IN THE HIGH COURT OF SOUTH AFRICA
(ORANGE FREE STATE PROVINCIAL DIVISION)

Appeal No.: A251/2006

In the appeal between:

THEMBEKILE ALFRED FAKU Appellant

and

THE STATE Respondent

CORAM: RAMPAI, J *et* MOLEMELA, AJ

JUDGMENT: RAMPAI, J

HEARD ON: 20 AUGUST 2007

DELIVERED ON: 22 NOVEMBER 2007

---

[1] The appellant was charged with culpable homicide. The state alleged that he unlawfully and negligently caused the death of Nodatini Seri Qinisa by stabbing her in Welkom on Friday the 28th January 2005. He pleaded not guilty in the Welkom Regional Court on the 21st April 2006. He offered no explanation for his plea. Notwithstanding his plea, he

was found guilty on the 18th May 2006. On the same day he was sentenced to seven years imprisonment. He now comes on appeal against the conviction as well as the sentence.

[2] The version of the state was narrated by three witnesses, namely: Ms M. C. Motuboli, the appellant's tenant; Mr. T. S. Matokoane, a police inspector and Mr. R. Lekoata, also a police inspector.

[3] Briefly stated the testimony of Ms Motuboli was as follows: she stayed in the cottage on the appellant's property. The appellant and the victim occupied the main house. She was their tenant. On Friday the 28th January 2005 she was home when the couple arrived from somewhere. At about 14h00 a fight broke out in the main house between the appellant and the victim. She heard the victim saying:

> "Thembinkosi, you are killing me."

[4] The next day, on Saturday the 29th January 2005 the victim called her, showed her a wound on her back, made a report to her and asked for relieving medication. The

wound was still bleeding. She gave the victim two Panado tablets. A day later on Sunday the 30th January 2005 she again gave the victim two more Panado pain-killers. On both occasions she realised that the victim was having respiratory problem and that she was in pains. On Monday the 31st January 2005 she did not see the victim.

[5] On Tuesday the 1st February 2005 she entered the main house at the appellant's request. She found the victim dead. She called an ambulance. The members of the ambulance crew confirmed the victim was dead. Later the police came and questioned the appellant. Inspector Matokoane testified that the appellant told him that he and the victim were fighting on Friday the 28th January 2005, that the victim fell on her back onto a garden tool and sustained injury. The testimony of Inspector Lekoata confirmed that of his colleague. Like him he also saw a wound on the victim's back but he saw no garden implement in the bedroom where the fighting took place.

He gathered that the appellant and the victim were lovers and that they were living together. That then completed the prosecution evidence.

[6] The appellant did not give oral evidence in his defence. He called no witness to testify on his behalf. He was convicted on the strength of the aforegoing oral evidence, his formal admissions, the doctor's affidavit in terms of section 212(4) Act No. 51 of 1977, the post-mortem examination report and other exhibits.

[7] The attack of the appellant's conviction is based on two grounds. The first ground of the attack was that the court below erred in receiving the post-mortem examination report together with the doctor's affidavit in terms of section 212(4) Act No. 51 of 1977 as admissible evidence without the oral testimony of the doctor. The second ground of the attack was that the court below also erred in finding or ruling as admissible, the evidence which the appellant contended was inadmissible hearsay. The first leg of this ground of attack concerned the evidence of what the victim

pointed out to the first state witness. The second leg concerned the evidence of what the victim told the first state witness.

[8] I deal with the first ground of the attack first. It is undisputed that the defence did request that the doctor concerned be called to give oral evidence. Notwithstanding such specific request, the doctor was not called to give oral evidence to explain the medical observations he made, the clinical findings he made and the conclusion he reached.

[9] In the case of **S v HLONGWA** 2002 (2) SACR 37 (T) at paragraph 22 Stegmann J said the following about a request by the defence to have the doctor called:

> ¡°On the contrary, even where a certificate or affidavit by a doctor complies in every respect with s 212(4), if there is a request from the accused or his representative for the doctor to be called, the court must exercise its discretion under s 212(12). **When the request is made by a legal representative, the court should be inclined to call the doctor**, unless it is clear that the request is frivolous or that no good purpose could possibly be served by calling the doctor. On the other hand, when the request is made by an unrepresented accused, the court should enquire whether the accused is prepared to disclose what it is that he wishes the doctor to deal with in evidence. If it appears that the doctor may be able to be of further assistance in the

matter, and particularly if the court is contemplating using what the doctor has recorded in the affidavit or certificate for the purpose of drawing inferences that have not been spelt out in the affidavit or certificate by the doctor, the court should, in terms of s 22(12), either prepare written interrogatories for the doctor, or have the doctor called as a witness."

[10] Almost two decades before **S v HLONGWA,** *supra* the following was said about the medical reports in, among others, homicide cases:

> ¡°Both this Court and the High Court have said repeatedly how important it is, particularly in a case of any seriousness, that the doctor be called to amplify and explain the contents of his report and generally to assist the court in an assessment of the nature and seriousness of the injuries and the inferences to be drawn from the presence or absence, as the case may be, of injuries. One knows that doctors are busy people but this is no excuse for failing to place before the court all the relevant evidence; and the viva voce evidence of doctors in, for instance, homicide, rape and serious assault cases is very relevant indeed. **Prosecutors should regard it as the rule rather than the exception that the doctor's evidence is necessary, and magistrates should always have in mind**

that it is their right, and indeed duty, in any case where they believe that viva voce evidence may be of assistance **to require the attendance of the doctor.**"

S v MELROSE 1985(1) SA 720 (AD) at 724 g – 725 a.

[11] The trial court discussed the post-mortem examination report and commented as follows on page 71: 4 - 18:

¡°The State has handed in the post mortem report together with an affidavit from the doctor concerned who conducted the post mortem, and compiled a report, it was handed in terms of Section 212(4) of the Criminal Procedure Act 51 of 1977. And the requirements of which were complied with. The Court accepts the evidence as *prima facie* proof of the issue and it has been said that a judicial officer must accept the evidence as *prima facie* proof will become conclusive proof. The post mortem report clearly describes the cause of death (sic) a stab wound with a sharp object in the back. The thorax ventral wound at the back, 5cm deep, 4cm in diameter, it penetrated the spinal cord. The penetration was from the back to the front 5cm deep and caused the collapse of both lungs. This was obviously a deep wound. The Court accepts that the cause of death in the post

mortem report has become conclusive proof in the absence of other evidence, and consistent with the version of the State."

[12] The victim was wounded on Friday the 28th January 2005, she died on Tuesday the 1st February 2005, approximately four days later. The post-mortem examination was performed by Dr. W. van Heusden in Welkom on Wednesday the 4th February 2005. The doctor found 1850ml, in other words approximately 2ℓ, of free blood in the chest cavity where the lungs are warehoused. The excessive free blood invaded the respiratory space of the lungs. The invasion created a tension between the lungs and the free blood. In the end the lungs drowned in the blood and collapsed. This is my understanding of the medical evidence.

[13] It would, therefore, appear that the victim's internal bleeding was a gradual process. Her respiratory problem probably started on Friday the 28th January 2005. She was wounded on that day. Ms. Motuboli observed that she was breathing with difficulty the next day on Saturday the

29th February 2005. The longer she gradually bled, the more free blood welled up in her chest cavity. The longer the gradual bleeding continued the worse her respiratory condition gradually deteriorated. On the fourth day since the bleeding started she could no longer breathe. Her two lungs seemingly submerged in blood. Her right lung was punctured by the sharp object with which she was stabbed.

[14] The medical question which arises in these peculiar circumstances is whether the victim's life could have been saved through timeous medical intervention before the moment of death on Wednesday the 1st February 2005. The answer to such a question cannot be ascertained *ex facie* the post-mortem examination report. Had the doctor been called as the defence had requested, the doctor would probably have amplified and explained the gravity of the stab wound. He would, probably have been of assistance to the court by clarifying whether or not the stopping of the victim's internal bleeding and the draining of the free blood by an intervening surgical procedure would

have averted the collapse of her lungs or not and whether such surgical intervention would have saved her from dying or not. In short the critical question is, was the stabbing the juridical cause of the victim's death?

[15] On behalf of the appellant it was contended on appeal that if only the doctor had testified and relevant questions asked he would have amplified his written evidence and clarified the chain of events and the critical legal connection between the wound and the ultimate death as well as the difference or impact, if any, prompt intervening surgery would have made. Whether the appellant's stabbing of the victim was a *conditio sine qua non* of her eventual demise is an issue at the heart of this appeal. **S v MOKGETHI EN ANDERE** 1990 (1) SA 32 (A). At this stage we have to refrain from deciding the issue on account of inadequate medical evidence.

[16] The court below appears to have believed that *viva voce* medical evidence was not necessary to require the attendance of the doctor. Unless the magistrate sees a

broader picture of the evidence presented and its shortcomings he or she will obviously not appreciate whether *viva voce* evidence will be of any assistance. To obviate this problem two rules have evolved through case-law. The general rule is that the doctor's oral testimony is always necessary (**S v MELROSE,** *supra).* The second rule is that when a request is made by a legal representative, as opposed to the case where it is made by an unrepresented accused, the court should readily be inclined to accede to the request (**S v HLONGWA,** *supra)*.

[17] In the instant case the appellant's defence lawyer specifically made a request to the court that the doctor be called to give *viva voce* evidence. The magistrate did not accede to the request. In my view the defence request was reasonable regard being had to the circumstances of this case. Worse still, no reasons were given by the court to justify the refusal. Certainly the request was not frivolous. The calling of the doctor would probably have served a useful and good purpose. All this notwithstanding the magistrate relied on the doctor's written medical evidence

to convict the appellant. In my view the court below erred. The irregularity cannot be regarded as materially insignificant.

[18] The trial court initially accepted the doctor's affidavit together with the post-mortem examination report, under protest from the defence, as *prima facie* proof of the cause of death. Subsequently in its judgment, the trial court found that such *prima facie* evidence became conclusive evidentiary proof because the appellant did not testify. It seems to me that written evidence tendered in terms of section 212(4) which is *prima facie* proof, remains just that until it is admitted by the defence or its attack by the defence fails. In the case of each of these scenarios the result is the same, namely the *prima facie* proof becomes conclusive evidentiary proof. In the instant case there was neither an admission nor a ruling.

[19] The reasonable request of the defence for the calling of the doctor so that he could give oral evidence was simply ignored. The appellant was effectively denied an

opportunity to cross-examine an important prosecution witness and to debate the medical issues sensibly during closing argument. The mere fact that no reasons were given not only as to why the prosecutor did not call the doctor but also as to why the defence's specific request was turned down justify the contention that the reception of the doctor's affidavit and post-mortem examination report without the *viva voce* evidence was irregular. We can only guess as to what favourable or unfavourable aspects to the defence case that doctor's oral evidence would have produced. We can never really know because the appellant was for no apparent reason denied a fair opportunity to establish through cross-examination that the stabbing was not the juridical cause of the victim's death and that something else could reasonably and possibly have been.

[20] If it is accepted, and I think we should, that the reception of such written medical evidence unconfirmed or unsupported by oral medical evidence was procedurally irregular, then it stands to reason that there was no *prima facie* evidence

which could have been elevated to conclusive evidentiary proof as to the real cause of death by the mere silence or failure of the appellant as the accused, to testify. It seems to me that even if the accused had testified the concerns of the defence about certain difficult aspects of the prosecution case would nonetheless have still remained. His silence did not erase the procedural irregularity.

[21] The question which now falls to be determined is whether the aforesaid irregularity resulted in failure of justice. And if the answer is in the affirmative, what an appropriate relief must be to grant in this case. In **S v HLONGWA,** *supra* at par 63 Stegmann J said the following about an irregularity:

> ¡°¡¦ if the verdict would probably have been different, or if there is substantial uncertainty whether it would have been the same, the irregularity has resulted in a failure of justice."

There the court was concerned with an irregularity in a matter which came via a review procedure. Here we are concerned with a case which came to us on appeal and not on review. But I can see no reason why the same

fundamental principle should not apply to appeals as well.

[22] To my mind there is substantial uncertainty as to whether the verdict would have been the same had the irregularity not been committed by failure to call the doctor and thereby precluding the defence from cross-examining the doctor. I do not want to labour the point any further. The doctor should have been called and the accused afforded an opportunity to establish his alleged defence of *actus novus intervenes* if he can.

[23] In the light of the conclusion I have reached as regards the first ground of the attack, it becomes unnecessary to deal with the hearsay front of the attack. We may cross that bridge should we come to it again in the future. For now we cannot proceed. We have reached the *cul de sac.*

[24] In my view the appropriate relief in the circumstances is to set the conviction aside. But since there is no proper medical evidence before us we cannot determine what an appropriate verdict should have been. Therefore

considerations of justice and fairness to the applicant and the society which today represents the victim dictate that the case be remitted to the court below for further remedial steps. Of course once the conviction is set aside, the sentence which followed such conviction must *ipso facto* also fall away.

[25] Accordingly I make the following order:

25.1 The conviction and the sentence are set aside.

25.2 The case is sent back to the regional court for the hearing of the oral testimony of Dr. W. van Heusden.

_____

M.H. RAMPAI, J

I concur.

_____

M. B. MOLEMELA, AJ

On behalf of the appellant: Adv. Van der Merwe
Instructed by:

The Justice Centre
BLOEMFONTEIN

On behalf of the respondent: Mr. D. W. Bontes
Instructed by:
Director: Public Prosecutions
BLOEMFONTEIN

/em