

**IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE DIVISION, MAKHANDA**

Case no: CA & R 98/2022

In the matter between:

JUSTIN WILDSCHUT

APPELANT

and

THE STATE

RESPONDENT

JUDGMENT

Zilwa AJ

[1] The Appellant was arraigned in the Regional Court of Willowmore with one count of murder read with the provisions of section 51(2) of the Criminal Law Amendment Act¹. The appellant was represented throughout the proceedings.

[2] The Appellant pleaded not guilty to the charge and gave no plea explanation as contemplated in section 115 of the Criminal Procedure Act ('CPA')²

[3] On 10 May 2022 the Appellant was convicted and on 11 May 2022 he was sentenced to 10 years imprisonment. Application for leave to appeal against conviction was made and it was refused on 7 June 2022. On 17 June 2022 a petition

¹ 105 of 1997

² 51 of 1977

as contemplated in section 309C(1) of the CPA was launched and leave to appeal was granted against conviction on 3 October 2022 by the Judge President.

Facts

[4] The common cause facts are briefly that on 8 June 2020, the deceased (who had a child with Michaela Wildschut, the Appellant's sister) brought a cake to his son's home since it was the latter's birthday. He later came back to fetch the container that had the cake. While the deceased was talking to one Chantelle (the Appellant's girlfriend) a war of words ensued and that resulted to the latter calling her boyfriend, the Appellant. The deceased was given the container and was requested to leave by Michaela since he was drunk and because there was a protection order in operation between him and the Appellant. She took the deceased out of the gate, and returned to the house with her son. It transpired later that the deceased did not leave as he came back to the yard. That further resulted to an altercation between him and the Appellant. Michaela requested the deceased once again to leave. The deceased refused and tried to force his way through by pushing the gate which separated them (i.e. him and the Appellant). The Appellant took out a knife and stabbed the deceased on the hands preventing him from pushing it open. A struggle ensued which ultimately resulted in the gate opening. They both fell to the ground with the deceased trying to dispossess the Appellant of the knife. It transpired that during the struggle the deceased sustained fatal wounds which led to his death. Later on, the Appellant alleged that he also got stabbed on the thigh during the scuffle. The deceased stood up and fell on the ground and ultimately died. The Appellant though, testified that the deceased did not manage to dispossess him of the knife.

[5] On a conspectus, the appeal is predicated mainly on the grounds that:

5.1 The Magistrate erred in not, apart from the documentary evidence³, calling the doctor who compiled the report to testify, as his evidence would have eliminated any future speculation of the possibility of the wounds being sustained or not in the manner testified by the Appellant.

5.2 The Magistrate erred in not calling Chantelle to testify as the fight was about her and as such her evidence could have been of help as she was present.

5.3 The Magistrate erred in accepting some of Michaela's evidence and rejecting a certain portion of her evidence.

Analysis

[6] Circumstantial evidence suggests that the death of the deceased points to one direction only, namely, the Appellant. Nowhere has it been suggested that the deceased's fatal wounds would have been sustained through other means. The deceased did not have any sharp object to harm himself and the only sharp object was the knife carried by the Appellant.

[7] The oral evidence of the doctor, who prepared a post-mortem report, could not have changed the picture, neither the evidence of Chantelle nor Michaela.

³ Post mortem report, photo album etc

[8] This is a serious case of murder. The Appellant knew that the knife is a dangerous object and, by pulling it out, he acted in a manner that is unacceptable in any civilised society that ought to be committed to the protection of the rights of all persons.

[9] There is also an issue of the stab wound on the Appellant's thigh which calls for comment. His version is that he noticed after 7 hours whilst he was at his aunt's place that he has sustained this wound. This is highly improbable. How can one sustain a wound in the thigh and go on with his life for a period of 7 hours without feeling pain and noticing it. A temptation is there that this wound was self-inflicted as a way of covering up and creating an impression that the deceased also stabbed him. This notwithstanding, the concession was made that the knife had always been in the Appellant's possession at all material times. It is clear from the evidence as a whole that the version proffered by the Appellant was untrue.

[10] In *R v Blom*⁴, Watermeyer JA said that, in reasoning by inference, there are two cardinal rules of logic which cannot be ignored namely:

- (i) that the inference sought to be drawn must be consistent with all proved facts and that, if not, the inference cannot be drawn.
- (ii) that the proved facts should be such that they exclude every reasonable inference from them except the one sought to be drawn and that if they do not

⁴ *R v Blom* 1939 AD 188 at 202 to 203

exclude other reasonable inferences there must be a doubt whether the inference sought to be drawn is correct.

[11] The court should not consider each circumstance in isolation but should consider the cumulative effect of all the items of circumstantial evidence.⁵

[12] An inference cannot be drawn unless there are objective facts from which to infer the other fact which it is sought to be established.⁶

Conclusion

[13] After careful analysis of the above principles I am satisfied that the only inference that can be drawn, based on circumstantial evidence, is that the Appellant is the one who was responsible for the deceased death. My finding is also based on the fact that that the Appellant was the only one with a knife during that scuffle and it is a proven fact that all the wounds in the deceased body were sustained during the scuffle.

[14] The post-mortem findings to the effect that the deceased had stab wounds and that he died as a result of a stab wound on the neck were admitted in the court *quo* and the Magistrate's finding was that it was clear that the deceased's body was penetrated with a sharp object at close range, as per the definition of stabbing. The wounds were described to be a deep stab wound on the neck below the chin, 1

⁵ See: *R v De Villiers* 1944 AD 493 at 508-9

⁶ See: *S v Essack and Another* 1974 (1) SA 1 (A) at 16D

centimetre wound on his arms, a stab wound on the chest, incised wounds on the fingers, a stab wound at the back. The Magistrate's findings, which I am in full agreement, are that it is improbable that all these injuries could have been accidentally caused during a struggle over a knife. These were deep penetrating wounds, not cuts, and that shows that a force was used to penetrate the deceased's body with a knife. The Magistrate further reasoned that the way the wounds were positioned is inconsistent with the version that there was a scuffle, especially the stab wound on the back. He went on to reason that the wound on the side of the arm towards the back is consistent with the defensive wound when the deceased was preventing the accused from stabbing him. His conclusion was that the possibility is that he used his arm to block the knife and whilst doing so, he got stabbed. There is no way that the deceased would have carried on struggling over a knife after sustaining such serious injuries that resulted to his death. What makes the Appellant's version to more improbable is that the deceased never got hold of the knife and it is the Appellant who ran away with the same knife. The Magistrate further reasoned that it does not make sense that the deceased would continue to lie on top of the Appellant, yet he was being injured, instead of standing up and run away. What is strange is that the Appellant, who was said to be underneath the deceased, could have managed to get lose and run away from the deceased. Quite noteworthy is the fact that, since the deceased was on top, as per the Appellant's version, the former could have managed to run away but what prevented him was the fact that he was the one who was mostly injured by this knife that was always in the Appellant's possession. The Magistrate further remarked that it is even doubtful whether they were really on the ground when this stabbing took place if regard is had to the Appellant's version.

[15] The Magistrate further found that the incised wounds inside the deceased's fingers are also not consistent with the Appellant's version – that he stabbed the deceased on the hands whilst holding onto the gate. If that version would be correct, the deceased was expected to have injuries on top of his hands on the outer side of his fingers or hands, not inside or in-between the fingers. On the contrary, the injuries sustained are consistent with Michaela's version that the deceased was trying to disarm the Appellant of the knife he was holding. The injuries paint a different picture that the deceased grabbed the blade side of the knife and it cut him inside the fingers as the Appellant was pulling the knife away.

[16] It is trite that a court of appeal will be hesitant to interfere with the factual findings and evaluation of the evidence by a trial court and will only interfere where the trial court misdirects itself insofar as its factual and credibility findings are concerned. *In casu* I find no basis for interference.

[17] Based on the evidence presented in this case. I cannot find any misdirection by the Magistrate based on his reasoning and conclusion. I find that the sum total of all the evidence points to the Appellant as the person who murdered the deceased. Apart from offering no version that is reasonably possibly true, he tried very hard to extricate himself from this murder by means of a mere denial. Each time he was asked as to what caused the deceased's death, he responded by saying '*I do not know. I cannot explain because everything happened so fast*'. Consequently, I am satisfied that the Appellant was the person who stabbed the deceased and that his

guilt was proved beyond reasonable doubt, and that the conviction of murder must not be interfered with. Accordingly the appeal must fail

[18] In the result, the appeal is dismissed.

H ZILWA
ACTING JUDGE OF THE HIGH COURT

I agree.

M. MAKAULA
JUDGE OF THE HIGH COURT

APPEARANCES:

For Appellant: Mr Charles
Instructed by: Legal Aid, Makhanda

For Respondent: Mr Vena
Instructed by: National Director of Public Prosecutions

Date Heard: 15 November 2023
Date Delivered: 20 March 2024