THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable

Case no: 068/2017

In the matter between:

DIRECTOR OF PUBLIC PROSECUTIONS, LIMPOPO **APPELLANT**

and

KAGISO KODISHI MOKGOTHO **RESPONDENT**

Neutral citation: *Director of Public Prosecutions, Limpopo v Mokgotho* (068/2017) [2017] ZASCA 159 (24 November 2017)

Coram: Tshiqi, Majiedt, Petse and Mocumie JJA and Makgoka AJA

Heard: 2 November 2017

Delivered: 24 November 2017

Summary: Criminal law and procedure: Criminal Procedure Act 51 of 1977, s 319: application for leave to appeal by State on question of law: acquittal of accused: trial court finding that State failed to prove guilt of accused beyond reasonable doubt: such finding a result of the trial court applying a wrong test in evaluating evidence: such error constituting a question of law.

ORDER

On appeal from: Limpopo Division of the High Court, Polokwane (M G Phatudi J sitting as court of first instance).

1 The application for leave to appeal is granted.

2 The appeal is upheld.

3 It is declared that the issue raised by the State encapsulated in para 27 of this judgment is a question of law and is answered in favour of the Director of Public Prosecutions.

4 The respondent's acquittal on the count of murder is set aside.

JUDGMENT

Petse JA (Tshiqi, Majiedt and Mocumie JJA and Makgoka AJA concurring):

[1] This is an application by the Director of Public Prosecutions, Limpopo (the State) for leave to appeal referred for oral argument in terms of s 17(2)*(d)* of the Superior Courts Act 10 of 2013 (the Superior Courts Act), and, if successful, the determination of the appeal itself. The State seeks leave to appeal against the refusal by the trial court (Phatudi J), to reserve a question of law for decision by this Court, in terms of s 319 of the Criminal Procedure Act 51 of 1977 (the CPA), following the acquittal of the respondent, Mr Kagiso Kodishi Mokgotho, at the conclusion of the trial.

[2] The respondent was indicted in the Limpopo Division of the High Court, Polokwane on four counts. On count one he was charged with murder, read with the provisions of s 51(1) of the Criminal Law Amendment Act 105 of 1997. On counts two

and three he was charged with contravening ss 3 and 90 respectively, of the Firearms Control Act 60 of 2000. On count four the charge was robbery with aggravating circumstances as defined in s 1 of the CPA.

[3] The respondent pleaded not guilty to all counts. In substantiation of his plea, the respondent made a statement in terms of s 115 of the CPA. The essence of the explanation was as follows: (a) he and two companions were traveling together in the deceased's minibus taxi from Mokgotho village en route to Penge village; (b) he occupied the front passenger seat next to the driver whilst his two companions occupied the seat behind the driver; (c) one of his companions shot the deceased once in the head; (d) he tried to drive the taxi in order to convey the deceased to hospital for medical assistance but the engine stalled; (e) he denied that it was him that shot the deceased but admitted that the firearm used belonged to him; and (f) after the shooting they fled the scene on foot, returning to their respective homes.

[4] The facts relating to the commission of the offences are straightforward and are, for the most part, not in dispute. Much of the argument in this Court centred around the approach adopted by the court below in arriving at its conclusion.

[5] Although the State had called six witnesses to testify in the trial, it accepted that only two witnesses gave incriminating evidence against the respondent, namely Mr Oscar Malepe and Mr Thabang Morena who were fellow passengers with the respondent in the deceased's taxi. It bears emphasising that the respondent denied any complicity in the commission of the offences with which he was charged in the court below.

[6] The gist of the evidence of Morena and Malepe was as follows. Morena testified that he boarded the deceased's taxi together with Malepe and the respondent at Ga-Mokgotho village en route to Penge village. They were all returning from a football tournament and were on their way home. When they boarded the taxi, the deceased was alone inside. Malepe occupied the front seat alongside the deceased. He and the

respondent sat on the same seat, behind the deceased. According to Morena, the respondent was seated on his right. It is common cause that the sliding door through which back passengers alight from the taxi was on its left side. When the taxi stopped at Penge village, he stood up from his seat, intending to pay the deceased the taxi fare and then disembark as he had to alight first. At that stage, he heard the sound of gunfire coming from behind him. He then saw the deceased slumped over the steering wheel, thereby triggering the horn of the taxi. After hearing the sound of a gunshot, he alighted and did not look back. He and Malepe fled the scene. Later, the respondent followed suit and soon caught up with them. The respondent was not carrying anything in his hands. Morena testified that the respondent mentioned that he (Morena) was lucky that he (the respondent) had only one bullet in the gun, which Morena understood to be a threat directed at him. The respondent warned them never to mention the incident to anyone.

[7] In his turn, Malepe testified that he, Morena and the respondent boarded the deceased's taxi at Ga-Mokgotho village, travelling to Penge village. He sat in the front passenger seat alongside the deceased. Morena and the respondent sat behind the deceased. When the vehicle stopped at Penge village, he heard the sound of gunfire. He looked back and saw the respondent holding a firearm pointed downwards. The respondent disembarked from the taxi, walked around to the driver's side and then, pushing the deceased towards the left side of the front passenger seat, attempted to drive the taxi without success. He and Morena fled the scene. They were later rejoined by the respondent who warned them not to mention the incident to anyone. Malepe further testified that a few years later the respondent repeated the warning over the telephone.

[8] For his part, the respondent closed his case without giving evidence in his defence or calling any witnesses.

[9] That the deceased died as a result of a single gunshot wound in the head in what appears to be an abortive robbery on 24 December 2010 was not in dispute. The

substantial issues in the case were, first, whether the State had proved beyond reasonable doubt that the respondent was responsible for the murder. Second, whether the approach adopted by the court below in evaluating the evidence at the trial constitutes an error of law as contemplated in s 319 of the CPA. It bears mentioning that neither Malepe nor Morena could say with any measure of conviction that it was indeed the respondent who had fired the shot that fatally wounded the deceased. Thus, in large measure the State's case rested on circumstantial evidence with respect to the events of the fateful night.

[10] Section 319 of the CPA provides:

'(1) If any question of law arises on the trial in [the High Court] of any person for any offence, that court may of its own motion or at the request of either of the prosecutor or the accused reserve that question for the consideration of the [Supreme Court of Appeal], and thereupon the first-mentioned court shall state the question reserved and shall direct that it be specially entered in the record and that a copy thereof be transmitted to the registrar of the [Supreme Court of Appeal].

(2) The grounds upon which any objection to an indictment is taken shall, for the purposes of this section, be deemed to be questions of law.'

[11] As already stated, the respondent did not testify in his defence at the trial. In the course of evaluating the evidence adduced at the trial, the court below was cognisant of the general principle that: (a) the onus in a criminal trial rests on the State; (b) an accused person bears no onus to satisfy the court that his version – if the accused elects to testify – is true and that it suffices that the version of an accused is reasonably possibly true; (c) while it is permissible to have regard to the probabilities, the version of an accused cannot be rejected simply on the basis that it is improbable and that it can be rejected on the basis of probabilities only if the court is satisfied that it is not only improbable but also false beyond reasonable doubt. (See in this regard *S v Shackell* 2001 (2) SACR 185 (SCA) para 30.)

[12] The court below rejected the evidence of the two material State witnesses describing their evidence as 'not satisfactory in all material respects'. In addition, it

found that the witnesses in question had ‘rehearsed’ their evidence and also ‘schooled each other’ as to what ‘to say in [their] evidence, in an effort to implicate the [respondent]’. For this reason, it noted that their evidence was untrustworthy. It went on to state that the ‘accused’s version’, even though not tested, is ‘. . . reasonably possibly true and . . . not inherently improbable’.

[13] I have put the words ‘accused’s version’ quoted above in parenthesis in order to illustrate that when the learned judge in the court below made reference to an ‘accused’s version’ he was seemingly labouring under a misconception that the respondent had testified when in truth he had not.

[14] It is necessary at this juncture to record that the reasoning underpinning the judgment of the court below is not a model of clarity. It reveals a fundamental misconception as to the proper test that finds application when a trial court evaluates the evidence at the end of the trial in instances where an accused has not testified in his defence or called any witnesses. I shall revert to this aspect in due course.

[15] At the conclusion of the trial, the court below held that the State failed to prove its case beyond a reasonable doubt, noting amongst other things, that the case had been poorly investigated by the police. It bears mentioning that the State conceded, when it addressed the court below on the merits, that it had not proved its case with respect to three of the four charges preferred against the respondent. Accordingly, the State accepted that the respondent was entitled to an acquittal in relation to those counts. In the event, the respondent was acquitted on all counts.

[16] Dissatisfied with the outcome of the trial in relation to the murder count, the State unsuccessfully applied to the court below for a reservation of a question of law in terms of s 319 of the CPA for decision by this Court, asserting that the respondent’s acquittal was occasioned by an error of law committed by the trial judge. The State subsequently applied to this Court for leave to appeal against the dismissal of its application. As already indicated, that application for leave to appeal by the State was referred for oral

argument in terms of s 17(2)*(d)* of the Superior Courts Act. Although the State had conceded in the court below that it had not proved its case in relation to, amongst others, the count of robbery – hence this count was not the subject of its application for reservation of a question of law in the court below – it nonetheless sought to widen the ambit of its application in this Court by contending that the respondent should not have been acquitted even on the count of robbery. I shall, however, return to this aspect later.

[17] Apropos the State's application for a reservation of a question of law in terms of s 319 of the CPA and pertinently addressing the State's contention that what was put to the State witnesses on behalf of the respondent under cross-examination was not evidence, the court below, amongst other things, said the following in its judgment dismissing the application:

'[T]he answers provided for by witnesses as opposed to the version put by the defence constitute, . . . [was] evidence before the court . . .'

For this proposition the court below sought to rely on *S v Van der Meyden* 1999 (1) SACR 447 (W) at 449a-f. In the event, the court below concluded that the question that the State sought to have reserved in terms of s 319 of the CPA was one of fact and not one of law. Consequently, the application failed. On this score, it suffices merely to state that *Van der Meyden* is not authority for the proposition for which it was cited by the court below.

[18] It is apposite at this stage to make some general observations with regard to the correct approach to the evaluation of evidence in a criminal trial. It is trite that an accused can only be convicted if the evidence establishes his guilt beyond reasonable doubt. And as Nugent J observed in *Van der Meyden* (at 450a-b):

'The proper test is that an accused is bound to be convicted if the evidence establishes his guilt beyond reasonable doubt, and the logical corollary is that he must be acquitted if it is reasonably possible that he might be innocent. The process of reasoning which is appropriate to the application of that test in any particular case will depend on the nature of the evidence which the court has before it. What must be borne in mind, however, is that the conclusion which is reached (whether it be to convict or to acquit) must account for all the evidence. Some of the

evidence might be found to be false; some of it might be found to be unreliable; and some of it might be found to be only possibly false or unreliable; but none of it may simply be ignored.'

[19] In *Director of Public Prosecutions, Transvaal v Mtshweni* 2007 (2) SACR 217 (SCA) this Court, with reference to *Magmoed v Janse van Rensburg & others* 1993 (1) SACR 67 (A), emphasised that 'there can be no appeal by the State against an acquittal where the Court has erred in evaluating the facts and drawing inferences, even if the error is grave'. In *Magmoed*, Corbett CJ held (at 101h-i) that it is not competent for the State to raise as a question of law, in terms of s 319 of the CPA, the issue whether a reasonable court could not have acquitted the accused.

[20] In the context of considering the effect of a failure of an accused to testify in the face of incriminating evidence, Smalberger JA had occasion to say the following in *S v Francis* 1991 (1) SACR 198 (A) at 203h-i:

'It was therefore incumbent upon the trial Court to properly evaluate the evidence of . . . in the light of its alleged deficiencies, and the criticisms voiced against it, in order to determine whether it measured up to the standard required for its acceptability. If it did not measure up to such standard, it would not avail the State in the discharge of the onus of proof upon it that accused . . . failed to testify. While an accused person's failure to testify may in appropriate circumstances be a factor in deciding whether his guilt has been proved beyond all reasonable doubt, this is only so where the State has prima facie discharged the onus upon it. A failure to testify will not remedy a deficiency in the State case *such as the absence of apparently credible implication of the accused* (*S v Masia* 1962 (2) SA 541 (A) at 546E-F).' (My emphasis.)

[21] In *S v Boesak* 2001 (1) SACR 1 (CC), a case where the applicant sought leave to appeal against the judgment of this Court by raising constitutional challenges against the dismissal of his appeal, the Constitutional Court held that it could not avail the applicant to clothe a challenge which was not constitutional at all in constitutional garb. Similarly in this case it can be said, by parity of reasoning, that it cannot avail the State to rely on s 319 of the CPA in relation to a fact that does not constitute a question of law.

[22] The remarks of Madala J in *Osman & another v Attorney-General, Transvaal* 1998 (2) SA 1224 (CC), although made in a different context, are instructive. There, the Constitutional Court stated the following in para 22:

'. . . Once the prosecution has produced evidence sufficient to establish a prima facie case, an accused who fails to produce evidence to rebut that case is at risk. *The failure to testify does not relieve the prosecution of its duty to prove guilt beyond reasonable doubt*.' (My emphasis.)

If the finding of the court below relates to the weight of the evidence and the inferences that can properly be drawn therefrom, it is not open to the State to clothe that finding as a question of law and then rely on it for the purposes of s 319 of the CPA.

[23] In *Magmoed v Janse van Rensburg & others* 1990 (2) SACR 476 (C) at 478g, it was held that the decision to reserve a question of law should not be an academic one but should have a practical effect on the conviction of the accused.

[24] I return to the facts of the present case. The application for leave to appeal against the refusal by the court below to reserve a question of law was confined to two grounds. These were broadly that: (a) the court below did not determine whether or not the evidence adduced by the State was sufficient, and, if not, that it consequently did not constitute a prima facie case against the respondent on which a court acting carefully might convict; and (b) the test applied by the court below, ie whether or not the version of the [respondent] is reasonably possibly true, was inappropriate given that the respondent did not testify. Thus, it was submitted that these material misdirections committed by the court below constitute errors of law as contemplated in s 319 of the CPA.

[25] In support of these contentions, counsel for the State relied on several decisions of this Court and the Constitutional Court. (See, for example, in this regard: *Director of Public Prosecutions, Gauteng v Pistorius* [2015] ZASCA 204; 2016 (1) SA 317 (SCA); *Director of Public Prosecutions, Gauteng Division, Pretoria v Moloi* (1101/2015) [2017] ZASCA 78 (2 June 2017); *S v Mavinini* 2009 (1) SACR 523 (SCA); and *S v Boesak*, above.

[26] In *Director of Public Prosecutions, Gauteng v Pistorius* (paras 21-24) this Court said that in an appeal brought under s 319 of the CPA considerations different to those that are ordinarily appropriate to appeals, apply. It noted that ordinarily an appeal is, as a general rule, 'a complete rehearing' of the case albeit confined to the evidence on record. It went on to state, with reference to *Magmoed*, that 'the traditional policy and practice of our law' is that an acquittal by a competent court in a criminal case is final and conclusive and may not be questioned in any subsequent proceedings. Accordingly, an appellate court is precluded from interfering with the factual findings of a trial court leading to the rejection of the version of the State.

[27] The question of law which the State sought to have reserved was formulated in the following terms:

'In instances where the accused did not testify, the correct test to be applied during the evaluation of the evidence is whether or not the evidence of the State constituted a prima facie [case] on which the Court might convict the accused.

The test is not whether the version of the accused is reasonably possibly true or not. . . . [that] test applies only in circumstances where the accused [has] testified.'

The thrust of the State's case therefore is that the court below erred in its approach to the evaluation of the evidence by essentially adopting a wrong test, hence its erroneous conclusion.

[28] In elaboration, the State strongly relied on several passages in the judgment of the court below. Counsel for the State contended that the judgment is replete with dicta which ineluctably indicate that the court below adopted an incorrect approach in its evaluation of the evidence. True, a reading of the judgment of the court below reveals a number of fundamental misdirections.

[29] Whilst the respondent did not testify, the court below, inexplicably, said the following:

'It is an entrenched principle of our law that the State carries the burden to prove in all criminal proceedings the accused's guilt beyond reasonable doubt.

That is the standard set by the law. Consistent with this principle is the principle that no onus is cast on an accused person to convince the court or that his evidence be true or believed.

All what accused need to do when faced with a case to answer, if any of course, is to place a version that is reasonably, possibly true. It need not even be truthful either. It is the court's judicial function to investigate and evaluate the totality of the evidence and determine whether there is a reasonable possibility that the accused is not guilty.

The accused should be convicted only if the court finds not only that his version is improbable, but also beyond reasonable doubt false. The accused need not necessarily be believed to acquit him.

These underlining principles were captured in the case of State v V 2000 (1) SACR 453 (SCA). . . .'

[30] The court below continued:

'The court is therefore given three diametrically opposed versions.

Oscar [Malepe] implicates the accused. He, the accused, also threw a counter accusation. Alleging that it was Oscar who killed the deceased. Clearly, . . . only the three of them know the truth of who actually fired the fatal shot. The three of them know the truth.

Now, following the approach adopted in S v V, I have referred to, it admits of no doubt that there is no obligation upon an accused person where the state bears the onus, to convince the court. If of course his version is reasonably, possibly, true he is entitled to his acquittal, even though his explanation is improbable.

A court is not entitled to convict, unless it is satisfied, not only that the explanation is improbable, but beyond reasonable doubt false. It is permissible for the court to view the probabilities of the case, to assess whether the accused's version is reasonably, possibly, true.

But whether one believes him is certainly not the test. It would therefore be a misdirection for the trial court to regard an accused's failure to convince the court as a sign of veracity of the state's case. That would be a serious misdirection on the part of the court.'

[31] The court below then concluded:

'The accused's version, even though not tested, is in my view, reasonably, possibly, true and it is not found to be inherently improbable. I find that there is no reasonable possibility that the accused is guilty.

The court in evaluating the evidence is of the view that there is a reasonable possibility that he might be innocent and therefore entitled to his acquittal. The evidence implicating him cannot be viewed in isolation, nor evidence exculpating him.'

[32] Counsel for the State criticised the approach adopted by the court below in reaching its conclusion. In particular, he submitted that its reliance on *S v V* 2000 (1) SACR 453 (SCA) was misplaced. There, the appellant had testified in his defence whereas in this case the respondent did not. Accordingly, in *S v V* the question of the guilt or innocence of the appellant was rightly determined in the context of the two versions, ie the version of the State and the defence version. In this case the question whether the 'explanation' of the respondent was false beyond reasonable doubt or reasonably possibly true simply did not arise. Put differently, the test applied by the court below when it said that there was a reasonable possibility on the 'accused's version' (as the learned judge put it) that the respondent might be innocent was inappropriate.

[33] For his part, counsel for the respondent, unsurprisingly, embraced the judgment and adopted the reasoning of the court below. He argued that when regard is had to the tenor of the judgment it becomes plain that the trial judge was alive to the fact that the respondent did not testify. Thus, so the argument went, whatever else is said in the judgment must be considered against that backdrop. Furthermore, he submitted that what the reasoning of the court below, quoted extensively above, sought to underscore was that it had regard both to the respondent's plea explanation and the evidence of Morena and Malepe in response to questions put to them under cross-examination.

[34] In my view the contention advanced by counsel for the respondent is plainly untenable in the context of this case. It entirely loses sight of the fact that, in truth, on a holistic and dispassionate reading of the judgment it becomes self-evident that the court below adopted a wrong test as is amply demonstrated by the various excerpts quoted from its judgment referred to in paras 29 to 31 above. Consequently, it can hardly be suggested that the approach adopted by the court below was correct.

[35] It is of course correct that a trial court, in determining the guilt or innocence of an accused, may have regard to an accused's statement in substantiation of his or her plea of not guilty. And that a court must consider both the incriminatory and exculpatory material of the plea explanation. (See in this regard: *S v Cloete* 1994 (1) SACR 420 (SCA) at 428d-g.) But what a trial court is not permitted to do is to equate the exculpatory material of a plea explanation and questions put to State witnesses with an accused's version when in fact they are clearly not. (See: *S v Mjoli & another* 1981 (3) SA 1233 (A) at 1238C-E and 1247H-1248A.) The court below merely glossed over the fundamental issue raised by the State in its application for reservation of a question of law. In so doing, it ignored the most elementary principle applicable in a criminal trial in determining the guilt or innocence of an accused in instances where such an accused has not testified.

[36] It is necessary to emphasise in this case that as the respondent did not testify in his defence at the trial, there was no 'accused's version' to speak of. Accordingly, the matter fell to be decided on the basis of the principles endorsed by this Court in *Francis* referred to in para 20 above. (See also in this regard: *S v Boesak*, above paras 46-47.)

[37] In these circumstances, it is beyond question that the court below committed a serious misdirection which amounts to an error of law. The State's criticism of its judgment was therefore fully justified.

[38] For all the foregoing reasons it is my judgement that the conclusion reached by the court below in acquitting the respondent cannot stand. In para 16 above, I mentioned that the State sought to widen the ambit of its application by arguing that the respondent should not have been acquitted also on the count of robbery. I have serious reservations as to whether it is open to the State to do so in light of the fact that it had conceded at the trial that it did not discharge the onus resting upon it with respect to this count. Hence, the State did not impugn the acquittal of the respondent in its s 319

application in the court below, which is perfectly understandable. However, in view of the conclusion to which I have come no more need be said on this aspect.

[39] There is one final issue that requires mention. And it is this. The State, relying on *Pistorius*, urged us to substitute the decision of the court below acquitting the respondent with a verdict of guilty on the murder count. But when we expressed our misgivings as to the propriety of adopting such a course, given the circumstances of this case, the State indicated that it would be content with an order in terms of which the acquittal is set aside and no more. (Compare: *S v Naidoo* 1962 (4) SA 348 (A) at 354D-E.) Accordingly, it will be left to the Director of Public Prosecutions to decide whether it wishes to institute fresh proceedings against the respondent before another judge.

[40] In the result the following order is made:

1 The application for leave to appeal is granted.

2 The appeal is upheld.

3 It is declared that the issue raised by the State encapsulated in para 27 of this judgment is a question of law and is answered in favour of the Director of Public Prosecutions.

4 The respondent's acquittal on the count of murder is set aside.

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X M Petse
Judge of Appeal

APPEARANCES

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