

SOUTH AFRICA / JUDGMENT

Nkutha v S (A274/2020) [2021] ZAGPPHC 726 (4 November 2021)

[2021] ZAGPPHC 726**COURT**

North Gauteng High Court, Pretoria

BEFORE

AC Basson, E Labuschagne

CASE / FILE NUMBER

A274/2020

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Source record**IN****THE HIGH COURT OF SOUTH AFRICA****(GAUTENG****DIVISION, PRETORIA)****Case****number: A274/2020****NOT REPORTABLE****NOT OF INTEREST TO OTHER****JUDGES****REVISED****In**

the matter between:

MBONGISENI
NKUTHA APPELLANT
and
THE
STATE RESPONDENT**JUDGMENT**

AC BASSON, J

- [1] The appellant has been convicted in the regional court, Sebokeng, of murder. He was sentenced to a period of 15 (fifteen) years' imprisonment. Leave to appeal was granted by the court a quo and he now appeals his conviction. Although the Notice of Appeal seems to appeal both the conviction and the sentence, the grounds of appeal and the Heads of Argument only deals with conviction.

- [2] The State's version, was simple. On 7 August 2019 at 03:30 the appellant was locked in cell number 13 at the Sebokeng Police Station together with three other inmates. Upon entering the cell, the appellant woke Mr Masisi ("the deceased") who was lying on the cell floor with a blanket over him and asked the latter why he was arrested. When Mr Masisi said he did not know why he was arrested he proceeded to assault him.
- [3] The learned magistrate summarised the evidence in some detail in the judgement. I do not intend repeating the evidence save to highlight a few salient aspects of the evidence led before the court a quo.
- [4] The State's first witness was Warrant Officer Motsoane ("Motsoane") who testified about the circumstances relating to the arrest of the appellant. He testified that the appellant was brought to the police station on a charge of drunken driving. Upon his arrival he was noisy and aggressive and demanded the return of his firearm. The appellant was locked into a cell with three other inmates. The next morning when he and other officers inspected the cell he found the deceased lying on the ground of the cell bleeding from a cut from his mouth. He enquired about the injuries to the deceased whereupon the other

two inmates (Mr Ngwenya and Mr Mofokeng) pointed to the appellant as the one being responsible for the injuries sustained by the deceased. He further testified that the other two inmates were trembling and that they were terrified. Motsoane also noticed blood on the top of the appellant's takkies. Motsoane testified that they then proceeded to assist the deceased (who was still alive at that stage and was lying on the floor) whereafter he was taken to hospital by an ambulance where the deceased passed away. He testified that he did not see any injuries on the deceased when he was first brought to the police station.

- [5] The second witness, Mr Ephraim Ngwenya ("Ngwenya") confirmed that he and the appellant and another inmate were all locked up together in the same cell. When he entered the cell he found the deceased already sleeping. The deceased raised his head and greeted him. According to Ngwenya the deceased looked fine at the time. He testified that when the appellant arrived, the appellant questioned the rest of them as to why they were arrested. The deceased replied that he did not know why he was arrested whereafter the appellant pulled the deceased's blankets off him and started kicking him. The appellant also started hitting the deceased's head against the toilet. Ngwenya and the other inmate screamed for the Police to come and help them but no one came. He testified that the appellant also pulled him towards the toilet and also hit his head against the

toilet. He testified that the deceased bled from his mouth and nose. When confronted with the appellant's version during cross examination to the effect that the deceased was already injured when he entered the cell, Ngwenya disagreed and stated that he would have noticed that the deceased had been already injured.

- [6] At about 3 AM, Mr Mofokeng ("Mofokeng") was locked up in the same cell together with the appellant and Ngwenya. Mofokeng testified that, at that time, the appellant was already fighting and arguing with the police whilst demanding the return of his firearm. He

confirmed that the deceased was in the cell and was already sleeping. He confirmed that the appellant had asked the deceased why he was arrested and that the deceased had told the appellant that he did not know the reason for his incarceration. The appellant then started to hit the deceased with his fists. Mofokeng testified that he then covered his head with a blanket and that he did not see how the appellant dragged the deceased to the toilet. He did however see the appellant stamping on the deceased's face. He confirmed that he and Ngwenya pointed to the appellant as a person who had assaulted the deceased when the cell was opened by the police later that morning. Mofokeng also testified that the appellant had tried to bribe him order for him to change his version.

- [7] Sergeant Jamela confirmed that he and other officers discovered the deceased on the floor with his face swollen up and confirmed that the deceased was bleeding from his mouth and that there was a lot of blood on the floor. He denied that the deceased was already injured when he was placed in the holding cell.
- [9] The post-mortem report on the deceased was admitted into evidence by agreement and revealed intracranial injuries, hematoma on the anterior cervical spine, hematoma left and right thoracic cage with fractured 7, 8, 9 left thoracic cage, hemithorax on the left lung which all resulted in hypovolaemia, respiratory and cardiac arrest. The intra-cranial bleed extended to the anterior lobe left and right hemisphere and there was cerebellar herniation.
- [8] The appellant testified and disputed the evidence presented by the state witnesses. According to him he went to sleep after he was placed in the cell and only woke up when the police came in the next morning and woke him up. It was only then that he noticed the blood on the floor. It was not his version that one of the other two inmates (Ngwenya or Mokokeng) was responsible for the injuries to the deceased.
- [10] The appellant criticised the evidence of witnesses on behalf of the state as being improbable and contradictory. It was submitted that the version of the two eyewitnesses, apart from the fact that it differed in some aspects, was also contradictory to the medical evidence.
- [11] The magistrate took into account that there were discrepancies between the evidence of the two eyewitnesses but concluded that it was not to an extent that their evidence must be rejected. The magistrate also considered that Ngwenya and Mofekeng did not know each other nor did they know the appellant prior to the incident and that they had no reason to falsely implicate the appellant. The magistrate found both of them to have been honest and reliable in their evidence despite some differences between their evidence. The appellant conceded in cross-examination that no reason existed for the two witnesses to falsely incriminate him. The learned magistrate found that the appellant's version was farfetched and not reasonably possibly true.
- [12] The appellant submitted with reference to the post-mortem report that the injuries described therein are not in line with the manner in which Ngwenya and Mofokeng described the assault. A reading of the judgment of the court a quo shows that the learned magistrate duly took note of the content of the medical legal post-mortem examination and

considered this report against the evidence of Ngwenya and Mofokeng which corroborated each other in respect of the appellant's assault on the deceased, the stamping on his head and the fact that the deceased bled from his nose and mouth. The learned magistrate concluded that the head injuries which caused the deceased death could only have been caused by the blunt trauma to the head of the deceased by the appellant who not only hit the accused's head to the toilet but also repeatedly stamped on the deceased's head.

- [13] The court concluded that the appellant subjectively foresaw the possibility that the deceased might die in consequence of the assault but nonetheless went ahead until the deceased lay motionless on the cell floor. The appellant therefore had the intention to kill the deceased.
- [14] The magistrate, in his judgment, dealt with the credibility of the witnesses and his factual findings. I find no misdirection or reason to interfere with these proceedings.
- [15] In *S v Prinsloo and Others*[1], the stance of the law regarding the duty and power of a court of appeal when dealing with findings of fact and credibility is

explained as follows:

"[183] Counsel for the second accused argues further that the trial court erred in its factual findings and that it ought to have been held that he was merely a passive observer at the meeting. The approach to factual findings in an appeal was correctly set out by Jones J in S v Leve 2011

- (1) SACR 87 (ECG) at 90g – i where he explained:

'The trial court's findings of fact and credibility are presumed to be correct, because the trial court, and not the court of appeal, has had the advantage of seeing and hearing the witnesses, and is in the best position to determine where the truth lies. See the well-known cases of *R v Dhlumayo and Another* 1948

- (2) SA 677 (A) at 705 and the passages which follow; *S v Hadebe and Others* 1997

- (2) SACR 641 (SCA) at 645; and *S v Francis* 1991

- (1) SACR 198 (A) at 204c – f. These principles are no less applicable in cases involving the application of a cautionary rule. If the trial judge does not misdirect himself on the facts or the law in relation to the application of a cautionary rule, but, instead, demonstrably subjects

the evidence to careful scrutiny, a court of appeal will not readily depart from his conclusions."

”

- [16] See also *S v Chinridze*[2] and *S v Mabena*[3] where the following was said regarding allegations of errors in the judgment of the court a quo:

"[11] On appeal it was argued that the regional magistrate ought to have accepted that the evidence of the appellant was reasonably

possibly true. It was, however, not suggested that the regional magistrate misdirected herself in any respect. The power of an appeal court, to interfere on fact with the findings of the court below, is limited. Interference in this regard is only permissible where the findings of the court below are vitiated by misdirection or are patently wrong. I find no basis for interference in the present case. I think that the regional magistrate was correct in her finding that intercourse had in fact taken place and, in the light of that finding, rightly rejected the appellant's evidence. The appeal against conviction must therefore fail.”

[17] It is thus not the duty of the court on appeal to re-evaluate the evidence afresh as if sitting as a trial court, but to decide whether patently wrong findings and/or misdirection by a magistrate led to a failure of justice.

Evaluation

[19] The argument on behalf of the appellant that it was improbable for the appellant to have assaulted the deceased without proper reason is without merit. The evidence shows that the appellant was already aggressive and combative when he was locked up in the cell. His aggression was obviously exacerbated by the fact that he was under the influence of alcohol.

[20] The appellant also argued that the manner of the assault as testified to by the State's witnesses is not supported by the injuries reflected on the post-mortem report. This argument has no merit. The assault according to the evidence did not consist of a single act which the witnesses could easily describe as it did not consist of a single blow with an object, for example. The evidence shows a lengthy continuous assault on the deceased which is confirmed by the injuries reflected on the post-mortem report.

[21] A attempt was made in argument on behalf of the appellant interpret the post-mortem report. This is inappropriate. A layman's evaluation of the contents of the post-mortem report is of no value to find in favour of the appellant. Although the indicated injuries correspond in general with a prolonged vicious assault on the deceased as explained by the witnesses, only a medical professional can explain whether the injuries reflected on the post-mortem report are inconsistent with the manner of assault as explained by the State's witnesses. Unfortunately for the appellant, the pathologist who had performed the post-mortem was not called by either party to testify.

[17] The appellant has not placed any facts before this court upon which the conclusion can be drawn that the learned magistrate is patently wrong in any of his findings. In respect of the conviction, I am thus unable to find that the learned magistrate misdirected himself with regard to the facts.

[18] I can also find no reason to interfere with the magistrate's credibility findings.

The learned magistrate had the opportunity to appraise the demeanor of the witnesses and in this regard came to a finding that the appellant's version was improbable. In the circumstances I am unable to find that the magistrate misdirected himself or erred in a manner that warrants that the conviction ought to be set aside.

Order

[19] The appeal by the appellant against his conviction is dismissed and the conviction is confirmed.

A.C. BASSON

JUDGE OF THE HIGH COURT

GAUTENG DIVISION OF THE HIGH COURT, PRETORIA

I agree.

E. LABUSCHAGNE

ACTING JUDGE OF THE HIGH COURT

Delivered: This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be ____ 2021.

Case number: A274/2020

Matter heard on: 2

November 2021

APPEARANCES:

FOR THE APPLICANT: ADV NGIWENI

INSTRUCTED BY: BOTES MAHLOBOGOANE VAN HEERDEN INC

FOR THE STATE: ADV PCB LUYT

INSTRUCTED BY: DIRECTOR OF PUBLIC PROSECUTIONS

[1] 2016(2) SACR 25 (SCA)

[2] 2015(1) SACR 364 (GP) para 39

[3] 2012(2) SACR 287 (GNP)

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