REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

CASE NO: A10/2021

[1] REPORTABLE: ~~YES~~ / NO
[2] OF INTEREST TO OTHER JUDGES:
[3] REVISED.

13/8/2021

Date: 20/8/2021 **T MOOSA**

In the matter between:

NDLOVU, LINDA Appellant

And

THE STATE Respondent

JUDGEMENT

CORAM: MONAMA, J and MOOSA AJ

MOOSA AJ (MONAMA, J concurring)

1. This is an appeal against conviction and sentence. The appellant was tried and convicted in the Regional Court, sitting at Protea, on the charges of attempted

murder and murder as defined in Section 51(2) of the Criminal Law Amendment Act 105 of 1997 and Schedule 2 of the Criminal Law Amendment Act 105 of 1997.

2. The accused was found guilty of unlawfully and intentionally attempting to kill Zwelithini Nzimande (Nzimande) by stabbing him with a knife and unlawfully and intentionally killing Doctor Mondli Noyi, (the deceased) by stabbing him with an unknown object/ or knife on the 18 February 2017 near Nancefield Hostel in Gauteng.

3. The appellant was legally represented and the magistrate was assisted during the trial by two assessors in terms of section 93ter (1) of the Magistrates Court Acts 32 of 1944.

4. The appellant entered a plea of not guilty and exercised his right to remain silent.

5. After the closure of the State's case on 1 February, the appellant brought an application for his discharge in terms of section 174 of the Criminal Procedure Act 51 of 1977, this application was dismissed.

6. The Appellant was convicted as charged on 7 March 2018 as follows:

   6.1 Count 1: 3 years imprisonment
   6.2 Count 2: 12 years imprisonment

7. The appellant successfully lodged an application for leave to appeal against his conviction and sentence on 4 September 2020 this included an application for condonation for the late filing of the application for leave.

ISSUES IN DISPUTE AD CONVICTION

8. The appellant raised two issues which must be decided on. The first is whether the Court can rely on the evidence of as single witness, Mr. Nzimande on the events which occurred in the shack with regards to his stabbing. While the second is whether the court can rely on the hearsay evidence of Mr. Nzimande as regarding the words told to him by the deceased.

The Single Witness

9. Section 208 of the CPA reads that any accused can be convicted of any offence on the single evidence of a competent witness.

10. The court must have regard to the cautionary rules when considering the evidence of a single witness.

The trial judge will weigh his evidence, will consider its merits and demerits and, having done so, will decide whether it is trustworthy and whether despite the fact that there are shortcomings or defects or contradictions in the testimony, he is satisfied that the truth has been told. **S v Sauls and Others** [1]

Appellant 's evidence:

11. Mr. Nzimande contradicted his evidence in cross-examination. He stated that there had never been an altercation with the appellant, after having previously testified that he had been stabbed on his arm, by the Appellant, the previous August.[2]

12. The appellant denies that he entered the shack with a knife that he stabbed Mr. Nzimande, on his version Mr. Nzimande scratched his finger with the knife when the appellant tried to take the knife from him and it fell on the road[3]

[1] S vs Sauls and others 1981 (3) SA 172 (a) at 180 E-H

[2] Record: page 36, lines 15-1 - page 62, lines 9-14

3 Record: page 102, lines 16-23

13. MS Dlamini testified that the appellant entered the shack with a knife at the stage when they were trying to contact the ambulance for Mroza. She then fled the premises.[4]

14. The incident occurred between 20h30 and 21h00 in the shack the size of a single garage. No evidence was lead on the visibility inside the shack.[5]

15. The shack was a smallish room about four by five meters and there were between ten (10) perhaps twenty (20) people present in and outside the room.[6]

16. The appellant submitted that the state did not prove its case beyond a reasonable doubt on count 1.

Respondent's evidence:

17. Mr. Nzimande's contradiction was not considered by the Court in its judgement to render his evidence non-compliant with the cautionary rule nor was it found to be a reason to doubt his credibility. [7]

18. The Court a quo found Mr. Nzimande's evidence to be, 'satisfactory in every material respect'. [8]

19. It was further questioned how 16/20 people were in the shack and, how no one could have seen the stabbing?

20. Contradictions per se do not lead to the rejection of a witness evidence. Nicholas J observed that they may simply indicative of an error. **S v Oosthuizen** [9]

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[4] Record page 72, lines 3-5, 14
[5] Record page 55, lines 17-20, page 105, lines 2-20
[6] (C 101- line 13,14)
[7] Record: page 133, line 21
[8] Record page 135, line 2
[9] S v Oosthuizen 1982 (3) SA 571 at 576 – B-C

21. Not every error made by a witness affects his credibility. In each case the trier of a fact must make an evaluation, taking into account such matters as the nature of the contradictions, their number and importance and their bearing on other parts of the witness' evidence. **S v Oosthuizen**[10] , **S v Mkohle**[11] and **S v Pretorius**[12]

22. Contradictory versions must be considered and evaluated on a holistic basis. The circumstances under which the versions made, the proven reasons for contractions with regard to the reliability and credibility of the witness, the question whether the witness was given a sufficient opportunity to explain the contradictions - and the quality of the explanations - and the connection between contradictions and the rest of the witness' evidence, amongst other factors, are to be taken into consideration and weighed up. **S v Jochems**[13]

Hearsay Evidence

Appellant's evidence:

23. The issue here is whether the court may rely in the hearsay evidence presented by Mr. Nzimande pertaining to the fact that the deceased, told him inside the shack as he was exiting that, "Willie" has stabbed him and that he needed help.[14]

24. According to the appellant this evidence is inadmissible and no one had witnessed the stabbing of the deceased. Further Mr. Nzimande's evidence, that he turned around and saw the appellant following the deceased with a knife and

[10] S v Oosthuizen 1982 (3) SA 571 at 576 – G - H
[11] S v Mkhole 1990(1) SACR 95 (A) at 98f-g
[12] S v Pretorius 2014(2) SACR 314 (SCA) at para 27
[13] S v Jochems 1991 SACR 208 (A) at 211f-j
[14] Record: page 44, lines 22-25

saw blood on the deceased again amounted to the evidence of a single witness and should therefore be considered with caution.[15]

25. The appellant in its heads of argument emphasized that there was no evidence led as to the visibility inside the shack at the time when Mr. Nzimande became aware that the deceased had been stabbed.

26. Further that there were 7 (seven) persons attempting to exit the shack at the time that the deceased was stabbed.[16]

27. It is on the aforementioned issues that the appellant submitted the court a quo had erred in its finding that the appellant stabbed the deceased. [17]

Respondent's evidence:

28. The court a quo dealt with hearsay evidence as follows: "The complainant made a spontaneous exclamation, it is not allowed for the truth of the contents thereof, he said, 'Willie stabbed me.' But from that exclamation, coupled with the fact that the accused was the only person behind him in possession of a knife, there is only one possible inference that can be drawn and that is that the accused stabbed him." [18]

29. The respondent submitted that the reasoning of the court a quo in this regard cannot be faulted. The Court did not accept this exclamation as the truth, but used the fact as a factor to be considered together with all the other evidence in decoding whether by way of inferential reasoning it can be accepted that the appellant stabbed the deceased.[19]

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[15] Record: page 44, lines 22-25 and page 45, lines 1-8

[16] Record: page 44, line 14

[17] Page 9. 9.26 A HOA)

[18] Page 12, 36 – R HOA)

[19] Page 12, 37 -R HOA)

30. The following prerequisites were set to establish whether the state has proved its case beyond reasonable doubt where the accused is implicated in the commission of a crime by means of circumstantial evidence:

30.1 The inference sought to be drawn must be consistent with all the proved facts. If it is not, the inference cannot be drawn.

30.2 The proved 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 a doubt whether the inference sought to be drawn is correct. **S v Blom** [20]

31. "I bear in mind in this regard that circumstantial evidence should never be approached in a piecemeal fashion. The court should not 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." **Lachman v S.**[21]

32. Justice Navsa held: "A conspectus of all the evidence is required. Evidence that is reliable should be weighed alongside such evidence as may found to be false. Independently verifiable evidence, if any, should be weighed to see if it supports any of the evidence tendered. In considering whether evidence is reliable, the quality of that evidence must of necessity be evaluated, as must corroborative evidence, if any. Evidence, of course, must be evaluated against the onus on any particular issue or in respect of the case in its entirety. The compartmentalized and fragmented approach of the magistrate is illogical and wrong." **S v Trainor.**[22]

[20] S v Blom 1939 (AD) 188
[21] Lachman v S 2010 (3) ALL SA 483 (SCA)
[22] S v Trainor 2003 (1) SACR 35 (SCA)

33. The respondent submitted that the state did prove its case against the appellant beyond reasonable doubt and that there is no reasonable provision for the inference that the deceased was stabbed by anyone else without it being seen.[23]

34. It is worth noting at this stage that the State must prove its case beyond reasonable doubt and if the Appellant's version is only reasonably possibly true, he is entitled to his acquittal. **S v Trickett.**[24]

35. The Court must also apply its mind not only to the merits or demerits of the State and the defence witnesses but also the probabilities of the case. **S v Singh**[25] , **S v Guess** [26], **S v Mhlongo**[27]

36. In evaluating the evidence presented, I am of the view that the evidence in the matter cannot be decided in a piecemeal fashion but all the evidence must be considered in totality.

37. The appellant has provided no factual evidence why this court should deviate from the reasoning of the court a quo, the circumstantial evidence outlined above by the respondent is sufficient to establish the guilt of the appellant beyond reasonable doubt. I find no misdirection by the court a quo for relying on this evidence to convict the appellant. In assessing the evidence in its totality, in my view the State has discharged the onus of proving that the appellant had committed attempted murder and murder as defined in Section 51(2) of the Criminal Law Amendment Act 105 of 1997 and Schedule 2 of the Criminal Law Amendment Act 105 of 1997.

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[23] Page 17, 48,49 – R HOA
[24] S v Trickett 1973 (3) SA 526 (T)
[25] S v Singh 1975 (1) SA 227 (N)

[26] S V Guess 1976 (4) SA 715 (A)
[27] S V Mhlongo 1991 (2) SACR 207 (A)

38. In the premise, the appeal against conviction stands to fail.

39. I now turn to the question of sentence. The imposition of sentence is in the discretion of the trial court and the court of appeal must not interfere with the discretion for frivolous reasons. **S v Rabie, S v De Oliveira, S v Kgosimore** [28]

40. The court a quo considered the triad in respect of sentence to wit, the personal circumstances of the appellant, the seriousness of the crime and the interests of the community.[29]

41. In this matter the Minimum Sentence Act 105 of 1997 finds application as (Count 2). The specified sentences are not to be departed from lightly and for flimsy reasons. The Legislature has however, deliberately left it to the courts to decide whether the circumstances of any particular case calls for a departure from the prescribed sentence. **S v Malgas** [30]

42. In this matter the court a quo did deviate from the prescribed minimum sentence and imposed a sentence of 12 years imprisonment on count 2 instead of the prescribed 15 years imprisonment.

43. The effective sentence being of 15-year imprisonment if the 3 years imprisonment on count 1 is added.

44. The court a quo considered all the aggravating and mitigating factors when it considered an appropriate and just sentence and the sentence imposed by the court a quo does not induce a sense of shock and is not disproportionate to all

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[28] S v Rabie 1975 (2) SA 537 A at 857 D-E
S v De Oliveira 1993 (2) SACR 59 A at 667
S v Kgosimore 1999 (2) SACR 238 (SCA)
[29] Record: page 143 line 2 – page 145 line 20
[30] S v Malgas 2001 (1) SACR 469 (SCA)

the factors considered. I align myself with the reasoning of the court a quo. The appeal against sentence stands to be dismissed.

45. In the result, I propose the following order be made:

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

2. The conviction for attempted murder and murder is confirmed

3. The 15 years imprisonment in respect of the appellant is confirmed

T MOOSA AJ
ACTING JUDGE OF THE HIGH COURT

I agree and it is so ordered

MONAMA J
JUDGE OF THE HIGH COURT

COUNSEL FOR THE APPELLANT:

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COUNSEL FOR THE RESPONDENT:
D Barnard – Senior State Advocate
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Date of hearing: 10 August 2021

Date of Judgement: 13 August 2021