



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

**Reportable:
YES/NO
Of Interest to other
Judges: YES/NO
Circulate to Magistrates:
YES/NO**

Appeal No: A138/2021

In the appeal between:

TSIETSI DAVID MOKOENA

Appellant

and

THE STATE

Respondent

CORAM: REINDERS ADJP *et* DE KOCK AJ

JUDGMENT BY: REINDERS, ADJP

HEARD ON: 16 MAY 2022

JUDGMENT BY: REINDERS ADJP

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 are deemed to be 09:00 on 26 July 2022.

I INTRODUCTION

- [1] On 4 October 2019 the appellant was convicted in the Regional Court held at Bethlehem on a charge of murder read with the provisions of sec 51(2) of the Criminal Law Amendment Act, 105 of 1997 and sentenced to 13 years' imprisonment. Leave to appeal against his conviction was granted by the court a quo on 28 February 2020.

II GROUNDS OF APPEAL

- [2] The grounds of appeal as summarised by the appellant entailed that the court a quo erred in:

“2.1 finding that the guilt of the appellant was proven beyond a reasonable doubt;

2.2 accepting the evidence of a single witness despite:

2.2.1 caution to be applied to such evidence;

2.2.2 the witness's observation changed and contradicted his evidence;

2.2.3 no further witnesses were called despite being identified;

2.3 in dismissing the appellant's version where he carried no burden of proof.”

III EVIDENCE TENDERED BEFORE THE TRIAL COURT

- [3] To prove its case the state tendered the evidence of three witnesses, namely Mr Teboho Nyama, Sergeant Andries Mzangoa and Captain Petrus Mbambo. In respect of both Sgt Mzangoa and Capt Mbambo (relating to

alleged confessions) the conclusion of the trial court was that it accepted the appellant's explanation of what transpired between them, as reasonably possibly true. There is, therefore, no need to deal with their evidence save to mention that the evidence of Mr Mzangoa, being a sergeant, was in my view in any event impermissible having regard to the provisions of s 217 of the Criminal Procedure Act 51 of 1977.

- [4] I find it prudent to deal with the essence of the evidence of Mr Nyama as it appears from the judgment of the trial court. I will return to his evidence later herein when dealing with the trial court's finding in respect of the credibility and reliability of this state witness.

"The version of the state as narrated by Mr Tebogo Nyama is that on the 5th of August 2017 at about eight in the morning he was at his place when he was called by Moeketsi Nhlapo. Mr Nhlapo invited him to come and see what Tsietsi was doing on the street.

He came out running. He then saw accused in possession of a knife, stabbing on someone who was on the ground in order to prevent him from standing up. This person was later identified as the accused – as the deceased. He grabbed the accused and tossed away the knife.

Accused left and went home. He summoned the ambulance personnel and the police. When the police came he told them what he knew – he told them he knew who was fighting with the deceased. It is his friend, and he took them to the accused's place. The accused was arrested.

He was cross-examined at length. The following transpired – that the accused was denying being at the scene, fighting or stabbing the deceased. It was put to the witness that the accused was at his place drinking beer, but he did not see him when leaving, until he saw him in the morning when called by Nhlapo – in possession of a knife and stabbing on the deceased."

- [5] The version of the appellant was summarised by the court a quo as follows:

"Accused testified in is defence and denied that he was seen by the first state witness stamping – or stabbing on the deceased. He also denied

that he was at the scene. He admitted that on the 4 August 2017 he was at the first state witness's place coming from a funeral. He bought four bottles of liquor, as the first state witness was selling liquor. He had a knife which he handed over to the first state witness.

At about four a.m. the first state witness gave him back his knife, indicating he was about to close. At around this time he also left without telling the first state witness and went home.

At about eight a.m. until the in the early morning hours of about 04:00 when he left for his home after he was handed back his knife. He however denied that he was at the crime scene at the alleged time of 08h00."

IV ADJUDICATION OF THE APPEAL

- [6] It has been a long-established principle that a court of appeal must take into account that the court a quo was in a more favourable position to form a judgment and will not interfere with a trial court's findings if there is no misdirection, unless or upon an examination of the record reveals that those findings are patently wrong.

See: ***R v Dhlumayo and Another 1948 (2) SA 677 (AD) at 705-6.***

See also: ***Director of Public Prosecutions, Gauteng v Pistorius 2016 (2) SA 317 (SCA).***

- [7] In ***S v Francis 1991 (2) SACR 198 (A)*** it was reiterated that a court of appeal's power to interfere is limited as the trial court has the advantage of seeing, hearing and appraising witnesses (at 204 c-e).

- [8] We are not at liberty to depart from the trial court's findings of fact and credibility unless it is vitiated by irregularity or upon an examination of the record of evidence it is revealed that those findings are patently wrong.

See: ***S v Hadebe 1979 (2) SA at 654 e-f.***

- [9] This court in the unreported judgment of ***Elliot Mnguni v The State*** per Daffue, J (Case no A7173/ 2020 delivered on 29 November 2021) summarised the position (with reference to ***S v M 2006 (1) SACR 135 (SCA)***) as follows”

“It is accepted that no judgment is perfect and the fact that certain issues were not referred to does not necessarily mean that these were overlooked. It is accepted that factual errors do appear from time to time, that reasons provided by a trial court are unsatisfactory or that certain facts or improbabilities are overlooked. As shown *supra* the court of appeal should be hesitant to search for reasons that are in conflict with or averse to the trial court’s conclusion. **However, in order to prevent a convicted person’s right of appeal to be illusory, the court of appeal has a duty to investigate the trial court’s factual findings in order to ascertain their correctness and if a mistake has been made to the extent that the conviction cannot be upheld, it must interfere.**” (own emphasis added)

V EVALUATION OF THE EVIDENCE AND THE PARTIES’ SUBMISSIONS PERTAINING TO CONVICTION

- [10] Relying on ***S v Trainor 2003 (1) SACR 35 (SACR) 35*** it was submitted by the appellant that during the evaluation of the presented evidence the trial court did not account for all the evidence which affected the credibility and reliability thereof.
- [11] From a reading of the judgment of the court *a quo* it is evident that it was well appraised thereof that Mr Nyama was a single witness and quite correctly dealt with the applicable test in this regard.
- [12] The court *a quo* in its judgment held as follow:

“ The first state witness is a single witness. He is also and dealing with the identity of the accused. The court must therefore exercise caution when dealing with cautionary rules apply to his evidence.

It is so that the Court can convict on the evidence of a single witness, but such evidence must be clear and satisfactory in all material respects. The witness narrated clearly how he ended up at the scene and what he observed. He was honest enough to say he did not see the accused stabbing the deceased. He did not know the deceased.

I have also noted some few contradictions on the evidence of this witness, but they were only minor contradictions with little or no bearing on the issues in dispute. I am satisfied that they did not affect his credibility as a witness. He impressed me as an honest reliable witness and did not show any signs of bias against the accused.’

[13] The learned magistrate concluded:

“ I am satisfied that as a single witness he surpassed the threshold of a single witness. Accused says he was not at the scene. It was in the morning. There was enough light, and the witness observed the accused over some time. As he was approaching he saw the accused stabbing on the deceased who was on the ground. He arrived at the scene and removed the accused from the deceased. The two parties know each other very well. As an indication that he had seen the accused – when the police arrived, without hesitation he took them to the accused’s place. There is no basis at all for a mistaken identification of the accused in the circumstances. ...The accused is the person who was at the scene.”

She hereafter dealt with her impression of the appellant:

“On the other hand accused was not an impressive witness. During his evidence he raised issues that the first state witness was never confronted about – which were very essential to his case. Throughout his testimony I

could not find any reason as to why the first state witness would mistakenly identify him as the person who was at the scene.”

[14] Before us it was contended that the state case eventually consisted of the evidence by a single witness, Mr Nyama, and notwithstanding the magistrate’s findings in this respect, the evidence tendered by him was not sufficient to overcome the cautionary rule in respect of a single witnesses - there was no corroboration therefore, the state witness seriously contradicted himself in material respects and that accused’s version of an alibi could not be rejected to such an extent that it warranted his conviction.

[15] In respect of Mr Nyama, the record shows that in evidence in chief he initially testified that he was called out by Mokoetsi Nhlapo to take a look at what was going on in the street. On doing so he saw the accused has caused “another individual to be on the ground and already the knife – and he was carrying a knife in his hand. I grabbed him and tossed him away. And when I went to assist the person who was on the ground I then discovered that things were beyond my control.”

15.1 Still in evidence in chief, the prosecutor asked him to give the court a picture of what he observed. He testified:

“Your worship, upon my arrival at the scene I found accused busy stepping on this alleged person was on the ground.”

The witness then gave a demonstration and the record reads:

“Let the record shows the demonstration by the witness is accused feet was literally being lifted up on the high landing on the body of this person who was lying.”

15.2 On a question by the prosecutor about when the witness saw the knife, the witness stated:

“During their fighting, when they were fighting that is when I then saw this knife.”

15.3 The record after this evidence reads:

PROSECUTOR: And now I am confused now Mr Nyama, you say when they were fighting. Explain what do you mean, because the evidence that you gave earlier was that you – when you laid your eyes there Mpampu was already on the ground. So you can explain now when you say you saw the knife as they were fighting, so I ...[intervenes]

MR NYAMA: I simply mean that Your Worship when I got to them after grabbing accused and throwing or tossing him aside the knife which was in his hands ended up scratching me. And I even say to him: ‘Can you see what you have done?’. After saying that, I then attended to this person who was on the ground.

PROSECUTOR: Again Mr Nyama, you did not really answer my question, or let me try to rephrase, Your Worship. As you were coming approaching the accused, okay as you got to the accused, you testified that you get to the accused and you see him still stepping on the person. That first time you got to him stepping on the person were you able to see the knife at that stage, the first time you got to them?

MR NYAMA: At that stage yes, I saw that the knife was in his hand. Even when I was grabbing him and forcing him aside the knife was still in his hand.

15.4 In cross-examination the witness stated that he informed the police when they arrived the following:

“I told them that I was being called out and when I appeared or rather when I emerged I then saw Tsietsi stabbing this person and already stepping on this person who was on the ground.”

- 15.5 The witness admitted making a statement to the police containing the following:

“On 17 August the 5th at about 8 o’clock I was at my residential address when Moeketsi called me as I was inside my house. When I arrive outside on the street I noticed an African male lying on the ground and the other one standing next to him. On my observation I found the two were fighting. The African male who was on the feet is well-known to me as Tsietsi Mokoena. I did not see the fight as when I arrived at the street this other African male was already on the ground. I then phoned the police as well as the ambulance, as I noticed the person on the ground was injured. That is all.”

- [16] I am respectfully not in agreement with the learned magistrate that the aforementioned constituted minor discrepancies. Even the prosecutor found it confusing. I say so for the following reasons: the evidence of Mr Nyama attempts to portray several different scenarios, ranging from him only seeing the accused standing over the deceased, to fighting and stabbing by the accused. Moreover, there were no other witnesses who corroborated his version nor were any of the other identified witnesses called. In my view the contradictions by the state witness were material and affected his credibility and reliability. It is not legally expected of the appellant to furnish a good reason why a state witness would falsely implicate him.

- [17] The trial court was well aware of the fact there was no evidence directly indicating or showing that the accused stabbed the deceased. It quite correctly referred to the test for adjudicating circumstantial evidence as set out in the well-known *dictum* in **R v Blom** 1939 AD 188 at pp 202 – 203. In

the absence of direct evidence, the trial court concluded that an inference could be made of the appellant's guilt.

[18] The trial court however, based its conclusions in this respect on its finding that the evidence of the single witness was reliable and credible, surpassing the applicable cautionary rules for a finding of guilt beyond a reasonable doubt against the appellant. Accordingly, the facts upon which the trial court concluded that "There is no other reasonable inference to be drawn on these facts other than that the accused stabbed the deceased with a knife on the day in question. The deceased subsequently died as a result of a stab wound inflicted by the accused.", cannot justify such a conclusion and subsequent finding of the appellant's guilt beyond a reasonable doubt.

[19] It follows therefore that in my view the conviction and sentence cannot stand and should be set aside.

[20] I therefore make the following order:

1. The appeal against the conviction is upheld.
2. The conviction and sentence are set aside.

C. REINDERS, ADJP

I concur and it is so ordered.

D. DE KOCK, AJ

On behalf of the appellant:

Adv JD Reyneke

Instructed by:

Bloemfontein Justice Centre

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On behalf of the respondent:

Adv M Strauss

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Director: Public Prosecutions

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