

SOUTH AFRICA / JUDGMENT

Warney v S (CA&R291/2014) [2014] ZAE CGHC 91 (5 November 2014)

[2014] ZAE CGHC 91

COURT

Eastern Cape High Court, Grahamstown

BEFORE

J W Eksteen, E Revelas

CASE / FILE NUMBER

CA&R291/2014

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IN

THE HIGH COURT OF SOUTH AFRICA

EASTERN

CAPE DIVISION, GRAHAMSTOWN

C.A.&

R.: 291/2014

Date

Heard: 29 October 2014

Date

Delivered: 5 November 2014

In

the matter between:

FREEK

WARNEY

Appellant

and

THE

STATE

Respondent

JUDGMENT**EKSTEEN J:**

- [1] The appellant has been convicted of culpable homicide and was sentenced to a fine of R4 000 or six months imprisonment which was conditionally suspended for four years. He appeals against his conviction.
- [2] The charge arose from the events which occurred on 1 January 2010 at Rietbron in the jurisdiction of this Court. The appellant and the deceased, one F. B., were close friends. They were gathered together with other friends on the occasion of the New Year. Although there is some dispute as to the precise time at which the events occurred I think it must ultimately be accepted, as the appellant contends, that it occurred late at night in darkness.
- [3] At least some of the role players had consumed some alcohol prior to the event. At some stage the appellant says that he told one September le Roux that he wanted to fetch some beer. They intended to drive in the appellant's pickup vehicle (hereinafter referred to as "the bakkie"), however, the engine would not start. In the circumstances it was decided to tie the bakkie to Le Roux's car with a sturdy rope and to tow the bakkie in order to jumpstart the engine. This was duly done, however, alas, to no avail. The bakkie would not start.
- [4] Eventually the exercise was abandoned and the appellant, who was behind the steering of the bakkie, instructed his friends to untie the rope. The deceased proceeded to Le Roux's car where he took up a position on the ground behind the vehicle in an endeavour to untie the rope. Whilst the deceased was on the ground behind Le Roux's car the appellant again attempted to start the engine of the bakkie by turning the key in the ignition. To the surprise of all, the ignition functioned without difficulty and the engine started. The appellant put the bakkie in gear and proceeded to reverse.
- [5] As it turned out the rope had not been untied yet and Le Roux's car was drawn back along with the bakkie as the appellant reversed. The deceased was still on the ground behind Le Roux's car attempting to untie the rope and the car was drawn back over the deceased. He sustained injury to his left arm, shoulder and an open wound to the back of his head.
- [6] At the time the injuries did not appear to be too serious, however, after some women who were present there had cleaned his wounds the appellant took the deceased to the Beaufort West Hospital. There a doctor attended to his wounds and sent him back home. Some days later the appellant visited the deceased. The deceased was not well and accordingly the appellant again took the deceased to the Beaufort West Hospital. There the doctor in attendance decided to transfer him to the George Hospital because of his condition. He died in the George Hospital on 6 January 2010. Hence the charge of culpable homicide.

- [7] The appellant was legally represented at the trial and pleaded not guilty to the charge of culpable homicide. He made a number of admissions relating to the events which occurred and in elaboration on his plea of not guilty specifically denied that he had been negligent at all and denied that the deceased died as a result of injuries which he sustained in the accident. Immediately after pleading the State handed in a post-mortem report as evidence under cover of an affidavit in terms of section 212(4) of the Criminal Procedure Act, 51 of 1977 (hereinafter referred to as “the Act”). The record reflects that the report was handed in by consent.
- [8] Dr Hurst, a registered Specialist Forensic Pathologist in the service of the State as a Principal Specialist (Forensic Pathologist) at George conducted a post-mortem examination on 8 January 2010. She confirmed her findings in an affidavit in terms of the provisions of section 212(4). At the time the cause of death was recorded in the post-mortem report as “under investigation”. During the autopsy on the body she recorded that she had retained certain specimens of the liver, heart, lungs, kidneys, spleen, brain, adrenals, pancreas and arm muscle for further examination requiring skill in medical science. After the histology was completed Dr Hurst issued a final post-mortem report which reflects the cause of death as being:

“Muscle necrosis of the left arm with secondary renal and cardiac failure following shoulder dislocation.”

- [9] She again attested to an affidavit in terms of the provisions of section 212(4) of the Act confirming her findings and recording that she ascertained these facts by means of an examination requiring skill in biology, anatomy and pathology. She later attested to yet a further affidavit in terms of the provisions of section 212(4) in which she elaborated on the cause of death as recorded in the post-mortem report. She recorded that the injury to the shoulder following the accident led to damage to

the muscles of the arm which resulted in complications of the kidney and heart failure which ultimately caused the death. She concluded therefore that the injury was the cause of death.

- [10] At the trial the court a quo accepted that the cause of death had been properly established. In appeal before us, however, Mr Mtini, argued on behalf of the appellant, that where the appellant had expressly disputed that the deceased died as a result of injuries

sustained in the incident it cannot be said that handing in a statement in terms of section 212(4) of the Act is sufficient to

establish the cause of death beyond reasonable doubt. He has referred us to *S v MM 2012 (2) SACR 18 (SCA)*, a rape appeal, where Wallis JA at p. 24E-H stated:

“[15] As appears to be an increasing feature of cases such as these, the doctor's report was simply handed in by consent and the doctor was not called to give evidence. That practice is, generally speaking, to be deprecated. It means that there is no opportunity for the doctor to explain the frequently subtle complexities and nuances of the report; to clarify points of uncertainty and to amplify upon its

implications and the reasons for any opinions expressed in the report. That may make the difference between a conviction and an acquittal, or perhaps a conviction on a lesser charge. Depending on the areas where there is a lack of clarity, the lack of clarification may either benefit or prejudice an accused. Neither result is desirable. Magistrates and judges who are confronted with these reports, without explanation, do not have the requisite medical knowledge to flesh out their full implications. Unless therefore there can be no confusion, for example, in a case where the fact of rape is admitted and the only issue is one of identification of the perpetrator, it will generally be desirable for the doctor to give

evidence in support of his or her report.

[11] At the conclusion of the same judgment, however, Wallis JA stated at 28E-F:

“In principle, unless there is no issue about the fact of rape, the doctor should be called as a witness. Certainly, wherever the

implications of the doctor's observations are unclear, the doctor should be called to explain those observations and to guide the court in the correct inference to be drawn from them.”

[12] I agree entirely with the comments set out therein. In the case of *S v MM*, supra, however, the appellant had been convicted of rape. The doctor's report concluded merely that the complainant had been a victim of a sexual assault. He did not record a finding of rape. In the present matter Dr Hurst ascertained the cause of death as a fact with considerable clarity. Moreover, in the case of *S v MM*, supra, the report was not handed in under cover of an affidavit in terms of the provisions of section 212(4). It is therefore distinguishable from the present matter in these respects.

[13] The material portions of section 212(4)(a) for purposes of this appeal provide as follows:

“(4)(a) Whenever any fact established by any examination ... requiring any skill–

(i) in biology, ...

(iv) in anatomy ...;

(v) ... in any branch of pathology ...

is relevant to the issue at criminal proceedings, a document purporting to be an affidavit made by a person who in that affidavit alleges that he or she is in the service of the State and that he/she has established such fact by means of such examination ... shall, upon its mere production at such proceedings be prima facie proof of such fact: ...”

[14] It is not contended that the provisions of section 212(4) have not been complied with and in the circumstances it must be accepted that the State had prima facie established the cause of death upon handing in the findings of Dr Hurst in terms of the provisions of section 212(4). No evidence was led which may serve to contradict her findings.

- [15] Mr Mtini argues, however, that her reasoning and findings could have been scrutinised under cross-examination and the court would have been in a much better position to pronounce upon the legal cause of death had the doctor been called. He submits that the doctor could have been questioned about why the deceased was at first released from hospital only for him to be later readmitted with more severe symptoms. The possibility of other causes for the deceased's kidney and heart failure, so it is argued, could also have been explored. All of this is of course true.
- [16] In *S v Van der Sand* 1997 (2) SACR 116 (W), however, the constitutionality of the provisions of section 212(4) came under scrutiny. The matter concerned an accused charged of driving with a blood alcohol content in excess of the permitted limit under section 122(2) of the Road Traffic Act, 29 of 1989. Counsel argued that in the case of section 212(4) the evidence is often not of a formal nature and that the accused's right to cross-examine may not be subjected to the discretion of the court as is done in section 212(12) of the Act. Counsel emphasised that the fact of blood alcohol content in such a charge is not a peripheral matter but it is an issue which stands at the centre of the charge. Van Dijkhorst J acknowledged the correctness of the latter statement and proceeded to state at 132h-i:
- "... but I fail to see how a trial can be regarded as unfair in which the accused, upon being presented (in advance upon request, as is now practice) with the affidavit or certificate, may either request that the deponent be subpoenaed under s 212(12) or do it himself. The debility that one may not cross-examine one's own witness will not apply in the former case and should not apply in the latter. It remains a State witness."*
- [17] In the present case the appellant, despite being legally represented, did not request that the doctor be subpoenaed and called to testify in terms of the provisions of section 212(12) nor did he himself subpoena the doctor in order to cross-examine her and clarify these issues. On the contrary, in the present matter the State applied for a postponement in order to call the doctor to testify. The appellant resisted the postponement and argued, inter alia, that the evidence of the doctor could not assist the resolution of the matter.
- [18] In all the circumstances the magistrate correctly held that the State had established the cause of death and its link to the accident and to the extent that the appellant may have wished, through his legal representatives, to have cross-examined the doctor they have only themselves to blame for their failure to do so.
- [19] I turn to consider the negligence of the appellant.
- [20] The appellant testified, as I recorded earlier, that the incident happened late at night. It appears from his evidence that there was a floodlight situated some distance away against the wall of a building, however, the light emitted from the floodlight was obscured by a large pepper tree and accordingly the appellant was unable to see clearly in the darkness. The rope between the vehicles, the appellant says, was approximately 40 metres long extending from the rear of Le Roux's car to the front of the bakkie. When the attempt to jumpstart the engine of the bakkie was abandoned, the appellant says that he instructed the deceased and

others to untie the rope. They proceeded to do so and the appellant says that he saw some of them moving to the rear of Le Roux's car in order to untie the rope. There were two people at the car and two at the bakkie and accordingly he felt that it was not necessary for him to get out of the bakkie to assist in untying the rope. He remained seated in the bakkie and he says that he wanted to see if the vehicle would start and therefore he turned the key. When the engine started he put the bakkie in reverse and proceeded to reverse. He concedes that he could not see anybody at that time and he did not notice whether the rope had been untied or not. He had, however, instructed them to proceed to untie the rope and he accepts that they must have been behind the car. Although the issue was never canvassed in cross-examination it is clear that the appellant did not turn on the headlights of the bakkie in order to see what had happened to the persons behind the car before reversing.

- [21] The thrust of the appellant's defence and the argument presented to us is that it was put to various State witnesses during cross-examination that the appellant would testify that "someone", the appellant thinks perhaps the deceased, shouted "Right, stoot, maar terug". He accordingly thought that it was safe to do so. None of the State witnesses were able to confirm an utterance of this nature neither were they able to deny it. When the appellant testified in his own defence, he did not allude to such a statement at all in his evidence in chief. I shall nevertheless accept, in the appellant's favour that somebody had shouted words to that effect. I do not think that this can avail the appellant.
- [22] As set out earlier the appellant himself had instructed persons to untie the rope. He accordingly knew that they had proceeded to the rear end of Le Roux's car. On his own evidence when the ignition of the bakkie started he could not see where these people were but he acknowledges that they must have been behind Le Roux's car because he had asked them to untie the rope and he had seen persons proceed to the car to do so. In these circumstances I think that the reasonable man would have foreseen the possibility that the deceased or others may be engaged behind Le Roux's car and may be injured if the vehicle were pulled back. The reasonable man in such circumstances would have ascertained whether the persons whom he had sent to untie the rope were safe before he proceeded to reverse the bakkie. He would have turned on the headlights of the bakkie or would have alighted from the bakkie in order to ascertain that it was safe for him to reverse. This, the appellant failed to do. The magistrate therefore correctly held that he had been negligent. In the circumstances the appeal must fail.

[23] In the result, the appeal is dismissed.

J W EKSTEEN

JUDGE OF THE HIGH COURT

REVELAS J:

I agree. It is so ordered.

E REVELAS

Appearances:

For Appellant: Mr O Mtini instructed by Justice Centre, Grahamstown

For Respondent: Adv S Mgenge instructed by National Director of Public Prosecution,
Grahamstown

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