

SOUTH AFRICA / JUDGMENT

Shabalala v S (A 201/2015) [2015] ZAGPJHC 262 (17 November 2015)

[2015] ZAGPJHC 262

COURT

South Gauteng High Court, Johannesburg

BEFORE

Satchwell, Mailula, Boruchowitz

CASE / FILE NUMBER

A 201/2015

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IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

LOCAL DIVISION, JOHANNESBURG

Case

number: A 201/2015

DATE:

17 NOVEMBER 2015

In the

matter between:

SHABALALA

MACHOSINI.....Appellant

And

THE

STATE.....Respo

ndent

JUDGMENT

SATCHWELL J:

INTRODUCTION

1. This is an appeal against the conviction of Mr Shabalala on 16th September 2013 by Naidoo AJ on one count murder and one count of robbery with aggravating circumstances in respect of which the court a quo gave leave to appeal on the grounds that “people think differently.”
2. At issue is whether or not there is sufficient evidence to sustain appellant’s conviction of the robbery and murder of L..... B.... (‘F.....’) on 19th January 2013 beyond reasonable doubt. The trial court found that the “totality of the evidence” justified a finding that “the proven facts support the inference that the accused robbed and murdered the deceased on 19th January 2013 and that this is the only reasonable inference to be drawn from such given facts”. That finding is challenged on the grounds that too much weight has been attached to the evidence of the state witnesses.
3. The background to this trial may be succinctly stated. F..... was a 13 year old boy who lived with his mother, Bango, and her boyfriend, appellant. On Saturday 16th September, F..... went out to play with his bicycle taking his cellphone with him, his mother had a nap and appellant left the house. F..... did not return home that evening which was reported to the South African Police Services. There was a search for him which involved many members of the family and community. His bicycle was subsequently found on an embankment near a river and his body was found later in the reeds next to the river. F.....’s cellphone was subsequently found in the possession of one Nhlabathi.

THE EVIDENCE

4. The evidence which points to appellant as the perpetrator of the killing of F..... and robbery of his cellphone is circumstantial in nature.
5. Such evidence must be considered in its totality and thereafter one applies the oft-quoted dictum in *R v Blom* 1939 AD 188 at 202 as to assessment of the two cardinal rules of logic that the inference sought to be drawn must be consistent with all the proved facts and that the proved facts exclude every other reasonable inference save the one to be drawn. In

weighing the cumulative effect of all inferences drawn one must bear in mind that “a number of circumstances, each

individually very slight, may so tally with and confirm each other as to leave no room for doubt of the fact which they tend to establish..... Even two articles of circumstantial evidence, though each taken by itself weigh but as a feather, join them together, you will find them pressing on a delinquent with the weight of a mill-stone.”[1]

The Cellphone

6. The major evidence is the alleged possession of the deceased's cellphone by appellant and his sale or pledge of this cellphone to the witness Joseph Nhlabathi in exchange for the sum of R 400.00. At trial, the appellant disputed the evidence of Nhlabathi and denied that he had ever possessed the phone or sold or pledged it.
7. Nhlabathi testified that he knew appellant through a mutual friend. On Sunday 20th January appellant contacted him and they met at the Tembisa Plaza. Appellant presented him with a cellphone which he asked Nhlabathi to keep for him and asked to borrow funds which he needed "to pour petrol into the car so he could go and look for the child".

They agreed that Nhlabathi would loan him R 400 and keep the phone as security. Appellant removed the simcard from the phone and gave Nhlabathi a Blackberry phone (purple in colour) and took the R 400.00. Nhlabathi variously inserted his and his girlfriend's

simcards into this phone. He changed the front face of the Blackberry from purple to black.

8. Appellant disputed this evidence at trial, stating that any communication between himself and Nhlabathi pertained to disagreements over a young lady, one Nomcebo and that he had never handed a Blackberry or any other phone to Nhlabathi.
9. This phone was subsequently identified as belong to the deceased. The IMEI number of the phone which was recovered through Nhlabathi was the same as that of the deceased – IMEI 350908049116730[2] -and the phone was the same make (though Nhlabathi had changed the cover).[3]
10. In assessing the evidence of Nhlabathi, one must bear in mind that, on this point, he is a single witness. In addition, one must be mindful that it is he whom the SAPS connected to possession of and use of the cellphone and that he has an interest in directing the enquiries of the SAPS away from himself. Finally, on his own version, he received a cellphone from appellant in exchange for which he gave appellant a sum of money which makes him, at the very least, a dealer in stolen property and, ultimately, the reason why persons are frequently robbed for or murdered for their cellphones which have monetary value. In sum, the trial court and this appeal court must be extremely cautious in assessing the evidence of Nhlabathi who is a single witness, a possible suspect and himself a role-player.
11. Nhlabathi's evidence is confirmed or corroborated in important respects.
12. Firstly, he and appellant were in communication over the period 15th January to 14th February 2013 on at least 36 occasions.[4] Twenty seven of those calls emanated from appellant. Appellant sought to explain all this communication whilst F.....

was missing and a search was underway on the grounds that he was telling Nhlabathi to keep away from his girlfriend, Nomcebo.

Nomcebo (the alleged girlfriend) gave evidence and denied that she was ever in a relationship with appellant who, after all, was in a relationship with the mother of the deceased. In any event, appellant was strangely ignorant of the personal life and details of Nomcebo, his supposed girlfriend.

13. Secondly, Nhlabathi's evidence is that he handed R 400.00 in cash to appellant on Sunday which appellant denies. Sipiwe Magagula gave evidence that she had lent or given R 10 to appellant the day before (Saturday) so he could purchase airtime as he had no money. The following day, Sunday, Sipiwe and appellant went for a drink at the shebeen of Hilda Duda. Hilda gave evidence that appellant did not have money with him but then received a phone call, said he was leaving and meeting someone at the robot at the Plaza and would pay for the drinks on his return which he did, giving her R 50.
14. Accordingly, the undeniable evidence is that Nhlabathi was in touch with appellant over this crucial period and appellant received funds at the time when and where Nhlabathi averred. Nhlabathi is corroborated.
15. It can only but be found that appellant was in possession of the cellphone of the deceased and sold or pledged it to Nhlabathi.

Pointing out of the bicycle

16. It was common cause that F..... was at home with his mother and Sipiwe Magagula. Ben Molaba saw them and made an arrangement with the boy to collect certain 'movies' for the boy to watch. By the time he returned to the house, F..... had gone. Mariett Bango said that her son left but she did not know when appellant left the house.
17. F..... disappeared from home on the evening of Saturday 19th January.
18. His family and friends searched for, but did not find, him. A report was made to the South African Police Services. In the course of that Saturday evening, appellant stated to the family that "we are going to find the bicycle first" and "after that we would find the child dead".
19. A group of boys, who did not give evidence, brought F.....'s bicycle which they had found near the river on Sunday morning at about 11h00. Ben Molaba went on foot, with appellant, to see the place where the bicycle was found and thereafter searched for F..... but they did not find anything.
20. Meriott Bango mother of F..... and girlfriend to appellant, gave evidence that she asked her sister, Aletta, to approach appellant on the grounds that he had a reputation as a 'prophet' and asked him to give guidance. Appellant asked for liquor. After some meditation, appellant said that they should search where the bicycle had been found.

21. Bango and Molaba gave evidence that, again on Sunday, appellant was again asked to use his powers to find the boy. It is the evidence of both Bango and Molaba that 'Uncle Bubu' was the driver of the vehicle. There is no evidence who gave directions to the place near the river where the bicycle had been found. It is common casue that appellant banged on the dashboard when the spot was reached near the river where the bicycle was found. Appellant obviously knew this place (as did Molaba) from their earlier visit.
22. However, there is then the evidence of Bango and Molaba that the appellant left the vehicle and threw himself on the ground where the bicycle was found. Only Molaba from all the witnesses had been shown where the bicycle was found and was therefor in any position to know that appellant had 'thrown himself on the ground' where the bicycle was found. Again, appellant had already visited this spot in the company of others.
23. It is my view that little can be made of the 'pointing out' of the place where the bicycle was found. However, it is notable that appellant was in a position, on Saturday night when the child was missing, to comment that the child was dead which, at that stage, no one else suspected or knew.

Pointing out of the Body

24. After Bango (mother to the boy) had made further requests of appellant to try and find her son, he performed certain strange rituals and went in the vehicle as already described to the river. None of the persons with him appear very impressed by his further rituals
 - ranging from plastering mud on a mirror to leaping into the river and humming and giggling to himself. Bango left. Accordingly, the only witness as to what happened is Ben Molaba.
25. Molaba said that, while appellant was in the river, he was making gestures towards the reeds behind those who were standing on the river bank. Pursuant to those gestures by appellant, the other searchers went towards the reeds where they found the body of F..... On this point, Molaba is a single witness. But his evidence is not in dispute. This was also the evidence of appellant under cross-examination who confirmed that "I made gestures, yes" but disclaimed knowledge whether he had pointed out the body or not.
26. This 'pointing out' by appellant was done at the instance of his girlfriend, mother of the missing boy, and her family. Appellant had indicated before the boy was even thought to be dead that his body was near the bicycle. Appellant returned to the place where the bicycle had been found. He made gestures which led the searchers to the place where the body was lying hidden in the reeds. There is no suggestion that there was anything untoward in the manner in which he was encouraged or enabled to perform this 'pointing out'. No influence or pressure was placed on him. In fact, he was requested to assist because he was believed to have special powers – even though his rituals performed at the stream apparently aroused amusement which led to him flouncing into the stream. I have no difficulty in accepting that he made a 'pointing out'.

27. Appellant's explanation of his ability to find the body was that he was taken to where the bicycle had been found, then returned home where he performed certain rituals relevant to his 'prophecies', he was then taken back in Bubu's car to where the bicycle had been found, more rituals were performed and he was moving from side to side of the river while the people were following him and one of them found the body of the child. That is all very well. But he purported to have special powers, he extracted both funds and attention by reason of those special powers and he led the searchers to the body.

Appellant walking from the river

28. Both Bango and Molaba claimed to have seen appellant coming from the direction of the river – Bango on Sunday when she was looking for her son and Molaba whilst he was sitting drinking some beers at the spaza shop on the Saturday evening.
29. Neither was very impressive on this point. Molaba had been drinking but he had opportunity to view appellant. There is no evidence how close the river is or what other shops or houses are along that road. Molaba's evidence was initially stated that he had seen appellant coming from the direction of the shops and then changed by the interpreter to have been that Molaba saw appellant coming from the direction of the lake or river. Bango had gone into the road looking for her son and seen appellant coming from the direction of the river. Again this was not explored. What is clear is, at this time, neither had seen appellant as a suspect in any manner.

CONCLUSION

30. I can see no misdirection in either the procedure adopted at trial, the approach to the evidence by the learned trial judge, the understanding of that evidence.
31. I note that the right ear of the deceased had been removed – Dr Medar thought this could have been done by animals whilst Colonel Kumana was of the view this was a muti murder. Dr Medar did concede that it was possible that someone could have removed the deceased's ear. I do not think that it is necessary to comment on the claims of appellant to have prophetic powers or the claims of Colonel Kumana on the likelihood that this was a 'muti murder'. The two are not necessarily linked and there is no evidence of any sale of body parts as part of such a 'muti murder'.
32. I am of the view that the evidence, though circumstantial, is sufficient to justify the conviction of appellant of the robbery of the deceased and his murder.
33. He and the boy knew each other and lived in the same home. The boy's cellphone was found in the possession of Nhlabathi whose explanation for such possession is confirmed by the communications between himself and appellant and the acquisition of funds by the appellant. The version of the appellant in this regard is not reasonably possibly true. It must be accepted that appellant was in possession of F.....'s cellphone on Sunday when he handed it to Nhlabathi in exchange for money.

34. It is undisputed that F..... left home in possession of his cellphone and he was not subsequently seen alive. The only inference which can reasonably be drawn is that appellant obtained possession of the cellphone prior to or at the time of the boy's death thus leading to the inescapable conclusion that appellant both robbed F..... and then killed him.
35. Prior to any suggestion of the death of the boy, appellant was already on Saturday evening talking of finding his 'body'.

This certainly suggests knowledge of the fate of F..... to which only the robber and murderer would be privy.

36. After the bicycle had been found and all had returned to the scene of such recovery, appellant continued with his rituals and allegedly spiritual practices. What is of importance is that he 'gesticulated' in such a manner that this led the searchers to go into the reeds adjacent to the river bank where F.....'s body was concealed. Such gesticulations, whether presented as part of a pseudo-spiritual ritual or not, have exactly the same impact and import as a 'pointing out'. Appellant indicated where the body of F..... was to be found.
37. Expressing certainty (not just a premonition) of the boys death on Saturday, possession of the boys cellphone and disposal of that phone on Sunday, pointing out the body are the vital pieces of circumstantial evidence presented in this trial.
38. In the result, I can see no reason to interfere with the decision of the learned judge in the court a quo as to conviction on the counts of robbery and murder.
39. There has been no argument that sentence is inappropriate or not in accordance with justice. This was a young boy, robbed and killed by a man with whom his mother was in a relationship and whom he presumably trusted. The robber and murderer made money out of his deeds by selling or pledging the cellphone to Nhlabathi and using some of the proceeds for alcohol even as a search was underway for the missing boy.
40. If indeed, there is a link between appellant's spiritual and ritual proclivities and the mutilation and murder of F..... this makes what happened even more culpable.

Accordingly, I would propose that an order be made that:

The appeal against conviction is dismissed.

DATED AT JOHANNESBURG NOVEMBER 2015

SATCHWELL J

I agree

It is so ordered – the Appeal is dismissed

MAILULA J

I agree.

BORUCHOWITZ J

Counsel for Appellant: Adv A H Lerm

Attorneys for Appellant: Legal Aid SA

Counsel for Respondent: Adv F Mohamed of the DPP

Dates of hearing: 06th November 2015.

Date of judgment: 17th November 2015.

- [1] See Best on Evidence 10th ed §297 quoted in S v Reddy and Others 1996(2) SACR 1 A at 8c-h
- [2] Exhibit E.
- [3] Exhibit I is the phone itself on which the IMEI number appears.
- [4] Exhibit F records the calls of appellant.

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