

SOUTH AFRICA / JUDGMENT

Thubeni and Others v S (A509/2015) [2016] ZAGPPHC 1242 (14 October 2016)

[2016] ZAGPPHC 1242

COURT

North Gauteng High Court, Pretoria

BEFORE

AC Basson, M Senyatsi

CASE / FILE NUMBER

A509/2015

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REPUBLIC

OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

DIVISION, PRETORIA

14/10/2016

CASE

NO: A509/2015

NOT

REPORTABLE

NOT

OF INTEREST TO OTHER JUDGES

REVISED

In

the matter between:

SONWABILE

THUBENI 1st

Appellant

SIBEKO

SINDEKILE 2nd

Appellant

MONDE

PAKINE 3rd

Appellant

and

STATE Respondent

JUDGMENT

AC BASSON, J

- [1] The appellants were the first three of five accused before the Benoni Regional Court on charges of murder (count one) and assault with intent to do grievous bodily harm (count two). They pleaded not guilty. The three appellants were convicted of murder and acquitted on count two. They were sentenced to effective terms of 12 years' imprisonment each.
- [2] Leave to appeal against both conviction and sentence was granted pursuant to a petition.
- [3] Appellant 1, 2 and 3 were accused number 1, 2 and 3 respectively in the trial court. Accused number 4 and 5 are not the subject of this appeal.
- [4] It is not in dispute that on the evening of 26 March 2011 there was a stokvel held at the premises of the deceased, which stokvel was attended by many people. A tent was erected on the premise and a generator was used to provide light in the tent. It was the evidence of Mr Mpanza (one of the state witnesses) that it was dark. He testified that he could not see who were throwing stones at the deceased.
- [5] It was not in dispute that the deceased was killed in the early hours of the morning. According to the post mortem report the cause of death was a head injury: "Saturated skull wound left temple, right eyebrow and left earlobe".
- [6] One of the state witnesses, Mr Johannes Sabangu, took the deceased to the hospital after the deceased was injured. Sabangu was, however, not present at the meeting and was therefore unable to identify any of the perpetrators.
- [7] At issue is the question whether the State has proved beyond reasonable doubt that the three appellants were involved in the
attack on the deceased which ultimately resulted in his demise.
- [8] The State called three witnesses in an attempt to prove that the three appellants were involved in the attack on the deceased. The first witness Ms Ntshwangase - the deceased's girlfriend - was present at the stokvel on the evening the deceased was killed. She explained that she knew accused number 5 and that she saw him there the evening of the stokvel. She also testified that she heard accused number 4 say "Boetie, I will kill you" and saw accused number 4 in possession of two stones.
- [9] Ntshwangase testified that she saw five men and that all of them were throwing stones. She, however, conceded that she did not really pay much attention to what the others did and that she only noticed accused number 4 and what he did. At the identity parade, despite the fact that the other appellants were present, she was, however, only able to identify accused number 5. In her evidence she also stated that she did not see who threw the stones that struck the deceased on the head.

[10] The second State witness, Ms Memela, was also present at the stokvel. Although she also placed all five accused at the scene, she only managed to identify accused number 4 and 5 at the identify parade. Memela testified that she saw appellant 1 for the first time that evening. She testified that she knew appellant number 2 because they were renting at the same premises. She knew appellant number 3 but only by sight. However, despite the fact that she testified in court that she had seen all three appellants and in fact knew appellant 2 and 3 previously, she did not point them out at the identify parade.

[11] The third State witness Mr Mpanza was only able to identify appellant

2. He was, however, not able to explain what role appellant number 2 played in the assault. He also testified that it was dark and that he was unable to say who had hit the deceased with a stone.

[12] It is trite that the State bears the onus to prove the guilt of the accused beyond reasonable doubt. I am not persuaded that the State has proven the guilt of Memela was able to identify the three appellants at the identity parade despite their best efforts to implicate them in the assault when giving evidence in court. In this regard the Court is reminded of the dictum in *R v Masemang*[1] where the Court held as follows:

"The positive assurance with which an honest witness will sometimes swear to the identity of an accused person is in itself no guarantee of the correctness of that evidence. One often finds that a woman who was totally unable to point out her assailant on an identification parade will, when the accused is arrested on the strength of other evidence, swear positively at the trial that she recognises him as her assailant. The innate and instinctive desire that there shall be retribution may be conducive to this. In *Wills on Principles of Circumstantial Evidence* (7th Edit. p. 193) the learned author cites a number of cases in which persons have been wrongly convicted (and even executed) on this type of evidence, which fills one with apprehension. At p. 36 the learned author observes:

"The testimony of the senses cannot be implicitly depended upon, even when the veracity of the witness is above all suspicion. An eminent barrister, a gentleman of acute mind and strong understanding, swore positively to the persons of two men whom he charged with robbing him in the open daylight. But it was proved by conclusive evidence that the men on trial were, at the time of the robbery, at so remote a distance from the spot as to render their guilt impossible."

[13] I am therefore not persuaded that the three appellants have positively been identified as having been part of the five individuals who attacked the deceased. The State has therefore not succeeded in proving its case beyond reasonable doubt. The convictions and sentences should therefore be set aside.

[14] The order that I propose is the following:

The convictions and sentences of the three appellants are set aside and substituted with the following:

Accused number 1 (Sonwabile Thubeni}; Accused number 2 (Sibeko Sindekile} and Accused number 3 (Monde Pakine) are found not guilty and are discharged.

AC BASSON

JUDGE OF THE HIGH COURT

I agree

M SENYATSI

ACTING JUDGE OF THE HIGH COURT

Appearances:

For the first appellant

: Adv. S Moeng

Instructed by

: Pretoria Justice Centre

For the respondent

: Adv. A Coetzee

Instructed by

: The State Attorney

[1] 1950 (2) SA 488 (A) at 493

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