

IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Appeal case no: **A145/2022**

Reportable: YES/NO

Of Interest to other Judges: YES/NO

Circulate to Magistrates: YES/NO

In the appeal of:

SEHLOHO ZACHARIA MOKHETHI

Appellant

and

THE STATE

Respondent

CORAM:

MOLITSOANE, J et CRONJé, AJ

HEARD ON:

8 MAY 2023

JUDGMENT BY:

MOLITSOANE, J

This judgment was handed down electronically by circulation to the parties' representatives by email, and released to SAFLII. The date and time for hand-down is deemed to be 30 May 2023 at 12h30.

[1] The Appellant was convicted on one count of murder read with the provisions of Section 51(1) of the Criminal Law Amendment Act, 105 of 1997. The court a quo having found substantial and compelling circumstances sentenced the appellant to fifteen years' imprisonment. Aggrieved by the order of the court a quo, he appeals the conviction with leave of the said court.

[2] The facts of this case are briefly as follows: The appellant was married to Irene Motsheare. On 22 December 2018 the appellant went to the parental

home of his wife. The appellant met one Daniel Mofokeng also known as Phoka (the deceased). He had an altercation with him (the deceased) as a result of which his mother in law chased them away. The following morning the appellant arrived again at his in-laws' home to collect his passport. He was in the company of two unknown people.

[3] The version of the state is that he had a firearm in his possession and three bullets which he shown to his mother in law and her daughters. This part of the evidence is disputed by the appellant. The version of the state is further that after appellant had shown the firearm and bullets, he also said that he would look for the deceased and would shoot him with the three bullets he had in his possession. This version is also denied by the appellant.

[4] Mr Motjhale testified for the state. He was on that day going to a certain farm. His evidence is that the appellant, who is known to him, asked for a lift in his motor vehicle in order to visit his sister on the same farm. Along the way, appellant informed him that he was involved in a fight. The appellant also told him that the person with whom he fought had an affair with his wife. The appellant had a plastic bag in his possession which contained a black object. He could not tell what the object was. He confirmed that the accused said he shot someone although he did not say who.

[5] Mr Leeto testified that he was at the tavern drinking when he saw the appellant at the gate after hearing a loud bang. I will revert to his testimony in detail later in this judgment. The rest of the testimony does not take this case any further.

[6] The version of the appellant boils down to a denial in the killing of the deceased.

[7] The Appellant assails the conviction on the following grounds:

3.1 That the Court a quo erred in finding that the state had proved its case beyond reasonable doubt;

3.2 That the Court erred in not properly analysing or evaluating the evidence of the State witnesses and considering the improbabilities inherent in the version of the state;

3.3 That the court erred in its application of the test on circumstantial evidence.

[8] This appeal turns on the sufficiency of the circumstantial evidence upon which the trial court convicted the appellant.

[9] It is trite law that the onus rests upon the state to prove the guilt of the accused beyond a reasonable doubt. The appeal Court will normally accept the factual findings made by the trial Court, unless the Court finds that same were clearly wrong or a mistake was committed. In *S v Hadebe and Others*¹ the court said:

“Before considering the submissions, it would be well to recall that there are well established principles governing the hearing of appeals against findings of fact. In short, in the absence of demonstrable and material misdirection by the trial court, its findings of fact are presumed to be correct as will only be disregarded if the recorded evidence shows them to be clearly wrong.”

[10] As indicated above, the determination of the sufficiency of the circumstantial evidence is at the heart of this appeal. The court in *S v Ntsele*² held that when dealing with circumstantial evidence, the court was not required to consider every piece of evidence separately. It was the cumulative impression, with all the pieces of the evidence made collectively, that had to be considered in order to come to a finding of guilt.

[11] *S v Reddy*³ is instructive in the approach to be followed in the assessment of circumstantial evidence. In this case it was held as follows;

¹ 1997(2) SACR 641(SCA) at 645 e-f; See also *S v Naidoo and Others* 2003(1) SACR 347(SCA) at para 26.

² 1998(2) SACR 178(SCA).

³ 1996(2) SACR 1 (A) at 8C-D.

“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 an 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 oft-quoted dictum in *R v Blom*⁴, 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 considered with all the proved facts, and secondly, the proved facts should be such that they exclude very reasonable inference from them save the one sought to be withdrawn.”

[12] The essence of the state case is that the appellant arrived at the parental home of his wife. He was in the company of two other people. He had a firearm and three bullets in his possession. There is a contradiction between the evidence of the appellant's wife and sister in law and that of their mother regarding the firearm. The mother testified that the appellant arrived at her home carrying a firearm in his hand. On the other hand, her daughters, testified that when the appellant entered their yard, he lifted the top of the garment he was wearing and showed them the firearm on his waist. The court a quo found that the contradiction was immaterial. That finding cannot be faulted. It has to be remembered that contradictions on their own do not necessarily lead to the rejection of the evidence of the witness(es). Such contradictions may simply be indicative of an error.⁵ The version of the state is that he made threats about killing the deceased.

[13] The appellant thereafter took a lift with one Mr Motjhale. The testimony of this witness was less than candid. The trial court also formed a view that this witness tried to protect the appellant on the issue of the firearm but the court believed him on the allegation that appellant told him that he shot someone who had an affair with his wife. I find it difficult to agree with the reasoning of the court a quo in this regard.

⁴ 1939188((AD) at 202-203.

⁵ See *S v Oosthuizen* 1982(3) SA 571(T).

[14] In the evidence in chief when asked what the appellant had in his possession, he initially said he had a white plastic bag containing a black item he could not tell what it was. It was never his testimony that the appellant showed him the plastic bag. The impression he created was that it was out of his own observation that he saw the plastic with the black object. He blamed the investigating officer for this discrepancy saying that he (the investigating officer) told him not to mention this in his statement. With regard to what later transpired during cross examination, the record⁶ further reveal the following:

MR MAZIBUKO: If someone can come and inform the court that you said that the accused show you a firearm, a revolver, the black revolver, what you going to say?

Mr MOTJHALE: What I said to Mr Mofolo was that the item or the object which was black inside this white plastic, it looked or appeared like a wheel.

COURT: Like a wheel?

MR MOTJHALE: A wheel, then Mofolo then said, it is impossible, because that person has shot someone.

MR MAZIBUKO: So Mofolo is the one who said you must say that the accused show you?

Yes. The item which I said looked like a wheel, wheel.

COURT: Wheel?

Mr MOTJHALE: Wheel. Mofolo said that is the very same item which is the firearm.

MR MAZIBUKO: Of which you cannot confirm?

⁶ Page 0052-0053.

MR MOTJHALE: I can confirm.

- [15] Clearly the testimony of Motjhale vacillated from not knowing what the appellant had in his possession, to the item being a wheel and lastly to confirming that what the appellant had in his possession was a firearm. Although he did not testify about the fact that the appellant had shown him the firearm in his evidence in chief, the chickens came home to roost when he was confronted with his previous statement to the police. It is clear that he changed his version as he went along. I can find no reason why the court a quo rejected his version on the aspect of the firearm but chose to believe him when he said that the appellant told him that he shot someone. His evidence is riddled with inconsistencies and cannot be seen as credible.
- [16] The testimony of the last state witness which the court a quo heavily relied upon to conclude that the appellant is the person who shot the deceased shows nothing of the sort. Mr Leeto testified that he was at the tavern drinking with one Setlha. While he was there they suddenly heard a loud noise which sounded like a firecracker. When he raised his eyes he saw the appellant standing about 8 to 10 metres away at the gate of the tavern. According to him the appellant had a plastic bag in his possession. He did not know what was in the plastic bag. He also noted that after the bang he saw a mark on the wall. He testified that he and Setlha ran away.
- [17] The testimony of Leeto reveal that he heard a loud bang as a result of which he immediately raised his head. When he looked he saw the appellant with a plastic bag in his possession. He did not see a firearm in the hands of the appellant even though he looked at the direction of the appellant. From the mobility of this scene one would have expected him at least to see the firearm if any in the hands of the appellant. He did not testify about seeing the deceased after being shot. What he later saw was a chip on the wall as if caused by a bullet which begs the question whether someone else fired the shot as he did not see the appellant with a firearm. The evidence led is in my view insufficient to draw an inference that the appellant is the person who

shot the deceased. The conviction cannot stand and has to be set aside. The sentence consequently also stands to be set aside. I accordingly make this order:

ORDER

1. The appeal against the conviction is upheld.
2. The conviction and the sentence are hereby set aside and the order of the court a quo is replaced with the following:

“The accused is found not guilty on the charge of murder.”

P.E. MOLITSOANE, J

I agree

P R CRONJé, AJ

On behalf of the Appellant: Ms V Abrahams
Legal Aid South Africa
BLOEMFONTEIN

On behalf of the Respondent: Adv. D Pretorius
Adv. A Bester (Heads of Argument)
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