

**IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE LOCAL DIVISION – MTHATHA**

Case No: CA&R 83/2018
Date Heard: 13/05/2019
Date Delivered: 15/05/2019

In the matter between:

MXOLISI MBIZA	First Appellant
THEMBINKOSI NGCAYETHAFA	Second Appellant
MPUMZI ZAKADE	Third Appellant
SIVUYILE MBANGAZELI	Fourth Appellant

and

THE STATE	Respondent
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JUDGMENT

MAKAULA J:

A. Introduction:

[1] This is an appeal against conviction. The appellants were convicted by the Regional Court in the district of Mthatha on 6 February 2018 of murder. The appeal serves before us with the leave of the court *a quo*.

[2] The grounds of appeal are set out in the Notice of Appeal in detail. I shall not regurgitate them for purposes of the appeal. Suffice for me to summarise the grounds as I comprehend them. Furthermore, I shall not deal with the first ground because it relates to sentence. The second ground is predicated on the evidence of one of the witnesses, i.e. N[....] M[....] (N[....]). The court *a quo* is criticized for having relied on her testimony which was hearsay evidence. The third leg is that the *court a quo* erred in accepting the evidence of G[....] P[....] (G[....]) who is a single witness regarding the events that led to the death of the deceased. His evidence is full of contradictions and should have been rejected by the court *a quo*, so it is submitted. The fourth ground is that the post mortem findings are not supported by the evidence of the single evidence of G[....]. I shall refer to the appellants as the accused.

B. Facts:

[3] The common cause facts are that the deceased, the accused and the State witnesses reside in [....]. N[....] operates a tavern in the area. The accused, deceased and G[....] were her patrons on the night of 31 January 2015.

[4] The deceased was troublesome to an extent that he was chased away from the tavern. That was after he had been locked in the bedroom of N[....]. He was found dead the following morning next to the tavern. That led to the arrest of the accused. The medico-legal post mortem examination completed by Dr Mamve revealed the following:

“4. That the chief post mortem findings made by me on this body were:-

- Extradural haematoma on the occipital area; skull fracture on the left occipito-parietal region;
- bilateral tibia and fibula fracture.

That as a result of my observations a schedule of which follows, I concluded that the **cause of death** was:

- Extradural haematoma (head injury) post assault.”

[5] I state upfront that the evidence presented reveals that the deceased was assaulted with fists and was kicked. I shall deal with this aspect later on.

[6] The evidence of N[....] did not assist the State case at all. Apart from the evidence that the deceased was brought by her patrons and locked in her bedroom because he was a nuisance, the rest of her evidence should have been disregarded by the court *a quo* because it amounts to hearsay. She got information about the assault on the deceased from Lucky. Lucky was never called to testify.

[7] The next and only relevant witness who testified was G[....]. He testified that the deceased was chased out of the tavern because he was provoking people and a nuisance. He was told to go away and they locked the burglar guard. At some stage G[....] and S[....] went outside to urinate. He testified that while they were urinating, he saw the shadow of the deceased next to the house. The deceased ‘pounced’ on accused 3. S[....] retaliated and ‘pounced’ on the deceased causing the deceased to fall on the ground. Siyabulela kicked the deceased while lying on the ground. G[....] left and went back inside the tavern leaving them outside. Later on S[....] and accused 3 came back and joined him.

[8] At midnight, N[...] told them to leave because she was closing for the night. They went out. As they were leaving, he saw the deceased being assaulted by other people. Amongst those were accused 1, 2 and 4. They were kicking and assaulting him with fists. He could see because there was electric bulb attached to the side of the house that provided light. The electric bulb was 9 paces away from where the deceased was assaulted. The deceased was screaming. However, he did not observe any injuries on him. He and others proceeded to a nearby tavern where they continued to drink. A little while later they were joined by accused 1, 2 and 4. He learnt the following day that the deceased had died.

[9] The evidence G[...] became less convincing under cross-examination. His evidence is punctuated by 'no comment' when such was required or necessary. For example, it was put to him that he was 'not a reliable and honest witness' his response was 'no comment'. It was further put to him that by the time he left the tavern, the deceased had already left, he gave a similar response. It was put to him that the accused, when they testify, would deny that they assaulted the deceased and would say they left the tavern at 21h00. He did not want to comment. He could not comment when he was told that the accused would say that they did not meet the deceased after they left the tavern at 21h00. These responses to me indicate that G[...] was not an honest witness. Furthermore, he was asked as follows in one instance:

“Mr Nogumbe: Accused 1, 3 and 4 will come and say before this Honourable Court that never assaulted the deceased on the day in question, are you in a position to dispute that? (Sic)

Witness: No, I cannot dispute that”.

[10] G[...] testified that at the time he saw the deceased outside, the latter was armed with a hammer. It is not clear from his evidence what became of that hammer. G[...] conceded that he did not know whether accused 2 joined the people who assaulted the deceased to intervene or stop the fight. He further agreed when it was put to him, that he could not dispute that accused 2 never assaulted the deceased despite his earlier evidence.

[11] Taking into consideration the evidence referred to above, it is apparent that the court erred in accepting the evidence of G[...]. His evidence under cross-examination contradicts his evidence in chief markedly. He is a single witness¹ and knew virtually nothing about how the deceased was assaulted. His evidence has to be treated with caution.

¹ Section of the Criminal Procedure Act 51 of 1977 provides that an accused may be convicted of any offence on the single evidence of any competent witness. In *R v Mokoena* 1932 OPD 79 at 80; De Villiers JP held the following:

“Now the uncorroborated evidence of a single witness competent and credible witness is no doubt declared to be sufficient for a conviction by (the section), but in my opinion that section should only be relied on where the evidence of a single witness is clear and satisfactory in every material respect. Thus the section ought not be invoked where, for instance, the witness . . . contradicts himself in the box . . . where he has not had proper opportunities for observation, etc.”

[12] The charge sheet stated that the deceased died as a result of stabbing and being assaulted by sticks. The evidence of G[...] does not support this at all. The magistrate clearly misdirected herself in finding out that the defects in the charge sheet were cured by the evidence. There is absolutely no such evidence that cured it based on the evidence. Even the post mortem results do not support the averments made in the charge sheet. No stab wounds were noted by Dr Mamve. It is clear that the State failed to prove its case beyond reasonable doubt. The accused should have been acquitted.

[13] Consequently, I make the following order.

1. The conviction is set aside and substituted with the following order.
2. The accused are found not guilty and are discharged.

M MAKAULA
Judge of the High Court

Griffiths J: I agree.

RE Griffiths
Judge of the High Court

For the Appellant:

Mr NM Notununu

Mthatha

Instructed by:

*Mpumelelo Notununu & Ass
Mthatha*

For the Respondent:

*Adv MD Nyendwana
Director of Public Prosecution
Mthatha*

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