

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

Case No.: A236/2018

In the matter between:

ZIMISELE ELLIA PIYANA

Appellant

and

THE STATE

Respondent

CORAM:

DAFFUE, J *et* MATHEBULA, J

JUDGMENT BY:

DAFFUE, J

HEARD ON:

18 FEBRUARY 2019

DELIVERED ON:

18 FEBRUARY 2019

INTRODUCTION

- [1] On 29 March 2017 the appellant was convicted on a charge of murder in the Regional Court, Bloemfontein and sentenced to ten years' imprisonment. On 12 May 2017 the trial court granted leave to appeal the conviction. The conviction is not supported by Adv M Strauss who appeared for the State before us in the appeal.

THE GROUNDS OF APPEAL

[2] Several grounds of appeal are relied upon, but the more relevant are that the trial court erred in finding that the:

- (1) version of appellant was improbable;
- (2) the knife was handed over by appellant to constable Mokoena whilst the discovery thereof was not explained on appellant's version;
- (3) the inference drawn that appellant stabbed and killed the deceased is not the only reasonable inference that could be drawn from the proven facts.

THE JUDGMENT OF THE COURT A QUO

[3] The trial court acknowledged that there was no direct evidence linking appellant with the murder and that the matter had to be adjudicated based on circumstantial evidence.

[4] The trial court accepted that appellant was inside the white Mercedes Benz truck of Anton le Roux Vervoer, behind the driver and co-driver's seats – the area providing for a bed as is apparent from photo 3 of exhibit A – when constable LA Mokoena and Mr Serai Samuel Motlhacwi, an employee at the particular truck stop, arrived at the truck.

- [5] The trial court found that both State witnesses testified that appellant handed a knife to the constable and that their version is corroborated by a photograph of the knife depicted on photo 9 of annexure A. The trial court referred to appellant's version, denying that he had seen or handled a knife and therefore that he handed over a knife as testified by the State witnesses and held that there was no reason for the two State witnesses to give false evidence as "I did not get the impression that they were having a bone to pick with the accused."
- [6] The trial court accepted there was a lapse of time between Mr Motlhacwi's first and second visits to the truck, but this was not considered relevant at all. I must mention that Mr Motlhacwi received a report from a person referred to as Mr Roets which caused him to go the truck. This was between 18:00 and 18:45. He saw blood dripping from the truck onto the ground, an obviously injured driver sitting behind the steering wheel with his head leaning against the window, as well as an unidentified person on the bed behind the seats. He left the scene, phoned an ambulance and the police and reported to a co-worker, Mr Tola. The truck was left unattended and no immediate medical attention was provided by anyone. They attended the scene again after arrival of members of SAPS. On constable Mokoena's version, that must have been at or past 21:00; therefore more than two hours since Mr Motlhacwi's discovery.

- [7] The trial court held that appellant's version of the events, *i.e.* that he entered the truck whilst noticing the seriously injured driver was "a bit improbable." Although not stated as such, it must be accepted that the trial court rejected appellant's version that he entered the truck, tried to ascertain the deceased condition, took his cellphone in order to call his employer and as he was on the verge of alighting the truck, the police arrived. It proceeded to hold that when the police arrived there were only two people in the truck - the driver and appellant on the bed behind the seat - that appellant handed the knife to the police and consequently, appellant was the person that stabbed and killed the deceased with the necessary intention.

APPLICATION OF LEGAL PRINCIPLES IN EVALUATING THE TRIAL COURT'S JUDGMENT

- [8] Although not a ground of appeal, I am of the view that the appeal should succeed solely based on the material irregularity that has occurred during the trial. This court has a duty to ascertain whether appellant had a fair trial. Appellant's attorney was never given an opportunity to cross-examine constable Mokoena before the close of the State's case and dismissal of the application for appellant's discharge in terms of s 174 of the Criminal Procedure Act, 51 of 1977 ("the CPA"). In fact, this witness was called back after closure of the defence's case and once deliberations between the legal representatives and the presiding officer had taken place about the correct procedure. Notwithstanding appellant's clear

instructions to his attorney as is evident from the cross-examination of Mr Motlhacwi, the attorney failed to properly cross-examine and/or to put his client's version to the constable. Notwithstanding the ruling in the trial within a trial, the trial court allowed the constable to again testify about an admission by appellant. Although extracted this time during cross-examination, this should never have been allowed. The trial court should not have allowed the reopening of the State's case in the circumstances. Appellant's attorney was totally flabbergasted and apparently out of his depth. He failed to meaningfully cross-examine the constable. A crucial issue in this regard is the fact that the trial court allowed the prosecutor to put it to appellant that his attorney had failed to put it to the constable that he (appellant) said that he did not know what happened, whilst the attorney by that time did not even had an opportunity to cross-examine the constable. This must have confused the appellant who was confronted with a wrong statement by the prosecutor which the trial court should not have allowed.

- [9] There is no inflexible rule pertaining to the reopening of the State's case. Most of the authorities deal with reopening to allow the State to present new evidence, but I could not find any authority justifying reopening of the State's case after closure of the defence case in order for a State witness which should have been cross-examined, to be cross-examined. Each case must be considered on its particular facts. In my view an irregularity such as what occurred *in casu* could not be remedied under the circumstances. Reopening may be allowed if no injustice will be caused to an

accused. *S v Felthun* 1999 (1) SACR 481 (SCA) may be seen as a case in point. A pharmacist was called by the State after closure of both the State and the defence's cases in order to testify as to exactly when the deceased visited his pharmacy on the day he was killed. This witness did not originally testify. His evidence indicated that the time on the printout of an invoice given to the deceased was inaccurate by some ten minutes, indicating that the deceased left the pharmacy earlier than previously admitted. The Court of Appeal accepted that no unfairness took place during the hearing and that the reopening of the State's case was not an irregularity. *In casu* there would be no irregularity if the State's case was re-opened before appellant testified. Appellant's attorney had a right to cross-examine the constable. The record clearly shows the improper appreciation by the appellant's attorney of his duty to belatedly cross-examine the constable as he did not know how to deal with an issue which should not have been allowed in the first place. At that stage the trial court had already made a ruling in terms of s 174 of the CPA to the effect that there was "indeed substantial evidence that was put before the court." The most crucial evidence relied upon was by then not even subjected to cross-examination. Even if my viewpoint is incorrect, there are further reasons why the appeal should succeed. I deal with those in the next paragraphs.

- [10] When an appeal is lodged against a court *a quo*'s findings of fact, the appeal court should take into account that the court *a quo* was in a more favourable position than itself to form a judgment

because it was able to observe the witnesses during their questioning and was absorbed in the atmosphere of the trial. See Schmidt and Rademeyer, *Law of Evidence* 3-40. The appeal court will normally accept factual findings made by the court *a quo*, unless there is some indication that a mistake was made. See *R v Dhlumayo* 1948 (2) SA 677 (A) at 696 and 705. The Court of Appeal summarised this issue as follows in *S v Hadebe and Others* 1997 (2) SACR 641 (SCA) at 645e - f:

“Before considering these submissions it would be as well to recall yet again 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 and will only be disregarded if the recorded evidence shows them to be clearly wrong.”

- [11] The presumption is that the trial court's conclusion on the facts is correct. The appeal court will only reverse it where it is convinced that such conclusion is wrong. In such a case, if the appeal court is merely left in doubt as to the correctness of the conclusion, it will uphold it. The Supreme Court of Appeal in *S v Naidoo and Others* 2003 (1) SACR 347 (SCA) in paragraph [26] reiterated this principle as follows:

‘In the final analysis, a court of appeal does not overturn a trial court's findings of fact unless they are shown to be vitiated by material misdirection or are shown by the record to be wrong.’

- [12] 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 court *a quo* are unsatisfactory or that certain facts or improbabilities are overlooked. The appeal court should be hesitant to search for reasons that are in conflict with or adverse to the trial court's factual findings. However, in order to prevent a convicted person's right of appeal to be illusory, the appeal court 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. See *S v M* 2006 (1) SACR 135 (SCA) at paragraph [40].
- [13] To secure a conviction the State had to prove all the elements of the crimes beyond reasonable doubt. The test in a criminal case has been restated in *S v V* 2000 (1) SACR 453 (SCA) at paragraph [3]. If there is a reasonable possibility that the accused is not guilty, he should be acquitted. The accused should be convicted if the court finds not only that his version is improbable, but also that it is false beyond reasonable doubt. It is not necessary for the court to believe an accused person in order to acquit him.
- [14] The State has to prove its case against an accused beyond reasonable doubt, but in evaluating the evidence, the trial court is entitled to consider the probabilities and improbabilities. This

issue was considered in *S v Chabalala* 2003 (1) SACR 134 SCA in paragraph [15] where Heher AJA (as he then was) held:

“The correct approach is to weigh up all the elements which point towards the guilt of the accused against all those which are indicative of his innocence, taking proper account of inherent strengths and weaknesses, probabilities and improbabilities on both sides and, having done so, to decide whether the balance weighs so heavily in favour of the State as to exclude any reasonable doubt about the accused’s guilt.”

See also: *S v Trainor* 2003 (1) SACR 35 (SCA) at 41b – c.

[15] The test when considering circumstantial evidence has been authoritatively stated in *R v Blom* 1939 AD 188 at 202 – 203. Firstly, the inference sought to be drawn must be consistent with all the proved facts. If it is not, the inference cannot be drawn. Secondly, the proved facts should be such that it excludes every reasonable inference from them, save the one sought to be drawn. If they do not exclude other reasonable inferences, then there must be doubt whether the inference sought to be drawn is correct. The two rules referred to above are known as the cardinal rules of logic to be applied when no direct evidence of an offence is available. An example of the cumulative effect of all the evidence pointing to the guilt of the accused is to be found in *S v Reddy* 1996 (2) SACR 1 (A) at 8.

[16] An accused’s version cannot be rejected merely because it appears to be improbable. It must be shown, in light of the totality of the facts, to be so untenable and/or improbable and/or false that it cannot reasonably possibly be true. See *S v Schackell* 2001 (2) SACR 185 (SCA) at para [30] and *S v V supra*.

- [17] Plasket, J in emphasised the following in *S v T* 2005 (2) SACR 318 (E) in paragraph [37], recently approved by the SCA in *S v Phetoe* 2018 (1) SACR 593 (SCA) in paragraph [21]. The State is required to prove the guilt of the accused beyond a reasonable doubt. This high standard is a core component of the fundamental right to a fair trial as enshrined in the Constitution. If the guilt is not proven beyond reasonable doubt, the accused is entitled to an acquittal, even if there may be suspicions that he was indeed the perpetrator. The inverse - convictions based on suspicion or speculation - is the hallmark of a tyrannical system of law.
- [18] Although it is possible that the trial court considered other probabilities or improbabilities without expressly referring thereto in the judgment, there are several improbabilities that come to mind and which have not been dealt with *ex facie* the judgment. If appellant killed the deceased, he would in all probabilities not remain on the crime scene in excess of two hours. This is contrary to human nature: criminals do not remain on crime scenes, especially not in a parking lot frequented by many people and after a member of the public has already visited the crime scene and would have detected a seriously injured person. No blood was found on appellant which is improbable bearing in mind the amount of blood spilled all over the cab of the truck. If the netting between the seats and the bed is considered, it is highly improbable that someone would be able to inflict wounds to the deceased's upper body and neck from behind the driver's seat. The person inflicting the wounds must have executed his actions from the passenger

seat. One would have expected appellant, if he killed the deceased and wanted to remain on the scene, to raise an alarm, explaining that he went to wash and/or to buy goods and on his return to the truck he found the injured driver.

[19] Although appellant's reaction upon finding the seriously injured or deceased driver appears improbable, exactly the same observation applies to the reaction of Mr Motlhacwi who did not even arrange for immediate medical care which would arguably be the most logical thing to do. Appellant's version could not be rejected as false. It must be remembered that appellant is a Xhosa speaker whilst constable Mokoena speaks Sesotho. Although the alleged admission was not allowed, it is apparent that a misunderstanding between the two persons cannot be excluded.

[20] It remains a mystery why the State failed to call Mr Roets, or even Mr Tola. Apparently, Mr Roets must have been in possession of crucial evidence if Mr Motlhacwi can be believed. The time difference between Mr Motlhacwi's first observation and the time when constable Mokoena arrived is crucial as so much could have transpired in between. There is no evidence that appellant was inside the cab of the truck the first time. No blood was detected on appellant which is irreconcilable with the objective facts and it is improbable that he could be the attacker, unless he had an opportunity to wash himself and change clothes. Mr Motlhacwi could not say whether the knife in the photo-album is the one handed over. There is no evidence as to where the photo of the

knife was taken and save for constable Mokoena's single evidence, that this knife was indeed the knife handed over. Fact is that the constable only pointed out the truck to the photographer and there is no evidence that the constable handed over and/or pointed out the particular knife to the photographer. There is also no evidence that the knife was indeed the murder weapon as it was not subjected to DNA testing. More troublesome is the fact that the knife was not even handed in as an exhibit. The State witnesses contradicted each other materially on the stage when the knife was allegedly handed over by appellant to the constable. The constable could not say where in the cab the knife was before it was handed over to him.

- [21] Notwithstanding the *dictum* contained in *Reddy supra* I am convinced that the test to be applied for a finding on circumstantial evidence has not been met. In order to dismiss the appeal this court will have to rely on suspicion and/or speculation. Insofar as the trial court found in favour of the State, it incorrectly applied the test on circumstantial evidence. Even if the trial court is correct in respect of the proved facts, which I do not agree with, such finding does not exclude every reasonable inference from them, save the one sought to be drawn, *i.e.* that appellant killed the deceased. If they do not exclude other reasonable inferences, then there must be doubt whether the inference sought to be drawn is correct.

ORDERS

[22] Consequently, the following orders are made:

- (1) The appeal against conviction succeeds.
- (2) The order of the trial court is set aside and substituted with the following:

“The accused is found not guilty and discharged.”

J P DAFFUE, J

I concur

M A MATHEBULA, J

On behalf of appellant:

Mr L M THABALALA
Instructed by:
JUSTICE CENTRE
BLOEMFONTEIN

On behalf of respondent: Adv M STRAUSS
Instructed by:
Director: Public Prosecutions
BLOEMFONTEIN