



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable
Case No: 459/15

In the matter between:

AVHAPFANI DANIEL KHAVHADI

FIRST APPELLANT

RUDZANI ELISAH SIGOVHO

SECOND APPELLANT

MASHUDU JOYCE MUDAU

THIRD APPELLANT

and

THE STATE

RESPONDENT

Neutral citation: *Khavhadi v S* (459/15) [2015] ZASCA 191 (30 November 2015)

Coram: Navsa, Lewis, Pillay, Mbha and Zondi JJA

Heard: 20 November 2015

Delivered: 30 November 2015

Summary: Criminal law – evidence of death of deceased lacking – single witness not credible and satisfactory – conviction overturned.

ORDER

On appeal from Limpopo Local Division of the High Court, Thohoyandou (Makgoba AJ sitting as court of first instance):

The appeal is upheld and the appellants' convictions and related sentences are set aside.

JUDGMENT

Zondi JA (Navsa, Lewis, Pillay and Mbha JJA concurring):

[1] The three appellants were convicted in the Limpopo Local Division of the High Court, Thohoyandou (Makgoba AJ) of the murder of four-year old Tshilelo Sigovho (Tshilelo). They were each sentenced to a period of life imprisonment. They appeal against their convictions. The first and third appellants were granted leave to appeal by this court. The second appellant was granted leave to appeal by the court below. Tshilelo is the daughter of the second appellant, Rudzani Elisah Sigovho (Rudzani).

[2] In a nutshell, the State's case, in the court below, was that after Tshilelo had been left in the care of a friend and neighbour, namely, the principal witness on behalf of the State, Ms Azwinndini Alice Maphosa (Maphosa), Rudzani arrived during the night of 14 September 1999 together with the other two appellants and took her daughter away in order to present her as a sacrifice in a ritual murder to appease the gods Rudzani believed in. It was alleged that Tshilelo had to be killed in order to harvest her body-

parts for presentation to the gods as part of the appeasement process. It is common cause that Rudzani was in training to become a traditional healer. It is also undisputed that the third appellant was a traditional healer and was training the second appellant to be one as well.

[3] Rudzani and the other appellants were charged with the murder of Tshilelo after the latter's disappearance and after the release of two other suspects, which included Maphosa. The deduction that the appellants had conspired to kill Tshilelo in order to harvest her body-parts to appease the gods was based on Maphosa's assertion that the first appellant, Avhaphani Daniel Khavhadi (Khavadi), who is also her common-law husband, had told her, on the night prior to Tshilelo being spirited away, that Rudzani's gods required human body-parts in order to be appeased.

[4] There was no witness to the murder that had allegedly been committed by the three appellants. Approximately a week after Tshilelo's disappearance, skeletal remains were found in the vicinity of where she and her mother resided. At the commencement of proceedings in the court below a post-mortem report was admitted by consent of the appellants. They also appear to have admitted that the skeletal remains were that of Tshilelo. It is necessary to record that all that was found was a skull and six ribs.

[5] The doctor who completed the post-mortem report, recorded that the child had been found on 14 September 1999. That date is at odds with the evidence of a policeman tendered in support of the State's case that he had been to the place where the remains had been found on 22 September 1999. From the photographs of the skeletal remains it appears, at least superficially, that the body had been in a prolonged and advanced stage of decomposition. The post-mortem report records that the sex of the person whose remains were found was undetermined but that it was 'probably male'. This conclusion was based on the doctor's observations of the clothing that had been found with the skeletal remains. The time of death was estimated by the doctor to be

‘four weeks or longer’ prior to the date on which the post-mortem examination was conducted. From the skeletal remains it was deduced that it was the remains of a child who had been between four and seven-years old. The cause of death was ‘undetermined’. DNA testing, which would have been conclusive as to the sex of the child, was not conducted.

[6] In light of the very unsatisfactory conclusions recorded in the post-mortem report, the admission about the identity of the deceased person whose skeletal remains were found is difficult to comprehend.

[7] The very first problem for the State is that in order to sustain a conviction for murder it had to prove that the person the appellants are accused of having murdered had in fact been killed. Even in the face of the apparently uninformed admissions made by the appellants there must be grave doubt about whether the death of Tshilelo had been proved. Put differently, there has to be substantial doubt about whether the skeletal remains were those of Tshilelo. An essential element of the crime of murder would thus not have been proved.¹

[8] Even if the State were somehow to overcome the very fundamental hurdle referred to in the preceding paragraph, the further difficulty it faces is that the evidence of Maphosa, who was the only person who implicated the three appellants, was wholly unreliable.

[9] It is common cause that at a stage when the community was first made aware of Tshilelo’s disappearance and when Rudzani, at least superficially, appeared frantic and sought the assistance of a traditional healer and arranged for community leaders to conduct a search of the area, Maphosa went along with her and supported those efforts. It was only when community suspicion fell on Maphosa that she publicly accused

¹ See C R Snyman *Criminal Law*, 5 ed (2008) at 447 *et seq.*

Rudzani of being involved in Tshilelo's disappearance. Her evidence in this regard is noteworthy:

'As people had gathered at my kraal I realised that there was a number of school children and anything can happen. It is then that I told this group of people that people are just wasting time by searching my kraal because the child was taken from my kraal by accused 1 and 2.'

It is clear from this testimony that fear for her own safety prompted the accusations she levelled at two of the appellants. At that stage there was no mention of the third appellant. It must also be borne in mind that she was among the first suspects to be arrested and must have been keen to avoid being prosecuted.

[10] Furthermore, a person who was also taken into custody at about the same time that Maphosa was arrested as a suspect, Mr Sonnyboy Netshitungulu, testified that he had seen Tshilelo crying on the night on which she was allegedly spirited away by the three appellants, saying that she was on her way to Maphosa's house and that he then saw her make her way in that direction. Netshitungulu testified in support of the State's case. However, his testimony, far from incriminating the appellants, casts a shadow of suspicion on Maphosa.

[11] The court below, even though reminding itself that it was dealing with the evidence of a single witness in the form of Maphosa and that it should be cautious in its approach, did not consider the negative aspects referred to in the preceding two paragraphs. There is no formula to apply when it comes to the consideration of the credibility of a single witness. It is, however, a well-established judicial practice that the evidence of a single witness should be approached with caution, and his or her merits and demerits as a witness should be weighed against factors which militate against his

or her credibility.²

[12] The court below erred in unreservedly accepting the evidence of Maphosa. She was far from a satisfactory witness. It is clear that the State failed to prove the appellants' guilt beyond a reasonable doubt. For the reasons set out above the convictions and sentences are liable to be set aside.

[13] The appeal is upheld and the appellants' convictions and related sentences are set aside.

D H Zondi
Judge of Appeal

² See E Du Toit et al *Commentary on the Criminal Procedure Act*, Service Issue 54 January 2015, at 24-1 to 24-2C where the learned authors comment on section 208 of the Criminal Procedure Act 51 of 1977 which provides that a conviction may follow on the evidence of a single witness and see the authorities there cited.

Appearances

For the Appellant: A L Thomu (Attorney)

Instructed by:

Thohoyandou Justice Centre, Thohoyandou
c/o Bloemfontein Justice Centre, Bloemfontein

For the Respondent: R J Makhera

Instructed by:

Director of Public Prosecutions, Thohoyandou
Director of Public Prosecutions, Bloemfontein