REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: A10/2014

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

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SIGNATURE **DATE**

In the matter between:

PAULOS SKHUMBUZO MOSOLOPANE **APPELANT**

And

THE STATE **RESPONDENT**

JUDGMENT

Coram Nicholls, Monama, JJ and Reyneke AJ:

[1] The appellant, Paulos Skhumbuzo Mosolopane, 33 years old at time of sentencing, was arraigned in this court on one charge of murder, one charge of attempted rape and one charge of assault with intention to do grievous bodily harm. All of these charges have to be read together with the provisions of sections 51 and 52 of the Criminal Law Amendment Act 105 of 1997. The appellant was convicted as charged and sentenced on 2 September 2011 as follows:

a) Count 1: Murder: 18 years imprisonment;
b) Count 2: Attempted Rape: 5 years imprisonment; and
c) Count 3: Assault with intention to do grievous bodily harm: 2 years imprisonment.

[2] It was ordered that the sentences on counts 1 and 2 should run concurrently. The effective term of direct imprisonment is twenty years.

[3] On 17 February 2012 the trial court granted leave to appeal to the Full Court of the South Gauteng High Court against the conviction and sentence on all three counts.

[4] The charges against the appellant arose from an incident that happened on 1 January 2011. The deceased is the mother of the complaint, Wandile Makgate. The deceased, the complainant and the accused, all three in their own separate ways, celebrated and drank the old year away. Early New Year's morning the complainant arrived at his home which he shared with his mother. He found the appellant in the bedroom of the deceased. The deceased was motionless, lying down with her short denim pants partially pulled down and her mouth foaming. The appellant was in the process of standing up from the deceased, pulling up his pants. The complainant pulled the appellant away from the deceased and a struggle ensued. during which the complainant got hold of an ashtray. He hit the appellant on the head. The fight continued until they ended up outside. While they were struggling the appellant pinned the complainant to the ground, throttled him with his hands and applied pressure to his neck. A tenant on the same premises, Twice Bogatsu, arrived. She called her husband, Samuel Mjali. Mjali pulled the complainant from the appellant. The complainant grabbed the appellant and slapped him. Mjali separated them where after the appellant ran away.

[5] Dr Klepp, who performed the post-mortem, was not informed about the circumstances at time of death. During the post-mortem it was discovered that the deceased had an underlying ischaemic disease. She had found that the deceased died of pathology of her heart. She testified that the deceased, who was more susceptible to pressure applied to the neck, could die instantly as a result of pressure applied to her neck by the appellant with his hands.

[6] The appellant testified that he went to the deceased to report to that his girlfriend was going to press charges against the complainant in regards to an incident which happened earlier that morning. On his arrival at the house he knocked and was invited to enter into the dining room. The deceased turned her back to him, while he was talking to her. She then hit him with something on his head, causing him to bleed. He cannot identify the object as it happened unexpectedly, although the visibility was good; the sun already shining. The deceased jumped on the deceased and throttled her. They both felt into the bedroom. The deceased felt on her back and he felt on his side. He was holding on to her neck all the time, adding pressure. They fought until the complainant entered. The complainant kicked him. While he and the complainant were fighting in the bedroom Mr Mjali entered and separated them. The accused denied the allegations that he was throttling the complainant, that the complainant hit him on the head with an ashtray, that he and complainant were fighting outside and that he was pulling up his pants. He cannot explain how it came that the pants of the deceased were lowered. He had never met Mr Mjali before.

A ground of appeal is that the trial court misdirected himself by rejecting the version of the appellant. (footnote: Appellant;s Heads of argument, par 7)

The approach to be adopted by a court of appeal in dealing with the factual findings of a trial court is found in *R v Dhlumayo and Another 1948 (2) SA 677 (A).* A court of appeal will not disturb the factual finding of a trial court, unless there was a misdirection. Where there has been no misdirection on fact by the trial judge, the presumption is that his conclusion is correct. The appeal court will only reverse it where it is convinced that it is wrong. If the appeal court is merely left in doubt as to the correctness of the conclusion, then it will uphold it.

There is no reason to find that the trial court was misdirected in regards to the factual findings or in rejecting the appellant's version as false beyond reasonable doubt.

A further ground of appeal is that the version proffered by the state does not postulate the only reasonable inference that could be drawn from the facts, but that the version of the appellant in respect of all three counts postulates a reasonable alternative. (footnote Appellant's heads of argument, par 7)) In regards to the charge of attempted rape it was contended on behalf of the appellant that the proven facts could also lead to the inference that the deceased had already passed away at the stage when the accused had attempted to have forced sexual intercourse. The argument goes that such a situation leaves no room for a conviction on attempted rape, but rather calls for a finding of necrophilia.

The trial court found it to be common cause that the deceased was lying motionless when the complainant had found her. (footnote: Judgment, par 4.2) In this regard, the complainant testified that he had found his mother as depicted on photo 13, in a lying position. (footnote P 28 line 23) The appellant's version in this regard appears from his answers in cross-examination:

"What were you doing at the point when Wandile came into the room or you noticed him? --- Wandile came in and kicked me on my chest. At that time the deceased was fighting whilst I was throttling her. … So when Wandile came into the room his mother according to you was still alive, because she was still fighting with you. ---- Correct." P123 line 3-8

In *S v Reddy and Others 1996 (2) SACR 1 (A)* the following was said regarding the assessment of circumstantial evidence:

'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 often-quoted *dictum* in *R v Blom 1939 AD 188* at 202-3, 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 form them save the one sought to be drawn." '

The possibilities that could support other inferences to be drawn from the circumstantial evidence were never put to any of the witnesses. The accused did not tender any plausible explanation for the lowered pants of the deceased or the compromising position in which he was found. The finding "that the accused had pulled down the pants of the deceased, thrown her to the ground, lowered his own pants and was mounting her when he was interrupted by Wandile" (Footnote Judgment, p 155, line 19-21)) is consistent with all the proved facts.

A further ground of appeal is that, if the appellant's version is found to be correct, in the absence of *dolus directus*, a competent verdict to the one of murder should have followed; taking into account the pre-existent heart condition. (footnote Appellant's heads of argument, par 14, line 4)) Counsel for appellant conceded that in accepting the state's version as factual correct, the appellant had, at the very least, *dolus eventualis.*

The appellant could only be convicted of murder if he had foreseen the possibility of the deceased's death. The reasonable man in the same circumstances would have foreseen that the force he was applying to the neck of the deceased would have caused her death. The appellant testified that the deceased was trying desperately to free herself as he was throttling her and that he wanted her to surrender. (FOOtnoe)

In order to find liability, there should be a factual causation or *nexus* between the act of strangulation and the cause of death. The determination of a factual causal connection is based on the *conditio sine qua non* test. The question for decision is what caused the death.

[15] Unknown to the appellant and even the complainant, the deceased had a potentially dangerous pre- condition of the heart. Dr Klepp testified that a person with her condition was more susceptible to pressure being applied to her neck. In other words, it would take less pressure to kill the deceased than it would a normal person with a normal heart.

[16] It is common cause that the appellant indeed applied force to the neck of the deceased. The strangulation caused her death. It has long been the law that those who use violence on other people must take their victims as they find them. I am

satisfied that there is a legal causation between the act of the accused and the consequent death of the deceased.

[17]

forward might be true.'

(b) That the appellant was acting in private defence; and

(c) That the sentence should be re-visited on the grounds that not all substantial and compelling circumstances were taken into account, with specific reference to the pre-existing heart condition of the deceased.

[8]

[10] The trial court quoted *S v Van der Meyden 1999 (1) SACR 447 (WLD) at 448*, referring to the criminal standard of proof, to wit:

'The onus of proof in a criminal case is discharged by the state if the evidence establishes the guilt of the accused beyond reasonable doubt. The corollary is that he is entitled to be acquitted it it is reasonably possible that he may be innocent. In order to convict, the evidence must establish the guilt of the accused beyond reasonable doubt, which will be so only if there is at the same time no reasonably possibility that an innocent explanation which] The appellant's version that the complainant and the deceased attacked him, thus he was acting in private defence, was found to be inherently improbable. The mere denial of the charge of attempted rape was rejected. In order to test the finding of the trail court, it is necessary to give a summary of the appelant's version. has been put

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[14]

[18] In respect of count 3 and the private defence, the trial court found that the accused was the aggressor and that the complainant was acting in defence of his mother who was being assailed by the accused. It was found that the accused had no legal interest to protect and that the attack on the complainant was unlawful and intentional assault. There is no reason to depart from the above finding.

[19] The remaining matter is concerned with the sentence. In *S v Pieters 1987 (3) SA 717 (A),* at 734 D-F the decisive question facing a court of appeal on sentence was formulated as 'whether it was convinced that the court, which had imposed the sentence being adjudicated upon, had exercised its discretion to do so unreasonably. If so, the court of appeal was entitled to interfere, and, if no, not. … (E)ven if the court of appeal is of the view that it would have imposed a much lighter sentence, it would not be free to interfere if it were not convinced that the court below could not reasonably have imposed the sentence which it determined."

[20] The trial court did not specifically mention that the heart condition of the deceased was taken into account as a substantial and compelling factor in terms of S51 of the Criminal Law Amendment Act, Act 105 of 1997. This factor was extensively canvassed in evidence. While this condition certainly may impact on a sentence, a court of appeal will not lightly depart from specified sentences for flimsy reasons which could not withstand scrutiny. *(S v Malgas 2001 (1) SACR 469 (SCA) at 4S70I).*

[21] The trial court properly assessed the personal circumstances of the appellant. It had regard to the guides and principles as stated, inter alia, in *Malgas (supra), S v Dodo 2001 (C) SACR 594 (CC), S v Nkomo 2006 (2) SACR 439 (SCA) and S v Vilakazi 2009 (1) 552 (SCA).* The sentenced imposed does not induce a sense of shock. I am not convinced that the trial court exercised its discretion in imposing a proper sentence unreasonably.

ORDER

In the result, I make the following order: The conviction and sentence are confirmed. The appeal is dismissed.

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C REYNEKE

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

I agree.

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CE NICHOLLS

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

I agree.

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RE MONAMA

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

Appearances

Counsel for the Applicant: Adv. Haram
Instructed by: Leagal Aid SA

Counsel for the Respondent: Adv. T. Byker
Instructed by: Director of Public Prosecutions

Date of Hearing: 4 June 2014

Date of Judgment: 25 June 2014