

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA



CASE NO: A572/2014

DATE OF HEARING: 26 MAY 2015

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

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DATE

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SIGNATURE

In the matter between:

VIMBELA, MADLISA

APPELLANT

and

THE STATE

RESPONDENT

J U D G M E N T

AVVAKOUMIDES, AJ

1. The appellant was charged with, and convicted of, one count of murder read with the provisions of section 51 of the Criminal Law Amendment Act 1997, Act No. 105 of 1997. He was represented at the trial and was convicted on 24 March 2014 and sentenced to 7 years imprisonment. The appellant was also declared unfit to possess a firearm in terms of section 103 of Firearms Control Act 2000, Act No. 60 of 2000.
2. The state's case was based largely solely on circumstantial and hearsay evidence. The first witness, Mr Ntakumba, did not implicate the appellant in any manner. The second witness, Mrs Bangani did not see the stabbing of the deceased and was unsure to the extent that she, upon being asked whether the eye witness, one Simangele, actually saw the stabbing replied that "she thinks so". Of critical importance is that Simangele's evidence was not led to corroborate the hearsay evidence of Mrs Bangani.
3. The trial court allowed the hearsay evidence and appears to have applied the provisions of section 3 of the Law of Evidence Amendment Act 1988, Act No. 45 of 1988. The said provision permits the admissibility of hearsay evidence in three board circumstances, namely:

- (a) Where the party or parties against whom the evidence is to be adduced agrees to the admission thereof.
 - (b) Where the person upon whose credibility the probative value of such evidence depends, himself testifies at such proceedings; or
 - (c) Where the court having regard to the nature of the proceedings; evidence; purpose for which the evidence is tendered; probative value of the evidence ... and where the court is of the opinion that such evidence should be admitted in the interests of justice.
4. No forensic evidence in respect of the murder weapon was admitted in evidence. I am of the view that the trial court misdirected by firstly admitting the hearsay evidence of Mrs Bangani on the basis that the evidence of Simangele would be led, and when this evidence was not led, to conclude that such evidence could be admitted because it was in the interests of justice. The trial court was not entitled to do so in the circumstances.
5. The trial court disregarded the evidence of the appellant's evidence that he was beaten severely by a group of people because of him having worn a T shirt bearing the name of National Union of Mineworkers (NUM). There is no dispute that the appellant suffered severe injuries by the assault on him. The issue arose about whether the attack on the appellant took place before or after the stabbing of the deceased. No evidence in this regard was

presented. The trial court did not place any weight on the evidence of the appellant.

6. There is no duty that rests on the accused to convince the court of the truth of any explanation he gives. If the accused gives an explanation, albeit improbable, the court is not entitled to convict unless it is satisfied that not only is the explanation improbable, but false beyond reasonable doubt. See *R v Difford* 1937 AD 370.

7. In my view the appeal must succeed. Consequently, taking all the circumstances into account I make the following order:

7.1 The appeal is upheld.

7.2 The conviction and sentence are set aside.

AVVAKOUMIDES, AJ

ACTING JUDGE OF THE HIGH COURT

I agree:

HUGHES, J

JUDGE OF THE HIGH COURT

Representation for the Appellant:

Counsel J. S. Nyathi

Instructed by Finger Phukubje Inc.

Representation for Respondent:

Counsel A. T. Moetaesi

Instructed by: The State