IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	NO
Of Interest to other Judges:	NO
Circulate to Magistrates:	NO

Case no: **A55/2016**

In the matter between:

PITSO EDWARD PEPENENE Appellant

and

THE STATE Respondent

CORAM: DAFFUE J *et* MATHEBULA J

HEARD ON: 21 FEBRUARY 2022

DELIVERED ON: 21 FEBRUARY 2022

JUDGMENT BY: DAFFUE J

This judgment was handed down electronically by circulation to the parties' representatives by email, and release to SAFLII. The date and time for hand-down is deemed to be 13h00 on 21 February 2022.

I INTRODUCTION

[1] The appellant was arraigned in the Regional Court, Bloemfontein on a charge of murder in that on or about 10 March 2008 he murdered his wife, Khathazwa Susan Penenene. On 29 February 2012 he was convicted as charged and on 27 March 2012 he was sentenced to 16 years' imprisonment.[1]

[1] Record: pp 390 & 409

[2] On 23 June 2014 the appellant successfully applied for leave to appeal the conviction and sentence imposed and at the same time bail was granted pending appeal.[2]

[3] The case was in the first place unnecessary dragged out in the court *a quo* in that it was finalised about four years after the appellant's first appearance. Then another two years lapsed before leave to appeal was granted. More chaos occurred since then in the High Court. A first appeal number was allocated in 2014, then another in 2015, but eventually the present appeal number was allocated in 2016. Now, six years later, the appeal was eventually heard. Serious problems were experienced with the transcription of the record as is apparent from the notes of legal representatives placed in the court file. I do not intend to set out any detail in this regard, but merely wish to reiterate that a travesty of justice has occurred. Fortunately, and bearing in mind the outcome of this appeal, the appellant was successful in his bail application. If that was not the case, he would have been incarcerated for another eight years.

[4] The record is still not complete. I have referred to a similar situation in *S v Nkhahle*[3] in which judgment I dealt with the problems experienced regularly pertaining to incomplete appeal records. I merely wish to quote two paragraphs from the judgment in which I dealt with the *dicta* of both the Constitutional Court and Supreme Court of Appeal:[4]

"[19] The Constitutional Court referred in *Phakane* with approval of *S v Joubert* where the Appeal Court, as it was known then, stated:

'If this failure [the incomplete record] cannot be rectified, as in this case, it seems to me that the conviction cannot stand, because it cannot be said that there has not been a failure to justice.'

[20] In *S v Chabedi* the Supreme Court of Appeal held as follows:

'On appeal, the record of the proceedings in the trial court is of cardinal importance. After all, that record forms the whole basis of the rehearing by the Court of appeal. If the record is inadequate for a proper consideration of the appeal, it will, as a rule, lead to the conviction and sentence being set aside. However, the requirement is that the record must be adequate for proper consideration of the appeal; not that it must be a perfect recordal of everything that

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[2] Written note of Regional Court Magistrate Matthews
[3] 2021(1) SACR 336 (FB)
[4] Nkhahle paras 19 & 20

was said at the trial. As has been pointed out in previous cases, records of proceedings are often still kept by hand, in which event a verbatim record is impossible . . . .'"

[5] Bearing in mind the following aspects it might have been appropriate to uphold the appeal on technical grounds due to the incomplete record:

(a) The court *a quo* relied heavily on the evidence of the appellant's stepson in respect of the identification of the trousers when he was called back to the witness stand. This evidence has not been transcribed and we are not in a position to evaluate the judgment in this regard;

(b) The evidence of the medical doctor has also not been transcribed, but this may not be that crucial bearing in mind the admissions made by the appellant;

(c) The full evidence of the appellant's witness does not form part of the record. The appellant was accused by the court *a quo* of coaching his witness and therefore, credibility findings were made against both the appellant and his witness. Again it is not possible for us to properly evaluate the judgment due to the incomplete record.

[6] Instead of upholding the appeal and setting aside the conviction and sentence based on an incomplete record, as we could have done, we are in a position to adjudicate the appeal on the merits for the reasons that will soon become clear.

II GROUNDS OF APPEAL

[7] The most relevant ground of appeal is that the court *a quo* erred in not considering the material contradiction between the versions of the Investigating Officer ("IO") and Captain Lekone in respect of the discovery of the trousers that allegedly belonged to the appellant. Furthermore, the court *a quo* failed to take into consideration the photographer, Inspector Beckman's evidence to the effect that several members of SAPS had access to the appellant's house before he arrived to take photographs.

[8] The appeal against sentence is in essence directed at the court *a quo*'s failure not to accept that substantial and compelling circumstances existed that warranted a departure from the prescribed minimum sentence.

III THE JUDGMENT OF THE COURT *A QUO*

[9] Before I proceed to deal with the court *a quo*'s reasons for convicting the appellant, I need to emphasise that the evidence of several witnesses could safely be accepted as credible and reliable. Unfortunately for the State's case the circumstantial evidence did not suffice in order to justify a conviction. Although many fingers point towards the guilt of the appellant, a proper analysis of the evidence presented by the State should be undertaken. Before then, the following aspects in the judgment are highlighted:

9.1 The court *a quo* stated that "as we all know, DNA has been found to be the most reliable method of proving identity."[5]

9.2 After criticizing the appellant with reference to five specific issues,[6] the court *a quo* acknowledged that there was "one important shortcoming in the state case, and it is on who found the pair of trousers, and where."[7]

9.3 The court *a quo* dealt with the different versions, but instead of subjecting the differences to proper scrutiny, merely held that the appellant's stepson was certain that the trousers belonged to the accused.[8] It continued to hold that it sounded far-fetched that the IO would plant DNA on the trousers.

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[5] Judgment: p 388/22
[6] Judgment: p 387/10 – 388/8
[7] Judgment: p 388/8 & 9
[8] Judgment: p 388/14 & 15

9.4 The court *a quo* was severely critical of the evidence presented by the appellant's witness and accused the appellant of "coaching" the witness.[9]

IV ADJUDICATION OF THE APPEAL

[10] A court of appeal will not likely intervene with the credibility findings of the trial court. In the absence of an irregularity or misdirection the court of appeal is bound by such credibility findings, unless it is convinced that such findings are clearly incorrect.[10]

[11] When an appeal is lodged against the trial court's findings of fact, the court of appeal should take into account that that court was in a more favourable position than itself to form a judgment because it was able to observe the witnesses during their questioning and was absorbed in the atmosphere of the trial.[11] Therefore, the court of appeal will normally accept factual findings made by the trial court, unless there is some indication that a mistake was made. More recently the Supreme Court of Appeal summarised the approach as follows:[12]

> "Before considering these submissions it would be as well to recall yet again that there are well-established principles governing the hearing of appeals against findings of fact. In short, in the absence of demonstrable and material misdirection by the trial Court, its findings of fact are presumed to be correct and will only be disregarded if the recorded evidence shows them to be clearly wrong. The reasons why this deference is shown by appellate courts to factual findings of the trial court are so well known that restatement is unnecessary."

[12] In concluding the topic and to reiterate: if the court of appeal is merely left in doubt as to the correctness of the factual conclusions arrived at by the trial court, it will uphold them. The Supreme Court of Appeal restated the principle as follows in *Naidoo*:[13]

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[9] Judgment: p387/2-9 & 389/6-10
[10] S v Francis 1991 (1) SACR 198 (A) at 204 c-e; S v Mkohle 1990 (1) SACR 95 (A) at 100e
[11] Schmidt and Rademeyer, Law of Evidence, LexisNexis ed para 3 – 40 & judgments relied upon
[12] S v Hadebe 1997 (2) SACR 641 (SCA) at 645 e-f
[13] *S v Naidoo & others* 2003(1) SACR 347 (SCA) at para 26; see also the following *dictum* of the SCA in *Beukes v Smith* 2020 (4) SA 51 (SCA) at para 22:

"In the final analysis, a Court of appeal does not overturn a trial Court's findings of fact unless they are shown to be vitiated by material misdirection or are shown by the record to be wrong."

[13] The court of appeal should be hesitant to search for reasons that are in conflict with the trial court's conclusion. However, in order to prevent a convicted person's right of appeal to be illusionary, the court of appeal has a duty to investigate the trial court's factual findings in order to ascertain their correctness and if a mistake has been made to the extent that the conviction cannot be upheld, it must interfere.[14]

V EVALUATION OF THE COURT *A QUO*'S JUDGMENT AND THE PARTIES' SUBMISSIONS

[14] The assessment of evidence must be approached in a holistic manner geared towards the determination whether the guilt of the accused person (appellant) has been proved beyond reasonable doubt. This was eloquently stated by Heher AJA (as he then was) as follows:-

"The correct approach is to weigh up all elements which point towards the guilt of the accused against all those which are indicative of his innocence, taking proper account of inherent strengths and weaknesses, probabilities and improbabilities on both sides and, having done so, to decide whether the balance weighs so heavily in favour of the State as to exclude reasonable doubt about the accused's guilt"[15]

[15] I now turn to the evaluation of the evidence by the court *a quo*. At the outset, I am of the view, that the magistrate misdirected himself in his application of the law to the facts, given the evidence on record. I shall deal only with the most glaring aspects.

"It is trite that the powers of an appeal court to overturn factual findings by a trial court are restricted. But where the findings of a trial court are based on false premises or where relevant facts have been ignored, or where the factual findings are clearly wrong, the appeal court is bound to reverse them."

[14] *S v M* 2006 (1) SACR 135 (SCA) para [40]

[15] S v Chabalala 2003 (1) SACR 134 (SCA) at para 15

[16] The test for circumstantial evidence is well-known. In *R v De Villiers*[16] the court again explained the test enunciated in *R v Blom.* Not even the test for adjudicating circumstantial evidence as set out by Zulman AJA (as he then was) in *S v Reddy and Others*[17] could assist the State to obtain a conviction.

[17] I am satisfied that the evidence of the State witnesses, Mrs Ndlela, the appellant's stepson Ismael, Mr Nwenya, Mr Morake and the reservist Sejaname could have been accepted, save in so far as Ismael might have been wrong in respect of the identification of the trousers. But even so, all these versions, taken together, were wholly insufficient to convict, contrary to the observations made in *Reddy supra.* The distance between the place where the deceased's body was found and the appellant's house, the medical evidence, and especially the evidence of the forensic expert, Mrs Michelle Thompson are extremely relevant evidence that tend to point to the appellant's guilt. The admissions made[18] in terms of s 220 of the Criminal Procedure Act[19] also went a long way in alleviating the burden on the State to prove its case beyond reasonable doubt. It was *inter alia* admitted that blood samples taken from both the appellant and the deceased were correctly sent to and analysed at the Forensic Science Laboratory. Did this take the State's case far enough? Surely not, as I will explain.

[18] It is permissible to test an 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 the inherent probabilities if it can be said to be so improbable that it cannot reasonably possibly be true.[20]

[19] The court *a quo* subjected the appellant's version to severe scrutiny. After stating that the appellant generally stuck to his version, five points of criticism were raised, but according to the court *a quo* the final straw that broke the camel's back was the coaching of his witness. This caused the court *a quo* to

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[16] 1944 AD 493 at 508-9
[17] 1996(2) SACR 1 (A) at 8i
[18] Record, p 264/19 – p265/8
[19] 51 of 1977
[20] *S v Shackell* 2001 (2) SACR 185 (SCA) at para [30]

say the following: "... it becomes clear what type of person the court has to view the accused at."[21]

[20] The same scrutiny with which the appellant's evidence was considered is absent when the evidence of the police officers, the IO, Captain Lekone and even Inspector Beckman was evaluated. In fact, there was no evaluation and the evidence was just accepted. It could not be held that the trousers were found in the appellant's house on 11 March 2008. The court *a quo* erred. It did not indicate whose version it accepted. Both police officers were adamant, but both could not be correct. There is no possibility of an innocent mistake. This must be considered in light of serious discrepancies and improbabilities in their versions as well as the fact that the court *a quo* already held in its judgment in the trial-within-a-trial that the warning statement was not made freely and voluntarily. In this regard the court *a quo* emphasised that, unlike as vividly testified by the IO that he and Lekone were present during the appellant's interview, the Captain did not say a word about being present. The court *a quo* correctly frowned about this as "...obviously Captain Lekone's evidence was meant to corroborate Inspector Ndaleni on the fact that the statement was made freely and voluntary."[22] The IO was adamant that the Captain was also present when the warning statement was read back to the appellant and signed by him.[23]

[21] Beckman explained that when he arrived to take photos at the appellant's house on 10 March 2008 there were already several police officers in the house that had to be asked to exit it for him to do his work. This is in line with the appellant's version that his house was ransacked as the officers were apparently searching for clues. None of the photos taken by Beckman confirm positively that bloodstains were found in the premises. The most crucial aspect in Beckman's evidence is the failure to deal with the trousers handed to him the next day. He also received shoes at that time. He inspected the shoes, could not find any possible bloodstains and handed the shoes back. However, the trousers were merely taken without inspecting same and no

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[21] Record: p 387/10 – p 388/8
[22] Record: p 213/5-15
[23] Record, p 86/8-13

conversation took place about any bloodstains found thereon. Any reasonable person who had obtained possession of trousers in the circumstances as the IO wanted the court to believe, would have told his colleague about the obvious bloodstains for the photographer to note same and to photograph the damning evidence. This did not occur and the question is why not. There can be three possible answers; either there were no blood stains on the trousers at that stage, or there were, but the trousers were contaminated before police officers arrived at the appellant's house, or thereafter and during their investigations.

[22] In order to consider answering the question posed in the previous paragraph, the chaos in the house before the arrival of the photographer and the far-fetched versions of the IO and Captain Lekono must be considered. It must be remembered that the appellant denied that the trousers belonged to him, but even if he lied in this regard, he denied that the trousers were found in his house and in his presence.

[23] Let me firstly deal with the IO's version. According to him he and Captain Lekone took the appellant to his house after he had made his warning statement on 11 March 2008. He testified that they "...were going to look for any clothing that had bloodstains on it",[24] notwithstanding the fact, I may say, they had ample opportunity to do that the previous day. According to him "**we** found the khaki pants or trousers that **we** found hidden underneath the matras (sic); ,,,,Yes, **we** lifted the matras up and found it underneath."[25] (my emphasis.) This happened in the appellant's presence. Later on he changed "**we**" to "**I**". He did not *ex facie* his evidence needed to point this out to the Captain and as strange as it may sound, neither of them discussed the bloodstains apparently found on the trousers. He merely confronted the appellant who denied having knowledge of the bloodstains. This extremely important aspect – the visible bloodstains on the trousers - was also not conveyed to Beckman. I say this as neither the IO, nor Beckman testified about such conversation and in any event, Beckman

[24] Record: p 87/10-11
[25] Record: p 87/10-24

also testified that he did not inspect the trousers which were folded when handed over to him.[26]

[24] Captain Lekone gave a diametrically opposed version to that of the IO. According to him the appellant took out trousers and handed same to him, saying that these were the trousers he was wearing that day.[27] The Captain handed the trousers to the IO, but no fuss was made as could be expected. Instead of immediately calling the IO and showing him the bloodstained trousers taken out by the appellant, he waited a while and only after they had exited the house, he handed over the exhibits to the IO. This is just so unbelievable that it is not possible to accept it as the truth. Even when confronted with the IO's version, he found that surprising and insisted that his version was correct.[28]

[25] I would rather let a guilty person free, than convict an innocent person. The material contradiction of senior members of the South African Police Service is deplorable. In fact, they contradicted each other from the moment they fetched the appellant for his warning statement containing so-called admissions which were nothing but amounted to a confession of murder. The allegations contained in the document which the court *a quo* correctly held to be inadmissible, could have been concocted by anyone that visited the scene the previous day. The appellant did not have to prove his innocence. The court *a quo* should have given the appellant the benefit of the doubt that had been caused due to sloppy investigation and material contradictions in the evidence of the police witnesses mentioned above.

VI CONCLUSION

[26] Although several fingers point to the appellant as the guilty party, the court *a quo* misdirected itself as mentioned. The effect thereof is that the conviction cannot stand.

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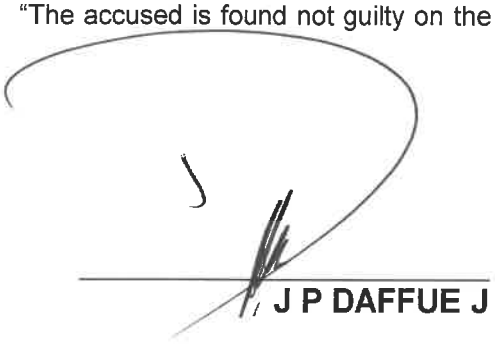
[26] Record, p 223/12 – p 224/6
[27] Record, p 159/5-9
[28] Record, p 171/11-20

VII THE ORDERS

[27] The following orders are issued:

1. The appeal succeeds.
2. The conviction and sentence are set aside and the order of the court *a quo* is substituted with the following: "The accused is found not guilty on the charge of murder and acquitted."



J P DAFFUE J

I concur

M A MATHEBULA J

On behalf of the Appellant: Adv L Smit
Instructed by: Legal Aid Board
BLOEMFONTEIN

On behalf of the Respondent: Adv T September
Instructed by: Office of the DPP, Free State
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