IN THE HIGH COURT OF SOUTH AFRICA

(LIMPOPO PROVINCIAL DIVISION, POLOKWANE)

(1) REPORTABLE : YES / NO

(2) INTEREST TO THE JUDGES : YES / NO

(3) REVISED

10/05/17
DATE

SIGNATURE

CASE NO: A083/2015

In the matter between:

MKUNDEYI SAMUEL MULAUDZI **APPELLANT**

and

THE STATE **RESPONDENT**

JUDGMENT

KGANYAGO J

[1] This appeal is directed against both conviction and sentence.

The appellant was convicted by the Regional Magistrate Court Giyani on one count of murder read with the provisions of Section 51(2) of the Criminal Law Amendment Act 105 of 1997. He was sentenced to 15 years imprisonment.

[2] The question which this court must determine is whether the appellant has been correctly convicted of the charge he was facing and also whether the sentence meted to him is appropriate.

[3] The background of the facts is as follows: On the night of the 2nd July 2007 the appellant came to the deceased homestead. He found the deceased and her daughter cooking beans. The deceased and the accused were in a love relationship. Later the deceased and the appellant went to another hut to go and sleep. The deceased daughter and her child also went to another hut to go and sleep.

[4] At about midnight the child of the deceased daughter started crying and whilst comforting the child to stop crying, she heard a voice of someone trying to talk but the voice was not coming out. She then fell asleep. In the morning she was woken up by one Lucky who is their neighbor. When she got out of her hut, she found the deceased lying at the door of her hut naked and only wearing her panty. On inspection of the deceased, she found that she was dead and there were some white foam coming from her mouth.

[5] According to the appellant, during the night of the 2nd July 2007, he went to bed with the deceased at her homestead. Whilst they were asleep, the deceased started coughing and also acting as if she was struggling to breath. The deceased then went outside the hut. He then went to knock at the door of the hut wherein the deceased daughter was sleeping in order to report the incident her, but there was no response. He thereafter decided to leave the deceased homestead as he was scared. He denies having killed the deceased.

[6] The trial court accepted the state version and rejected the version of the appellant. The appellant was found guilty as charged and sentenced to fifteen years imprisonment. In rejecting the appellant's version, the trial court relied on the appellant's warning statement and the deceased post mortem report. The appellant's warning statement was accepted as evidence after a trial within a trial was held. However, when the appeal was argued before this court, the appellant's warning statement and the deceased post mortem report did not form part of the record before this court. Also the full record of the trial within trial did not form part of the record before this court. This court was informed that the missing exhibits and full record of the trial within trial could not be found and were also unable to reconstruct it. From the transcribed record, it seems according to the post mortem report, the cause of the deceased death was strangulation.

[7] In this case, there is no eye witness and the state case was based on circumstantial evidence. There is nothing wrong in admitting circumstantial evidence. In some instances, circumstantial evidence is more convincing than direct evidence.

[8] In the case of **Jantjies v S (871/13) [2014] ZASCA 153** at paragraph 14 the court observed the following:

> *"It is common cause the crux of this matter is about drawing a reasonable inference from proved facts. (See **R v Blom 1939 AD 188 at 202-203** where **Watermeyer JA** observed that:*
>
> *In reasoning by inference there are two cardinal rules of logic which cannot be ignored:*
>
> *(1) The inference sought must be consistent with all the proved facts. If it is not, the inference cannot be drawn.*
>
> *(2) The proved facts should be such that they exclude every reasonable inference from them save 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".*

[9] In **Mahlalela v S (396/16) [2016] ZASCA 181** (28 November 2016) at paragraphs 15 and 16 the court observed that:

> *"[15] The difficulty is that proved facts envisaged in Blom are facts proved beyond reasonable doubt. Intermediate inferences, too, must be based on proved facts. Inferences may not be drawn from other inferences. See the article by **Nicholas AJA** in (E Khan (ed) Fiat Justitia Essays in memory of **Olive Deneys OD Schreiner (1983) at 312**.*

[16] Simply put, circumstantial evidence provides a basis from which the fact in dispute can be inferred. The salient question to be answered is whether the appellant was guilty of the crimes committed beyond reasonable doubt. All circumstantial evidence depends ultimately upon facts which are proved by direct evidence."

[10] In the present case, the common cause and proved facts are that on the night of the 2nd July 2007, the appellant went to sleep with the deceased who was his lover in a separate hut from that of the deceased daughters. It is also not in dispute that the deceased was found the following day dead next to the door of her hut naked wearing only her panty. When the deceased was found, the appellant has already left the deceased homestead. There is no one to shed light as what has happened in the deceased hut until the appellant left, except the appellant's version.

[11] According to the appellant, as they were sleeping, the deceased starting coughing and acted as if she was running short of breath. He went out of the hut they were sleeping in together with the deceased and went to knock at the door of the hut of the deceased daughter in order to report

the incident to her, but there was no response. As he was scared, he left the deceased homestead.

[12] However, according to the State the post mortem report state that the cause of the deceased death was strangulation. The State contends that as the appellant was the last person to be seen with the deceased, and the fact that the postmortem report state that the cause of death was strangulation, the appellant should be held responsible. That is one of the basis upon which the court *a quo* relied on in convicting the appellant. The postmortem report is now missing and this court is unable to satisfy itself that indeed the cause of death was strangulation.

[13] The trial court had also relied on the appellant warning statement in convicting the appellant. During the trial, the appellant has objected to the admissibly of his warning statement as evidence. The appellant's warning statement and the full record of the trial within trial are missing and does not form part of the record of the appeal. It is therefore difficult for this court to determine whether all the requirements for the admissibility of that statement have been met without full record of the trial within trial and the actual warning statement. However, even if the appellant's statement is missing, from what was read into record after the court has declared it admissible, it does not seem that the appellant

had admitted any guilt in his warning statement. In the warning statement he has stated the same version that the deceased started coughing and also looked as if she was struggling to breath. What the trial court has relied upon was the contradictions that occurred in his evidence under oath during the trial and what appeared in the warning statement.

[14] In S v Chabedi 2005 (1) SACR 415 (SCA) at paragraphs 5 and 6 the court observed the following:

"[5] On appeal, the record of the proceedings in the trial court is of cardinal importance. After all, that record forms the whole basis of the rehearing by the Court of appeal. If the record is inadequate for a proper consideration of the appeal, it will as a rule, lead to the conviction and sentence being set aside. However, the requirement is that the record must be adequate for proper consideration of the appeal; not that it must be a perfect recordal of everything that was said at the trial. As has been pointed out in previous cases, records of proceedings are often still kept by hand, in which event a verbatim record is impossible (see eg, S v Collier 1976 (2) SA 378 (C) at 379A-D and S v S 1995 (2) SACR 420 (T) at 423b-f).

[6] The question whether the defects in a record are so serious that a proper consideration of the appeal is not possible, cannot be answered in abstract. It depends, inter alia, on the nature of the of the defects in the particular record and on the nature of the issues to be considered on appeal."

[15] In my view, the missing documents and the incomplete record of the trial within a trial are crucial in this matter and their absence renders the defect in the record to be serious. Without the postmortem report, and full record of the trial within trial, the adjudication of this appeal on the record as it stands will prejudice the appellant. The State contends that the cause of the deceased death was strangulation, whilst the appellant contends that it might have been due some illness. All these two versions could be clarified by the postmortem report. The appellant contends that he was not warned of his rights when he made a warning statement, whilst State contends that he was warned. All these two versions could be clarified by the actual warning statement and the full record of the trial within trial.

[16] As stated in Mahlalela's case supra, circumstantial evidence provides the basis from which the facts in dispute can be inferred. Inferences must still be drawn from proved facts. It is trite that there is no duty on an accused person to tender any evidence, but once he/she decides to testify, what the court must determine is whether the version presented is reasonably possibly true. The court does not have to be convinced that every detail of an accused version is true. The test to be applied in any particular case depends upon the nature of the evidence which the

court has before it. Some of the evidence might be found to be false, some of it might be found to be unreliable, and some of it might be found to be only possibly false or unreliable, but none of it may simply be ignored (See **S v Meyden 1999(1) SACR 447(W).**

[17] In the present case the inference drawn by the court *a qou* was based more on the contradictions on the appellant testimony and what he has stated in his warning statement. However, what is more disturbing in this case, is the role which the trial Magistrate has played. The trial Magistrate has clearly taken the role of the prosecution. There is nothing wrong with the court asking clarifying questions. The purpose of questioning by the court of a witness is to elucidate any points that may still be obscure after examination by the parties. However that should not be in the form of cross examination and the presiding officer should also not enter the arena. In this case it is clear from the record that the presiding magistrate was cross examining the witnesses and has therefore entered the arena.

[18] In the case of **Maliga v The State (543/13) [2014] ZASCA 161** (01 October 2014) on paragraph 19 the court observed that:

> *"Section 35(3) of the Constitution compels presiding officers and indeed all officers of court to play a role during the course of a trial in order to achieve a fair and just outcome. As was said in Hepworth at 277(supra) a criminal trial is not a game where one side is entitled to claim the benefit of any omission or mistake made by the other side, and a judge's position in a criminal trial is not merely that of an umpire to see that the rules of the game are observed. A judge's note is to see that justice is done."*

[19] In the present case the presiding Magistrate was not merely asking clarying questions but has taken the role of the prosecution. It was clear that the presiding Magistrate was supplementing the evidence of the state in order to prove the guilt of the appellant. In my view, the way the trial Magistrate was questioning the witnesses and the appellant, has compromised his objectivity. He was eliciting answers that would prove the guilt of the appellant having realized that the state has failed to do so. Counsel for the respondent has conceded that the presiding Magistrate had taken the role of the prosecution.

[20] Consequently in my view, the way the presiding magistrate has handled the trial, has resulted in the appellant not receiving a fair trial as

enshrined by Section 35 of the Constitution. The conviction therefore falls to be set aside. It follows that the sentence should also be set aside.

[21] Counsel for the respondent is of the view that this matter should be referred back to the trial court to start ***de novo***. The appellant was sentenced on the 13th July 2010 for fifteen years. He has already served almost half of his sentence. In my view, if the matter is referred back to the trial court to start *de novo*, it will be prejudicial to the appellant. It is the therefore, not in the interest of justice to refer this matter back to the court *a quo* to start ***de novo.***

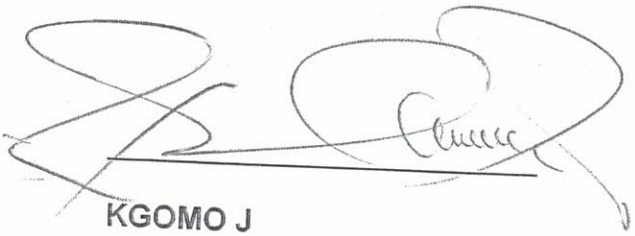
[20] In the premises, the appeal is upheld.

[21] The following order is proposed:-

21.1. The appeal is upheld and the conviction and sentence are set aside.

KGANYAGO J
JUDGE OF THE HIGH COURT OF SOUTH AFRICA LIMPOPO PROVINCIAL DIVISION, POLOKWANE

I concur.



KGOMO J
JUDGE OF THE HIGH COURT OF SOUTH AFRICA LIMPOPO PROVINCIAL DIVISION, POLOKWANE