

SOUTH AFRICA / JUDGMENT

Phooka v S (ASH 14/07) [2010] ZAECHGC 44 (3 June 2010)

[2010] ZAECHGC 44**COURT**

Eastern Cape High Court, Grahamstown

BEFORE

Y Ebrahim, M Makaula

CASE / FILE NUMBER

ASH 14/07

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IN THE EASTERN CAPE HIGH COURT, GRAHAMSTOWN

APPEAL No. 16/2009

CASE No. ASH 14/07

Heard on 31 March 2010

Judgment delivered on 3 June 2010

OUPA PHOOKA Appellant

versus

THE STATE Respondent

JUDGMENT

Y EBRAHIM J:

Introduction

The Appellant was convicted of murder in the Regional Court for the Division of the Eastern Cape, sitting at Aliwal North, and sentenced to a term of imprisonment for ten years. The appellant was granted leave to appeal his conviction but leave to appeal the sentence was denied.

At the trial in the court a quo the State adduced the evidence of two witnesses, Ms Y Qinela and Mr Z Ndzishe, who testified that they had witnessed the events that culminated in the deceased sustaining the fatal wound. The pertinent details of their evidence were that on the particular night they were drinking liquor at a tavern called Barry's Place. Ndzishe was in the company of the appellant, the deceased and a friend of the deceased, while Qinela was with a friend. At some stage the appellant left but on his return quarrelled with the deceased, assaulted her and dragged

her outside. After the witnesses intervened to prevent any further assault on the deceased, the appellant forcibly dispossessed Ndzishe of a bottle of beer, injuring his (Ndzishe's) hand in the process. The appellant thereafter broke the bottle and stabbed the deceased in the neck near her collar bone (namely, the left

clavicle).

A third witness, Mr L Nkopane, testified that the appellant came to his house and requested him to transport the deceased (who was still alive) to hospital. The appellant told him that he accidentally hit the person when he threw an empty bottle. The witness thereupon transported the injured person to hospital in his vehicle.

The appellant and his witness, Mr G H Matunya, furnished a different version. The appellant said that he was outside the tavern when he heard a bottle breaking behind him. He looked back and saw the deceased advancing towards him. Her arm was raised in a stabbing position and in her hand was the neck of a broken bottle. As she reached him he grabbed both her arms, turned her hand and they wrestled. The area was muddy and the deceased slipped and fell and he fell on top of her. When he got up he saw

that the deceased was bleeding from her left chest near her neckline. He denied having dispossessed Ndzishe of a beer bottle, breaking it and stabbing the deceased. He said that she sustained the stab wound when they fell.

Matunya testified that he saw the deceased leaving the tavern carrying a beer bottle. He heard a bottle breaking and on arriving outside saw the appellant and the deceased grabbing each other and they had their hands around a bottle. They slipped and fell as the ground was wet and icy but got to their feet and talked to each other. They did not fight but the deceased had sustained a wound. The tavern owner's wife arrived and placed a moistened hat on the deceased's wound whereupon he left.

A further witness for the defence, Mrs N Cefa, testified that she went outside and found the appellant holding onto the deceased. She asked the appellant what had happened and he replied that the deceased had stabbed herself with the bottle. She then took a hat from a young man, moistened it and gave it to the appellant to place on the wound.

At the conclusion of the defence case the Regional Magistrate, in terms of the provisions of s 186,1 deemed it in the interests of justice that Dr M Groenewald testify to clarify aspects of his findings in respect of the post mortem

examination he had conducted. The Regional magistrate's questions to this witness concerned the location and characteristics of the wound, the degree of force that had to be applied to cause it, and whether it was probable that the deceased could have sustained such a wound if she was holding the broken bottle in her hand.

In his judgment the Regional Magistrate reasoned, inter alia, that '[t]he two versions of the State and the defence is so far removed from each other, that the Court must find at the onset that one of these versions is a result of not bone (sic) fide mistakes, but express lies. The two versions are not reconcilable.' He stated further, that '[o]n the basis of the evidence of Dr Groenewald, the Court finds that the only version that can be reasonably possibly true, or in fact is the truth, is that of the two State witnesses. I reject the defence case in its totality and find that accused was in fact the one armed with the bottle and that he stabbed the deceased under circumstances where he was not acting under self defence.'

The gist of the argument advanced by Mr Kincaid on behalf of the appellant was that the Regional Magistrate had erred in accepting the testimony of Dr Groenewald as his answers constituted 'either inadmissible opinion evidence or, secondly, lack[ed] any cogency'. He contended that without a basis having been laid that he was an expert on the subject, Dr Groenewald 'postulate(d) on issues of anatomical positions involving supination and or pronation of the hands, fore arm rotation and wrist movement, all of which fall within the expertise of orthopaedic doctors.² Consequently his conclusions should be excluded.

During the course of arguing the appeal Mr Kincaid conceded, and correctly so, that the Regional Magistrate had been unbiased. He was constrained to concede further that the Regional Magistrate had not erred in accepting Dr Groenewald's

conclusion

that it was a penetrating wound and that force had been used to inflict it; in addition to the skin being pierced, the first rib had been shattered and the carotid artery and the thoracic wall (i.e. the chest cavity) had been penetrated. The medical competency of Dr Groenewald to conduct a post mortem examination was not placed in issue at the trial nor has it been raised on appeal. His comments related to his findings and his reasoning was based on what he had observed when examining the wound.

I find the criticism of Dr Groenewald's competency to express an opinion on the position of the deceased's hands and the movement of her wrists when the wound was inflicted to be misconceived. His opinion that it was improbable that the wound could have been inflicted during a fall with the deceased holding the bottle, was based on the angle and location of the wound, the force necessary to cause it, and the limited rotation to which a person's wrist could be subjected. It is evident that he was utilising his medical knowledge (including general common sense) to demonstrate this. Even though not a specialist in the field of orthopaedics, he had sufficient medical knowledge as a qualified medical doctor to express an opinion on these

issues.

While it would have been useful if the physical demonstrations by Dr Groenewald had been described by the Regional Magistrate,

bearing in mind that a Court of appeal has to rely on a written record, I do not agree with Mr Kincaid that the evidence lacked cogency. What clearly emerges from the testimony of Dr Groenewald is that it was improbable that the deceased could have sustained the wound in an incident as described by the appellant and his witness. There is no valid reason for excluding his evidence and the Regional Magistrate did not err in placing reliance thereon.

Neither the appellant nor the witness Matunya provided any details of how the fatal wound came to be inflicted, save to say that it occurred when she and the appellant fell. The two State witnesses, on the other hand, related in clear terms what had occurred and corroborated each other in all material respects. The post-mortem findings and the evidence of Dr Groenewald confirmed that their version of events was in fact the true account of how the deceased sustained the fatal wound. Their evidence established beyond a reasonable doubt that it was the appellant and not the deceased who was armed with the broken bottle and that the appellant intentionally stabbed the deceased, thus unlawfully causing her death.

It is clear from the evidence as a whole that the version proffered by the appellant and his witness was untrue. In my view, the Regional Magistrate erred on the side of caution in stating that the appellant had not been shown to be a liar. The evidence tendered by the State and by the defence demonstrates the opposite. Shortly after the incident the appellant gave different versions of how the deceased had been injured. His own witness, Ms Cefa, testified that he told her that the deceased had stabbed herself with the bottle. The appellant had no reason not to reveal that the deceased had been accidentally injured if this had indeed occurred. He then gave a different version to the witness Nkopane which was to the effect that the deceased was injured when he threw an empty bottle. Yet a third version emerged when the appellant testified. There is no doubt therefore that the appellant was an untruthful witness. The version given by him and his witness is, in the circumstances, not reasonably possibly true and was correctly rejected as false. Accordingly, the appeal must fail.

In the result, the appeal is dismissed.

JUDGE Y EBRAHIM

1 JUNE 2010

I agree

ACTING JUDGE M MAKAULA 1 JUNE 2010

For the appellant: J C Kincaid

For the respondent: H Obermeyer

SIXABA v THE STATE..APJ

1 Criminal Procedure Act 51 of 1977

2 Mr Kincaid referred in this regard to the case of Mkhise v Lourens 2003 (3) SA 292 (TPD)

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