

SOUTH AFRICA / JUDGMENT

Tsolo v S (A26/2021) [2021] ZAGPPHC 708 (17 September 2021)

[2021] ZAGPPHC 708

COURT

North Gauteng High Court, Pretoria

BEFORE

MJ Mosopa, E van der Schyff

CASE / FILE NUMBER

A26/2021

Source: saflii.org · Research copy typeset by Esheria. Not court-issued or certified.

Source record

IN THE HIGH COURT
OF SOUTH AFRICA
GAUTENG DIVISION,
PRETORIA

(1)

REPORTABLE: YES/NO

(2)

OF INTEREST TO OTHER

JUDGES: YES/NO

(3)

REVISED: YES/NO

17/9/2021

Case

number: A26/2021

In the matter

between:

DAVID
TSOLO
Appellant
v
THE
STATE
Respondent

JUDGMENT**MOSOPA, J**

1. In issue in this appeal matter, is whether the below court correctly applied circumstantial evidence when convicting the appellant of murder read with the provisions of section 51(1) of Act 105 of 1997, and robbery with aggravating circumstances as intended in section 1 of Act 51 of 1977 read with the provisions of section 51(2) of Act 105 of 1997.
2. The appellant admitted to being in possession of the knife, which is classified as a dangerous weapon, when he was arrested, in contravention of section 1 read with section 3 of the Dangerous Weapons Act 15 of 2013. On this charge, the appellant was correctly convicted and sentenced.
3. As a result of the conviction, the appellant was sentenced as follows;
 - 3.1. Murder – Life imprisonment;
 - 3.2. Robbery with aggravating circumstances – Fifteen (15) years imprisonment; and,
 - 3.3. Possession of a dangerous weapon – Three (3) months imprisonment.
4. During the trial in the below court, the appellant appeared as Accused 1 and stood trial with three other people. Two of the co-accused died before the trial matter was finalized and the remaining co-accused was acquitted of all charges. Because the sentence of life imprisonment was imposed, the appellant has an automatic right of appeal against the murder conviction. The appellant appeals against both conviction and sentence. The appellant was legally represented throughout his trial.
5. The evidence used by the State to convict the appellant can be summarized as follows; The police received a report of the murder case at 04h30am and Constable Kekana attended to the murder scene. When he arrived at the scene, the victim was already dead and no person was arrested at that time. From the scene, he gathered information that the deceased was from Lesotho and arrived at the taxi rank in a taxi. When he arrived at the scene, Constable Pillay was already at the scene.
6. Moyaneng Mapitsi is the driver of the taxi in which the deceased traveled from Lesotho. He arrived at the taxi rank at approximately 04h05am and the deceased was the only remaining passenger in his vehicle. The deceased wanted to go out to buy himself cigarettes but he discouraged the deceased from doing so as he believed the place to be unsafe at that time of morning. However, at some point he fell asleep and the deceased left his vehicle to go buy cigarettes. He heard a person, who was seated on the steel bench next to his vehicle, screaming for help and when he went out to enquire, he found that it was a person who had been a passenger in his vehicle. The deceased pointed out to him the stab wounds on his back, between his shoulder blades. He did not see the people who attacked the deceased, which attack ultimately killed the deceased.

7. The two police officers, Constables Moseleng and Kgarajane, on the night of the incident, were tracing suspects when they received the message about the murder case. At the scene, they received information about four people who killed the deceased and according to Constable Mosele, he was told that one of the people was wearing a white t-shirt, whereas Constable Kgarajane said that they were informed that the person was wearing a white top. It is because of this information that they went to look for the perpetrators. There were a number of police officers who were involved in the search for the perpetrators.
8. As they were driving around town at 05h30am, they saw a group of people which comprised of four African males and one African woman. The place where they saw these people was about 800 meters from the scene of the crime. Constable Kgarajane saw a person wearing a grey jacket drop something to the ground- and informed Constable Moseleng of that. Constable Kgarajane took that person to where the item was dropped, he saw the appellant also using his foot to push a knife away on the ground. A knife and a wallet with the deceased's clock-in card and R50.00 were seized by the police. The clock-in card was compared to the passport of the deceased and the names on the passport and clock-in card were found to correspond by Captain Theron. The appellant was then arrested and charged with the murder of the deceased, after he was read his constitutional rights.
9. Seipati Kotsi, who was a defense witness for the appellant's co-accused, also testified that she heard the police ask the appellant what he dropped to the ground, but she never saw the appellant dropping any item to the ground. She never saw a person, while they were inside the taxi, handing a knife to the appellant, despite not sitting far from each other as they were only separated by a single seat.
10. The State did not call the people who witnessed the attack on the deceased, despite the fact that the police officers testified about receiving information at the taxi rank regarding the people who attacked the deceased. The knife seized from the appellant was never forwarded to the Forensic Science Laboratory for DNA analysis, despite it having had a substance resembling blood on it. Certain clothing belonging to the appellant and his co-accused were forwarded for analysis, but no blood of the deceased was found on such clothing.
11. The case against the appellant rested entirely on circumstantial evidence. Circumstantial evidence ultimately rests on direct evidence and there must be a foundation of proved or probable fact from which to work.
12. Watermeyer JA, in the seminal judgment dealing with the admissibility and reliability of circumstantial evidence, in the matter of *R v Blom* 1939 AD 188 at 202-203, observed;

"(1) The inference sought to be drawn must be consistent with all the proven facts. If it is not, then the inference cannot be drawn.

(2) The true facts should be such that they exclude every reasonable inference from them save the one sought to be drawn. If they do not exclude other reasonable inferences, then there must be doubt whether the inference sought to be drawn is correct."

13. In the matter of S v Reddy and Others 1996 (2) SACR 1 (A) at 8C-E, Zulman JA, when dealing with the assessment of circumstantial evidence, observed;

"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 an 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 Rex v Blom 1939 AD 188 at 202-203 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 and secondly, the proved facts should be such "that they exclude every reasonable inference from them save the one sought to be drawn". The matter is well put in the following remarks of Davis AJA in R v De Villiers 1944 AD 493 at 508/509:-

"The Court must not take each circumstance separately and give the accused the benefit of any reasonable doubt as to the inference to be drawn from each one so taken. It must carefully weigh the cumulative effect of all of them together, and it is only after it has done so that the accused is entitled to the benefit of any reasonable doubt which it may have as to whether the inference of guilt is the only inference which can reasonably be drawn. To put the matter in another way; the Crown must satisfy the Court, not that each separate fact is inconsistent with the innocence of the accused, but that the evidence as a whole is beyond reasonable doubt inconsistent with such innocence."

14. The appellant admitted to have been in possession of a knife when he was arrested, even though his version differs with that of the police officer who found the knife. According to the appellant, he voluntarily surrendered the knife when arrested, but according to Constable Kgarajane, the accused was trying to push the knife away with his right foot while it was lying on the ground. The

appellant even told Kgarajane that the knife belongs to him without being asked who the owner of the knife was. The appellant himself

testified that he was given a knife by another person who was a passenger in the taxi which was supposed to take them to Khutsong.

This version of the appellant is not corroborated, as none of the people in the taxi were called as witnesses, except for Seipati, who denied ever seeing that, despite not being seated far from where the appellant was seated.

15. Constable Kgarajane, before he arrested the appellant, saw the appellant dropping an item to the ground. The appellant co-operated with Kgarajane and showed him the brown wallet which was lying on the ground. Kgarajane asked the appellant who the wallet belongs to but the appellant did not answer. Constable Moseleng heard when Constable Kgarajane said that the appellant dropped something to the ground, but he did not see the appellant throwing the brown wallet to the ground. Seipati also heard when the appellant was asked what he dropped to the ground.

16. The appellant denies ever throwing the brown wallet to the ground and insisted that he only saw the wallet when it was presented to him at the police station. The appellant's version cannot be believed, simply for the reason that from the scene of the arrest, the police together with the appellant went to the taxi rank. It is at the taxi rank where Captain Theron compared the passport of the deceased with the clock-in card found in the brown wallet and realised that they correspond.
17. The post-mortem report, which was admitted into evidence by consent of the appellant's legal representative, indicates the cause of death as "stab wound neck with large volume blood loss".
18. Shortly after the commission of the offence and not far from the scene of the murder, the appellant is found in possession of the wallet belonging to the deceased. The appellant fails to give the police a probable explanation as to who the wallet belongs to and chooses to remain silent when asked about it. He is found in possession of a knife that he wanted to conceal when the police approached him. I am mindful of the fact that this knife was not referred to the Forensic Science Laboratory for analysis, but the fact that the appellant wanted to dispose of the knife, leaves us with no choice but to draw inferences.
19. A proven fact is that the deceased was attacked and killed at the taxi rank and his passport corresponded with the clock-in card which was in the wallet found in the possession of the appellant at the time of his arrest. The appellant could not explain the circumstances why he was found in possession of this, he merely denied being in possession thereof.
20. The inference that can be drawn, that the people who attacked and killed the deceased took his wallet and walked away from the scene of the crime, is consistent with the proven facts. We find no need to interfere with the conviction as the magistrate, when convicting the appellant, properly applied the principles of circumstantial evidence and did not misdirect himself.

SENTENCE

21. In the matter of *S v Bogaards* 2013 (1) SACR 1 (CC) at para 41, Khampepe J, writing for the majority, observed;

"Ordinarily, sentencing is within the discretion of the trial court. An appellate court's power to interfere with sentences imposed by courts below is circumscribed. It can only do so where there has been an irregularity that results in a failure of justice; the court below misdirected itself to such an extent that its decision on sentence is vitiated; or the sentence is so disproportionate or shocking that no reasonable court could have imposed it. A court of appeal can also impose a different sentence when it sets aside a conviction in relation to one charge and convicts the accused of another."

22. The appellant refused to testify in mitigation of sentence and his personal circumstances were presented from the bar by his legal counsel. The appellant's list of previous convictions is on record and I do not intend to deal with that any further. He was 35 years old at the time of sentencing, unmarried, but had two dependants aged three and two years respectively. He suffers from a chronic illness. He is self-employed as a vendor selling vegetables, with an income of R900.00 per week. The highest standard passed by the appellant in school is Standard 9 and he has been in custody since his arrest on 15 October 2016, as his application for bail was denied.
23. The murder the appellant is convicted of, is in terms of the provisions of section 51(1) of Act 105 of 1997, for the following two reasons;
 - 23.1. It is murder committed by a group of people in furtherance of a common purpose and;
 - 23.2. Murder committed in the process of the commission of a robbery.
24. The below court did not make a pronouncement on whether compelling and substantial circumstances exist, but looking at the sentence which was imposed, it seems that no such compelling and substantial circumstances were found by the below court to exist.
25. In issue is whether compelling and substantial circumstances exist in the case of the appellant.
26. In the matter of *S v Vilakazi* 2009 (1) SACR 552 (SCA), Nugent JA observed, at para 58;

"In cases of serious crime the personal circumstances of the offender, by themselves, will necessarily recede into the background. Once it becomes clear that the crime is deserving of a substantial period of imprisonment the questions whether the accused is married or single, whether he has two children or three, whether or not he is in employment, are in themselves largely immaterial to what that period should be, and those seem to me to be the kind of 'flimsy' grounds that Malgas said should be avoided. But they are nonetheless relevant in another respect. A material consideration is whether the accused can be expected to offend again. While that can never be confidently predicted his or her circumstances might assist in making at least some assessment."
27. The appellant at the age of 35, had a string of previous convictions, of which some are relevant to the robbery conviction. The appellant's last conviction was on 22 August 2016. He was arrested for the current offenses on the same day they were committed, namely 15 October 2016, which is approximately two months after the conviction of 22 August 2016. This demonstrates that the appellant is the type of person who easily re-offends. As a consequence, we are of the view that the below court did not misdirect itself and there is no need for us to interfere with the sentence imposed.
28. The court did not order that the sentences run concurrently. This is mainly because of the life sentence imposed, as any sentence imposed together with a life sentence automatically runs concurrently by operation of law (see *Mabunda v S* 2013 (2) SACR 161 (SCA)).

ORDER

29. Having regard to the above, I make the following order;

1. The appeal against both conviction and sentence is dismissed.

MJ MOSOPA

JUDGE OF THE HIGH

COURT, PRETORIA

I agree,

E VAN DER SCHYFF

JUDGE OF THE HIGH

COURT, PRETORIA

Appearances:

For the appellant: Adv M Botha

Instructed by:

Legal Aid SA

For the respondent: Adv SD Ngobeni

Instructed by:

The Director of Public Prosecutions

Date of hearing: 27 July 2021

Date of judgment: Virtually transmitted

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.saflii.org/za/cases/ZAGPPHC/2021/708.html>

CASE PAGE <https://chat.esheria.ai/case-law/south-africa/tsolo-v-s-unknown-topic-agpphc-2021>

Prepared on 11 October 2026 · Esheria