

SOUTH AFRICA / JUDGMENT

S v Motong (CC61/2020) [2021] ZALMPPHC 70 (11 October 2021)

[2021] ZALMPPHC 70

COURT

Limpopo High Court, Polokwane

BEFORE

Kganyago

CASE / FILE NUMBER

CC61/2020

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REPUBLIC

OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

LIMPOPO

DIVISION, POLOKWANE

CASE

NUMBER: CC61/2020

REPORTABLE:

YES/NO

OF

INTEREST TO OTHER JUDGES: YES/NO

REVISED

In

the matter between:

THE

STATE

And

KATLEGO

VINCENT MOTONG

ACCUSED

JUDGEMENT**KGANYAGO J**

[1] The accused has been indicted on one count of murder read with the provisions of section 51(1)[1] in that it is alleged that on 1st February 2019 the accused unlawfully and intentionally killed Gobakwang Sylvia Mogajana an adult female person. The accused had pleaded not guilty to the charge, and denied all the allegations levelled against him and put the State to prove.

[2] Admissions in terms of section 220 of the Criminal Procedure Act[2] (CPA) were made and admitted as evidence by consent between the State and the defence. The 220 admissions read as follows:

“1.The deceased is the person mentioned in the indictment to wit Gobakwang Sylvia Mogajana.

2.The deceased died on or about 1st February 2019 at or near Leeukraal Location in the district of Sekhukhune.

3.The deceased did not sustain injuries from the time she was certified dead until post-mortem examination was done on her body on 7th February 2019.

4.Dr Olufemi Omotobora conducted the post-mortem examination on the body of the deceased on the 7th February 2019 and recorded his findings on the post-mortem report number Lim/08/0013/2019.

5.The facts and findings on the post-mortem examination report are correct.

6.The chief post mortem findings on the body were:

- i.Wide spread body surface injuries including the scalp and face;
- ii.Severe injuries on the anterior and lateral aspects of the neck involving the soft tissues;
- iii.Fractured ribs;
- iv.Congested organs.

7.The cause of death of the deceased is correctly recorded:

- i.Blunt force trauma with anterolateral neck congestion.”

[3] The State called Anna Mogajana as its first witness. She testified that the deceased Sylvia is her daughter. On 31st January 2019 at about 15h00 a small boy came to her homestead and told the deceased that someone was calling her. That boy did mention the name of the person that was calling the deceased. The deceased left with that boy but did not tell anyone where she was going. The time the deceased left their homestead, the deceased was supposed to start cooking for dinner. After she left she never returned home.

- [4] The following day at around 6h00, the accused came to their homestead to notify them that the deceased was sick, and that she was having a broken arm. The accused further told her that they must come to his homestead and collect the deceased. The witness instructed her grandchild Happy to go with the accused to find out what was happening. When Happy came back from the accused homestead, she reported to them that she found the deceased already dead. A few minutes later the accused brother in law came to her homestead to notify them that the deceased had passed away.
- [5] They then went to the accused homestead, and on arrival they found the deceased covered with a blanket. When the witness checked the deceased, she saw that she was having a wound on the right side of her neck. When the witness arrived at the scene, the police have already arrived. Later the deceased was taken by the pathologist to the mortuary. The witness further stated that when the deceased left their homestead, she was healthy and during the day she had been busy doing laundry. The witness was not cross examined by the defence counsel.
- [6] The State called Mponeng Diago as its second witness. She testified that she knows the accused and that she is the accused neighbour. On 31st January 2019 at about 22h30 she was at her homestead and the rain was drizzling. Whilst home at that time, the accused called her to come to his homestead. She went to the accused homestead, and on arrival she met Phillemon Zulu the other neighbour of the accused leaving the accused homestead. She entered the accused homestead through the kitchen door. On entering the house, she saw a light in complexion female person lying on the floor on her back as if she had fallen. That female person was lying on top of broken glasses.
- [7] The witness asked the accused the name of the female person, and he told her that she was Sylvia. She called the deceased by her name and she opened her eyes. She asked the deceased what was the problem with her, and the deceased told her that she was seeing people calling her. She asked the deceased whether she can be able to identify her (witness), and the deceased woke up sat down on her buttocks and told her that she was the lady from next door.
- [8] The witness asked the accused why he was not taking the deceased to her homestead as she might be moving around with her unknown sickness. The deceased responded and told the witness that she was not going home. The accused told the witness that the deceased had soiled herself as if she was having a running stomach. The deceased confirmed that she was having a running stomach. The witness then requested the accused to boil water so that they can bath the deceased as the deceased was complaining about feeling cold. After the deceased was bathed, the witness left and went to her homestead.
- [9] The following day the 1st February 2019 at about 6h30, the accused called her to come to his homestead. She told the accused that she was still busy preparing for her children to go to school and that she will come when she was done. After the school children have left, she went to the accused homestead. On arrival at the accused homestead she found two girls at a

water tap holding the deceased and pouring her with water. When she asked the two girls why they were pouring the deceased with water, the two girls told her that the deceased had fainted. She told the two girls to stop pouring the deceased with water. The witness called the deceased by her name but she did not respond. The witness then told the two girls to take the deceased into the house. When they entered the lapa carrying the

deceased, they deceased took a deep breath, and when the witness checked the deceased eyes, she only saw the white bowl, and the black bowl was no longer appearing. She then remembered that when her daughter passed away, her eyes looked like that.

[10] The witness asked the two girls whether they have called an ambulance and they said yes. Later the paramedics arrived and they certified the deceased dead on the scene. The paramedics advised them to call the police. When the police arrived, the witness had already left the accused homestead and was at her homestead.

[11] The witness was cross examined, and when asked what type of broken bottles was the deceased lying on top of them when she found her the previous night, her response was that they looked like broken glasses. The witness further said that it looked like the deceased had slipped and fell to top of the broken glasses as there were marks which looked like a person had slipped. The witness conceded that the said broken glasses could have injured the deceased as she saw small scratches on the neck of the deceased, and also there was too much blood that was coming from her wound. The witness further stated that according to her observation, the deceased was not assaulted as she did not see any sign of assault even though she did not take off her clothes. The witness further conceded that the scratches that appears in the photos from the photo album, are the same scratches that she saw when she found the deceased lying on top of broken bottles. The witness further testified that in the evening she could not see the marks that appears on the deceased legs from the photo album as the deceased was wearing pyjamas.

[12] The State called Catherine Malaka as its third witness. She testified that she is the accused aunt. On 1st February 2019 at about 6h00 the accused came to her homestead to request her to go to his homestead as his girlfriend Sylvia was not feeling well. The accused told her that he was still on his way to go and call the deceased's parents. She went to the accused homestead.

[13] On arrival at the accused homestead, she found the deceased lying on a bed. She tried to woke up the deceased and talk her, but the deceased was not talking. The deceased was responding to the witness by just nodding her head. The witness stayed at the accused homestead until the accused came back with two of the deceased relatives. On the arrival of the accused and the deceased relatives, they took out the deceased out of the house and waited for the ambulance. When the paramedics arrived, they certified the deceased dead at the scene, and the paramedics told them to call the police. The witness was briefly cross examined and she stated that when she arrived at the accused homestead, she found blankets with faeces, faeces on the floor and also signs that someone has been vomiting.

- [14] The State called Dr Arnold Mamashela as its fourth and last witness to testify about the post mortem examination report prepared by Dr Olufemi Omotobora. He placed his qualifications on record and that he is qualified forensic pathologist. He confirmed that he is not the one who had prepared the post mortem examination report of the deceased, and that he came to court to assist with the interpretation of the report to the court.
- [15] The witness confirmed that the post mortem report was that of the deceased, and that the cause of death has been recorded as blunt force trauma with anterolateral neck congestion which might have been caused by strangulation. That when a person dies facing upward lying on his/her back, there is the pulling of the blood that accumulates at the back due to the gravity, and that result in the deceased body having what they refer as staining if a person lies in that position for some time. That the staining can be seen on the deceased body.
- [16] The witness was cross examined, and he stated that the incised wound that the deceased had sustained was less life threatening, and he conceded that this wound might have been caused by broken glasses. The witness further stated that the deceased had broken ribs which might have been caused by significant violent amount of force applied. The witness further testified that the injuries as they appear on the deceased neck, might not have been sustained by the deceased the previous night at 22h00, as with the type of those injuries, it was highly unlikely that a person would have survived the whole night. The witness further conceded that many inferences can be drawn out of this incident, and further that it is possible for a person to die from seizure attacks. The witness conceded that it was possible that the deceased might have sustained the injury on her skull when she was falling. That concluded the State evidence and it closed its case.
- [17] The accused took the witness stand and testified under oath. He testified that the deceased was his girlfriend. On 31st January 2019 he invited the deceased to his homestead. He is staying alone at his homestead. After the deceased accepted the invite, he went to collect her. He and the deceased used a maxi taxi to go to his homestead. Whilst they were on the way to his homestead, the deceased was complaining about her arm that was shivering. They arrived at his homestead around 18h00.
- [18] On arrival at his homestead, the deceased told her that she was hungry. He invited the deceased that they should prepare the meal together, but the deceased told him that she will not be able to do so as she was not feeling well. He left the deceased in the lounge to go and prepare the meal. As he was busy preparing the meal, the deceased called him telling him that she was not feeling well. He gave the deceased water in a jug. As the deceased was holding that jug, it fell to the floor due to her shaking hand. The deceased asked for mob to clean the floor and he gave her the mob. After that he went back to the kitchen to continue preparing the meal.

- [19] As he was in the kitchen, he heard a sound of something that was falling. When he went to check, he found that the deceased had fallen on the stairs. The accused asked the deceased what was happening, and the deceased told him that it was a mistake. By then it was past 19h00. The deceased went to the bedroom to go and lie, whilst he went back to the kitchen to continue preparing the meal.
- [20] The accused went to the bedroom to go and check the deceased. On arrival in the bedroom, he found that the deceased had vomited and had also soiled herself. He assisted the deceased to remove the sheets and the deceased took off her clothes and put on a gown. The deceased went out of the house to get fresh air, and when she tried to come back into the house, she fell on her back at the stairs. He assisted the deceased to come back into the house, and as he was assisting her, the deceased told her that she was not feeling well in her stomach. As they were in the bedroom, the deceased asked him to give her water. He gave the deceased water in a glass and thereafter went back to the kitchen.
- [21] Whilst in the kitchen, he heard a sound of a glass falling on the floor. The accused saw the deceased slipping and falling, and he got scared and called his neighbour Phillemon Zulu. On arrival of Mr Zulu, he told the accused to call the other neighbour Ms Diago as she was a woman. When Ms Diago arrived, she found the deceased lying to top of the broken glasses. After the arrival of Ms Diago, the rest of the accused testimony corroborate that of Ms Diago. The accused further stated that before Ms Diago arrived, the deceased had already fallen three times.
- [22] The accused further testified that after Ms Diago had left, he continued preparing their meal, but that the deceased did not eat much as she told him that she was no longer hungry. After eating they went to sleep and whilst sleeping the deceased continued vomiting and soiling herself and they had to change the bedroom and go and sleep in another bedroom as they one they were sleeping in was no longer smelling nice. The accused gave the deceased his BVD to wear and they went to go and sleep in his sister's bedroom. When they were sleeping in his sister's bedroom, the deceased again vomited and also soiled herself. The accused asked the deceased whether she had eaten poison and she said she did not know but she will be fine. She continued vomiting throughout the night, and in the morning the deceased told the accused that she was having a headache. The accused went to the shop to buy her panado tablets and an energy drink. However, the deceased did not drink the energy drink, and the accused
- decided to call her neighbour Ms Diago to come and assist him. Ms Diago told the accused to call his aunt and the deceased parents as she was still busy preparing for her school children to go to school.
- [23] The accused went to call his aunt and the deceased parents. On the way to the deceased parents, the accused called Portia the deceased friend, to accompany him to the deceased homestead. On arrival at the deceased homestead, the deceased mother told the accused to go with her grandchild Happy. On arrival at his homestead, Happy and Portia poured the

deceased with water and told the accused to call an ambulance. The accused called an ambulance and later Ms Diago arrived. At that point in time the deceased was trying to talk to Happy but could not talk, and was just shaking her head. Portia and Happy took the deceased to the water tap where they poured her with water.

- [24] Eventually the paramedics arrived and certified the deceased dead at the scene. The police arrived but he was not arrested the same day. He was arrested during May 2019 and on 11th May 2019 he made a written police statement. He denied having assaulted, strangling or killing the deceased. The accused stated that the deceased might have sustained those injuries when she was falling, as she fell several times hard on the ceramic tiles.
- [25] The accused was briefly cross examined but nothing new came out. The accused closed his case. Both parties submitted their closing address with the State submitting that its case is being based on circumstantial evidence and that the only inference to be drawn is that the accused is the one who killed the deceased and should be found guilty as charged. The defence submitted that there are many inferences to be drawn, and that Dr Mamashela has also conceded to that, and therefore the accused should be given the benefit of doubt, and he be found not guilty and discharged.
- [26] It is a trite principle that in criminal proceedings the prosecution must prove its case beyond reasonable doubt and that a mere preponderance of probabilities is not enough. Equally trite is the observation that, in view of this standard of proof in a criminal case, a court does not have to be convinced that every detail of an accused version is true. If the accused version is reasonably possibly true in substance the court must decide the matter on the acceptance of that version. Of course it is permissible to test the accused's version against inherent probabilities. But it cannot be rejected merely because it is improbable; it can only be rejected on the basis of inherent probabilities if it can be said to be so improbable that it cannot reasonably possibly be true. (See *S v Shackel*[3]).
- [27] The State case is solely based on circumstantial evidence. In *S v Reddy*[4] Zulman AJA said:
- "In assessing circumstantial evidence one needs to be careful not to approach such evidence upon a piece-meal basis and to subject each individual piece of evidence to a consideration of whether it excludes the reasonable possibility that the explanation given by the accused is true. The evidence needs to be considered in its totality. It is only then that one can apply the oft-quoted dictum in R v Blom 1939 AD 188 at 202-3, where reference is made to two cardinal rules of logic which cannot be ignored. These are, firstly, that the inference sought to be drawn must be consistent with all the proved facts, secondly, the proved facts should be such that they exclude every reasonable inference from them save the one sought to be drawn."*
- [28] According to the State version, the deceased died as a result of being strangled by the accused. The State is relying on the post mortem examination report that was interpreted by Dr Mamashela as he is not the pathologist that prepared that report. Dr Mamashela was called by the State to interpret the post mortem examination report as the State was struggling to secure the attendance of Dr Omotobora the author of the report as it is alleged

that he was now employed in the Free State. The evidence of the other two State witnesses Ms Diago and Ms Malaka who at some stage were both at the scene of crime, corroborate the version of the accused. The evidence of the first State witness is of little assistance to the court, even though to some extent it also corroborate the version of the accused in relation to the accused reporting the sickness of the deceased to her family in the morning of the 1st February 2019 before the deceased passed away.

[29] The conclusion of Dr Omotobora is that the deceased died on 1st February 2019 as a result of blunt force trauma anterolateral neck congestion which Dr Mamashela has explained that it means the

deceased was strangled. What this entails is that the deceased died as a result of strangulation. According to Dr Mamashela, the injuries sustained by the deceased and which were as a result of strangulation, were fatal, and a person with those type of injuries would not have survived from 22h00 of the previous day until 6h30 of the following day. The conclusion of Dr Mamashela is that the injuries on the deceased neck as the appear on the photo album and also as recorded in the post mortem examination report would not have been inflicted during the night of the 31st January 2019 at 22h00.

[30] However, Ms Diago the second State witness, has testified that on 31st January 2019 at 22h30 when called by the accused to come and assist him, she did observe the scratches on the deceased neck and further that she did not observe any sign of assault on deceased person. Ms Diago further testified that when she arrived at the deceased homestead, the deceased was unconscious, but that she regained her consciousness and started talking in a coherent manner.

Further that Ms Diago requested the accused to take the deceased home, and the accused was willing to do so, but it was the deceased

herself who refused to be taken home and she told both the accused and Ms Diago that she will be fine. In my view, if indeed the accused had done something untoward to her, she would have jumped to the offer and took advantage of being rescued.

[31] Dr Mamashela has testified that with the type of the injuries which the deceased had sustained, if she did not die immediately, she would have slipped in coma, and would never have regained her consciousness, and if by miracle she did regain her consciousness, it would have been for a few minutes in which she would have been able to talk and thereafter slipped back into coma for good. However, in the case hand the deceased was able to regain her consciousness, talked in a coherent manner, was bathed, and when Ms Diago left the accused homestead she was still talking in a coherent manner, except that she was complaining that she was not feeling well. That in my view, is not consistent with a person who had sustained injuries of strangulation referred to by Dr Mamashela.

- [32] There are uncontested evidence that during the evening of the 31st January 2019, the deceased was not feeling well, was having a running stomach, was soiling herself and even failing. Dr Mamashela did not rule out the possibility that the injury on the deceased scull might be as a result her falling. It has not been established what caused her fall, vomit and soiling of herself. Dr Mamashela has also conceded that seizures can also be fatal. It has not been established whether the deceased had a history of seizures except for the evidence of Ms Mogajane that on the date of the incident the deceased was healthy and had been doing laundry work. However, the mere fact that the deceased was healthy on the date of the incident does not exclude the possibility that might have been suffering from other types of illness.
- [33] Despite the post mortem report having identified the cause of death, Dr Mamashela conceded that other inferences may drawn as the cause of the deceased death from this incident. Ms Diago testified that in the morning of the 1st February 2019 when she arrived at the accused homestead, she found two girls holding the deceased at the water tap pouring the deceased with water. These two girls are Happy and Portia and are the second people to arrive at the scene after the accused aunt, and after their arrival, they were actively involved in assisting the deceased. Happy and Portia were crucial witnesses who might have shared more light in this matter by assisting in telling this court the condition in which they found the deceased and what made them to pour her with water. Further Ms Mogajane testified that when Happy came back from the accused homestead, she told them that she found the deceased already dead, whilst Ms Diago testified that the deceased took her last breath whilst being carried by Portia and Happy, and further that Portia and Happy has told Ms Diago that the deceased had fainted. The two witnesses in my view, are the missing link in this matter.
- [34] The State did not submit that the two witnesses were not available to testify. The failure by the State to call an available witness may not be without consequences especially where the State relies on circumstantial evidence. That failure to call an available witness may in particular circumstances justify the inference that, in the prosecutor's opinion, such evidence might possibly give rise to contradictions which could reflect adversely on the credibility and reliability of the State witnesses. (See *S v Teixeira*[5]). Even though the *Teixeira* case relates to the evidence of a single witness, I don't find any reason why that principle should also not apply to circumstantial evidence as well.
- [35] If this court was to accept the evidence of Dr Mamashela in isolation of the other evidence of the State witnesses which corroborate the version of the accused, this will be approaching the evidence in a peace-meal approach, which courts were warned in *S v Reddy* not to do. The evidence of the accused was corroborated by three of the State witnesses and this court cannot reject it on the basis that it is improbable. Taking the evidence presented in this case in its totality, more than one inference may be drawn as to what might have caused the deceased death. Under the circumstances in my view, the State has failed to proof its case against the accused beyond reasonable doubt. The accused is therefore given the benefit of

doubt.

[36] In the result I make the following order:

36.1 The accused is found not guilty and discharged.

JUDGE OF THE HIGH COURT OF SOUTH

AFRICA, LIMPOPO DIVISION,

POLOKWANE

APPEARANCES: Counsel for the State :Adv Mthombeni LM Instructed by : Office of DPP

Polokwane Counsel the accused : Mohlaka L Instructed by : Legal Aid of SA Polokwane Office

Date heard : 7th October 2021 Date delivered : 11th October 2021

[1] Act 105 of 1997

[2] 51 of 1977

[3] 2001

(2) SACR 185 (SCA) at 194g-i

[4] 1996

(2) SACR 1 (A) at 8c-e

[5] 1980

(3) SA 755 (A) at 764A

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Prepared on 11 October 2026 · Esheria