

SOUTH AFRICA / JUDGMENT

S v Zikhali (CC15/23) [2023] ZAGPPHC 1847 (7 August 2023)

[2023] ZAGPPHC 1847

COURT

North Gauteng High Court, Pretoria

BEFORE

Cox

CASE / FILE NUMBER

CC15/23

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IN

THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION,
PRETORIA

CASE NO CC15/23

NOT REPORTABLE

NOT OF INTEREST TO

OTHER JUDGES

REVISED

In the matter between:

THE
STATE
And
NTOKOZO
KHULEKANI ZIKHALI

JUDGMENT

(Section 174 Act 51/77)

COX, AJ

- [1] This judgment is relevant to counts to counts 3 -6.
- [2] Count 3 is one of kidnapping wherein it was alleged that the accused kidnapped the deceased mentioned in count 4 on 10 October 2022, a 4 year old girl by unlawfully depriving her of her freedom of movement in that he took her from a park where she was playing to another spot against her will.
- [3] In count 4 it was alleged that he unlawfully and intentionally killed the same girl on or about 10 – 11 October 2022
- [4] The 5th count was that he violated the corpse of the deceased by unlawfully cutting off her limbs and other body parts
- [5] Count 6 stated that the accused defeated or obstructed the course of justice by unlawfully burning the corpse of the deceased, which act defeated or obstructed the administration of justice.
- [6] The only admissible evidence placed before the court was that of the deceased's biological mother, Sgt Thenga and two video clips.
- [7] In order to curtail proceedings the defence counsel made a host of admissions in terms of section 220 of the Criminal Procedure Act, 51 of 1977 (the CPA) as contained in exhibits C and N.
- [8] Ms P testified that her daughter went missing on 10 October 2022, that she engaged the community in searching for her, that a missing person case was registered with the police and that her child was not found.
- [9] It was also due to her initiative that the video footage which was admitted into evidence was recovered.

There was nothing untoward in her evidence and she can be described as a reliable witness.

- [10] The evidence of Sgt Thenga relates to the discovery of a leg at a certain address in Watville and does it not take the matter any further.
- [11] The CCTV footage shows that the deceased playfully running from the direction of the park, crossing the street and disappearing from the view.

It continues to show the accused walking down the street with the park on his right, he crosses an intersection and shortly thereafter the deceased re-appears. The accused continues on his journey, walking in the street whilst the deceased walks on the left hand side next to him.

The footage does not show that they interacted with each other at all, or that they acknowledged each other. At the very most they may have been aware of each other's presence.

[12] The defense argued that there was no evidence placed before the court on which a reasonable man may convict the accused and therefore submitted that he should be discharged.

[13] The prosecution argued that sufficient circumstantial evidence was placed before the court to warrant a refusal of the application. Counsel for the state argued that paragraph 7 of the accused's written plea explanation shows towards the accused's involvement in the commission of the offences.

It reads: I admit that I was not supposed to be in Watville on 10 October 2022 due to the case that was pending against me in respect of count 1.

I saw this footage on my mother's phone, got scared and disappeared from home

[14] I cannot agree with that contention. It would rather be that he knew that he was somewhere, where he was not supposed to be and feared the consequences.

[15] The prosecution further argued that the accused was the last person who was seen with the deceased and hence he needs to be placed on his defence to explain what happened to the girl.

[16] Upon a viewing of the footage it does not show that the accused was with the child in the sense of them accompanying each other but rather that they coincidentally ended up walking next to each other, the one walking more or less in the middle of the road and the other on the left side of the street.

Anything could have happened further down the street, Anyone else may have come across the child and committed these horrendous acts.

[17] The leading authority with regards to circumstantial evidence is that of *R v Blom* 1939 AD 188. The principles laid down therein is that when considering circumstantial evidence the court must establish whether the only reasonable inference that can be drawn from the proved facts is the inference sought to be drawn.

The only circumstance is that the accused was seen walking next to the deceased in the same street.

That is barely sufficient to draw the inference that he was with the deceased or the last person who was with the deceased.

[18] Section 174 of the CPA reads:

"If, at the close of the case for the prosecution at any trial, the court is of the opinion that there is no evidence that the accused committed the offence referred to in the charge or any offence of which he may be convicted on the charge, it may return a verdict of not guilty."

- [19] In R v Mall and others 1960 (2) SA 340 (A) it was stressed that the consideration of an application in terms of section 174 is a discretion which must be exercised judicially.
- [20] An accused person is entitled to his discharge after closure of the state case if there is no possibility of a conviction other than if he enters the witness stand and incriminates himself.
- [21] There is no evidence before the court upon which a reasonable man, acting cautiously may convict the accused on any of counts 3 – 6 hence the application for the discharge of the accused is granted in respect of those counts and the accused is found not guilty and he is discharged on counts 3 -6.

Cox AJ

Acting Judge of the High Court of South Africa

North Gauteng Division, Pretoria

Appearances:

For the Accused:

Adv Van Wyk Legal Aid South Africa.

For the State:

Adv Sihlangu DPP Pretoria.

Date of delivery: 07 August 2023

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Prepared on 13 October 2026 · Esheria