



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

DELETE WHICHEVER IS NOT APPLICABLE

- (1) REPORTABLE: **NO**
- (2) OF INTEREST TO OTHER JUDGES: **NO**
- (3) REVISED: **NO**

Date: **14 JUNE 2022** Signature:

Case Number: A141/2021

In the matter between:

KGAUGELO MATHABATHA

Appellant

and

THE STATE

Respondent

JUDGMENT

NYATHI J

Introduction

- [1] The appellant was convicted of murder read with the provisions of Section 51 (2) of Criminal Law Amendment Act 105 of 1997 and kidnapping, by the Regional Court sitting in Cullinan on the 27 August 2019.
- [2] On the 29 October 2019 she was sentenced to 15 years' imprisonment for both counts. Both counts were taken as one for the purposes of sentencing.
- [3] She had been legally represented during the trial in which she was tried with accused 1.
- [4] The appellant then sought leave to appeal against the conviction only. This was granted by the trial court on the 28 October 2020. She is now before this court as a result.

Common cause facts

- [5] The following background facts are common cause and were not denied:
- 5.1 The appellant and the deceased used to have a love relationship and they cohabited.
- 5.2 Their relationship ended and the appellant moved in with accused 1.
- 5.3 On 2 September 2017, the appellant, accused 1 and a group of men went to the deceased's residence. They called the deceased since he was at his next door neighbour's house.
- 5.4 The deceased was assaulted and placed on the back of a bakkie. The deceased jumped off the bakkie when it was moving.
- 5.5 The bakkie stopped and the deceased was loaded on the back of the bakkie again and they continued assaulting the deceased.

- 5.6 The deceased was assaulted with dangerous items namely, an axe or a pick, a spade and fists.
- 5.7 The deceased was tied with a rope and dumped at a dumping site.
- 5.8 The deceased was never seen or heard of again.
- 5.9 The family of the deceased searched for him at the mortuaries, hospitals, dumping site and surrounding villages without success.
- 5.10 The deceased never defaulted on signing the register of correctional services since he was on parole prior to the day of the incident.
- 5.11 The family of the deceased also searched for the deceased through newspaper advertisements but deceased was never found.
- [6] The appellant now seeks to have the conviction set aside on the basis that:
- (a) She never participated in assaulting the deceased and dumping him at the dumping site even though she was present during the incident and,
 - (b) The State witnesses contradicted each other regarding how the deceased was assaulted.

Appellant's plea and plea explanation

- [7] Having pleaded not guilty, the appellant made a plea explanation in which she alleged that when she and the deceased parted, the latter had taken her two cellphones. On the fateful day of the murder, she and accused 1 had gone to the deceased's residence to collect the cellphones. They found the deceased drunk. She further alleged that the deceased insulted them and accused 1's friends picked him up and placed him at the back of a van. Appellant also got inside the van. Deceased got out of the van and assaulted accused 1 with an axe. Accused 1 and his friends then assaulted the deceased with open hands. They then placed the deceased back in the van and accused 1 and his friends continued assaulting the deceased. They then took the deceased to the dumping side and left him there.

The State's case

- [8] Six witnesses testified for the State. Two witnesses, namely **Elvis Moakamela** and **Shoke Mogamela** testified about the assault and the identity of the assailants. The remainder of the State witnesses dealt with the search for the deceased.
- [9] Elvis Moakamela testified that on the day of the incident, he was in company of the deceased at Charmaine's home drinking liquor. A vehicle came and stopped in front of deceased home and someone called the deceased. He saw 6 people (5 men and the appellant) fighting with the deceased. He then saw 6 people putting the deceased in a van. The deceased jumped out of the van when it was driving away. One of Accused 1's friends tried to hit the deceased with an axe but the deceased managed to disarm the man and hit him with that axe. All the attackers got out of the bakkie and assaulted the deceased. The appellant assaulted the deceased with an iron bar. The deceased was also assaulted with a spade but did not see who assaulted the deceased with a spade. They then placed him in the bakkie again and left with him. During the attack, the deceased was crying and asked for help.
- [10] Shoke Mogamela testified that on 2 September 2017, she was at her sister's place. A white bakkie arrived with 6 to 7 men and a female. One of the men called the deceased. She saw them wrestling. They took the deceased and placed him at the back of the bakkie. At some stage the deceased jumped out of the bakkie. One of the men also jumped out of the bakkie. The appellant was in possession of a spade and assaulted the deceased with it all over his body. She also saw a pick, rope, rake and spades at the back of the bakkie.

Analysis of the evidence

[11] There was substantial corroboration of the fact that the appellant was present at the scene and took part in the assault that was inflicted upon the deceased.

[12] The contradictions regarding the tool or instrument she used to strike at the deceased is not material. Elvis testified that the appellant used an iron bar to hit the deceased while Shoke said she had used a spade. The fact of the matter is that an assortment of garden implements was seen at the scene and were used by some of the assailants during the commotion. One has to have regard to what the court held in *S v Oosthuizen 1982 (3) SA 571 (T)* where it was held that:

“Contradictions per se do not lead to rejection of a witness’ evidence. Not every error made by a witness affects his credibility, in each case the trier of facts has to take into account such matters as the nature of the contradictions, their number and importance, and their bearing on other parts of the witness’ evidence.”

[13] In *S v Mafaladiso 2003 (1) SACR 583 (SCA)* at 593i -594h it was held that not every error by a witness and not every contradiction or deviation affects the credibility of the witness. Contradictory versions must be considered and evaluated on a holistic basis.

[14] There is no cogent reason advanced for this court to interfere with the trial court’s findings. The approach by an appeal court has long been settled in our law. In *S v Naidoo & Others 2003 (1) SACR 347 (SCA)* the Supreme court of Appeal stated that:

“a court of appeal does not overturn a trial court's findings of fact unless they are shown to be vitiated by material misdirection or are shown by the record to be wrong” (own emphasis).

[15] I accordingly come to the conclusion that this appeal cannot succeed and propose the following order:

The appeal against conviction is dismissed.

J.S. NYATHI
JUDGE OF THE HIGH COURT

I agree.

C.J. VAN DER WESTHUIZEN
JUDGE OF THE HIGH COURT

CASE NUMBER: A141/2021

HEARD ON: 1 June 2022

FOR THE APPELLANT: MR. M.B. KGAGARA

INSTRUCTED BY: Legal Aid South Africa; Pretoria Justice Centre

E-mail: BishopK@legal-aid.co.za

FOR THE RESPONDENT: ADV. L.A. MORE

INSTRUCTED BY: Director of Public Prosecutions

DATE OF JUDGMENT: 13 JUNE 2022