

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

Appeal No.: A242/2013

In the matter between:

TUMELO FRANS MOKOENA

Appellant

and

THE STATE

Respondent

CORAM: MUSI, J *et* MOTLOUNG, AJ

HEARD ON: 24 FEBRUARY 2014

JUDGMENT BY: MOTLOUNG, AJ

DELIVERED ON: 22 MAY 2014

- [1] The appellant appeared in the Bethlehem Regional Court on charges of murder and robbery with aggravating circumstances. He was convicted on both counts and sentenced to fifteen years on each count, 10 years on count 2 to run concurrently with count 1. He appeals against both convictions and sentences.

- [2] The convictions flowed from the murder of the deceased on 18 June 2011 and robbery with aggravating circumstances, as set out on the date in count 1 above, in Bethlehem
- [3] Mapoelo Evelina Khumalo, who is the deceased, Buti Petros Khumalo's wife, testified that on 18 June 2011 she was on her way home with her husband. As they were to pass the rail crossing to their home, they met three men, one of whom was the appellant. As they were about to pass them, the deceased suggested they run as it was cold.
- [4] The appellant then asked the deceased why he suggested they run after they passed them and referred to him as a "spook". An altercation between the deceased and the appellant ensued. They wrestled and after her intervention they stopped. The family proceeded on their journey.
- [5] A few minutes later the appellant came rushing to the deceased, hurling insults at him and saying he is going to stab him. She pleaded with the appellant to leave the deceased alone and the deceased picked up stones to defend himself. The appellant managed to trip the deceased, who fell to the ground. The appellant got on top of him and stabbed the deceased repeatedly on his upper body.
- [6] Ms Khumalo screamed for help to no avail and ran home to get further assistance. On her return to the scene with more

manpower, she found the deceased in a pool of blood and called the police from her phone. She went to the police station to seek further assistance. When she returned to the scene she found that the police were already there. An ambulance arrived a while later. She was informed by the paramedics that her husband had passed away.

- [7] She had observed that the deceased's pockets were drawn out and his wallet, which contained his bank cards, was missing. His phone and keys were not taken. That same day there was an attempt to withdraw money from the deceased's bank card, as a result she received a message via her husband's mobile phone. She informed the police about the message.
- [8] Her evidence was that a few days afterwards she saw the appellant in town and informed the police. The appellant was arrested. Even though the events took place at night she testified that she could identify him. The appellant is a person she knew for many years.
- [9] Elvis Radebe testified and corroborated Mrs Khumalo. He testified that he knew the appellant as a friend from 2008. He testified that the deceased was a neighbour. He went to a local taxi rank and met the appellant and one Padiso. After a while they decided to leave on the understanding that the appellant would buy them beer in Morelig where they stayed. On their way the deceased and his wife passed them, but the couple

had a quarrel. It is at this point that the appellant intervened and the deceased took exception to that. An altercation broke out. They separated the two antagonists.

[10] The appellant was not happy after this and claimed the deceased had caused him to be cut by his own knife. He told them he was going to take revenge. He had a cut on his hand. He was cursing all the time. While they were still baffled by the events, the appellant rushed to the deceased with an open knife. Appellant tripped the deceased and when the latter fell, he stabbed him several times.

[11] Radebe testified that while he could not see Mrs Khumalo, because it was dark, he heard her screams. The incident occurred some 80 metres from them. He did not see when the appellant removed the deceased's property from his pockets. He said there was no motive for him to implicate the appellant. The three of them went back to town. The appellant washed blood off his hands. They bought food and headed for the township where they entertained themselves at a tavern.

[12] They bought liquor with money taken from the deceased's wallet. They also used the deceased's bank cards to try and access his account, but failed to get the right pin number.

[13] Padiso Tsitso Tsosana testified that he was with the appellant and Radebe that 18 June 2011. He knew the appellant for

about three years. He said he was only acquainted to Paseka Elvis Radebe. He said they were drinking at the taxi rank when Radebe joined them. They left together for Morelig. The evidence of this witness is similar to that of Radebe and corroborates it in all material respects.

[14] Teboho Khumalo testified that the deceased was his father. He gave evidence that he had known the appellant for one year. On 18 June 2011 he attended a traditional ceremony. He said he was never at the taxi rank.

[15] The evidence of Kobedi Kobedi who was the investigating officer was that on 27 June 2011 he arrested the appellant after receiving information that he had been seen in town in Bethlehem. He testified that Mrs Khumalo was unsure of the identity of the appellant on the first day, because she was overcome by emotions. He then obtained a supplementary statement from her which contained the names of suspects. She gave the name of the appellant as Tumelo Mokoena. He said he could not arrest the appellant as he was already at large. He further testified that Radebe and Tsosana were arrested initially, but could not be linked with the crimes.

[16] The evidence of the appellant was that he knew the deceased's wife and son. He also knew the two witnesses that gave evidence on behalf of the State. On 18 June 2011 he found the two witnesses, Radebe and Tsosana, at the taxi rank. They did

not have money for liquor.

- [17] The appellant testified that he bought a beer quart and that he drank with the two. He informed Radebe and Tsosana that he intends to go to Qwa-Qwa. While standing outside the taxi rank tavern, Teboho, the deceased's son, came and ask for beer. He gave Teboho R10.00 to buy beer. Teboho did not buy beer, but left for Morelig, his home. He left the taxi rank to hitch a hike to Qwa-Qwa. He arrived in Qwa-Qwa at approximately 18h00.
- [18] He testified that he was never at Ninth Avenue Tavern on 18 June 2011. He said he knows nothing about the fatal stabbing of the deceased.
- [19] The appellant's version of events was that he went to the tavern, found the two witnesses, Radebe and Tsosana. They drank a few beers and were joined by the son of the deceased. He said he gave the latter some money before he hitched a hike to Qwa-Qwa where he arrived at 18h00 on 18 June 2011. He therefore pleaded an alibi.
- [20] The State's version was that he was with Tsosana and was later joined by Radebe. From there they moved to Morelig, where they stayed in order to continue drinking. Along the way, the appellant got into an altercation with the deceased. The deceased was with his family. After the deceased's wife

separated them, the appellant charged the deceased with an open knife and a fight ensued. This resulted in the death of the deceased. It was found that he had also been pick-pocketed or robbed.

[21] The magistrate accepted the evidence of the State and rejected that of the appellant as false beyond reasonable doubt. On appeal we can only interfere with the findings in case of a material misdirection by the magistrate or if the court of appeal is convinced that the decision is clearly wrong.

[22] Insofar as the count of murder is concerned, the proven facts exclude every reasonable inference other than that the appellant committed the crime, resulting in the death of the deceased.

[23] 23.1 The appellant argued that the evidence of the two state witnesses, who were with the appellant, should be approached with caution as they were implicated in the use of the bank cards of the deceased.

23.2 It was further argued that the identity of the appellant was never established.

23.3 It was submitted that he had an alibi.

23.4 Appellant lastly submitted that a key statement that was missing should have been considered fatal to the state case.

[24] The above submissions were rejected by the magistrate when he found that:

24.1 The evidence of Mapoelo Evelina Khumalo established the identity of the appellant beyond reasonable doubt.

24.2 In as far as the evidence of the two witnesses, he accepted they should be approached with caution, but when taken with the evidence of the deceased's wife, Mapoelo Evelina Khumalo, it established that the appellant was on the scene and was properly identified.

24.3 The affidavit made by deceased's wife was corroborated by the evidence of Warrant Officer Kobedi who testified that on the first day Evelina Khumalo was confused, but later after recovering, she gave him the name of the appellant. This was also entered in the investigation diary of Kobedi.

24.4 In respect of the alibi, evidence of the deceased's son was that he was never at the taxi rank on the day. The appellant's mother could also not confirm that he was in Qwa-Qwa, as alleged.

[25] I find that looking at the totality of the evidence, the learned magistrate was correct. See **S v Van Aswegen** 2001 (2) SACR 97 (SCA) at 101 a – f. The “totality” approach makes the appellant the culprit.

[26] In as far as the second count of robbery is concerned, it was established that the cards and wallet, including R100.00 that belonged to the deceased, were found in the possession of the appellant and the two witnesses, after they used the cards at a tavern.

[27] Relying on the evidence above, the trial court convicted the appellant of robbery with aggravating circumstances. In my view the trial court erred. The magistrate said the only reasonable inference is that the appellant robbed the deceased of his wallet with aggravating circumstances. There is more than one inference that can be drawn. Robbery with aggravating circumstances is defined as follows:

“Robbery consists of the theft of property by intentionally using violence or threats of violence to induce submission to its taking.”

See **SA Criminal Law and Procedure**, Vol II by JRL Milton, page 642. See also **S v Moloto** 1982 (1) SA 844 (A) at 850A.

In this particular instance there is no evidence that at the time of taking the deceased's wallet, he was still alive or dead. In the result robbery as defined above, cannot succeed as there is no evidence of violence being used to induce the deceased to submit to his belongings being taken. The property must be obtained by appellant as a result of violence or threat of violence. The premise is that the violence must precede the taking and that robbery is not committed if the violence is used to retain a thing already stolen or to facilitate escape. If this happens, appellant commits theft and assault. The converse is also true. If appellant assaulted the deceased, after the assault discovers that the deceased had by chance dropped some of his property and then only then for the first time forms an intention of taking the property, he does not commit robbery if he picks up the property and appropriates it, he may however be charged with and convicted of assault and theft.

See **S v Moerane** 1962 (4) SA 105 (T) at 106 D;

S v Jabulani 1980 (1) SA 331 (N);

S v Matjeke 1980 (4) SA 267 (B);

C R Snyman: **Criminal Law**, 5th Edition page 518.

[28] Robbery is a form of theft and no conduct can be robbery unless it is also theft. The offence of theft is defined as:

“The unlawful taking of another’s property with intent to steal, of a thing capable of being stolen.”

There is evidence that the property of the deceased was found on the appellant. He went to a tavern where he used the items stolen from the deceased with his friends. They testified that he had urged them to use the cards as everyone should earn his keep. He was not going to buy them liquor if they did not participate.

A more detailed definition of theft is the appropriation of another’s property, which consists of the:

- (i) Deprivation of the lawful owner of his property;
- (ii) The exercise of right as an owner of property belonging to someone.

And lastly the element of intention would be satisfied by the use by the appellant and his friends of the items taken from the deceased at the tavern as the money would be appropriated by the appellant for his own benefit.

Theft is a competent verdict on a charge of robbery.

[29] In the circumstances I find that the appellant ought to have been found guilty of the crime of theft, as the deceased's wallet and bank cards were found on him. They were used at the tavern for his own benefit.

[30] Adv Kruger, for the appellant, left it to the court to decide on an appropriate sentence in regard to the issue of robbery, which this court has found can only amount to theft. In the circumstances I find that a sentence of three years is appropriate for the crime on the following basis:

- (i) The appellant was not a first offender in respect of the 2nd charge. He has previous conviction for crime involving dishonesty.
- (ii) He was a young adult of 34 years when the crime was committed. His age cannot count in his favour. He was also unemployed at the time of the offence.
- (iii) While robbery has been ruled out, theft by itself is serious and cannot be condoned. This is more so because of the circumstances under which the crime was committed. It was callous of the appellant to kill the deceased and still take from him as he did.

[31] In the premises the following order is issued:

31.1 The appeal against conviction and sentence on count 1 is dismissed.

31.2 The appeal against conviction on count 2 is upheld; the conviction is set aside and replaced with a conviction of theft, which is a competent verdict.

31.3 A sentence of 3 (three) years imprisonment is imposed in respect of count 2.

31.4 The sentences on both counts are to run concurrently.

S.E. MOTLOUNG, AJ

I concur.

C J MUSI, J

On behalf of appellant:
Instructed by:

Adv J.D. Reyneke
Legal Aid SA
BLOEMFONTEIN

On behalf of respondent:
Instructed by:

Adv M.M.M. Moroka
Director of Public Prosecutions
BLOEMFONTEIN