

SOUTH AFRICA / JUDGMENT

Nkettle v S (A141 /2020) [2021] ZAFSHC 276 (5 November 2021)

[2021] ZAFSHC 276

COURT

Free State High Court, Bloemfontein

BEFORE

Opperman, Page

CASE / FILE NUMBER

A 141 /2020

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IN THE HIGH COURT OF SOUTH
AFRICA
FREE
STATE DIVISION, BLOEMFONTEIN
Case
no: A 141 /2020
SHT
58/18
In

the matter between:

GOSIANE
McDONALD NKETLE
Appellant
and
THE
STATE
Respondent

CORAM:

OPPERMAN J et PAGE AJ
HEARD

ON:

30 AUGUST 2021
DELIVERED
ON: 5 NOVEMBER 2021

JUDGMENT

BY: PAGE AJ

INTRODUCTION

- [1] The Appellant was convicted of murder read with the provisions of section 51(2) of the Criminal Law Amendment Act 105 of 1997. The appeal, with leave to appeal granted by the court a quo, lies against the conviction of the Appellant.
- [2] Mr. Tullo Steven Saotsi, and the Appellant had an eventful evening on 7 October 2018 of visiting a shebeen, sitting at the Appellant's home and playing a role in an incident related to the theft of a mobile phone. The two of them ended up walking back to the tavern to look for the deceased.
- [3] Upon their arrival at the tavern they found the deceased inside the tavern whereafter Mr. Saotsi later noticed that the Appellant and the deceased were engaged in an argument. The deceased had a beer bottle in his hand. The deceased tried to hit the Appellant but missed whereafter he ran away from the Appellant. The Appellant chased after the deceased and Mr. Saotsi followed them. He saw the deceased on the ground and witnessed the Appellant kicking him. Mr. Saotsi joined the Appellant by kicking the deceased. Mr. Saotsi found a brick at a nearby house and hit the deceased with it. The accused took the same brick and also hit the deceased about four times. Mr. Saotsi thereafter hit the deceased with the brick again but saw that the deceased was crying and he stopped the Appellant. The blows with the brick were inflicted on the head of the deceased.
- [4] Mr. Saotsi then suggested they leave the deceased there because if someone saw them, they may be arrested for assault or attempted murder. They both walked away from the deceased and after some 15 metres away from the scene the accused said that the deceased knows him and suggested that they finish the deceased off. Mr. Saotsi told the Appellant that he was not going back and the two of them had an argument. The accused walked back to where the deceased was. Mr.

Saotsi looked back to where the Appellant was and saw the Appellant picking up the brick and hitting the deceased. He saw the deceased

lifting up his upper body and falling back again.

- [5] Thula Butumelo was walking back from the tavern at about half past twelve at night on 7 October 2018 when he came across the Appellant, the deceased and Mr. Saotsi. He heard them arguing about a cell phone. The Appellant asked him to buy cigarettes, but he replied that he was not going to the shop. He heard the screaming in the distance

but decided not to go back to check. He later walked back on the same route and found the deceased. He called the deceased and tried to shake him but he was not moving. He called the police and went back to the shop to call other people.

[6] Constable Pakani noticed two persons (the Appellant and Mr. Saotsi) who wanted to walk through the crime scene, he asked them to identify themselves. He noticed blood on the Appellant's ankles and upon further inspection saw more blood on his legs and knees. Later, he confiscated a torn part of a trouser with more blood at the accused's

house. Two bloody t-shirts and a jersey which were in a bath were seized as well.

[7] The record was not transcribed further but the parties agreed that the presiding officer's reconstruction of the record was correct. Dr Shantell Liebenberg, the expert witness and pathologist, placed her qualifications on record. She conducted the medico-legal post-mortem examination. Her findings were that the head of the deceased was deformed. The head and neck were covered with abrasions. Brain tissue was protruding from the nose and skull fractures. Small injuries were found on the chest. She found blood in the lungs and concluded that the cause of death was extensive blunt force trauma to the head with a big object.

[8] The report on the medico-legal post-mortem examination by Dr Liebenberg, and photo plan were handed in as exhibits.

[9] After the closing of the State's case the Appellant's legal representative applied for his discharge in terms of section 174 of the Criminal Procedure Act 51 of 1977 ("the Act"). The court dismissed the application whereafter the Appellant's case was closed.

ADJUDICATION ON APPEAL

[10] The Supreme Court of Appeal has confirmed in *AM and another v MEC Health, Western Cape* (1258/2018)

[2020] ZASCA 89 in paragraph 8 of the judgment that:

"It is trite that an appeal court is reluctant to disturb findings of that character by a trial judge, who was steeped in the atmosphere of a lengthy trial and had the advantage of seeing and hearing the witnesses. Such findings are only overturned if there is a clear

misdirection or the trial court's findings are clearly erroneous. That has consistently been the approach of this court and the Constitutional Court as reflected recently in the following passage from *ST v CT*:

'In *Makate v Vodacom (Pty) Ltd* the Constitutional Court, in reaffirming the trite principles outlined in *Dhlumayo*, quoted the following dictum of Lord Wright in *Powell & Wife v Streatham Nursing Home*:

“Not to have seen the witnesses puts appellate judges in a permanent position of disadvantage as against the trial judges, and unless it can be shown that he has failed to use or has palpably misused his advantage, the higher court ought not to take the responsibility of reversing conclusions so arrived at, merely on the result of their own comparisons and criticisms of the witnesses and of their own view of the probabilities of the case.”

[11] In *Rex v Dhlumayo and Another* 1948 (2) SA 677 (A) on pages 705 and 706 Greenberg, AJ summarizes a number of guiding principles when adjudicating a matter on appeal. One of these is that where the appellate court is constrained to decide the case purely on the record, the question of onus becomes all-important, whether in a civil or criminal case.

[12] In *Minister of Safety and Security v Craig* 2011 (1) SACR 469 (SCA) at paragraph 58, the Supreme Court of Appeal clarifies the approach of an appeal court as follows:

“Although courts of appeal are slow to disturb findings of credibility, they generally have greater liberty to do so where a finding of fact does not essentially depend on the personal impression made by a witness’s demeanour, but predominantly upon inferences and other facts, and upon probabilities. In such a case a court of appeal, with the benefit of a full record, may often be in a better position to draw inferences.”

THE GROUNDS OF APPEAL

[13] That the court a quo erred by amending the charge sheet as it infringed the Appellant’s right to a fair trial.

1. It appears from the record that there was an objection raised from the sidebar before the charge was put to the accused. The objection was based thereon that the charge sheet lacked the details of the modus operandi. The State was then allowed to amend the charge sheet. The charge sheet was thus amended to include the allegation

“by hitting him with a brick, kick him with booted feet and use any other force.”

2. The legal representative of the accused did not have any further requests or objections and the amended charge was put to the accused who pleaded “not guilty”. The Appellant’s legal representative confirmed the plea and made no plea explanation.
3. It is submitted on behalf of the Appellant that the accused was prejudiced in his defence and that his right to a fair trial was infringed by the amendment of the charge sheet.
4. In casu, as it appears from the record, the objection was raised, whereafter the amendment was made to the charge sheet. It appears from the record that the legal representative did not take the matter further at that stage and allowed the Appellant to plead to the amended charge.

5. The amendment, as correctly indicated by the parties in their heads of argument, were effected in terms of section 86 of the Act. The Appellant's legal representative does not elaborate on the prejudice suffered by the accused, neither has he employed the provisions of section 85 of the Act, which is of assistance to the accused and could bring about either the amendment or the quashing of the charges faced by the accused.
6. The amendment was fair and in accordance with justice. This ground for appeal must be dismissed.

[14] That the court a quo erred in finding that the evidence of the first State witness, as a single witness, was credible and satisfactory in all material respects; that the court a quo erred in not considering the material contradictions inherent in the evidence of a single witness.

1. As it appears from the record, Mr. Saotsi's relay of events

clearly is that he and the accused assaulted the deceased on the date of the incident. He has thus been convicted and sentenced for the murder of the deceased in this matter pursuant to a plea-and-sentencing agreement. This is not in dispute between the State and the defence.

2. The witness was challenged during cross examination about his

conviction and as is clear from his answers that he was of the belief that he was convicted of attempted murder and not murder.

3. The legal representative has taken issue with this contradiction

during cross examination and also raises this issue in the appeal to this court. It is submitted that Mr. Saotsi has tried to minimize his participation in the murder of the deceased in an attempt to exonerate himself by blaming the Appellant.

4. The court a quo deals with this argument in the judgment on page 125 of the record:

"The credibility of the witness is also attacked severely because in the section 105A Act 51 of 1977 plea the witness was clearly convicted of murder whilst the witness indicated his recollection was attempted murder."

The witness however qualified his interpretation indicating that after he had assaulted the deceased the deceased had lifted his head and from this he derives it was the accused who executed the mortal blows.

He does however conceded (sic) that it is impossible to determine who hit the mortal blows because they both assaulted the deceased taking turns hitting him with the same concrete block.

The witness has been convicted and sentenced and the court is of the opinion that this greatly diminishes the incentive for the witness to falsely implicate the accused."

5. The court a quo further deals with the cautionary rules applicable to a single witness and in addition the cautionary rules applicable to a co-accused with reference to applicable case law.
6. The court a quo finds that Constable Pakani corroborates Mr. Saotsi's evidence at page 126:
"... in as far as the time, place and surroundings of the murder is concerned. He also confirms the first witness and accused revisited

the scene of the murder where the accused was arrested for acting suspicious and the accused's pants were full of blood."

7. The court a quo finds that Mr. Saotsi's evidence is corroborated by Mr. Thulo who is viewed as an independent witness. The accused and the deceased were known to both the accused and Mr. Saotsi and he witnessed them arguing earlier the night with the deceased.
8. The court a quo finding of the credibility of the single witness and other witnesses cannot be faulted.

THAT THE COURT A QUO ERRED IN FINDING THAT THE STATE PROVED ITS CASE BEYOND A REASONABLE DOUBT.

- [15] The State adduced the oral evidence of four witnesses. The report on the medico-legal post-mortem examination by Dr. Liebenberg and photo plan form part of the evidential material. The Appellant elected not to testify.
- [16] The court a quo found that there was an abundance of evidence it would have expected the Appellant to have answered upon and that the failure to testify negates any argument against the reliability of the single witness. There is no evidence to the contrary. The court found that the State has proven its case beyond a reasonable doubt.
- [17] It is submitted on behalf of the Appellant that no negative inference can be drawn from the fact that the Appellant did not testify since the single witness's evidence should not have been accepted as credible and that the State thus failed to prove its case beyond a reasonable doubt.
- [18] The court a quo, in the evaluation of the evidence, refers to the judgment in *S v Boesak* 2001(1) SACR 1 (CC) which deals specifically with the instance whereby an accused elects not to testify.
- [19] The following quotation from the above case at paragraph [14] is of importance and necessary to mention:

"The fact that an accused person is under no obligation to testify does not mean that there are no consequences attaching to a decision to remain silent during the trial. If there is evidence calling for an answer, and an accused person chooses to remain silent in the face of such evidence, a court may well be entitled to conclude that the evidence is sufficient in the absence of an explanation to prove the guilt of the accused. Whether such a conclusion is justified will depend

on the weight of the evidence What is stated above is consistent with the remarks of Madala J, writing for the Court, in *Osman and Another v Attorney-General, Transvaal*, 24_when he said the following: 'Our legal system is an adversarial one. Once the prosecution has produced evidence sufficient to establish a prima facie case, an accused who fails to produce evidence to rebut that case is at risk. The failure to testify does not relieve the prosecution of its duty to prove guilt beyond reasonable doubt. An accused, however, always runs the risk that, absent any rebuttal, the prosecution's case may be sufficient to prove the elements of the offence. The fact that an accused must make such an election is not a breach of the right to silence. If the right to silence were to be so interpreted, it would A destroy the fundamental nature of our adversarial system of criminal justice.'

[20] In *S v Buda and Others* 2004 (1) SACR 9 (T) at [19], which case is referred to by the Appellants, the following quotation is of importance:

"Yet there are, as has been held by the Supreme Court of Appeal and the Constitutional Court limits to this right. There comes a stage in a prosecution where an accused has a duty to tell her or his story or to lead other evidence, which would show that, for example, the denial of participation is reasonably possibly true."

[21] The court a quo has found the single witness to be credible and dealt with the reasons for the finding as described above. It was found that there was an abundance of evidence to which it would have expected the Appellant to answer upon.

[22] Having considered the record of the proceedings before the court a quo and being mindful that the appeal court is not at liberty to interfere with the credibility findings of the court a quo, it cannot be ignored that the Appellant is placed on the scene by Mr. Saotsi who testified that both he and the Appellant were

assaulting the deceased as described. Mr. Butumelo's evidence that he had seen both the Appellant and Mr. Saotsi, who was unknown to him, assaulting the deceased is on record. This evidence cannot be regarded as insignificant, weak or improbable. It is this evidence, the Appellant disregarded and elected not to gainsay.

[23] During the cross examination of Mr. Saotsi, a version was put to him that the Appellant confronted the deceased about the stolen mobile phones and that it was in fact not he, but Mr. Saotsi who started to assault the deceased. Further, that it was the deceased who informed the Appellant that Mr. Saotsi was in fact the one responsible for the theft of the mobile phones. Further, that the deceased ran away and that it was in fact Mr. Saotsi who caught up with the deceased and was about to stab the deceased when the Appellant intervened. Further, that it was Mr Saotsi who had beaten the deceased with a brick several times on his head when the Appellant was the one intervening. The reason why Mr. Saotsi assaulted and killed the deceased is because he did not want the truth to be revealed, namely, that It was in fact he who stole the mobile phones and not the deceased. The Appellant elected not to testify and thus this version put to Mr. Saotsi is not on record and under oath.

[24] The court a quo evaluated all the evidence in its totality and the weight of the evidence; and subsequently concluded that the State has discharged its onus of proof. The Appellant elected not to place his denial of the participation in the murder on record under oath and by so doing did not show that his denial was reasonably possibly true.

THE ARGUMENT OF COMMON PURPOSE

[25] The legal representative of the Appellant raised the argument that the Appellant should not be convicted of murder for the mere fact that there was no mention of a common purpose between Mr. Saotsi, who was already convicted and the appellant. That this was not raised in the plea and sentence - agreement of Mr. Saotsi and further to this, that common purpose was not averred in the charge sheet.

[26] The court a quo found that the Appellant was a co-perpetrator and from what can be gleaned from the reasoning of the court a quo, is that no reliance was placed on the doctrine of common purpose. The court regarded the Appellant as a co-perpetrator charged with murder.

[27] I am in agreement with the court a quo, that this is not a valid argument which could serve as a defence to the Appellant. The State chose not to rely on the doctrine of common purpose and the evidence led against the Appellant was clearly focussed on the acts alleged to have been committed by the Appellant and his alleged role in the crime which was committed.

[28] This argument does not make any legal sense and does not amount to a defence which could lead to the acquittal of the Appellant.

CONCLUSION

[29] I have considered the record of the proceedings, arguments and heads of arguments of the State and the Appellant. I am satisfied for the reasons stated above that the court a quo evaluated the evidence of the single witness correctly in applying the appropriate cautionary rules. I am satisfied that the evidence of the single witness does not consist of any material contradictions and that the court a quo's evaluation of the issue of the plea and sentence - agreement is correct and cannot be faulted. I am satisfied that the court a quo has correctly evaluated the totality of the evidence and dealt with the weight attached to the evidence on record sufficiently and arrived at the finding that the evidence was overwhelming against the accused. I am satisfied that the court a quo is correct in finding that the State has proven its case beyond a reasonable doubt.

[30] I make the following order:

The appeal is dismissed.

C PAGE, AJ

I concur

M OPPERMAN, J

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