tools:

The witness, Mr Abrahams, informed the trial court that it was suspicious that the appellant's garden tools were not packed away as usual.

iv. The townhouse unit 8 was discovered open with the lights off:

The witnesses, Thami Sibanda and Mr Abrahams, found it strange that the lights were off and that the security gate and door were open, especially since it was 18h00 and it was winter.

v. The appellant went missing after the incident:

This has been fully discussed in paragraph [15] (vii) (supra).

vi. There was no evidence of a forced entry in unit 8:

It is common cause the appellant was well known to the deceased and there were till slips and groceries found scattered on the floor,

which suggests the appellant had once again assisted the deceased in carrying their groceries, or, accosted them when the deceased entered with their groceries. There was no forced entry as the walls of the complex and the electric fence had not been tampered with, so it was clearly an inside job.

vii. The pointing out and the confession:

The court a quo correctly determined that the pointing out and the incriminating statements were admissible after a trial within a trial was held. The Court a quo correctly determined that the appellant was not assaulted and that he made the statements voluntarily. Apart from the wounds caused by the handcuffs, there were no other injuries observed on the appellant. It cannot be overlooked that the appellant had intrinsic knowledge of the incident. His statement contained information which only the appellant would know, namely;

- (a) lieutenant colonel Muhlari, who was not involved in the investigation would never have known that;
- i. the deceased were handcuffed, bound and gagged,
 - ii. the appellant had a wife and a son,
 - iii. the appellant took R6000, two gold rings and a laptop,
 - iv. the jewellery was sold to Nigerians for R1400 and the laptop was sold in Zimbabwe,
 - v. Talente grabbed the deceased and put a sponge in their mouth and tied them with shoelaces around their mouth and hands and left them in the toilet,
 - vi. the appellant switched off the cameras
- (b) There is also no way lieutenant colonel Muhlari would have known about the involvement of Talente, as the CCTV cameras had been switched off. Therefore, noone would have known that a second person had assisted the appellant, unless he out of his own volition, told lieutenant colonel Muhlari.

THE LAW

[17] Best on Evidence, 10th Edition at page 261, explains circumstantial evidence as being a "... number of circumstances, each individually very slight, [which] may so tally with and confirm each other as to leave no room for doubt of the facts which they tend to establish... not

to speak of greater numbers, even two articles of circumstantial evidence, though each taken by itself weigh but a feather, join them together you will find them pressing on a delinquent with the weight of a mill-stone."

[18] The decision of the learned Watermeyer J in *R v Blom* 1939 AD at 202 opines that circumstantial evidence presupposes inferential reasoning, namely "...that the proved facts should be such that they exclude every reasonable inference save that one sought to be drawn"

EVALUATION

[19] The circumstantial evidence is overwhelming and the appellant's alibi of being in Zimbabwe remains uncorroborated. The manner in which the appellant left the garden tools in disarray, switching off the CCTV cameras, the missing handcuffs, the pointing out and the confession, are all facts linking the appellant to the crime. The inferential reasoning, based on circumstantial evidence, upon which the Court a quo based its finding, cannot be faulted. The appellant's failure to return to work was merely one of the factors the Court a quo considered, which supported the respondent's allegation that the appellant had a reason to flee. The appellant's version was correctly rejected by the Court a quo.

[20] After a thorough reading of this record, this Court has no doubt as to the correctness of the Court a quo's factual findings. I can find no misdirection which warrants this Court disturbing the findings of fact or credibility that were made by the court a quo. The State proved the guilt of the appellant beyond reasonable doubt, and the Court a quo correctly rejected the version of the appellant as not being reasonably possibly true.

[21] In the premises I make the following order;

The appeal in respect of conviction is dismissed.

D DOSIO

ACTING JUDGE OF THE HIGH COURT

I agree

M.W.MSIMEKI

JUDGE OF THE HIGH COURT

C MATSHITSE

Appearances:

On behalf of the Appellant :

Adv. S. HLAZO

On behalf of the Respondent : Adv. A.D MAHARAJ

Instructed by :

Director of Public Prosecutions

Cnr Kruis and Pritchard Street,

Johannesburg

Date Heard :

16 March 2018

Handed down Judgment :

17 April 2018

[1] See S v Fran. cis 1991 (1) SACR 198 (A) at 198 J – 199A and S v Hadebe and Others 1997

- (2) SACR 641 (SCA) at 645 E-F
 - [2] Volume 2 of the court transcript page 153 line 5-6
 - [3] Volume 2 of the court transcript page 100 line 8-9
 - [4] Volume 3 of the court transcript page 193 line 10-12
 - [5] Volume 1 of the court transcript page 39 line 15-16
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