IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, PRETORIA

APPEAL CASE NO: A236/2022
TRIAL COURT CASE NO: SH 67/19
(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: YES
2023/08/24

In the matter between:

YONGA MXATHULI **APPELLANT**

And

THE STATE **RESPONDENT**

JUDGEMENT

Johnson AJ

[1] The Appellant, an adult male, was charged with a second accused in count 1 with assault with the intent to cause Alex Sithole grievous bodily harm, and in count 2 with the murder of Mnikelo Tini, on 27 October 2018 by stabbing both with a knife. He was represented by Mr Ramabula and pleaded not guilty to both counts. The other accused had passed away. The appellant denied that he committed any of the offences.

[2] Despite his plea he was found guilty on both counts and warned and discharged on count 1, and sentenced to 12 years imprisonment on count 2.

[3] It was not in dispute that the complainant in count 1 was injured by a stab wound, and that the deceased was killed with a knife. The identities of the perpetrators were in dispute.

[4] Of concern to us is the way in which the court a quo came to its ultimate decision.

[5] The evidence in short is that the deceased, his girlfriend, and the next-door neighbours Alex and his brother, went to Fusi's Tavern on the day in question to look for persons whom the deceased alleged robbed him. From the description he gave, they concluded that Simpiwe was one of the robbers.

[6] They found Simpiwe at the Tavern and asked him who took the deceased's items. The appellant, who worked at the Tavern, approached them and he started arguing with Alex. There are contradictions as to whether Alex was armed and hit the appellant with a panga. There were also contradictions regarding the evidence of the alleged attack by the appellant of the deceased, and the injuries that were noted on the post mortem report. The witnesses contradicted each other as to the total of stab wounds that were inflicted. Not one of the witnesses corroborated the amount of stab wounds as reflected in the report namely 3 in the front part of his body, one on top of his head and one at the back of his skull. The deceased had no back wounds, where he was also allegedly stabbed. It was dark where the incident took place, but there were light shining at the tavern. It is unclear what distance they were from the shining light, and what the nature of the visibility was.

[7] The State also called a witness Siphiwe Klaas who gave evidence contradictory to other witnesses, and whose evidence did not suit the State. Despite objections, the court a quo allowed the state to cross-examine its own witness without him having been declared hostile. His evidence was summarily rejected because the court was of the opinion that he was drunk during the incident.

[8] The credibility of the witnesses, nor their ability to make a reliable identification, was considered at all.

[9] During an application for the discharge of the appellant in terms of section 174 of the Criminal Procedure Act 51/1977, the court found in its judgement that the application was not without merits, but nevertheless refused the application.

[10] The court a quo failed to consider whether the evidence of the appellant was reasonably possibly true, It merely found that: “The mere denial of the accused was not confirmed by his witness. We can then convict him on both counts…” This is a strong indication that the court applied the incorrect test, and expected the appellant to prove his case, rather that considering whether there was a reasonable possibility that it was true.

[11] “In criminal proceedings the prosecution must prove its case beyond reasonable doubt and that a mere preponderance of probabilities is not enough. Equally trite is the observation that, in view of this standard of proof in a criminal case, a court does not have to be convinced that every detail of an accused's version it true. If the accused’s version is reasonably possibly true in substance the court must decide the matter on the acceptance of that version. Of course it is permissible to test the accused’s version against the inherent probabilities. But it cannot be rejected merely because it is improbable; it can only be rejected on the basis of inherent probabilities if it can be said to be so improbable that it cannot reasonably possibly be true.” (*S v Shackell* 2001 (4) SA 1 (SCA) para 30).

[12] The powers of a court of appeal in terms of section 322 (1) of the Criminal Procedure Act 51/1977, are set out as follows:

> *(1) In the case of an appeal against a conviction or of any question of law reserved, the court of appeal may –*
>
> > *(a) allow the appeal if it thinks that the judgment of the trial court should be set aside on the ground of a wrong decision of any question of law or that on any ground there was a failure of justice; or*

(b) give such judgment as ought to have been given at the trial or impose such punishment as ought to have been imposed at the trial; or

(c) make such other order as justice may require……"

[13] The duty of a presiding officer was described as follows in *S v Thomo* 1969 1 SA 385 (A) 394 C-D: "It is of importance first to determine what conduct was established ... Having thus determined the proper factual basis, the court can then proceed to consider what crime (if any) has [been] committed. The former enquiry is one of fact, the latter essentially one of law. When the presiding officer considers what one might call, a fact finding phase, it must be shown that the evidence was considered and evaluated. This phase forms an important element of each judgment and must appear as part of the judgment*."*

[14] If the trial court commits a misdirection on a point of law, the court of appeal must nevertheless establish whether the evidence proves beyond reasonable doubt that the accused is guilty. It is therefore a possibility that a point of law may be decided in favour of an accused, and the conviction still upheld (*S v Bernardus* 1965 (3) SA 287 (A) at 299F). We are at liberty to make any order, if warranted, "as justice may require" (*R v Solomons* 1959 (2) SA 352 (A) at 360).

[15] The court a quo did not consider the direction, as far as identity is concerned, that was given in *State v Mthethwa* 1972 (3) SA 766 (A) 768A–C: *"Because of the fallibility of human observation, evidence of identification is approached by the Courts with some caution. It is not enough for the identifying witness to be honest: the reliability of his observation must also be tested."*

[16] In view of the shortcomings in the judgement and the approach of the court a quo, considered in conjunction with the evidence, we are not in a position to make any other order as required by justice, but to give the appellant the benefit of the doubt. As is evident above, the matter was not correctly adjudicated and we are in no position to correct the wrong. The State has conceded that the conviction and sentence cannot be sustained.

ORDER

[17] The appeal in respect of the convictions and sentences are upheld and set aside.

P.J. JOHNSON A.J.
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION

I agree and it is so ordered.

P. PHAHLANE J
JUDGE OF THE HIGH COURT
GAUTENG DIVISION

Heard on:	22 AUGUST 2023
For the Appellants:	MR. M. B. KGAGARA PRETORIA JUSTICE CENTRE LOCARNO HOUSE 317 FRANCIS BAARD STREET PRETORIA
For the State :	ADV. A.P. WILSENACH THE DIRECTOR OF PUBLIC PROSECUTIONS PRETORIA
Date of Judgment:	24 AUGUST 2023