21/11/2017

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

Case no: A17/2016

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

21/11/2017

In the matter between:

KGOSI SIMON MOLEFI **APPELLANT**

And

THE STATE **RESPONDENT**

JUDGMENT

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1. The appellant was charged with one count of murder in the Vereeniging Regional Court. He plead not guilty and was represented throughout his trial.

2. The State's case was that he had strangled the deceased, his wife which he, throughout had denied. The appellant's version was that when he had arrived

home that fateful night he had found her already dead with more than one tie (being a man's necktie) around her neck. The appellant's case was that the deceased had used these to strangle herself after an argument they had had and thus that she had committed suicide.

3. It is quite clear from a reading of the record that the State's case is entirely circumstantial and the court *a quo* relied heavily on the report and findings of the pathologist, Dr Ramela, in convicting the appellant of murder as she was adamant that the only possible explanation for the wounds on the deceased body were those consistent with strangulation. Upon conviction the appellant was then sentenced to 15 years' imprisonment.

4. It bears mentioning at this stage that at various stages throughout the hearing, appellant's legal representative commented that he would require the services of an expert to assist him with the evidence given by Dr Ramala. This, however, was not done and at the time no explanation was provided for the omission.

5. This appeal was set down before us and on 20 September 2017 the appellant launched an application to lead new evidence on appeal. I pause to mention that the relief sought is not opposed by the State.

6. The gist of the new evidence is that the appellant wishes to call Professor Gert Saayman from the Department of Forensic Medicine at the University of Pretoria. Prof. Saayman has been practicing in the field of forensic medicine and

pathology since 1984, including the medico-legal investigation of death and has conducted, supervised and reviewed more than fifteen thousand such investigations and post mortem examinations. He was given Dr Ramala's report and in response he has filed a report of his own which is dated 22 November 2016.

7. This report calls into question not only the expertise of Dr Ramala as an expert (at par 14 thereof), but it also calls into question her findings and as a result, her evidence as a whole.

8. In his report, Prof Saayman states the following:

   "15. Dr Ramala should have unreservedly stated that the findings as recorded by her were also entirely consistent with hanging (as described by the accused) and that the reasonable possibility – perhaps even probability – exists that the decedent had not been strangled based on the autopsy findings. She should have reported that the findings were 'consistent with possible terminal acute hypoxia, due to constrictive force around the neck, the primary nature of which cannot be stated with certainty" It would then be left to the discretion of the court, in conjunction with other testimony or circumstantial evidence, to arrive at a conclusion, as to whether strangulation or hanging was the probable cause of death..."

9. The reason that this new evidence is only being introduced now is that the appellant simply could not afford to pay for both a legal representative and an

expert at the time of this trial. He has now managed to raise enough funds to appoint Prof Saayman and place this crucial evidence before us.

10. Section 19 of the Superior Courts Act[1] states the following:

"***19 Powers of court on hearing of appeals***

The Supreme Court of Appeal or a Division exercising appeal jurisdiction may, in addition to any power as may specifically be provided for in any other law-

(a) dispose of an appeal without the hearing of oral argument;

(b) receive further evidence;

(c remit the case to the court of first instance, or to the court whose decision is the subject of the appeal, for further hearing, with such instructions as regards the taking of further evidence or otherwise as the Supreme Court of Appeal or the Division deems necessary; or

(d) confirm, amend or set aside the decision which is the subject of the appeal and render any decision which the circumstances may require."

(my emphasis)

11. In **Dormell Property 282 CC v Renasa Insurance Co Ltd and others NNO**[2], Bertlesmann AJA stated that a court of appeal may admit new evidence but

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1 10 of 2013

2 2011 (1) SA 70 (SCA). See also Kirkland v Kirkland 2006 (6) SA 144 (C)

that the power should be exercised sparingly and only if the further evidence is reliable, "*weighty and material and presumably to be believed*"...[3]

"*In addition, there must be an acceptable explanation for the fact that the evidence was not adduced in the trial court...*"

12. The court in **S v Mchiza**[4] stated that although a court of appeal has a wide discretion to allow the re-opening of a case after conviction for the hearing of further evidence, this discretion is used sparingly and in special circumstances if it is found that it is in the interests of justice to do so and would not defeat the principle of finality to matters.

13. In my view, all the requirements set out *supra* have been met:

13.1 it is quite clear that the evidence of Prof Saayman is crucial to the defence's case. In fact, given its import and conclusions, if accepted by a trial court, it could well lead to an exoneration of the appellant and an acquittal;

13.2 given the aforementioned, it is clear that the new evidence is "weighty and material"[5]

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3 Also citing Wessels CJ in Colman v Dunbar 1933 AD 141 at 162

4 2011 JDR 0891 (GNP) ; and see the locus classicus of S v De Jager 1965 (2) SA 612 (A) at 613

5 Vide Dormell Properties *supra*

14. Whilst it is certainly so that matters cannot be dragged out indefinitely and that there must be finality in all matters, that cannot come at the expense of justice or a fair trial. In my view this is tied up with whether the explanation given by the appellant for the lateness of this new evidence, is reasonable.

15. Too many of the accused that are brought before our courts in the criminal justice system are indigent. Many are assisted by the Legal Aid Board and the various Law Clinics and other Pro Bono organisations. Some manage to scrape together enough money to appoint an independent attorney (and sometimes advocate) to represent them. For many, they rely on friends and family to assist them financially during what is sometimes a long and arduous trial process which generally involves several appearances.

16. The evidence before us is that neither the appellant nor his family were in a financial position in 2012 when this trial proceeded *a quo* to engage the services of an expert. The State has not taken issue with that statement and although there could have been more flesh added to that bone, given the exculpatory nature of Prof Saayman's evidence, I am inclined to accept the appellant's explanation.

17. Furthermore, it is obvious that, given this new evidence, the matter will have to be remanded and the State given an opportunity to cross-examine Prof. Saayman.

18. Given the fact that Prof. Saayman's evidence, if it holds up under cross-examination, may exculpate the appellant, it is clear that the only course of action is to set aside both the conviction and the sentence and to remit the matter to the trial court.

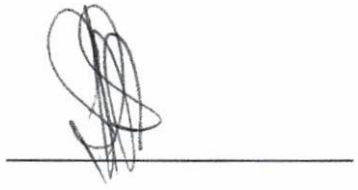
19. Counsel for the State has conceded, correctly so in my view, that this is the correct course of action and in the interests of justice.

20. The order that I make is therefore the following:

1. The conviction and sentence of the appellant **KGOSI SIMON MOLEFE** is set aside.
2. The case is remitted to the trial court to hear further evidence including:
   2.1 the further evidence of Prof G Saayman;
   2.2 such further evidence as either party may wish to adduce arising from the opinion from Prof G Saayman;
   2.3 such further evidence as may be tendered by the State;
   2.4 such further evidence as the trial court may deem necessary;
   2.5 the evidence of such witnesses as the court may allow to be recalled;
   2.6 to hear further argument and to give a decision *de novo* on the whole of the evidence which will then be before the court.

NEUKIRCHER AJ

I agree



MPHAHLELE J