THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case no: 868/2011
Not Reportable

In the matter between

JABULANI KENNY SITHOLE **Appellant**

and

THE STATE **Respondent**

Neutral citation: *Sithole v S* (868/11) [2011] ZASCA 85 (31 May 2012)

Coram: **MTHIYANE DP, KROON and SOUTHWOOD AJJA**

Heard: **17 May 2012**

Delivered: **31 May 2012**

Summary: In deciding whether to convict or acquit the court must take all the evidence into account – if accused's version improbable court cannot convict unless it can find that it is so improbable that it cannot be reasonably possibly true.

ORDER

On Appeal from: North Gauteng High Court (Pretoria) (Hartzenberg J and Mabuse AJ sitting as court of appeal) dismissing the appellant's appeal against convictions by the Nelspruit Regional Court of assault with intent to do grievous bodily harm and murder.

> Appeal upheld and order of the court below set aside and replaced with following order:
> 'The appeal is upheld and the convictions and sentences are set aside.'

JUDGMENT

SOUTHWOOD AJA (MTHIYANE DP AND KROON AJA concurring)

[1] On 21 September 2005 the appellant was found guilty in the Nelspruit regional court of assault, assault with intent to do grievous bodily harm and murder and on 22 September 2005 he was sentenced to 3 months imprisonment for the assault, 6 months imprisonment for the assault with intent to do grievous bodily harm and 15 years imprisonment for the murder. The regional court ordered that all the sentences run concurrently. On 17 August 2009 the appellant's appeal against the convictions of assault with intent to do grievous bodily harm and murder was dismissed by the Pretoria High Court which immediately granted leave to appeal to this court.

[2] The relevant convictions were based on the evidence of a single witness, Rose Nkosi, and the medico-legal post-mortem examination report which was handed in by agreement. The principal finding in the report was that the deceased, Pinini Lucas Zwane, sustained a single stab wound which penetrated his chest close to the sternum, between the third and fourth ribs, and caused his death. Only the appellant testified in his defence.

[3] The incident took place at night at a village in the Mganduzweni Trust where the appellant's and the deceased's girlfriends, respectively Doreen Vilakazi and Rose Nkosi, resided. It was not in dispute that at about 18:00 on 14 August 2004 the appellant arrived to visit Doreen and their five year old child and that when he saw Nico, one of Doreen's relatives, at the gate of her home the appellant wrongly assumed that Nico was courting Doreen and flew into a rage and chased him away from the house. There is no evidence that at that stage the appellant was armed with a knife. It is also not in dispute that when the appellant returned to the house, angry words were exchanged between the appellant and Doreen and that he slapped her more than once and chased her when she ran away. It is also not in dispute that Doreen ran to Rose Nkosi's house where she took refuge until she and the appellant were ordered to leave by Rose's mother and that they both slept at appellant's aunt's house and that neither was aware of the other's presence there. The acts involving Rose Nkosi (resulting in the conviction of assault with intent to do grievous bodily harm) and the deceased (resulting in the conviction of murder) took place after the appellant left Rose Nkosi's house.

[4] Although the appellant admitted that he stabbed the deceased there are two mutually destructive versions as to how this happened. It is common cause that Rose Nkosi sustained a stab wound in the forearm when she attempted to separate the appellant and the deceased while they were wrestling with each other.

[5] Rose Nkosi testified that she and the deceased were sitting in the deceased's motor vehicle which was standing in front of her house when the appellant approached the vehicle in the company of two 'boys' whom she did not recognize. The appellant approached her side of the vehicle and apparently wanted to open the door but she locked it. The appellant then walked around to the driver's door and, according to Rose, the appellant asked the deceased if he, the deceased, wanted to talk and the deceased got out of the vehicle. Without any discussion or provocation the appellant produced an Okapi knife and stabbed the deceased. Rose did not see

where the appellant got the knife from and where he stabbed the deceased. All she saw was the blood on his chest. Rose then got out of the vehicle and tried to separate the appellant and the deceased. In the process Rose was stabbed on the left forearm. She could not explain how this happened. She and the deceased then ran away and hid next to the pump at the river where the deceased collapsed. He died shortly afterwards.

[6] The appellant testified that after his altercation with Doreen Vilakazi he went to ask Rose for payment of the purchase price of some perfume which he had sold her. Rose said to him that he had turned against her because he had failed to catch the person he was chasing and told him that the perfume was useless. The appellant replied that if that was so she should return the perfume to him and Rose started shouting at him. She told him that Pigza (the deceased) is the only person who could control him. When Rose shouted at him, the appellant left. On his way back to Doreen's house a car stopped next to him. The deceased was driving and Rose was sitting next to him. Rose pointed at the appellant and said 'this is the man' and said something insulting to him. The appellant replied that he would not speak to her as she is a woman and only the deceased would understand him because he is a man. The deceased then called him over to the car. When the appellant reached the car, the deceased, without saying a word punched him and they started to wrestle and both fell down. They were still wrestling when the appellant managed to get to his feet. He heard Rose say 'Pigza catch' and she tossed a knife to the deceased. The knife fell between the appellant and the deceased and the appellant grabbed it before the deceased could and they wrestled with each other for possession of the knife. While they were wrestling Rose tried to separate them. She came between them and he heard her cry out. He did not stab her deliberately and he could not say whether he stabbed her by accident or not. He agreed that he stabbed the deceased – he could not say how this happened or how many times – but this happened while they were standing upright, struggling for possession of the knife. He did not see where he stabbed the deceased. After the incident he dropped the knife and he does not know what happened to it. The appellant denied that he was the aggressor and said that he was defending himself. He did not stab the deceased deliberately.

[7] The regional court found that Rose Nkosi was a credible witness and that her evidence was corroborated by Doreen Vilakazi's evidence and, accordingly, that her evidence could be accepted. The regional court also found that Rose's evidence was clear, straightforward and logical and that there was not a single improbability in her evidence. The regional court did not find that the appellant had contradicted himself or had deviated from his version but found that it could not believe a word of the appellant's testimony. This was because of the improbabilities in the appellant's evidence: the timing of the appellant's demand for payment; Rose Nkosi throwing a knife to the deceased while he was fighting with the appellant; the appellant's ability to pick up the knife; the appellant's inability to remember when he stabbed the deceased and the appellant's inability to explain how Rose was stabbed. The regional court therefore found that the appellant had not acted in self-defence and had deliberately stabbed Rose Nkosi and the deceased.

[8] The State bears the onus of establishing the guilt of an accused beyond reasonable doubt and he is entitled to be acquitted if there is a reasonable doubt that he might be innocent.[1]The onus has to be discharged upon a consideration of all the evidence. A court does not look at the evidence implicating the accused in isolation to determine whether there is proof beyond reasonable doubt nor does it look at the exculpatory evidence in isolation to determine whether it is reasonably possible that it might be true. The correct approach is set out in the following passage from *Mosephi and others v R* LAC (1980 – 1984) 57 at 59 F-H:

'The question for determination is whether, in the light of all the evidence adduced at the trial, the guilt of the appellants was established beyond reasonable doubt. The breaking down of a body of evidence into its component parts is obviously a useful guide to a proper understanding and evaluation of it. But, in doing so, one must guard against a tendency to focus too intently upon the separate and individual part of what is, after all, a mosaic of proof. Doubts about one aspect of the evidence led in a trial may arise when that aspect is viewed in isolation. Those doubts may be set at rest when it is evaluated again together with

[1] *R v Difford* 1937 AD 370 at 373, 383; *S v Van der Meyden* 1999 (1) SACR 447 (W) at 450a; *S v Van Aswegen* 2001 (2) SACR 97 (SCA) para 8.

all the other available evidence. That is not to say that a broad and indulgent approach is appropriate when evaluating evidence. Far from it. There is no substitute for a detailed and critical examination of each and every component in a body of evidence. But, once that has been done, it is necessary to step back a pace and consider the mosaic as a whole. If that is not done, one may fail to see the wood for the trees'.[2]

In weighing the evidence of a single State witness a court is required to consider its merits and demerits, decide whether it is trustworthy and whether, despite any shortcomings in the evidence, it is satisfied that the truth had been told.[3] It must state its reasons for preferring the evidence of the State witness to that of the accused[4] so that they can be considered in the light of the record. In applying the onus the court must also, where the accused's version is said to be improbable, only convict where it can pertinently find that the accused's version is so improbable that it cannot be reasonably possibly true.[5]

[9] With regard to the conviction of assault with intent to do grievous bodily harm it is clear that the regional court erred in finding that the accused deliberately stabbed Rose 'to get her away from him so that he can direct his aggression at the deceased again'. There is no evidence that the appellant deliberately stabbed Rose. Neither Rose nor the appellant could explain how she was injured and it is common cause that this happened while the deceased and the appellant were wrestling with each other and Rose attempted to separate them. The regional court introduced the finding by saying 'we believe' but did not refer to the facts. The evidence does not support their belief or the finding and the appellant's appeal against this conviction must succeed.

[10] As far as the conviction of murder is concerned the regional court's reasoning cannot be sustained.

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[2] *Quoted with approval in S v Hadebe & others* 1998 (1) SACR 422 (SCA) at 426f – h; *S v Mbuli* 2003 (1) SACR 97 (SCA) para 57.
[3] *S v Sauls* 1981 (3) SA 172 (A) at 180C–G
[4] *S v Guess* 1976 (4) SA 715 (A) at 718F–719 A.
[5] *S v Shackell* 2001 (2) SACR 185 (SCA) para [30] 194g – i.

(a) It clearly erred in finding that Rose Nkosi's evidence was corroborated by that of Doreen Vilakazi. Doreen was not a witness to the events about which Rose Nkosi testified. She therefore could not corroborate Rose's evidence.

(b) It clearly erred in finding that there was not a single improbability in Rose's evidence:

(i) It is highly improbable that the appellant, who had a good friendship with Rose, and, up to this time had shown no hostility to Rose, would suddenly, without provocation – or any reason at all – decide to attack her.

(ii) It is highly improbable that the appellant who did not know the deceased and had not been provoked by the deceased would suddenly decide to stab him – obviously with the intention of killing him;

(iii) It is highly improbable that if the appellant had just fatally stabbed the deceased the appellant and the deceased would have continued to wrestle with each other;

(iv) It is highly improbable that if Rose had such a restricted view of the appellant and the deceased she would have been able to identify the knife used by the appellant as an Okapi;

(v) It is highly improbable that Rose would have been able to identify the knife as an Okapi if she had not had it in her possession;

(vi) It is highly improbable that if the appellant had decided to kill the deceased by stabbing him that the appellant would have inflicted only one stab wound;

(vii) It is highly improbable that the appellant would have stabbed the windscreen of the deceased's car.

(c) It erred in finding that Rose's evidence was clear, logical and straightforward. Apart from Rose's ability to identify the knife as an Okapi, Rose contradicted herself about where the appellant got the knife. At first she testified unambiguously that she did not know. In cross-examination she testified, equally unambiguously, that she saw the

appellant drawing the knife from his right hand side before he stabbed the deceased.

(d) It erred in finding that not one word of the appellant's evidence was credible and could be believed. Most of the State's evidence about the attack on Doreen Vilakazi was not in dispute. The appellant admitted all the essential facts: i.e. that he had gone to visit Doreen at about 18:00 on the night in question; that he had seen Nico at the gate to Doreen's house; that he had chased Nico down to the river; that he had returned to the house and had an altercation with Doreen; that he was angry (because he had wrongly assumed that Nico was paying court to Doreen) and had struck Doreen; that he had chased Doreen when she ran to Rose's house; that when Doreen got to Rose's house and closed the door he had kicked the door; that when Rose's mother asked him to leave he had done so without protest; that he had kicked his child when he set off in pursuit of Rose and that he had slept at his aunt's house. The court obviously accepted that the appellant had slapped Doreen and not punched her repeatedly, as she testified, and found the appellant guilty of common assault. The court clearly accepted the appellant's evidence on this issue and contradicted itself about his credibility.

(e) It erred in finding that the appellant's aggression runs like a thread through the evidence. After the events involving Doreen the essential facts are all disputed, particularly that the appellant was the aggressor.

(f) It erred in first accepting Rose's evidence and then finding that the appellant's evidence could not be believed because of certain improbabilities, without assessing it in the light of all the evidence as a whole.

(g) Finally, and most importantly, it erred in failing to find pertinently that because of the improbabilities in the appellant's version it was so improbable that it cannot be reasonably possibly true.[6]

[6] *S v Shackell* 2001 (2) SARC 185 (SCA) para 30.

[11] Although the appellant's version was also improbable the following factors are consistent with the appellant's version:

(1) The fact that the two men wrestled with each other is consistent with them fighting for possession of the knife;

(2) The fact that neither the appellant nor Rose could explain how Rose was injured shows that there was great confusion – once again consistent with the two men fighting for possession of the knife;

(3) The fact that Rose could identify the knife as an Okapi shows that she had possession of the knife – consistent with the appellant's evidence that she threw the knife to the deceased;

(4) The fact that there is no evidence to show that it was not possible for the deceased to have been stabbed in the chest while the two men were fighting for possession of the knife. This was a crucial factor which had to be investigated and a pertinent finding made before the appellant's evidence could be rejected as not reasonably possibly true.

[12] In view of these factors the court's rejection of the appellant's version cannot be supported and it cannot be found that his version was not reasonably possibly true. On the appellant's version he was attempting to keep the deceased from obtaining possession of the knife and stabbing him and he, the appellant, had no intention of stabbing the deceased. He was therefore not guilty of murder or any other offence.

[13] It is significant that the tale appears to have grown in the telling. Rose added detail as she testified (for example where the appellant got the knife from) and some of her evidence makes no sense at all. The presence of the two 'boys' and the appellant stabbing the windscreen of the vehicle was never explained. Doreen's evidence about the appellant assaulting the child is clearly an embellishment. If she had witnessed this serious assault on her child she would have told the police and the appellant would have been prosecuted for that assault as well.

[14] In the premises the appeal is upheld and the order of the court below is set aside and replaced with the following:

'The appeal is upheld and the conviction and sentences are set aside.'

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B R SOUTHWOOD
ACTING JUDGE OF APPEAL

APPEARANCES:

FOR APPELLANTS:	V Z Nel
Instructed by:	Justice Centre, Nelspruit;
	Justice Centre, Bloemfontein.
FOR RESPONDENTS:	L Pienaar
Instructed by:	Director of Public Prosecutions, Pretoria;
	Director of Public Prosecutions, Bloemfontein.