

/LVS
IN THE GAUTENG HIGH COURT, PRETORIA
(REPUBLIC OF SOUTH AFRICA)

DATE: 15 September 2014
CASE NO: A831/2013

DELETE WHICHEVER IS NOT APPLICABLE

- REPORTABLE: YES/NO ☒ YES
- OF INTEREST TO OTHERS JUDGES: YES/NO ☒ YES
- REVISED

3/10/14
DATE


SIGNATURE

3/10/2014

In the matter between:

BAFANA SYDWELL KHOZA

APPELLANT

vs.

THE STATE

RESPONDENT

JUDGMENT

RANCHOD J:

[1] This is an appeal against conviction only, leave to appeal having been granted by the court *a quo* (Mabuse J).

[2] The appellant was convicted on two counts of murder and one count of robbery with aggravating circumstances in the High Court (Circuit Local Division of the Eastern Circuit District) on 24 April 2012. He was sentenced to two terms of life imprisonment for the murder counts and 15 years for the robbery count.

[3] The appellant was accused of having intentionally and unlawfully killed Elizabeth Sindiso Sibiya and Jabulani Absalom Mhlongo the deceased in counts 1 and 2 respectfully and of robbing them of a wheelbarrow, two television sets, blankets, clothes and two suitcases.

[4] The appellant pleaded not guilty and his plea explanation was that he denied involvement in and any knowledge of the offences with which he was charged. No admissions were made in terms of s220 of the Criminal Procedure Act 51 of 1977 ("the Act"). The result was that a number of witnesses who testified gave evidence of a formal nature which was in any event not challenged in cross-examination. The purpose of admissions, as the learned Judge observed in the court *a quo*, is to curtail the length of a trial and not burden the State with having to call witnesses unnecessarily when their evidence is not in dispute. Mr Malanguti, who represented the appellant in the trial explained that the appellant had refused to make any admissions.

[5] It is common cause that the two deceased found were dead at their residence on 3 January 2008 and it is not in dispute that certain items as listed in count 3 were taken from them. The causes of their death and the circumstances under which they were found were also common cause.

[6] The key issue is one of identity of the perpetrator or perpetrators. There were no eye witnesses nor any forensic evidence linking anyone to the commission of the crimes. The State relied primarily on the evidence of Ms Mpho Phumzile Mashego, who at some stage was in a live-in relationship with

the appellant, and some circumstantial evidence. (For convenience' sake I will refer to her as "Phumzile" as she was referred to in the court *a quo*).

[7] Phumzile testified that on 1 January 2008 she was asleep in a rented room which she shared with the appellant. Her child was with her. In the middle of the night the appellant arrived with the clothes he was wearing full of blood. She asked him what happened and he said he had completed what he went out to do. He then said he had killed Jabulani and his wife. It is common cause that Jabulani is the deceased in count 2 and the person referred to as his wife is the deceased in count 1. She further testified that the appellant had arrived with a television set and clothes wrapped in a blanket. He left the items there, went out again, and later came back with a wheelbarrow with more clothes and another television set.

[8] Under cross-examination Phumzile was referred to her witness statement made to the police almost three years after the incident. The statement was taken by the police only on 10 December 2010. She confirmed it was her statement and that the contents were correct. In this statement Phumzile says during December (the day is not stated) and in the early morning the appellant came inside the house whilst she was sleeping. She says further that the following night at about 2:00am she and the appellant were going together to the deceased's residence but on the way she changed her mind and came back home as she was afraid. The appellant then went alone to the deceased's house and brought back two TV sets, blankets and a suitcase full of clothes belonging to the deceased and their son. She says further in

full of clothes belonging to the deceased and their son. She says further in the statement that the two TV sets and one blanket were sold by the appellant while the clothes and some of the blankets were used by her and the appellant.

[9] The contradictions between Phumzile's testimony in court and what she said in her police statement were highlighted and put to her by appellant's counsel in cross-examination. Whereas in her statement she said they used the clothes, in her court testimony she said she did not wear any of them. Whereas she said the appellant brought the various items himself at night, in her witness statement she says she was going with the appellant the next night at about 2:00am to fetch the items but she changed her mind along the way and returned home and he brought the items. Her explanation was that the version in the statement was incorrect. As far as the difference between the statement and the oral testimony whether she had worn any of the clothes of the deceased is concerned, she said the version in the statement is correct.

[10] Phumzile said she did not report what appellant had admitted to her about he having killed the two deceased because she was afraid of him. This was in evidence-in-chief. However, under cross-examination she confirmed this but, pressed further on the point, she said it was also because she had been warned by the deceased's (Jabulani's) sister not to inform the police.

[11] Appellant's counsel submitted that these were material contradictions and referred to several more. It was submitted that Phumzile had a motive to

falsely implicate the accused. Further, that she heard about the deceased's death after Good Friday. A further string to counsel's bow was that Phumzile testified the appellant was drunk when he is alleged to have admitted to killing the deceased. The issue is whether the appellant was in sufficient possession of his mental faculties when he made the admission. Finally, it was also argued that the court *a quo* did not pay sufficient heed to the dangers inherent in accepting the evidence of a single witness.

[12] It would be appropriate at this stage to set out in broad terms the approach to be adopted when evaluating apparent contradictions in a witness's evidence. In *S v Mafaladiso en Andere* 2003(1) SACR 583 HHA the following is stated in the headnote in English:

"The juridical approach to contradictions between two witnesses and contradictions between the versions of the same witness (such as, *inter alia*, between her or his *viva voce* evidence and a previous statement) is, in principle (even if not in degree), identical. Indeed, in neither case is the aim to prove which of the versions is correct, but to satisfy oneself that the witness could err, either because of a defective recollection or because of dishonesty. The mere fact that it is evident that there are self-contradictions must be approached with caution by a court. Firstly, it must be carefully determined what the witnesses actually meant to say on each occasion, in order to determine whether there is an actual contradiction and what is the precise nature thereof. In this regard the adjudicator of fact must keep in mind that a previous statement is not taken down by means of cross-examination, that there may be language

and cultural differences between the witness and the person taking down the statement which can stand in the way of what precisely was meant, and that the person giving the statement is seldom, if ever, asked by the police officer to explain their statement in detail. Secondly, it must be kept in mind that not every error by a witness and not every contradiction or deviation affects the credibility of a witness. Non-material deviations are not necessarily relevant. Thirdly, the contradictory versions must be considered and evaluated on a holistic basis. The circumstances under which the versions were made, the proven reasons for the contradictions, the actual effect of the contradictions with regard to the reliability and credibility of the witness, the question whether the witness was given a sufficient opportunity to explain the contradictions - and the quality of the explanations - and the connection between the contradictions and the rest of the witness' evidence, amongst other factors, are to be taken into consideration and weighed up. Lastly, there is the final task of the trial Judge, namely to weigh up the previous statement against the *viva voce* evidence, to consider all the evidence and to decide whether it is reliable or not and to decide whether the truth has been told, despite any shortcomings. (At 593e - 594h.)"

[13] In *S v Mkhole* 1990(1) SACR 95(A) again from the headnote:

"Contradictions *per se* do not lead to the rejection of a witness' evidence; they may simply be indicative of an error. Not every error made by a witness affects his credibility; in each case the trier of fact

has to make an evaluation, taking into account such matters as the nature of the contradictions, their number and importance, and their bearing on other parts of the witness' evidence."

[14] In R v Dhlumayo and Another 1948(2) SA 677 (AD) it was held that:

"(3) The trial court has advantages – which the appellate court cannot have – in seeing and hearing the witnesses and in being steeped in the atmosphere of the trial. Not only has he had the opportunity of observing their demeanour, but also their appearance and whole personality. This should never be overlooked.

(4) Consequently the appellate court is very reluctant to upset the findings of the trial Judge.

...

(8) Where there has been no misdirection on fact by the trial Judge, the presumption is that its conclusion is correct; the appellate court will only reverse it where it is convinced that it is wrong.

(9) In such a case, if the appellate court is merely left in doubt as to the correctness of the conclusion, then it will uphold it."

[15] The deceased both died in early January 2008. The police statement of Phumzile was taken almost three years later on 10 December 2010. The appellant was arrested on 2 December 2009. The appeal record is unhelpful in determining why it is that the appellant was only arrested on 2 December 2009 nor about the circumstances leading to his arrest. Similarly, it cannot be determined why Phumzile's statement was taken only on 10 December 2010.

I state this in the context that a long interval elapsed between the incident and Phumzile's statement to the police and a further approximately 16 months before the trial took place. We were informed from the bar by State counsel, Mr Mnisi – who also appeared for the State in the trial – that when the appellant was arrested he was already a sentenced prisoner in relation to another matter.

[16] In *S v Francis* 1991(1) SACR 198 (A) at 198j – 199a the approach of an appeal court to findings of fact by a trial court was crisply summarized as follows:

“The powers of a Court of appeal to interfere with the findings of fact of a trial Court are limited. In the absence of any misdirection the trial Court’s conclusion, including its acceptance of a witness’ evidence, is presumed to be correct. In order to succeed on appeal, the appellant must therefore convince the Court of appeal on adequate grounds that the trial Court was wrong in accepting the witness’ evidence – a reasonable doubt will not suffice to justify interference with its findings. Bearing in mind the advantage which a trial Court has of seeing, hearing and appraising a witness, it is only in exceptional cases that the court of appeal will be entitled to interfere with a trial Court’s evaluation of oral testimony.”

[17] In *S v Oosthuizen* 1982(3) SA 571 TPD – I quote from the headnote -

“Where a witness has been shown to be deliberately lying on one point the trier of fact *may* (not *must*) conclude that his evidence on another

point cannot safely be relied upon. The circumstances may be such that there is no room for honest mistake in regard to a particular piece of evidence: either it is true or it has been deliberately fabricated. In such a case the fact that the witness has been guilty of deliberate falsehood in other parts of his evidence is relevant to show that he may have fabricated the piece of evidence in question. But in this context the fact that he has been honestly mistaken in other parts of his evidence is irrelevant, because the fact that his evidence in regard to one point is honestly mistaken cannot support an inference that his evidence on another point is a deliberate fabrication.”

[18] I turn then to the criticism of Phumzile’s evidence. In her police statement she says:

“(2) During December 2007 while staying with Bafana Sydwell Khoza at Shishila trust early in morning the morning while asleep he came inside the house. His clothing were full of blood. When I questioned him he told me that he killed Jubalani Mhlongo and Elizabeth. He told me that Elizabeth borrowed him an amount of one hundred rand (R100.00) thereafter she always asked him about the money.

(3) The following night at about 02:00 we went together to the deceased (Jubalani and Elizabeth) residence. Along the way before reaching I turned back as I was afraid. He proceeded alone and took two TV sets, one big and one small. The big TV was black and the small one was silver in colour. Both TV set name (brand) were not known to me. He also took blankets, (three one blue, khaki and purple) big ones. He also

took two suitcases full of various clothes belonging to the deceased and their son. All these properties were loaded in their wheelbarrow which was green in colour.

(4) The two TV sets were sold by Bafana Sydwell Khoza. The clothes were used by his and myself. The blankets two were used by us and one was sold locally by him. After that we had a quarrel and I moved away from him leaving him behind at the above mentioned place, Shishila Trust. That is all I can state." (Quoted as is).

[19] Ms Rucky Nkosinati Mashego ("Rucky") testified that the appellant was her brother. She spontaneously testified that appellant "stabbed Phumzile with a screwdriver". The relevance of this remark is in relation to Phumzile's testimony that the appellant had assaulted her on a number of occasions and had fought with her and his sister when they wanted to report him to the police for the murder of the two deceased and that she (Phumzile) was scared of him. Rucky testified that at some stage Phumzile was seen wearing the deceased Elizabeth's clothes, viz. "a dress and a cloth worn by women on their head, a doek" a week after the deceased's death. Although she believed the items belonged to the deceased Elizabeth she did not ask Phumzile how she came to have the items in her possession. Phumzile admitted having worn the doek belonging to Elizabeth but denied wearing her dress. There is nothing in Rucky's evidence to indicate how or why she could say with certainty that the dress belonged to Elizabeth.

[20] Phumzile was questioned about this. At p 45 of the record the following exchange takes place between the prosecutor and Phumzile:

"These clothes madam that were brought by the accused or that the accused came along on that night when he came with his clothes having blood did you yourself ever put on some of the clothes as if they were yours? – No.

Are you sure madam? – Yes."

[21] Under cross-examination she is referred to her police statement in which she states:

"The clothes were used by his (sic) and myself. The blankets too were used by us and one was sold locally by him".

She confirmed the contents of the statement.

[22] In re-examination a leading question is put to her –

"Madam is it not so that at one stage or the other you did use the clothes that were brought by the accused to the room that you were renting and used them? – I used only one piece of cloth.

What was it a skirt or a shirt, a blanket or what? ---The cloth that is used by women on their head as a hat.

A doek? – Yes

Did you know whose cloth was that? – No

Madam then out of honesty again I do not want to crucify you but I just want to know why did you not tell me when I honestly asked you did you ever use those clothes and then you said no? – I responded I said yes.

COURT: But only after the statement was read to you? The question now is before the statement was read to you why did you testify that you did not use any of these clothes that the accused brought? – I had forgotten that I had used that cloth that doek.”

[23] Given the length of time that elapsed since the incident and the taking of her statement and thereafter the interval until her testimony in court, it cannot, in my view be said that she was being deliberately dishonest or contradicting herself. It seems to be an honest mistake or error on her part.

[24] As to whether she accompanied the appellant to fetch the clothing, television sets and other items the following night after he reported to her the previous night that he had killed the deceased, she testified in cross-examination that the police statement was incorrect. From here as in other parts of her testimony it emerges that the witness is rather unsophisticated, often does not properly understand questions put to her and gives simplistic answers which require further questioning to get clarity. (She had schooled up to standard five at the age of 15).

[25] It was put to her that she had a motive for falsely implicating the accused because she said she and the appellant had constantly fought whilst they were together and he would beat her up. She did not like the fact that he beat her up but she never reported it to the police hence he was never punished for ill-treating and assaulting her, she said. Under cross-examination it was put to her:

“And if you had wanted back (sic) then you would have wanted to see him go to jail for what he was doing to you? – Yes

And this is the platform to see the accused going to prison not so that is why you testify against him today in court? No answer?

COURT: Did you want him to go to jail? – I have no answer.”

[26] In re-examination she is asked:

“Okay madam the ... (indistinct) to the effect that you want to use this opportunity in order to get the accused person to jail do you still remember the question? – Yes I remember.

Now I want to know is that the reason why you have come and narrated the story as you had already done or you have come to tell this court that you heard from the accused himself?

Mr Malanguti: M’Lord I do not mean to interrupt. When I put that question to the witness she said that she has no answer so I do not know as to why my learned colleague for the State needs to probe this question any further. She said she has no answer for that question.

COURT: That is correct. Do you want to say something on this Mr Mnisi?

MR MNISI: Yes M’Lord. We have to understand that this is re-examination she could have understood the question in a different way and I am putting it in a different way.

COURT: I will allow the question.

INTERPRETER: Can you please ... (intervenes).

MR MNISI: Rephrase the question yes. Madam is it so that with what you have already told this court and the information that you were told by this accused about his involved in the killing of the deceased in this matter are you fabricating a story because you want to see him straight, because you want to see him heading straight to jail or it is just a repetition what accused told you whether he goes to jail or not that is not for you? – No I am not fabricating a story.

Is this information what the accused person told you? – Yes

Thank you M'Lord I have got no further questions to the witness."

[27] What emerges is Phumzile's clarification in re-examination that her testimony of the admission by the appellant to her that he had killed both deceased had nothing to do with the fact that the appellant used to assault her – in other words there was no motive to falsely implicate him. The question is whether her explanation in re-examination is an adequate explanation. Quite clearly the prosecutor's response to the defence counsel's objection indicates that he was of the view that the witness might not have properly understood the question in cross-examination. The prosecutor's view cannot be faulted.

[28] That Phumzile appeared unsophisticated or often did not understand the impact of or properly appreciate the questions put to her emerges also from

the issue of whether she understood the incident to have taken place around the New Year of 2008 or after Good Friday. The prosecutor asks her to explain what she knew about the death of the deceased after telling her that the information before the court was that both deceased were found dead on 3 January 2008. She relates how the deceased Elizabeth came on two occasions to her house to look for the appellant as he owed her (Elizabeth) some money. On the first occasion – a Sunday- he was not there. She came back the following day when the appellant was there and asked him for her money and he promised he would give it to her. Phumzile then says:

“Thereafter I thereafter heard that they had died it was after Good Friday.

MR MNISI: Okay madam let us continue this way then. The time at which Elizabeth came to your place and demanded, and said that he, she wanted her money from Sydwell when was that, was that around Christmas time it was before New Year it was before the Good Friday? Or is it so it was around Christmas time around New Year or around Good Friday? – Around Good Friday.

By the way while we are talking of Good Friday what month are we talking about? – We are talking about a new year.

So this incident that you are talking about is an incident that took place on that New Year, around that New Year period? – Yes it happened around that time.

Madam are you okay? – Yes I am.

Thank you. Now do you know there is a Good Friday in a New Year not so? – Yes

And the New Year time is about the separation of two years? – Yes.

Now this incident this explanation that you are giving to this court could it have taken place at that time when there was one year that, when there was a separation of two years? – Before the separation of the two years.

Just before madam you could hear that the two have passed away is there any information which you have which could have resulted in them passing away? – No.

COURT: Can you ask the witness to look up please.

MR MNISI: On the New Year's Day madam where were you? -- I was at home asleep.

With whom were you? – With my child.

Where was Sydwell? --I do not know where he was.

Did you ever see him on that day, the day on which you said you were with your child? – Yes he came back at night.

Yes explain? – He arrived at night with his clothes full of blood.

Okay let us just hold it there. He is arriving when he left, when he left away because we are no speaking or arriving. When he left away did you speak to him or did he speak to you? – No when he left he did not tell me anything he just left.

Yes when he came back with his clothes full of blood what happened? – He then said I have completed what I went out to do.”

[29] The prosecutor was at pains to get clarity from a witness who often did not understand the questions put to her. But it actually became clear that she was referring to the New Year and not Good Friday.

[30] Appellant's counsel submitted that as Phumzile testified that appellant was drunk when he made the admission that he had killed the deceased the trial court was wrong in finding that the appellant was sober. However, a careful scrutiny of the relevant portion of the judgment reveals that the court was dealing with appellant's counsel's submission during the application for discharge of the appellant at the end of the State case. The learned Judge said it is a moot point because it was never the appellant's version that he was drunk at the time. I am therefore not persuaded by counsel's submission in this regard.

[31] Finally, there is the submission that the trial court did not keep in mind the cautionary rule about single witnesses. That submission is without merit as a careful reading of the judgment will show. The court looked for corroboration of some of the evidence. The learned Judge referred to the evidence of Ms Agnes Mhlongo who testified that she found two television sets and some clothes were missing from the deceaseds' house when she went there shortly after their death was discovered. The court was also aware of the circumstantial nature of some of the evidence and took into account in what circumstances such evidence may be accepted.

[32] It is trite that the onus is on the State to prove its case beyond reasonable doubt. There is no obligation upon the accused to disprove the case against him. Nevertheless, where an accused testified, his evidence must be scrutinised to see if it is reasonably possibly true and if so, a court is bound to acquit him even if it subjectively does not believe him. (See *S v V* 2000(1) SACR 453 (SCA)).

In *S v Bruiners en 'n Ander* 1998(2) SACR 432 (SE) (from the headnote):

"The principle, that an accused's version had to be accepted if his explanation might reasonably possibly be true, did not go so far as to require the exclusion of every possibility. What the court had to do was to evaluate the evidence as a whole, and thereafter to decide whether the State had proved its case beyond reasonable doubt."

[34] During cross-examination of Phumzile it was never pertinently put to her that it is accused's version that they had already separated before the time she alleged he had come to their rented room with clothes full of blood. However, when he testified he said Phumzile was not present at his room on the particular evening. The learned Judge said:

"It certainly came like a bolt from the blue to Mr Malanguti (appellant's legal representative in the court *a quo*) when in his evidence he testified that that particular evening the woman, the witness, was not present at his room".

Further:

“[34] And on that basis I am sure that had the accused told him that the witness Phumzile was not at his room on that particular evening, he certainly would have taken the matter up with the witness. He did not ask that question, and I believe correctly so, because or let me put it this way. He did not put such a statement to the witness, and correctly so because, he had not been told.”

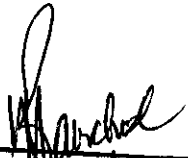
[35] The court *a quo* was alive to the differences between Phumzile's statement to the police and her oral testimony. The State conceded there were the differences. The court referred to *S v Mkhole (supra)* and, after looking at the evidence as a whole, accepted Phumzile's evidence that the accused came home with blood on his clothes and that he had made an admission to her about what he had done. The court also accepted that the appellant arrived home with the items belonging to the two deceased.

[36] Bearing in mind the principles set out in the case law referred to above, the relatively unsophisticated witness (Phumzile), the length of time that elapsed between the day of the incident and the taking of her statement and the further interval up to date of trial in my view explains a number of the inconsistencies in that they may be due to an honest mistake. A number of the inconsistencies are not material. In my view, it cannot be said that the trial court misdirected itself on the factual findings it made.

[37] Insofar as deviations by Phumzile from her statement to the police is concerned, it was held in *S v Bruiners (supra)*:

“The purpose of an affidavit was to obtain the details of an offence, so that it could be decided whether a prosecution should be instituted against the accused. It was not the purpose of such an affidavit to anticipate the witness's evidence in court, and it was absurd to expect of a witness to furnish precisely the same account in his statement as he would in his evidence in open court.”

[38] In all the circumstances I would dismiss the appeal on conviction.




N. RANCHOD
JUDGE OF THE HIGH COURT

I AGREE



S.A.M BAQWA
JUDGE OF THE HIGH COURT

I AGREE



N. MALI
ACTING JUDGE OF THE HIGH COURT

Appearances:

Counsel on behalf of Appellant : Att. R.S Matlapeng
Instructed by : Pretoria Justice Centre

Counsel on behalf of Respondent : Adv C. Mnisi
Instructed by : State Attorneys

Date heard : 10 September 2014
Date delivered : 3 October 2014