THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case No: 522/13
Not Reportable

In the matter between:

TSHAKWATA GERSON **FIRST APPELLANT**
MATORO NTHATHENI COLBERT **SECOND APPELLANT**

and

THE STATE **RESPONDENT**

Neutral citation: *Tshakwata v The State* (522/13) [2014] ZASCA 45 (31 March 2014)

Coram: Navsa, Theron and Petse JJA

Heard: 5 March 2014

Delivered: 31 March 2014

Summary: Appeal against conviction and sentence on charge of murder. ─ Hearsay evidence ─ statements made by two co-accused to a magistrate ─ not admissible ─ statements in any event in conflict. ─ Evidence insufficient to sustain a conviction.

ORDER

On appeal from: Limpopo High Court, Thohoyandou (Makgoba J sitting as court of first instance):

The appeal is upheld and both the convictions and resultant sentences are set aside.

JUDGMENT

Petse JA (Navsa and Theron JJA concurring):

[1] The two appellants ─ together with four others who do not feature in this appeal ─ were convicted in the Limpopo High Court (Makgoba J) on one count of murder. Each was subsequently sentenced to imprisonment for life. They each appeal against their convictions and resultant sentences with leave of the high court (Ebersohn AJ).

[2] The appellants who were accused 5 and 6 at the trial (and their four co-accused) pleaded not guilty and elected not to disclose the basis of their defence. The death of the deceased was not in dispute. It appears that her death was as a result of a ritual killing. This is evident from the extreme mutilation of the body. What was in issue was the identity of the persons who caused her death. Several witnesses were called to testify on behalf of the State. None gave evidence directly implicating the appellants. During the course of the State's case the State sought to tender evidence of the statements alleged to have been made by accused 3 and 4 which, inter alia, it was submitted, incriminated the appellants. The State also sought to tender evidence relating to pointings out that accused 3 and 4 were alleged to have made. The admissibility of those statements and the pointings out was contested by the affected accused on the grounds that they were not made freely and voluntarily. Consequently a trial-within-a-trial was held to determine their admissibility.

[3] At the conclusion of the trial-within-a-trial the high court ruled that the statements were admissible. Following the admission of the statements the State called two more witnesses, Mr Mutshelembele, who was employed at Mutale in the Environmental Affairs Division and Captain Mphaphuli, the Investigating Officer. The evidence of Mutshelembele was in substance aimed at discounting any possibility that the deceased might have been killed by a crocodile. As to the evidence of the investigating officer, the State sought to establish that the appellants were some of the persons implicated in the statements made by accused 3 and 4.

[4] The admissible evidence tendered at the trial by the State was briefly to the following effect. On 16 January 2001 the accused were, at different stages during the day, seen at the homestead of Ms Maria Thivhuleli Ndou at Tshikundamalema drinking traditional beer. Accused 1 and 2 were in the company of the deceased. Later in the day the appellants and accused 3 and 4 who had been drinking together left. I pause to record that accused 3 was married to the deceased. Before sunset accused 1 departed and shortly thereafter accused 2 and the deceased who had been drinking together also left. On 18 January 2001, Mr Josias Corombi Radzilani, then residing at Tshikundamalema, discovered the deceased's body floating in a puddle of water next to a river and summoned the police who retrieved the body which was subsequently identified by accused 3's elder brother. On 24 January 2001 Doctor Akut conducted a post-mortem examination on the body of the deceased but was unable to determine the cause of death because of the body's advanced state of decomposition and because of the number of major organs that were missing.

[5] As alluded to above, accused 3 and 4 made statements, the former to a magistrate at Mutale and the latter both to a magistrate at Mutale and to Captain Mphaphuli. In his statement accused 3, inter alia, said that on 16 January 2001 he left his home in search of his wife, the deceased, when told that the deceased had gone to the bar. When he arrived at the bar he did not find the deceased but remained there drinking liquor until 17h00. Thereafter he left to return home with accused 4 but discovered on arrival that the deceased was still not at home. He then went to Murangwe where he drank more liquor together with accused 4. Later he left with accused 4 and when they reached a river they found the appellants drinking. He

was called by accused 1 and then instructed (he does not state by whom) to blindfold accused 4. He then heard a loud bang after which there was silence. He and accused 4 left the scene to return home to sleep. This statement is meaningless in that it does not connect any of the appellants with the killing of the deceased. Indeed it does not connect anyone of them to any wrongdoing.

[6] In his statement, accused 4 starts off by saying that he 'admits that he directly participated in the killing of the deceased Vho-Mudangawe', which, on the face of it appears to be a confession to participating in a killing. However, later in the statement he says the following:

'[I] complied under duress or coercion. I have never seen or witness as to what was being done to the deceased since my eyes were closed or shut.'

[7] It is noteworthy that, in the statement, there is reference only by surname to individuals who were involved in 'grabbing' a deceased who is named in the terse manner described in para 6 above. The surname of accused 3 does not appear in the statement.

[8] In order to overcome the obvious problem relating to the identification of participants, the State resorted to calling the investigating officer to explain who accused 4 was referring to in his statement. The investigating officer testified that accused 4 was referring to all the accused. There was no basis for permitting the investigating officer to do so.

[9] All six accused did not testify at the trial. The high court placed much store on the fact that the appellants (and their erstwhile co-accused) did not testify in their defence. It held that the consequence of such failure was that the State's case against them remained unchallenged. Consequently, the high court concluded that nothing militated against the acceptance of such evidence more particularly having regard to the statements made by accused 3 and 4.

[10] Whilst the failure of the accused to testify may in appropriate circumstances be a factor in deciding whether their guilt has been proved beyond a reasonable doubt by the State, this is permissible only when the State has at least established a

prima facie case. (See eg *S v Francis* 1991 (1) SACR 198 (A) at 203f-i.) In this case the State's case came nowhere near establishing a prima facie case against the appellants. Thus there was no need for the appellants to lead any evidence in rebuttal. See eg *S v Chabalala* 2003 (1) SACR 134 (SCA) para 21. Accordingly the failure of the appellants to testify at the trial did not avail the State in discharging the onus resting upon it.

[11] If indeed the statement by accused 4 was a confession, as it purported to be, it was not, in terms of s 219 of the Criminal Procedure Act 51 of 1997, admissible against anyone other than himself. The problem, however, is that the statement ultimately exonerates him and it is unclear who was named therein and, indeed, it is difficult to establish what those 'named' actually did. There was no application or ruling in terms of s 3(1) of the Law of Evidence Amendment Act 45 of 1988 to have the statements admitted on any other basis. That they were admissible at all is highly questionable. In any event, as demonstrated above, they are virtually meaningless and do not contribute to the State's case. Consequently, it is clear that the State failed to prove the guilt of the appellants beyond a reasonable doubt.

[12] Faced with the foregoing insurmountable hurdles counsel for the State was constrained to concede that the conviction of the appellants is plainly insupportable.

[13] Accordingly the appeal is upheld and both convictions and resultant sentences are set aside.

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X M PETSE
JUDGE OF APPEAL

APPEARANCES:

For the Appellants: M J Manhwadu
Instructed by:
Justice Centre, Thohoyandou
Justice Centre, Bloemfontein

For the Respondent: R J Makhera
Instructed by:
Director of Public Prosecutions, Thohoyandou
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