IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG

Case No: AR 315/2020

In the matter between:

FIKANI PROTAS KHUBONI **APPELLANT**

and

THE STATE **RESPONDENT**

ORDER

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

(a) The appeal is upheld and the convictions and sentences of the appellant on all the counts, being those of murder, attempted murder and kidnapping are set aside;

(b) A copy of this judgment is to be sent to the Regional Court President of KwaZulu-Natal by the Registrar of this court.

JUDGMENT

Mossop AJ (Bedderson J concurring):

[1] This appeal, unfortunately, has become focussed on the quality of the judgment delivered by the regional magistrate of Ixopo. The appellant was one of

four people who stood trial in the Ixopo Regional Court on a charge of murder, a charge of attempted murder, a charge of public violence and two charges of kidnapping. The appellant was granted a discharge at the end of the State case in respect of one of the counts of kidnapping. At the end of the trial, he was acquitted on the charge of public violence but he was convicted on the count of murder, the count of attempted murder and the surviving count of kidnapping. For the purpose of sentence, the counts of murder and kidnapping were taken as one and he was committed to prison for 15 years. On the attempted murder count he was sentenced to 10 years imprisonment. The sentences were not ordered to run concurrently and accordingly he was condemned to an effective 25 years in prison.

[2] The appellant was granted leave to appeal in the court a quo against convictions and sentences. He is the only one of the four accused who is before us. The appellant was represented on appeal by Miss Franke and the State was represented by Mr Gula. They are both thanked for their helpful submissions.

[3] The events that led to the conviction of the appellant occurred at the Mahehle location, near Ixopo on 28 December 2018. Essentially, the events relate to an incident of mob justice. It was believed by the community of that location that one Khehla Mokoena, the deceased in the murder charge, referred to hereafter as ‘the deceased’, had previously been involved in a murder himself. He was fetched from his place of residence, beaten, questioned, and as a consequence of what he said, Mr Sphesihle Mbhele (Mr Mbhele) was fetched from his abode. Mr Mbhele was the victim in the attempted murder charge. Both the deceased and Mr Mbhele were thereafter beaten further and the deceased was ultimately killed. Mr Mbhele suffered extensive injuries, but survived, and was subsequently hospitalised for nine months.

[4] In convicting the appellant, the regional magistrate briefly summarised the evidence he heard from the State witnesses. The emphasis here is on the word ‘briefly’: the summary of all the evidence was dealt with in approximately a page of the transcript of evidence. The regional magistrate dealt with all the evidence of the accused and their witnesses in one sentence:

'They admitted they were on the scene, but each denied assaulting the deceased or complainant. That was the evidence for the defence.'

[5] The regional magistrate after briefly considering the nature of the onus on the State, went on to state the following:

'The Court is satisfied that all four State witnesses were good, reliable witnesses, that the Court can rely on their identification of the perpetrators.

I also find honesty in their evidence in that they said number 4 was there, but he was not part of it. They could easily have lied and said he also assaulted the people.

Therefore the Court accepts evidence of the four State witnesses as the truth.

I find the accused versions as false.'

[6] There was no attempt made whatsoever to consider the appellant's version or the version of his witness or to provide the reasons behind the conclusion reached regarding the trustworthiness of the State witnesses evidence.

[7] I have a fundamental difficulty with the regional magistrate's conclusion that the evidence of the State witnesses was the truth and could accordingly be accepted by him because the State witnesses did not all adhere to a single version. There were contradictions in the State case that needed to be explained and dealt with in the judgment of the court:

(a) The first State witness, Mr David Xaba (Mr Xaba) was the brother of the deceased in the murder count. He had been present at all material times and had observed the death of his brother and the assault of Mr Mbhele. As regards the assault of Mr Mbhele, the following exchange occurred when Mr Xaba was being cross-examined:

'Who assaulted him? --- As I have said, Your Worship, I will not be able to explain as to who did what, because I do not know their names.

Not any of the accused? --- No, Your Worship, no one from the accused before Court.'

However, the victim of that vicious assault, Mr Mbhele, stated that the appellant had struck him with a knobbed stick. No attempt was made by the court to analyse and explain this difference. Obviously, both versions cannot be the truth and the court was not in a position to accept both versions. In accepting the truthfulness of all the State witnesses, this is what the regional magistrate did.

(b) Mr Xaba went on to state in cross examination that the appellant had assaulted the deceased in the presence of the station commander of the South African Police Services at Creighton, who had come to the scene. However, that station commander, Lieutenant-Colonel Dwaga, who gave evidence, indicated that he would not say that any of the accused hit the deceased or Mr Mbhele;

(c) Beatrice Dlamini (Ms Dlamini) was the sister of the deceased in the murder count. For some unexplained reason, the regional magistrate referred to her as 'Patrick Dlamini' in his judgment. Ms Dlamini testified that the appellant carried 'something like a stick'. When the appellant testified, he pointed out that other witnesses had said that he carried a knobbed stick. He was correct in this regard (the appellant's version was that he did not carry either a knobbed stick or a stick). The regional magistrate intervened and said

'There's no difference. Next question.'

With due respect, there is a difference. The previous witnesses had been clear that it was a knobbed stick. This difference needed to be explored and considered by the regional magistrate.

[8] Besides these external contradictions, there was also a significant internal contradiction in the evidence of Mr Xaba. In his evidence in chief, he testified that the appellant had struck the deceased, his brother, with a knobbed stick. However, when cross examined, he stated as follows to a question put to him by accused two's legal representative:

'Okay, you agree with me that those people who physically assaulted your brother leading to his death, they are not before court, they are still out there? --- That is correct, Your Worship, they are not here.'

No attempt was made by the court to explain how it dealt with this aspect of the evidence of Mr Xaba or how, having accepted his evidence, he then found the appellant guilty on the count of murder.

[9] As regards the conviction of the appellant by the regional magistrate on the remaining charge of kidnapping, being the kidnapping of the deceased, there was not a scintilla of evidence that indicated that the appellant was ever present at, or involved in, the kidnapping of the deceased. As Mr Xaba explained, the appellant

made his appearance at the hall, where the deceased was already tied up. He could not have been involved in the taking of the deceased from Mr Xaba's home nor his removal from the granny's home to the hall. He ought to have been acquitted on that count at the stage that he applied for his discharge in terms of section 174 of the Criminal Procedure Act, 51 of 1977.

[10] In rejecting the appellant's evidence, the regional magistrate ignored his evidence that he had been at a traditional marriage ceremony on the day in question and that when he arrived back at the area of his homestead he noticed a crowd over at the hall. Having alighted from his transport, the appellant was carrying a bag and some plastic bags. Spying three boys from his area, he roped them in to help carry his bags to his homestead. No disrespect is meant by the use of the word 'boys': this is how they were described in the transcript of evidence and no mention was made of their respective ages. They may well thus have been boys. The boys were named by the appellant and one of them, Siyanda Radebe, was later called to give evidence on behalf of the appellant. Someone told them that there were people at the hall because a young man had been caught who had killed a girl that was pregnant. The appellant and his helpers went to the appellant's homestead, left the parcels on his bed and repaired to the hall to see what was going on there.

[11] At the hall they found the deceased 'sleeping' in the middle of the road, as the appellant described it, and his wrists were tied with rope. The appellant knew the deceased as he had previously gone fishing with him. He could see that the deceased was injured and he went and spoke to him, asking him if he had been involved in the killing of the young lady. The deceased allegedly admitted that he had and that he had been drunk and with Mr Mbhele when the young lady was killed. Mr Mbhele was then fetched and brought to the hall. Mr Mbhele was asked whether he had been involved in the death of the young lady but denied that he had been. He was then assaulted. The appellant, on his version, allegedly tried to intervene and stop the assault. He then told the boys who had gone with him to the scene that should leave and they all withdrew. He denied striking either the deceased or Mr Mbhele with a knobbed stick.

[12] The appellant was hardly cross examined by the State, the cross examination filling just under two and half pages of the transcript of evidence.

[13] Siyanda Radebe testified on behalf of the appellant. He confirmed the evidence of the appellant in all material respects, including that the appellant spoke to the deceased while he lay on the ground and that the appellant did not carry anything and therefore did not assault either the deceased or Mr Mbhele.

[14] Again, as with the appellant, Mr Radebe was barely cross examined by the State, the cross examination filling less than one and half pages of the transcript of evidence.

[15] The regional magistrate indicated in his judgment that it was the court's duty to weigh up the evidence of the accused persons. He was undoubtedly correct in this regard. In saying so, he must have included a weighing up of the evidence of the appellant and his witness. Having acknowledge that such evidence had to be considered and evaluated, the regional magistrate then did not do that as his 'weighing up' merely consisted of him pondering on the likelihood of the State witnesses knowing who had carried out the assaults, especially Mr Mbhele who had been close to his assailants.

[16] It is trite that the State is required to establish the guilt of an accused person beyond reasonable doubt. The accused person is entitled to be acquitted if there is a reasonable possibility that his version may be true. In dealing with the relationship between these two concepts, the court in In *S v Van der Meyden*,[1] explained that:

'These are not separate and independent tests, but the expression of the same test when viewed from opposite perspectives. In order to convict, the evidence must establish the guilt of the accused beyond reasonable doubt, which will be so only if there is at the same time no reasonable possibility that an innocent explanation which has been put forward might be true. The two are inseparable, each being the logical corollary of the other. In whichever form the test is expressed, it must be satisfied upon a consideration of all the evidence. A

[1] *S v Van der Meyden* 1999 (2) SA 79 (W) at 80I-81B.

court does not look at the evidence implicating the accused in isolation in order to determine whether there is proof beyond reasonable doubt, and so too does it not look at the exculpatory evidence in isolation in order to determine whether it is reasonably possible that it might be true.'

[17] It is also trite that a conviction can only follow upon a proper evaluation of the evidence led before the court. Only then can it be concluded that there exists a prima facie case for an accused person to answer. The failure by the regional magistrate to properly evaluate the evidence adduced in the State case but to accept it all, including the contradictions previously alluded to, and his failure to consider the appellant's evidence at all but to nonetheless reject, places this court in an invidious position. No specific credibility findings were made by the regional magistrate. This is not surprising because in the absence of a proper evaluation of all the evidence, no credibility finding can be made.

[18] It is not sufficient that a court comes to a decision: the reasons for that decision must be articulated as well. In *Schoonwinkel v Swart's Trustee*,[2] De Villiers JP stated the following:

'This court, as a Court of appeal, expects the court below not only to give its findings on the facts, but also its reasons for those findings. It is not sufficient for a magistrate to say, "I believe *this* witness, and I did not believe *that* witness". The Court of appeal expects the magistrate, when he finds that he cannot believe a witness, to state his reasons why he does not believe him. If the reasons are, because of inherent improbabilities, or because of contradictions in the evidence of the witness, or because of his being contradicted by more trustworthy witnesses, the Court expects the magistrate to say so. If the reason is the demeanour of the witness, the Court expects the magistrate to say that; and particularly in the latter case the court will not lightly upset the magistrate's finding on such a point.'

Whilst this dictum was intended for a civil case it is equally applicable to a criminal case.

[19] In *S v Singh*,[3] Leon J opined as follows:

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[2] 1911 TPD 397 at 401.
[3] 1975 (1) SA 227 (N) at 228.

'Because this is not the first time that one has been faced on appeal with this kind of situation, it would perhaps be wise to repeat once again how a court ought to approach a criminal case on fact where there is a conflict of fact between the evidence of the State witnesses and that of an accused. It is quite impermissible to approach such a case thus: because the court is satisfied as to the reliability and the credibility of the state witnesses that, therefore, the defence witnesses, including the accused must be rejected. The proper approach in a case such as this is for the court to apply its mind not only to the merits and demerits of the State and defence witnesses but also to the probabilities of the case. It is only after so applying its mind that the court would be justified in reaching a conclusion as to whether the guilt of an accused has been established beyond reasonable doubt. The best indication that a court has applied its mind in the proper manner in the above-mentioned example is to be found in its reasons for judgement including its reasons for the acceptance and rejection of the respective witnesses.'

[20] A trial court's failure to substantiate the judgment and engage in a proper evaluation of the evidence infringes upon the appellant's right to a fair trial, which includes the right to have his appeal properly adjudicated on by a higher court. In *S v Molawa; S v Mpengesi,*[4] the court stated:

'There is indeed a further compelling reason why reasons for judgement ought to be furnished. The right to appeal or review is entrenched constitutionally for every accused person. In this regard s35(3)(O) of the Constitution of the Republic of South Africa, 1996, provides as follows:

"(3) Every accused person has the right to a fair trial, which includes the right –

…

(o) of appeal to, or review by, a higher court"

These are certainly important rights that should not be overlooked'.

[21] In addition to the aforegoing, section 93 *ter* (3)(e) of the Magistrates' Courts Act[5] provides as follows:

'It shall be incumbent on the court to give reasons for its decision or finding on any matter made paragraph (d).'

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[4] 2011 (1) SACR 350 (GSJ) at para 15.

[5] Act 32 of 1944.

[22] It appears as if the regional magistrate acted in the exact manner cautioned against in *Singh*.[6] He accepted the State's evidence and therefore rejected the appellant's evidence without considering its merits. The judgment appealed against gives us no assurance that the court gave due consideration to the matter and did not act arbitrarily. The conviction on the count of kidnapping is particularly worrying for the reasons previously explained. We are therefore placed at a distinct disadvantage. We do not know how the regional magistrate reconciled the differences in the State case or why he disbelieved the appellant and his witness. It follows that we do not know on which facts the regional magistrate based his decision to come to a finding that the appellant's guilt had been established beyond a reasonable doubt.

[23] The regional magistrate had the opportunity of observing all the witnesses and their demeanour when giving evidence. Demeanour is an important factor in weighing up the credibility of a witness. Demeanour was not addressed at all by the regional magistrate and while we know what decision he came to, his reasons for doing so remain unknown. We do not have that advantage and the judgment does not assist us in any way in this regard.

[24] However, after considering all the evidence placed before us, it seems to me that the appellant's evidence and that of his witness could reasonably possibly have been true. Certainly, there were no discrepancies in the evidence of the appellant and that of his witness, Mr Radebe. The ineffectual cross examination of the appellant and his witness in no way undermined the appellant's version. In my view, the State did not prove the guilt of the appellant beyond reasonable doubt on any of the counts that he faced.

[25] One final aspect of the matter needs to be mentioned. It is implicit in our constitutional dispensation that all persons have inherent human dignity.[7] This includes those who come before a court, be they witnesses or accused persons. Such persons are to be treated with dignity by a judicial officer. All are human beings

[6] 1975 (1) SA 227 (N) at 228.
[7] Section 10 of the Constitution of the Republic of South Africa, 1996.

and are entitled to be treated politely and respectfully. It is so that very often accused persons will impress upon a court to accept a fanciful defence in order to escape conviction. When faced with such versions, it is incumbent upon the judicial officer to maintain his equanimity and continue to treat the accused with respect, even if he does not believe or accept the accused's version. Unfortunately, it seems to me that this did not occur in this matter. I mention the following instances harvested from the transcript of evidence:

(a) Accused one had just been cross examined when the following exchange occurred between the court and him:

'COURT' Who assaulted them? --- Assaulted who?

Sir, don't make a fool of me here. We are talking about the deceased and a second complainant --- I don't know because I am saying that I did not see.'

(b) Later with the same accused, the court asked the following:

'And why are only the four of you pointed out? --- I cannot explain that, Your Worship, because sometimes it happens that a person would harbour some hate towards you.

Ag please, don't come up with that type of rubbish. Thank you. Stand back.'

(c) After the appellant had been cross-examined, the court engaged in the following exchange with him:

'Oh? Did you call an ambulance? --- I was not able to call an ambulance

You see how ridiculous your answer is? You contradict yourself in the very next question.'

[My underlining]

[26] These are injudicious remarks that should be made to an accused person by a presiding officer. They display an unnecessary aggression towards the accused and give the impression that the court has already come to a decision that the accused is guilty. This impression must not be created and exchanges of this kind must not be repeated.

[27] I would accordingly propose the following order:

(a) The appeal is upheld and the convictions and sentences of the appellant on all the counts, being those of murder, attempted murder and kidnapping are set aside;

(b) That a copy of this judgment be sent to the Regional Court President of KwaZulu-Natal by the Registrar of this court.

Mossop AJ

I agree and it is so ordered.

Bedderson J

APPEARANCES

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Counsel for the respondent	:	Advocate M. Gula Instructed by: National Prosecuting Authority 325 Pietermaritz Street Pietermaritzburg
Date of Hearing	:	20 August 2021
Date of Judgment	:	20 August 2021