

IN THE HIGH COURT OF SOUTH AFRICA
SOUTH GAUTENG DIVISION, JOHANNESBURG

CASE NO.: SS03/2023

NOT REPORTABLE

NOT OF INTEREST TO OTHER JUDGES

NOT REVISED

In the matter between:

THE STATE

and

BUTHELEZI, NHLANHLA

Accused

NEUTRAL CITATION: *The State vs Buthelezi Nhlanhla* (Case Number: SS 03/2023)

[2023] ZAGPJHC 547 23 May 2023

JUDGMENT

KUMALO J

INTRODUCTION

[1] The accused is charged with one count of murder. The state alleges that on or about 2 September 2022 at or near house no:[...] Block 09 Doornkop, in the Magisterial District of Johannesburg, the Accused did unlawfully and intentionally kill B.N, a 3-year-old minor child.

[2] The Accused pleaded not guilty to the charge and was ably defended by Adv. Mthembu of the Legal Aid. In his plea explanation in terms of s115 of the Criminal Procedure Act, Act 51 of 1977, the Accused admitted the killing of

B.N, his son, but raised the defence known in our law as “temporary non-pathological incapacity. He alleged that he was too drunk and has no recollection of what he did or happened on that day.

- [3] Certain admissions in terms of s220 of the Criminal Procedure Act, 51 of 1977 were recorded and handed up as “Exhibit “A”. These admissions related to the identity of the deceased person, the date of his death, the correctness and truthfulness of the findings of the postmortem conducted by Dr. Funeka Nciweni.
- [4] It is common cause that the Accused killed the deceased on 02 September 2022. The deceased was his 4-year-old son. He stabbed him several times and left him on the street near a passage. It was in the evening when this tragedy occurred.
- [5] The first and second state witnesses Thembelihle Ntuli and Zinhle Nhose are eye witnesses to the killing of the deceased.
- [6] Ms. Ntuli the first state witness is the aunt of the deceased. The deceased was the son of her elder sister, and the Accused was the father. On the morning of 2 September 2022, the Accused came to their parents’ home drunk and had a verbal fight with her elder sister Zamokuhle Ntuli, the mother of the deceased. This happened after their mother had left for her workplace. Their mother works as a domestic worker in the suburbs. The mother is apparently a stay-in at her place of employment.
- [7] She did not pay much attention to their fighting as this would usually happen when the Accused was drunk. The Accused left and uttered the words that “There will be a movie” on that day. These words were directed to the mother of the deceased. The witness was close by when these words were uttered by the accused who then was closer to the house entrance.
- [8] She remained in the house with her sister and later left to go to the shops with the children. The accused returned when she was away. She observed him through the passage going towards her home but did not see him enter the yard.

- [9] She testified that the Accused came back again at about 19h00 in the evening. He was looking for her sister and she told him that she went out. He left again but came back shortly thereafter and pulled the deceased away from the other children and said to them that the mother of the deceased was looking for him.
- [10] Her niece came in the house and enquired that they are sitted relaxed when they know that the Accused had earlier said that he would kill the deceased. The witness testified that she was not present when the Accused is alleged to have made that threat but heard it from somebody she referred to as Mandie.
- [11] They then immediately followed the accused who was dragging the child in the street. They gave chase towards the passage. She thought that the Accused was assaulting the child as he had done that before, and her niece Zinhle told her that the Accused was stabbing the deceased.
- [12] When they got closer and at about 1 to 1,5 meters, she saw that the Accused was stabbing the deceased and she then shouted for help. The Accused stabbed the deceased several times.
- [13] She ran to look for help and the community members responded but it was too late. The Accused had left and abandoned the deceased on the street near the passage.
- [14] The community members went to look for the Accused whilst she remained on the street with the body of the deceased. The community members found the Accused after a while and came back with him to the scene.
- [15] The police were called, and she cannot tell much what happened then as she was in a shock. The police looked for the weapon used by the Accused but could not find it. It was found the following day by another child in the street. She saw the knife. It was a kitchen knife with an orange and white handle. She described it as very fine and sharp and was about 20cm in length.

[16] Under cross examination, Ms. Ntuli was asked whether she observed that the Accused was drunk, and she confirmed it but stated that he was not too drunk. She further conceded that a lot of what she testified about in court was not contained in the statement that she gave to the police on the night of the incident. She, however, gave the explanation that the police told her to tell them about what transpired at the time the deceased was killed.

[17] The second state witness was the niece of the deceased mother and the first state witness, Ms Zinhle Nhose.

[18] She lived in the same yard with the deceased. Upon her arrival at home on that day, the deceased told her that his father was there earlier and abusive. The deceased further her that his father said he was going to kill them but would kill him first.

[19] Counsel for the Accused objected to the above on the basis that it was hearsay. I overruled the objection and indicated that I would give my reasons later when I deal with the judgment.

[20] In terms of section 3 (4) of the Law of Evidence Amendment Act 45 of 1998, hearsay evidence is defined as evidence, whether oral or in writing which probative value depends on the credibility of another person other than the person giving such evidence. Hearsay evidence is generally not admissible in legal proceedings as the original source thereof will not be present at the proceedings to be cross-examined by the opposing party.

[21] Whether or not hearsay evidence may be admitted into evidence is subject to the discretion of the presiding officer, and this discretion should be exercised with due consideration to the exceptions as provided in section 3 (1) of the Law of Evidence Amendment Act. In terms of this section, hearsay evidence may only be admitted into evidence if;

21.1 the opposing party consents to the admission thereof. Or

21.2 the original source testifies at such proceedings;

21.3 the court, having regards to the following factors;

- (i) the nature of the proceedings;
- (ii) the nature of the evidence;
- (iii) the purpose for which the evidence is tendered;
- (iv) the probative value of the evidence;
- (v) the reason why the evidence is not given by the person upon whose credibility the probative value of such evidence depends;
- (vi) any prejudice to the party which the admission of such evidence might entail; and
- (vii) any other factor which should, in the opinion of the court, be taken into account, is of the opinion that such evidence should be admitted in the interests of justice.

[22] The Labour Appeal Court in the case of *Southern Sun Hotels (Pty) Ltd v SA Commercial Catering & Allied Works Union and Another* (2000) 21 ILJ 1315 (LAC) held that the test with regards to the admissibility of hearsay evidence is whether it is in the interest of justice to admit such evidence.

[23] It was clear that the evidence sought to be led was hearsay and the person who communicated the message is deceased. Clearly when he confided to the witness, it was more about his own state of mind. The person whom he loved was abusive on the day in question and had told him he was going to kill the mother, the sister but would start with him.

[24] In the light of the above, I believe it is in the interest of justice to admit the evidence. This piece of evidence is further collaborated independently by the first state witness when she described the conduct of the Accused whilst he was stabbing the deceased. She testified that the accused uttered the words 'Die Dog, I said I will kill you.'

- [25] When the deceased mother arrived, she related what the deceased told her, but the deceased mother pacified her and told her that she should not worry and left.
- [26] She went to the toilet and when she came out, Snazo (the sister to the deceased and daughter of the accused) told her that the Accused had taken the deceased. She called Thembelihle, the first state witness and they ran after the Accused calling on him to leave the child. The accused was then running and dragging the child. He then dropped the child on the ground and began stabbing him.
- [27] She confirmed that Thembelihle initially did not see that the accused was stabbing the child. They screamed for help. When they came closer, they realized that the child was deceased. At that stage, she was confused and shocked. The community members came. She confirmed that the community members came back with the accused after a period of about 15 to 30 minutes.
- [28] She confirmed under cross examination that the Accused loved the deceased and that the Accused and the deceased' mother would on occasions fight that the Accused paid much attention to the deceased.
- [29] The last state witness was the mother of the deceased.
- [30] She and the accused were in a relationship and the Accused was the father of her two children. They were not married. The accused had his own place where he lived, and she lived at her parents' home. They had been in the relationship for a period of about 8 years.
- [31] The Accused would visit the children any time he wanted to, and the children would do the same visit him in the morning and he would bring them back in the evening. This was an everyday arrangement. The Accused did not live far from them.

- [32] She further testified that at the time of the incident, they were no longer in a relationship with the Accused. It was about two weeks that they broke up. The Accused initiated the breakup.
- [33] On 01 September 2022, The Accused called her over the phone to talk about the children and the discussion centred around the visitation of the children.
- [34] On 2 September 2022, the Accused arrived at her home around 09h00 in the morning. He was drunk but not too drunk. He enquired about her mother, and she told him that she had just left for her workplace.
- [35] She stated that she could see that he had just began drinking, she knows him very well and they had been in a relationship for a period of about 8 years.
- [36] She stated that the Accused then told her that a movie is going to play, and she asked what he meant by that, and he simply reiterated that a movie would play. At that time the deceased was with her, and the other child Snazo was in the bedroom. The deceased could hear the conversation between the parents.
- [37] The Accused walked out of the gate and repeated his statement that he was going to show them a movie that day.
- [38] He came back at about 12h00 midday. The door was locked, and he came around to the window of what the witness described as the small bedroom and repeated his earlier words that a movie is going to play. She enquired why it did not play then and his response was that she should be patient, it would play in due course.
- [39] At that time, the deceased came to the mother and the Accused said "Here is this child – this child is not mine. The father of this child is in Mpumalanga."
- [40] She laughed it off and asked the accused what kind of liquor he drank on that day. He responded further and said the nose of the child is not his. She again laughed it off. The other child Snazo joined them, and the Accused said: "There is my child. This one, I do not know you. Your father is in Mpumalanga."

You are always close to your mother.” This utterance was directed to the deceased.

- [41] At that stage, she saw a knife protruding on the Accused left side and she then asked what he was doing with a knife and he responded and told her that “today I am going to stab somebody.”
- [42] She further asked him if his mother knows that he goes around carrying a knife and he said that he was going to dissect a person that day and leave for Natal.
- [43] The accused said that person is in trouble, and he left the yard.
- [44] He was roaming the street saying that a movie is going to play. At around 18h00 and whilst the witness was preparing food for the deceased, the Accused came and said the time has come, the movie is about to play and when the movie starts, nobody would come and help. He was at the door when he uttered those words.
- [45] After she was done preparing food for the deceased, she left to visit her friend Zinhle (not the witness who testified earlier). The street was deserted at that time. She stated that she felt somebody was following her but saw no one.
- [46] Whilst she was at the friend’s place, the Accused came and asked to talk to her. The friend noticed that the Accused was carrying a knife. The friend chased him out but he went as far as the gate and came back. He attempted to pull out the deceased mother.
- [47] He further told her friend that he had told the deceased mother that he would show them a movie and they refused to believe him. He then threatened to kill the deceased mother and their daughter Snazo.
- [48] The witness was cross-examined at length about her relationship with the Accused and how well she knew him. The cross examination was a valiant attempt to get the concession that the accused was very drunk on that day. The witness however stated that she knew the Accused very well and did not

appear to be that drunk. She however conceded that normally the accused would remember things he did when he was drunk and cited an instance where the accused told her not to remind him of what he did the night before as he knew what he did. Her point being that the Accused always remembered what he did when he was drunk, and did not need to be reminded.

- [49] She further was cross examined about the instance when the accused was brought by the members of the community to the scene. She testified that he was assaulted by the members of the community and at some point, he fainted. He was poured over with cold water, and he regained consciousness, and he asked what was happening. He denied that he killed his son.
- [50] The Accused testified and stated that the previous night at around 20h30, he left his home and went to block 7 to buy himself beers. The reason he went to Block 7 was that liquor is cheaper where he went compared to the liquor places around Block 9.
- [51] He bought 2 quarts of Black Label beer and drank them there. On his way back, he saw a stretch tent and the people there were playing “Umaskandi” music. This was still at Block 7. He was becoming drunk at that stage.
- [52] On arrival at this place, he found young people of his age smoking a hubbly and drinking alcohol. He joined and danced the traditional dance to the tune of Umaskandi. He loves “umaskandi” music. The people there offered him free drinks as they enjoyed his dancing. They were drinking ciders and smoking the hubbly. He did not know what they put in the hubbly and does not know what normally is put into the hubbly.
- [53] He continued drinking, smoking and dancing throughout the night and left only in the early hours of the morning. He was drunk but not too drunk when he arrived at his home but felt energetic.
- [54] He continued to play the music that was played at the place he just came from. The people had forwarded him the songs onto his phone. He had a

bottle of Smirnoff that he had intended to drink on his birthday, which was going to be on the 11th of September.

- [55] He was alone and does not know if there was anyone at his home. He rolled for himself a joint of dagga and smoked it. He would feel at times fatigued, but this feeling would go away. He further does not know if he slept. His mind just shut down.
- [56] When he came to his senses, he was on cuffs at Baragwanath Hospital. He was told he killed his son. To date, he has no recollection of what happened.
- [57] He confirmed that he heard the evidence of the state witnesses, and he cannot deny it. He stated that he had never doubted that the deceased was his son.
- [58] He reiterated that he cannot remember anything that happened and tries to remember and pray but nothing comes back.
- [59] He again stated under cross examination that he cannot dispute the evidence of the state witnesses and confirmed that everything that was said by the mother of the deceased was correct. He further conceded that the hubbly that he smoked during the night and the extremes he drank did not have that much of an effect `because he can remember what happened then.
- [60] It is clear from the evidence of the Accused that what is placed in issue is the question of criminal capacity at the time of the incident. In a nutshell the version of the accused is that he did not know what he was doing at the time of the incident and that he still does not have a recollection of what transpired at the time.
- [61] It is apposite that I deal with the legal position in such matters. It is trite that the State must prove beyond reasonable doubt that at the time of the incident, the accused had the necessary criminal capacity.

[62] The defence of non-pathological incapacity has become a very popular defence, and I share the same sentiments as Griesel J in *S v Eadie*(1)¹. The reasons are obvious: it is easy to raise and very difficult to refute and unlike the defence of insanity, where the accused bears the onus to prove on the balance of probabilities that as a result of a mental defect he was not criminally liable at the critical time, the onus rest on the state to prove beyond reasonable doubt that the accused did have the requisite criminal capacity where a defence of temporary non-pathological criminal incapacity is raised.

[63] In discharging the onus, the State -

‘...is assisted by the natural inference that in the absence of exceptional circumstances a sane person who engages in conduct which would ordinarily give rise to criminal liability does so consciously and voluntarily. Common sense dictates that before this inference will be disturbed, a proper basis must be laid which is sufficiently cogent and compelling to raise reasonable doubt as to the voluntary nature of the alleged actus reus and, if involuntary, that this was attributable to some cause other than mental pathology.’²

[64] Navsa JA³ in the appeal of the same matter said the following:

‘It is well established that when the accused person raises a defence of temporary non-pathological criminal incapacity, the State bears the onus to prove that he or she had criminal capacity at the relevant time. It has repeatedly been stated by this Court that:

- (i) *In discharging the onus, the State is assisted by the natural inference is that in the absence of exceptional circumstances a sane person who engages in conduct which would ordinarily give rise to criminal liability that’s so consciously and voluntarily;*
- (ii) *an accused person who raises such a defense is required to lay a foundation for it sufficient at least to create a reasonable doubt on the point;*

¹ 2001 (1) SACR 172 (C)

² See *S v Cunningham* 1996 (1) SACR 631 (A) at 635J – 636B

³ *State v Eadie* 2002 (3) SA 719 at 723 H- 724A

- (iii) *evidence in support of such a defence must be carefully scrutinized; and*
- (iv) *it is for the Court to decide the question of the accused criminal capacity having regard to the expected evidence and all the facts of the case including the nature of the accused action during the relevant period.'*

[65] I need further remind myself that in deciding the question posed to this Court, I must evaluate the evidence holistically and not in a piecemeal fashion.

[66] To this end, the *dictum* of Navsa JA in *S v Trainer*⁴ is appropriate when he said the following:

'a conspectus of all the evidence is required. Evidence that is reliable should be weighed alongside such evidence as must be found to be false. Independently verifiable evidence, if any should be weighed to see if it supports any of the evidence tendered in considering whether evidence is reliable, the quality of that evidence must be of necessity be evaluated as must corroborative evidence if any evidence of course must be evaluated against the ones on any particular issue or in respect of the case in its entirety. the compartment and fragment approach of the magistrate is illogical and wrong'.

[67] The State has argued that if this Court is to take the totality of the evidence into account, the guilt of the Accused was proven beyond reasonable doubt bearing in mind that it does not have to prove its case beyond all reasonable doubt.

[68] The evidence led which is not in dispute is that the Accused, the previous night attended what he initially referred to as a Bash but later changed that description of what he attended.

[69] Prior to that, he bought himself 2 quarts of Black Label beers and drank them on his own. He joined a group of people unknown to him who then supplied

⁴ 2003 (1) SACR 35 (SCA) at 40F – 41C

him with Extreme drinks and smoked with them what is referred to as a hubbly. He does not know what was put in the hubbly but when he left for his home in the early hours of the morning, he was drunk but had his faculties round him and could remember everything.

[70] Whatever he smoked and drank did not have such serious effect that he could have lost control of self or mental capacity to appreciate what was going on around him. In fact, what is normally put in a hubbly is flavoured tobacco and unless the Accused can furnish further evidence that there was something else other than tobacco, I must assume that they used what is normally used, tobacco. Extreme is an energy drink and would explain the reason the Accused felt energetic.

[71] The Accused defence is based on his assertion that he was so drunk that he cannot remember anything that transpired on the day in question. All he can remember is that when he arrived at home, he then continued to play the music that his hosts provided him and then opened his 1818 Smirnoff bottle.

[72] He cannot tell if he finished it but knows that whilst he was drinking it he would dash it. He also smoked dagga.

[73] Adv. Mthembu relied heavily on the decision of *S v Ramdass*⁵ to articulate the Accused position. The decision in *Ramdass* is correct on its facts. However, it is not on all fours with the matter before this Court.

[74] The facts before me suggest that the conduct of the Accused was premeditated. He is alleged to have said before that the deceased was not his child albeit jokingly as he would want this court to believe. The mother of the deceased also would not take him serious on the issue and would seem to have thought it was all a bad joke.

[75] The subsequent facts proved otherwise. He walked around uttering the same thing repeatedly. More importantly, when he is asked to explain what he meant, his

⁵ 2017 (1) SACR 30 (KZD)

response would be that the mother of the deceased must be patient. The time would come.

[76] This Court cannot ignore the fact that closer to the time that he committed this heinous act, he was asked again by the deceased mother what is this movie he is talking about, and his response was, the time has come. He will show them the movie, and nobody is going to help them.

[77] In his drunken stupor, he again goes to look for the mother of the deceased at her parents' home and is told she went out. He then goes to look for her at her friend's place and there is no evidence that he was told by any person where she would be.

[78] Shortly thereafter he again goes back to where the deceased was. He lies to the people in the house and tells them that the deceased mother is looking for him and takes him away only to go kill him. He stabbed the deceased to his death.

[79] There is uncontroverted evidence that when he was stabbing the deceased, he uttered the words 'Die Dog... I have said I will kill you.' This to my mind is indicative of a person who knew what he was doing and had planned it all along.

[80] The amnesia that he claims he suffered and still is suffering from does not take the matter any further. The amnesia supposedly arises from the fact that he was too drunk.

[81] The evidence before court is that he did not sleep the previous night. He drank two beers earlier on and then was supplied with Alcoholic Extremes. I have already alluded to the fact that the Extreme is an energy drink. Hence him feeling energetic in the morning. The hubbly that he was smoking, he does not know what was put in it. There is no suggestion that it was laced with drags or anything along those lines. What normal people put on a hubbly is flavoured tobacco.

[82] He came home and remembered that he had a bottle of Smirnoff 1818 for his birthday, and he began indulging on it. He also indulged on dagga and according to him he rolled a joint not joints. There is no evidence that he continued throughout the day to smoke or indulge on alcoholic beverages.

[83] What the court knows is that in the morning, he went to his girlfriend's home and enquired about the whereabouts and the deceased grandmother and was told that she went to her workplace. The evidence before court is that the grandmother was a stay-in where she works.

[84] Later in the day or evening, the Accused tells the mother of the deceased that the movie is about to begin and there is no one who would help them.

[85] When the defence of temporary non-pathological incapacity is raised, the Court does not have to accept the *ipse dixit* of the accused concerning his state of mind. The accused state of mind must be tested not only against his prior and subsequent conduct, but also against the Court's experience of human behaviour and social interaction.⁶

[86] I am satisfied that the State has proven its case beyond reasonable doubt. The conduct of the Accused on the day in question clearly proves premeditation and he was aware of what he was doing at the time of the commission of the crime based on the evidence of the eyewitnesses. His amnesia is his say so and the evidence of the witnesses contradict it and is therefore rejected.

[87] Based on the above conclusions, the Accused is found guilty as charged.

KUMALO MP J
Judge of the High Court of South Africa
Gauteng Local Division, JHB

⁶ See *S v Eadie* supra at paragraph 64 at 749E/F-G/H.

APPEARANCES:

For the state: Adv. Mathebula

From Office of NDPP

For the defence: Adv Mthembu

From Legal-aid South Africa

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Delivered: 23 May 2023