NOT REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE DIVISION, GRAHAMSTOWN

Case no: CA&R:194/2014
Date heard: 12.11.2014
Date delivered: 5.11.2015

In the matter between:

SIVIWE NGINASE **Appellant**

vs

THE STATE **Respondent**

APPEAL JUDGMENT

TSHIKI J:

[1] The appellant herein was charged and subsequently convicted by the Regional Court in East London of murder read with the provisions of section 51 (2) of the Criminal Law Amendment Act 105 of 1997. He was sentenced to undergo imprisonment for a period of twelve (12) years.

[2] He now appeals to this Court against the conviction only. The appellant was legally represented throughout the proceedings in the trial Court.

[3] The appellant's grounds of appeal are that the Court *a quo* should not have relied on the evidence of the state witnesses *Simphiwe Sheleni*, *Andisiwe Noqoko* and *Bulelwa Elda Loliwe* because they were biased in favour of the state. It was further contended by the appellant that the evidence of the state witnesses was riddled with inconsistences and contradictions.

[4] It is common cause that the cause of death of the deceased was multiple wounds to the chest, left ear, forehead, right ear and right shoulder.

[5] During the trial evidence was led to show that the witness *Simphiwe Sheleni (Sheleni)* who testified for the state, was the deceased's friend. The same witness was also aware of the animosity between the appellant and the deceased, although he was not aware of the cause of that animosity.

[6] In his judgment on the merits, the trial Court narrated the evidence of each witness and concluded that the state had proved its case against the appellant. The Court *a quo* was also alive to the dangers of accepting hearsay evidence without having made a ruling as to the admissibility of such evidence (***S v Ramavale*** 1996 (1) SACR 3 69 (AD)). The trial Court was also alive to the fact that *Sheleni* the first witness was a single witness and that his evidence must be approached with caution and circumspection. In his judgment the trial Court commented on the contradictions allegedly made by *Sheleni* in his two contradictory statements where he initially implicated *Xolile* and *Siyanda* but stating in his second statement that he had not seen them at all. In his explanation to the Court, *Sheleni* had stated that it was the investigating officer who mentioned the names Siyanda and *Xolile* as also having been involved in the stabbing of the deceased. According to the Court *a quo*, if criticism is to be levelled against *Sheleni* that is the only aspect on which his evidence can be criticised. The trial Court concluded that *Sheleni*:

> "Certainly did not appear to have any axe to grind with the accused. He did not show any animosity towards the accused. As a matter of fact, if he wanted to falsify evidence or fabricate evidence against him, he could very well have said that he saw the accused stabbing the deceased in the tavern as well. But he said he did not see that, when he got there the deceased was already bleeding."

[7] *Mr Solani* who appeared for the appellant, contended that based on the contradiction I have alluded to above the Court *a quo* erred in accepting that the deceased was stabbed by the appellant. I do not agree, the trial Court in its judgment clearly rejected the evidence of the accused that he was not present at the shebeen at ten (10) o'clock that evening when the deceased was assaulted there and it had no reason to doubt the truthfulness of the evidence of Sheleni.

[8] In this case, I agree with *Mr Mtsila*'s submissions in support of the contention that in a case where the witnesses testify long after the incident took place minor discrepancies are expected. Such minor discrepancies as is the case herein cannot be elevated to the status of creating a doubt as to whether or not the offence was committed. In any event, the appellant's lie was clearly exposed by the evidence of the witness *Siyanda Mnyaka*. His evidence exposed the improbabilities inherent in the entire version of the appellant.

[9] Mere contradictions in the state case cannot be elevated to the status of creating a doubt as to whether or not the offence was committed. In ***S v Sauls and Others*** 1981 (3) SA 173 at 180E Diemont JA remarked as follows:

> "There is no rule of thumb test or formula to apply when it comes to a consideration of the credibility of the single witness ... The trial Judge will weigh his evidence, will consider its merits and demerits and, having done so, will decide whether it is trustworthy and whether, despite the fact that there are short-comings or defects or contradictions in the testimony, he (or she) is satisfied that the truth has been told … The State is, however, not obliged to indulge in conjecture and find an answer to every possible inference which ingenuity may suggest any more than the Court is called on to seek speculative explanations for conduct which on the face of it is incriminating …"

[10] When the trial Court rejected the appellant's version it criticised his version by making the following remarks on page 130 lines 3 - :

> "The accused version is very, very simple. He says, 'I was not there. I left the shebeen just after seven o'clock because I was drunk and I went to sleep.' Now despite the simple nature of this evidence and the raising of this alibi, he was the most unimpressive witness. His demeanour was not that of a person taking the Court in its confidence. Throughout cross-examination he responded in a monosyllabic fashion. Of course it is improbable that at seven o'clock in the evening he would be off to bed being drinking with his friends. However, the biggest mistake the defence made was to call Siyanda Mnyaka. Because it stood out like a sore thumb when he testified that his evidence and the so-called alibi of the accused is based on collusion and that the alibi is contrived."

[11] Lastly, I wish to also comment on the effect of the deviation by state witnesses from their police statements which became an issue in this case. Such statements are made for the purpose of obtaining details of an offence so that a decision can be made whether or not to institute a prosecution, and the statement of a witness is not intended to be a precursor to that witness' evidence in Court. Quite apart from that, however, there are other problems associated with police statements. They are usually written in the language of the person who records them. Frequently the use of an interpreter is required, invariably, such interpreter is also a policeman (or policewoman) and not a trained interpreter. The statement is also usually a summary of what the policeman was told by the witness. The fact that discrepancies occur between a witness' evidence and the contents of that witness' police statement is not unusual nor surprising (***S v Govender and Others*** 2006 (1) SACR 322 (ECD)). See also ***S v Mafaladiso en Andere*** 2003 (1) SACR 583 (SCA).

[12] I must, however, remark that some of the state witnesses will deviate from the contents of their statements they made at the police station. Some do not deliberately do so, but that the person who takes the statement may have made an error in recording down the statement which error may lead to the incorrect meaning which had not been intended by the witness. Therefore, before the Court or any party to the proceedings has to criticise the witness concerning his or her statement it has to establish where the error lies. The Court should hesitate enough before it implicates the witness as a deliberate liar before making the investigation.

[13] As already stated above I cannot conclude that the trial Court has erred in its conclusion in convicting the appellant. There is no evidence pointing to that direction. On the contrary, the trial Court has applied its mind to the facts of the case and in my view, came to a correct decision.

[14] This appeal was argued on the 12th November 2014 and the judgment has only been delivered on the 5th November 2015. I have since been informed by the acting judge who was assigned to write the judgment, that she had forgotten about it. The problem was also compounded by the fact that I had to go on long leave until April 2015.

[15] I must also encourage practitioners who represent their litigants and/or parties to the appeal not to keep quiet when the judgment is not forthcoming. They have to enquire from the secretary of the Judge about the delivery of the judgment at least

three months after the judgment was reserved. When I heard about the fact that this judgment was not delivered it was on the 28th October 2015, and I made all endeavours to have the judgment written and delivered as soon as possible.

[16] Therefore, in the circumstances I would make the following order.

[16.1] The appeal is hereby dismissed and the appellant's conviction and sentence are hereby confirmed.

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P.W. TSHIKI
JUDGE OF THE HIGH COURT

Msizi AJ:

I agree.

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W. MSIZI
ACTING JUDGE OF THE HIGH COURT

For the Appellant	:	Mr Solani
Instructed by	:	Legal Aid Board S.A GRAHAMSTOWN
For the Respondent	:	Adv Mtsila
Instructed by	:	Office of the Director of Public Prosecutions GRAHAMSTOWN