

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)
REPUBLIC OF SOUTH AFRICA



16/5/2016

CASE NO: A 366/15

DELETE WHICHEVER IS NOT APPLICABLE

- (1) REPORTABLE: YES/NO
(2) OF INTEREST TO OTHERS JUDGES: YES/NO
(3) REVISED

16 May 2016

DATE

SIGNATURE

In the matter between:

MVULA JOHANNES MTIMKULU

Appellant

and

THE STATE

Respondent

JUDGMENT

JANSE VAN NIEUWENHUIZEN J

- [1] The appellant was convicted of murder and sentenced to 15 years imprisonment in the Vanderbijlpark Regional Court, Gauteng Division.
- [2] The appeal was against both conviction and sentence.
- [3] On 14 March 2016, the court made an order that the appeal be upheld and that the conviction and sentence be set aside. The reasons for the order appear *infra*.

EVIDENCE

- [4] The appellant was charged with the murder of his girlfriend, Dithare Roseline Pilane ("the deceased"). It was alleged that the murder took place on 31 March 2012 at the deceased's place of residence.
- [5] Several witnesses were called by the State and I propose to summarise their evidence chronologically.
- [6] Malefetsane Johannes Makoane ("Makoane") testified that he knew the deceased because they both used to visit the deceased's neighbour, known as Matabo. On 30 March 2012, he was at Matabo's residence when the deceased called him and told him to tell the appellant that she went to his home to fix his television aerial.
- [7] Makoane found the appellant on the *stoep* of the deceased's house and related the version he had received from the deceased to the appellant. The appellant did not respond. Makoane returned to Matabo's house and shortly thereafter he was called outside by the appellant who insulted him. He once more left for Matabo's house and whilst leaving he heard the appellant and the deceased arguing. They were still outside the house of the deceased and it was between 17:00 to 18:30 in the evening. He did not see either the appellant or the deceased again on Friday, 30 March 2012.
- [8] On the Saturday morning at approximately 9:00 he saw the appellant in the company of the police. He later learned that the deceased had passed away.

- [9] The neighbour, Magdeline Tsukudu, referred to as Matabo by the previous witness, testified next. For the sake of clarity, I will refer to her as Matabo. She testified that she was in her house on 31 March 2012 when she heard screaming. She, however, immediately changed her version and testified that she actually heard noises of people fighting. The noises were coming from the deceased's house. Although she was not certain of time she testified that it was at approximately 23:00. She remained house because she was afraid to go outside.
- [10] Matabo testified that she saw the appellant the next morning when he was leaving the deceased's house. He had his clothes with him. After a while she saw the appellant arriving with the police at the house of the deceased.
- [11] Papi Mthimkhulu, the appellant's son, testified that when he arrived at home on Friday, 30 March 2012 at approximately 20:30, he found the appellant at home. The next morning the appellant woke him up and told him that he is going to Kganana to give his bankcard to a sibling of Papi.
- [12] Papi further testified that after the appellant left he wanted to play music and realised that the CD player was not at home. He thereupon proceeded to the deceased's house to look for the CD player. Upon his arrival at the deceased's house he found the door and burglar door slightly open. He knocked at the door, but did not get any response. He went to Matabo's house to enquire, but was told by Matabo that she has not seen the deceased since the previous day. He thereupon entered the house of the deceased and found *"the house (was) mixed up. There was a (indistinct) on the floor and water and some bottles and the refrigerator was also open."*
- [13] He furthermore saw the deceased lying next to her bed with blood on her face. He was extremely shocked and decided to go to Kganana to inform the appellant of the deceased demise. The appellant asked Papi". *What are you saying?"* The appellant thereupon called his sister and Papi had to repeat the bad news. The appellant informed his sister that he had left the deceased with someone and that he had taken his bank cards and went home.

- [14] Papi testified that the distance between the deceased's home and his house was approximately one kilometre. He told the court that, although, the appellant and the deceased resided in the deceased's house, they would normally sleep at his father's house on month ends. When he found the appellant at home on the Friday night the appellant was in good spirits and even made a joke with Papi.
- [15] Detective constable Macheve testified that he arrived at the deceased's house at 16:00. He entered the house and noticed a pot on the kitchen floor and meat strewn all over the floor. Upon entering the deceased's bedroom, he observed the deceased on the floor and her clothes were full of blood. There was also blood on the wardrobe and on the wall. He was thereafter introduced to the appellant and he requested the appellant to show him the clothes that he wore the previous day. The appellant immediately took Macheve to his house. At this stage of the proceedings a trial-within-a trial was conducted in order to determine the admissibility of statements made by the appellant to Macheve. At the conclusion of the trial-within-a-trial, the court ruled that such evidence would be inadmissible.
- [16] The evidence of the pointing was, however, allowed and Macheve testified that the appellant handed over the clothes he was wearing the previous day. Macheve examined the clothes and found two blood stains on the appellant's overall top. He furthermore noticed that there were gravy stains on the t-shirt the appellant wore the previous day. These items were sent for DNA analyses.
- [17] The DNA results were handed in as an exhibit, but did not assist the court in its finding. The court correctly found that the DNA analyses was irrelevant. The State handed in further exhibits pertaining to the post mortem of the deceased, the transfer of her body and the identification of the body.

- [18] The State closed its case and after an unsuccessful application for discharge in terms of section 174 of the Criminal Procedure Act, 51 of 1977, the appellant testified in his defence.
- [19] He testified that he went to the deceased's house after work and found the house locked. He waited in the yard and a while later the deceased arrived in the company of Makoane. Both were under the influence of liquor. Makoane told him that the deceased went to a neighbour's house to fix a television. Because he was talking to Makoane and not the deceased, he asked Makoane to request his bank card and cell phone from the deceased.
- [20] The deceased unlocked the house and gave him the requested items. It was approximately 16:00 in the afternoon and he went home.
- [21] The appellant testified that Papi arrived at the house at approximately 20:00. He woke up before Papi the next morning and after speaking to Papi, he left.
- [22] Upon being informed by Papi of the deceased's death, he went to the police station and accompanied the police to the deceased's house. When requested by Macheve to hand over the clothes he wore the previous day, he complied with the request. During cross-examination the appellant denied that there was blood stains on his overall top.
- [23] In response to a question by the court, the appellant testified that he was referring to Makoane when he told Papi that he left the deceased in the company of another man on the Friday.

JUDGMENT: COURT A QUO

- [24] In its judgment the court *a quo* reached various conclusions that were not supported by the facts. The relevant portions of the judgment are discussed *infra*.
- [25] *"I am of the view that the fact that the he did not sleep at the deceased's place that night is a [indistinct] by his [indistinct] that he knew there was something*

wrong that has happened to the deceased. It is not just a coincidence that on the night, on the very first night he was away then the deceased was attack."

- [26] The appellant testified that he left the deceased's house at approximately 16:00 on Friday, 30 March 2012. He had his bank card in his possession. Papi testified that the appellant and the deceased normally slept at the appellant's home on month ends. The 30th of March was month end. Papi found the appellant at home at approximately 20:00. He testified that the appellant was in a good mood and he did not testify that he noticed anything out of the ordinary. Papi was not asked in what condition the appellant's clothing was, but one can accept if the clothes were blood stained, he would have noticed it.
- [27] Matabo testified that she heard screaming and/or fighting emanating from the house of the deceased at approximately 23:00. At 23:00 the appellant was already at home according to the evidence of Papi. Papi was awoken the next morning by the appellant. The appellant wanted to buy groceries, etc for Papi's sibling. This most probably explains why the appellant requested his bank card from the deceased on the previous day.
- [28] I view of this evidence, I struggle to find the logic in the court a quo's reasoning that the appellant slept at home because *"he knew there was something wrong with the deceased."* Why is it not a coincidence that the deceased was murdered on the first night they did not sleep together? The deceased was alone at home and could have been attacked by someone else.
- [29] *What I am saying is here is a man, he is insulting Malfetsane for no reason. Just immediately after somebody hears the moise of a fiht in that house that is not strange"*
- [30] This finding does not accord with the evidence. On Malefetsane Makoane's version, the appellant insulted him during the afternoon. Matabo testified that she only heard screaming / fighting at approximately 23:00 that night.

- [31] *"In [indistinct] the evidence of Magdeline Tsukudu (Matabo) that she saw accused moving out of the house of the deceased carrying his clothes. Behind him, that is the accused, in the house was his girlfriend wounded, blood stained, lying dead. With this piece of evidence alone the state has been able to prove beyond reasonable doubt that the guilt of the accused."*
- [32] The court *a quo* failed to take the evidence of Papi into account. Papi testified that his father was at home on the morning of 31 March 2012. This evidence contradicts that of Matabo. Papi confirmed the version of the appellant that he left his house on the morning of 31 March 2012 to go to Kganana. The appellant was indeed found by Papi in Kganana. It is improbable that the appellant would go to the house of the deceased on the morning of 31 March 2012, simply to collect his clothes.
- [33] *"In this case, our present case, we do not know whose blood was that, but by way of illustration say that was the blood of the deceased. The accused was not going to stay with that blood, he was going to wash it away or to burn those clothes with blood so the police had to act on the spot or that evidence could have easily been destroyed."*
- [34] The appellant had ample time to get rid of his clothes if he wanted to. Papi found him at home on Friday night at 20:00. Having heard of the death of the deceased, the appellant went to the police station and accompanied the police to the deceased's house. He apparently remained on the scene, because Macheve found him on the scene at 16:00 on Saturday, 31 March 2012.
- [35] Why would the appellant keep the clothes he was, according to the court *a quo*, wearing when he murdered the deceased? The appellant could have cleaned the clothes or burnt the clothes as suggested by the court *a quo*, but he does not. He keeps the clothes and upon being requested by the police, immediately takes the police to his house and hand the clothes over. The scenario sketched by the court *a quo* is not in line with the probabilities emanating from the evidence that was presented.

[36] Macheve did testify that there were two blood stains on the appellant's overall top. Save for the fact that there is no evidence linking the blood found on the top to the deceased, there is, furthermore, no evidence as to the extent of the two blood stains. Having regard to the massive injuries the deceased sustained, the fact that her clothes were blood soaked and that there was blood on the wardrobe and walls, one would expect more than two blood stains on the appellant's overall top. No blood was found on the appellant's T-shirt.

[37] A further unexplained feature is the open door of the fridge. The appellant was living with the deceased in her house. Why would he leave the door of the fridge open? It simply does not make sense.

[38] Finally and in evaluating the appellant's version of events, the court a quo made the following sweeping remarks:

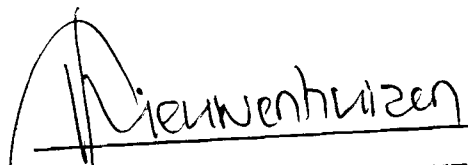
"The state witnesses were honest and reliable, the accounts given by them were credible and reliable in all material respects and satisfactory beyond reasonable doubt. There is no reasonable possibility that the defence raised by the accused could be true."

APPLICABLE LEGAL PRINCIPLES

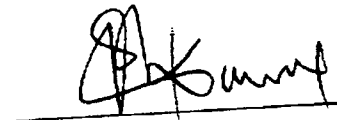
[39] In *S v Shackell* 2001 (2) SACR 185 SCA, Brand JA summarised the test to be applied at the end of a criminal trial at 194 g-l, as follows:

"It is a trite principle that in criminal proceedings the prosecution must prove its case beyond reasonable doubt and that a mere preponderance of probabilities is not enough. Equally trite is the observation that, in view of this standard of proof in a criminal case, a court does not have to be convinced that every detail of an accused's version is true. If the accused's version is reasonably possibly true in substance the court must decide the matter on the acceptance of that version. Of course it is permissible to test the accused's version against the inherent probabilities. But it cannot be rejected merely because it is improbable; it can only be rejected on the basis of inherent probabilities if it can be said to be so improbable that it cannot reasonably possibly be true."

- [40] The court *a quo* did not state which portion/s of the appellant's version is inherently improbable. The court erred in not having due regard to the evidence of Papi and more specifically the portions of his evidence that substantiates the appellant's version. The court *a quo*, furthermore, erred in not properly considering the probabilities that were in favour of the appellant's version.
- [41] Having regard to the evidence in totality, I could not find any basis to reject the version of the appellant as so improbable that it could not be regarded as reasonably possibly true.
- [42] Consequently, the court *a quo*'s finding that the State proved its case beyond reasonable doubt is incorrect and stands to be set aside.
- [43] An order to this effect has already been made.


N JANSE VAN NIEUWENHUIZEN
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

I agree


D T SKOSANA

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

It is so ordered.

Appearances:

Counsel for the Appellant	:	Advocate Mhlahlo
Instructed by	:	Legal Aid, Pretoria
Counsel for the state	:	Advocate Mnisi
Instructed by	:	The State