IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL DIVISION, PIETERMARITZBURG

APPEAL CASE NO: AR67/2018

In the matter between:

ZWELAKHE THULANI SBAYI MBATHA **Appellant**

and

THE STATE **Respondent**

ORDER

On appeal from: Ulundi Regional Court (sitting as court of first instance):

The appeal against both convictions is dismissed.

APPEAL JUDGMENT

Delivered: 4 March 2019

Mbatha J (Mnguni J concurring)

[1] The appellant was convicted on 30 September 2016 by the Regional Court Ulundi, held at Eshowe, of one count of murder and one count of attempted murder,

read with the provisions of s 51 and Schedule 2 of the Criminal Law Amendment Act 105 of 1997. The appellant was sentenced to undergo twenty years' imprisonment in respect of the murder conviction, and five years' imprisonment in respect of the attempted murder conviction. The sentence in respect of the attempted murder conviction was ordered to run concurrently with the sentence in respect of the murder conviction. He was effectively sentenced to a twenty year term of imprisonment. The appeal against both convictions is with leave of the court a quo.

[2] For the sake of practicality, I will briefly summarise the evidence of the State witnesses giving rise to the conviction of murder. Ms Mpumelelo Mbhele (Mpumelelo) testified that on 6 December 2015, at about 17h00, a terrified Skuta (the deceased), arrived at her homestead and reported that someone was chasing him. Shortly thereafter the appellant arrived and enquired from the deceased why he was abusing his trust.. The deceased was apologetic, and informed the appellant that since he warned him not to interfere with his girlfriend Mjombozi, he had heeded his warning. It was clear to Mpumelelo that the dispute related to the suspicions by the appellant that the deceased was having an affair with Mjombozi. At the behest of the appellant, the deceased handed over his mobile phone to the appellant. As the appellant perused the content on the mobile phone, Mjombozi's name appeared on the list of the saved numbers. The appellant then aggressively grabbed the deceased by his clothes at the chest area. When this happened, Mpumelelo called out to her son to come and separate the two men. Mpumelelo then suggested that the deceased and the appellant leave her home, and report their problem to the Induna. Instead, the appellant informed the deceased that they must leave to speak to Mjombozi.

[3] A while later Mpumelelo requested her son, Nhlakanipho (Nhlaka), to go and check up on the two men, to see if they were not fighting. Nhlaka returned back, and reported to her that he saw the two men seated at the bus station.

[4] Nhlaka's evidence materially corroborated that of his mother, Mpumelelo. It was also Nhlaka's evidence that before the confrontation at his home, he had been with the appellant at the appellant's homestead. They left together and separated

when Nhlaka entered his home. The appellant, according to Nhlaka, was on his way to visit Mjombozi. As Nhlaka entered his home, he observed the hurried arrival of the deceased followed by appellant. He confirmed that after he had separated them at the behest of his mother, they left his homestead. A while later, he had observed them at a distance, sitting together at the bus station. He estimated the time to have been shortly after 19h00 when he last saw them.

[5] The State also led the evidence of Thulani Dlamini (Dlamini), whose evidence was that at about 05h00 on 7 December 2015, he was doing stock taking at his tuckshop. He unexpectedly heard a knock at the window of the tuckshop, whereupon he saw the appellant standing outside the shop. The appellant produced a R10 note, and bought four loose cigarettes. Dlamini enquired from him why he was up so early in the morning. The appellant's response was that he had injured someone. He had hit that person with a hammer, which prompted Dlamini to enquire if that person passed away. He also learnt from the appellant that he was referring to the deceased. This arose his curiosity, as he observed that the appellant's clothing did not have any blood stains. Dlamini also enquired what that person had done to the appellant, whereafter the appellant told him he had injured the deceased as the deceased was in love with the mother of his children. Dlamini informed the court that the deceased, and the mother of the appellant's children, were people known to him, though he did not know her name. Dlamini informed the court that he did not enquire from the appellant when the incident took place, but learnt that it happened in their ward, Donsamahoho. Dlamini also learnt from the appellant that the deceased had been hit on the head with a hammer.

[6] The appellant in his defence denied that he was in Donsamahoho on 6 and 7 December 2015. He denied setting foot on the Mbhele homestead on 6 December 2015 and denied that there was any confrontation between himself and the deceased at the Mbhele homestead. The appellant denied knowing Dlamini at all and denied that he ever met him on the morning of 7 December 2015, when he admitted to killing the deceased. He raised an alibi that on the night in question, namely 6 December 2015, he had been with his girlfriend, Mjombozi.

[7] The State's case is based on circumstantial evidence, and therefore the all enduring logic as stated in *R v Blom*[1] should be applied. The appellant left the Mbhele homestead with the deceased to confront the appellant's girlfriend regarding the suspected love relationship between her and the deceased. They were last seen together, seated at the bus station by Nhlaka. The following morning the deceased body was found lying dead near a footpath in the same area where they were last seen together.

[9] At the plea stage, the appellant did not proffer the basis of his defence. In addressing the court in terms of s 150 of the Criminal Procedure Act 51 of 1977 (the Act), the prosecutor informed the court that certain admissions were made to Dlamini on the morning of 7 December 2015. This prompted the court to enquire from the appellant's legal representative if there will be a challenge to the admissibility of such evidence. The court was informed that he denied making any admissions at all. The court a quo in its judgment accepted that the appellant made the admissions to Dlamini, as they were detailed even to the extent of mentioning the type of weapon used, and the place on the body where the deceased was hit with a hammer. The court a quo found Dlamini's evidence to be consistent with the findings of the post mortem examination, which found that the deceased's skull had a fracture, which was the size of a golf ball, and which was be consistent with the use of a hammer.

[10] The court a quo, in accepting the nature of this evidence, relied on s 219A of the Act, which reads as follows:

'(1) Evidence of any admission made extrajudicially by any person in relation to the commission of an offence shall, if such admission does not constitute a confession of that offence and is proved to have been voluntarily made by that person, be admissible in evidence against him at criminal proceedings relating to that offence…'

[11] The court a quo also made credibility findings in respect of the State witnesses. In *S v Pistorius*[2] the court expressed itself as follows:

'It is a time-honoured principle that once a trial court has made credibility findings, an appeal court should be deferential and slow to interfere therewith unless it is convinced on a

[1] 1939 AD 188.
[2] [2014] ZASCA 47; 2014 (2) SACR 314 (SCA) para 30.

conspectus of the evidence that the trial court was clearly wrong. *R v Dhlumayo and Another* 1948 (2) SA 677 (A) at 706; *S v Kebana* [2010] 1 All SA 310 (SCA) para 12. . . . As the saying goes, he was steeped in the atmosphere of the trial.'

In this regard I am satisfied that the court a quo's approach to the credibility finding of the State witnesses' evidence was correct. In the absence of any suggestion that the trial court, in assessing the credibility of the State witnesses was wrong, this court is unable to interfere with the court a quo's finding.

[13] I now turn to the question of whether there was sufficient circumstantial evidence which supported a conviction on murder. Firstly, there are State witnesses who placed the deceased in the company of the appellant. To reject this evidence, would require findings that the appellant's aunt and nephew, Mpumeleo and Nhlaka, lied about his presence in their homestead. The probabilities would not support that reasoning, as it is evidence which did not incriminate the appellant in the killing of the deceased.

[14] The approach adopted by the court a quo was to consider the totality of the evidence and, in that process, weighed up the evidence of the State witnesses against that of the appellant. The evidence of the appellant being that he was never at Mpumelelo's residence and never in the company of the deceased, clearly shows that he did not take the court into his confidence. The court a quo rightfully rejected his evidence of not having been in their company on the late afternoon of 6 December 2015 as false.

[15] In *S v Ntsele*[3] the court held that the State, in a criminal matter, bears the onus to prove the guilt of the accused beyond a reasonable doubt, not beyond the shadow of a doubt. It further held that in dealing with circumstantial evidence, as in the present matter, the court was not required to consider every fragment of evidence individually. It was the cumulative impression, with all the pieces of evidence made collectively, that had to be considered to determine whether the accused's guilt had been established beyond a reasonable doubt. Courts are often warned of a tendency to focus too intensively on separate components of evidence

[3] 1998 (2) SACR 178 SCA

and viewing each component in isolation. In the light of the evidence presented at the trial, I am satisfied that on the conspectus of the evidence, the inference was correctly drawn that the appellant was guilty of the crime of murder.

[16] The exact time of the killing of the deceased was unknown, but it could not have been at any time prior to 19h00 as this was the last time that he was seen in the company of the appellant. The appellant's version of not being at the Mbhele homestead or in the company of the deceased is false. The evidence of Dlamini also places him in the area where the deceased died on the morning of 7 December 2015. Dlamini's version is a plausible version as he had no knowledge that the appellant had been present at the Mbhele homestead the previous afternoon.

[17] A question arises as to where the hammer came from. No one mentioned the hammer, save that it was mentioned by Dlamini to the police upon the discovery of the deceased's body. The post mortem examination conducted by Dr Mashiyane also concluded that the deceased was hit with a blunt object on the head. The appellant went to great lengths in trying to place himself away from the scene of the crime, though his alibi placed him at Mjombozi's home in the area where the deceased was killed.

[18] By way of testing the probabilities one may ask: where did Dlamini get all this information from? Did he make it up? The details of Dlamini's statement are so detailed, that he could not have made up the statement. The cross-examination of Dlamini was very brief, like the cross-examination of Mpumelelo and Nhlaka. The cross-examination did not accomplish its purpose of eliciting false evidence from either Dlamini or the other witnesses.

[19] The truthfulness of the evidence of Dlamini lies in that he stated that the appellant did not admit that he had murdered the deceased. If he wanted to implicate the appellant he would have said that the appellant said "I killed the

deceased" but he had said "I have assaulted a person." This appeal court is alive to what was said in *Pezzuto v Deyer & others*[4] where Smallberger JA stated as follows:

"It is true that it does not follow merely from the fact that if a witness' evidence is uncontradicted it must be accepted. It may be so lacking in probability as to justify its rejection. But where a witness' evidence is uncontradicted, plausible and unchallenged in any major respect there is no justification for submitting it to an unduly critical analysis. . ."

[20] The court accepted that there was friction between the appellant and the deceased relating to the appellant's girlfriend and that this was the motive for the killing. In *S v Boesak*[5] the court expressed itself as follows:

'. . . it is clear law that a cross-examiner should put his defence on each and every aspect which he wishes to place in issue, explicitly and unambiguously, to the witness implicating his client.'

In this regard the appellant did not even seem to know the time of his arrival at Mjombozi's place. Instead the appellant went to great lengths in trying to place himself away from the scene of the crime.

[21] The evidence of Mpumelelo and Nhlaka proved that the appellant behaved in an aggressive manner towards the deceased, demanded to see his cellphone, and checked if his girlfriend's name appeared on the screen of the phone. When the name appeared, he became angry and his own aunt referred them to an Induna. An Induna is a person entrusted with traditional authority to resolve disputes when they arise. This on its own shows the seriousness of the fight between the appellant and the deceased.

[22] Nhlaka is the nephew of the appellant. They had been together the very same afternoon at the appellant's homestead, which was not disputed by the appellant. They parted on good terms and Nhlaka had no reason to make up a story about the appellant. On this footing, the appellant was cunning enough to simply say that he was falsely implicated, though the court is aware that it is not incumbent upon the accused to advance reasons why a State witness would give false evidence against

[4] 1992 (3) SA 379 (A) at 391E-F
[5] 2000 (1) SACR 633 (A) at para 50

him. However, this assists the trier of facts when an accused suggests why a witness will be against him. The appellant failed to give a reason why his relatives would falsely implicate him.

[23] I have considered whether the version of the appellant could reasonably possibly be true. I have considered the alibi of the accused against the objective facts placed before the court. It was undisputed that the appellant lives at a place which is a distance of about 10km from Donsamahoho, and is not accessible by public transport; he was last seen at the bus station by Nhlaka at about 19h00, and in the early hours of the morning by Dlamini at his tuckshop; he was the last person to be seen in the company of the deceased and he stated that he spent the night at Mjombozi's place. All these facts placed the appellant in Donsamahoho ward. Therefore, the appellant's version that he was never in that place could not reasonably be true.

[24] In rejecting the alibi of the appellant, it is important to note that it must not be viewed in isolation, but in the light of all the evidence and probabilities.[6] The trial court correctly accepted that the alibi was false. The fact that no one saw him kill the deceased is not of any assistance to the appellant.

[25] In this case, murder in the form of *dolus eventualis* was proven by the State, as the appellant ought to have foreseen the possibility of hitting the deceased on the head with a hammer, would result in the death of the deceased, but persisted with his actions regardlessly.

[26] The second complainant, Fikani Mbatha (Fikani), testified as to the incident which gave rise to the appellant's conviction on the attempted murder charge. Fikani's evidence was that on 4 December 2013, they had been at the home of the appellant where they had been drinking and enjoying music. He was in the company of Chazani Sibisi (Chazani) and the appellant. He testified that the appellant had supper outside the room where they were seated. Upon his return to that room, having closed the door behind him, the appellant suddenly demanded from Fikani as

[6] R v Hlongwane 1959 (3) SA 337 (A)

to what he knew about the death of his brother, Zamani. He hit Fikani on the cheek with the butt of a firearm, and pushed him towards the corner of the room. When Fikani tried to grab him, the appellant fired a shot at him. Fikani sustained an injury to the groin area. This happened in the presence of Chazani, who was also taken by surprise by the new developments of that night.

[27] When Chazani enquired from the appellant as to what was happening, Fikani took the opportunity to run out of that house and ran to the Sibisi homestead, which was the home of Mzothule Sibisi (Mzothule). Mzothule's mother instructed Mzothule to accompany Fikani home. It was already dark and late at night. As they left Mzothule's home, the appellant emerged from the opposite side of the pathway and called out if Fikani was not amongst the persons on the pathway. Fikani upon realising that it was the voice of the appellant ran into the forest and thereafter proceeded home and was taken to hospital. It was Fikani's evidence that on that day 4 December 2013 they had been drinking at Phakathi's residence, before finally ending at the appellant's place, and at all times prior to the indecent the appellant had a firearm in his possession. The three of them had proceeded from Phatathi's residence to the appellant's home, to enjoy the drinks which they bought at Phakathi when the tavern closed at 21h00. His evidence was that although they had been sharing beers, none of them were very drunk.

[28] During the cross-examination of Fikani, it was suggested that he was never at the appellant's place that night as their families do not even visit each other, because of the misunderstanding between the families which arose from the death of the appellant's younger brother. It was suggested to Fikani that he was fabricating that he had been shot by the appellant, because of the ill feelings between the families.

[29] Chazani corroborated Fikani's version as to what happened at the home of the appellant. He confirmed that there was an argument between Fikani and the appellant about the death of the appellant's younger brother, Zamani. Chazani testified that he knew Fikani and the appellant, who were members of the same Mbatha clan. According to Chazani they had a cordial relationship amongst themselves. He confirmed that Fikani was shot in his presence. During cross-

examination it was suggested that he was falsely implicating the appellant, and that the shooting incident was a sheer figment of his imagination.

[30] Mzothule testified that on the night of 4 December 2013, whilst seated outside on the stoep at his home, the badly wounded Fikani arrived at his home. He reported that he had been shot at by the appellant who accused him of having killed Zamani. Mzothule's mother instructed him to accompany Fikani to his home. He informed the court that when they were about to enter the road, a man, who introduced himself as Zwelakhe (the appellant), emerged, and enquired if one of them was Fikani. Without saying anything further, the appellant fired a shot at Fikani who ran into the forest.

[31] Mzothule testified that he was certain that it was the appellant who had fired a shot at Fikani, as he had a conversation with him, accompanied the appellant to fetch tobacco from his room, as they had no matches and they returned to Mzothule's home, where the appellant spent the night. He also confirmed that the appellant was in possession of a black handgun on the night in question. The appellant also denied meeting Mzothule, that what he testified about never happened, and that Mzothule had a vendetta against the appellant.

[32] The medical evidence handed in, by consent, confirmed that the Fikani sustained a gunshot wound to the groin. The court a quo found that the evidence of the witnesses for the State to be credible. It found that the alleged conspiracy, as advocated by the appellant, to be senseless as the appellant brazenly shot Fikani in front of two independent witnesses. The court a quo rightfully rejected the appellant's defence that he was never in the company of the two State witnesses, as he could not state where he was, on the night in question. The court a quo came to the conclusion that the nub of the State's case did not even rest on the identification of the appellant, as it was not disputed that the State witnesses and the appellant knew each other very well and for a long time.

[33] This court has also not been persuaded that the appellant was wrongly convicted of the attempted murder charge. The appeal on the conviction for murder and attempted murder should fail.

[34] Accordingly, I propose the following order:

That the appeal against both convictions is dismissed.

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MBATHA J

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MNGUNI J

Date of hearing	:	1 March 2019 (D Court)
Date delivered	:	4 March 2019

Appearances:

For the Appellant	:	Adv I Khan
Instructed by	:	Justice Centre Pietermaritzburg
For the Respondent	:	Adv ES Magwaza
Instructed by	:	The Director of Public Prosecutions Pietermaritzburg