



IN THE HIGH COURT OF SOUTH AFRICA

[EASTERN CAPE DIVISION: MTHATHA]

CASE NO. CC18/2020

In the matter between:

NKOSIYOXOLO KAKUDI VELEMANI

Applicant

VS

THE STATE

Respondent

JUDGMENT

JOLWANA J:

[1] This matter concerns an application for leave to appeal. On 17 June 2022 I delivered a judgment in which the applicant was found guilty of assault with intent to do grievous bodily harm as a competent verdict to a murder charge which was the main charge that he had been charged with. He was also found guilty of imputing witchcraft in contravention of section 182 of Act 9 of 1983. He was thereupon sentenced to five years imprisonment for assault with intent to do grievous bodily harm, two years of which was conditionally suspended for five years. In respect of the imputation of witchcraft he was sentenced to two years. The two-year sentence in respect of the imputation of witchcraft was ordered to run consecutively with the three-year effective period of imprisonment in respect of the assault conviction.

[2] The applicant has applied for leave to appeal against both conviction and the sentences imposed. During the hearing of this matter counsel for the applicant abandoned the application for leave to appeal against conviction in respect of the imputation of witchcraft. That being the case I will not deal with it in any detail, if at all. I do not intend to list the grounds of appeal which are, in any event, not a model of clarity and are very difficult to understand. Counsel did clarify, if I understood him very well, that in essence, the applicant's case is not that he should not have been convicted of assault. However, he should have been convicted of common assault and not assault with intent to do grievous bodily harm.

[3] In some of the grounds appeal it is suggested that there was no direct evidence by the State witnesses about the assault committed by the applicant. It is further suggested that no evidence was adduced by the State indicating the nature of the injuries that were caused by the applicant.

[4] I do not know if it was expected of the State to lead evidence that a specific injury was attributable to a specific accused amongst other accused. I do not understand the legal position to be that absent such evidence an acquittal must follow. In this matter there were initially nine accused some of whom became State witnesses in terms of section 204 of the Criminal Procedure Act 51 of 1977. The trial of one of the accused was separated. I do not understand the basis for the contention that people who were charged as a group of people that allegedly committed the offence, especially where it is alleged that the deceased was assaulted by a number of them there must be specific detailed evidence about the role each person played. I am not aware of the legal requirement that there must necessarily be evidence that a specific accused assaulted the deceased on a specific part of the body and that the other one assaulted her on a different specific part of the body as a requirement for a

conviction. No authority was cited for the proposition that this is a *condictio sine qua non* in the absence of which an acquittal must follow.

[5] In the application for leave to appeal an issue is also taken about the absence of evidence in respect of the weapon that the applicant was carrying which he used to assault the deceased and how many times he assaulted the deceased. All of this ignores the fact that in assaulting the deceased the accused acted in concert and in execution of a common purpose something which the evidence established beyond reasonable doubt. Furthermore, none of the accused were armed. The other fact is that this was a moving crime scene which started at the Manundu homestead where the attack on the deceased by the accused including the applicant started. They then drove her, dragged her along the way and assaulted her all the way to her homestead where they eventually killed her. However, there was no evidence that the applicant entered the deceased's homestead where she was eventually killed. The evidence suggested that he had already dissociated himself during the time of the assault that took place at the deceased's homestead. It was on that basis that he was acquitted on the murder charge but found guilty of the assault with intent to do grievous bodily harm.

[6] The applicant raised the issue of the lack of direct evidence of the assault by the applicant. I was surprised that this issue was raised as it suggested that the applicant should only have been convicted not on any other form of evidence other than direct evidence. The surprise arises from the fact that nobody who had bothered to read the record or checked their own notes and read the judgment could have made that submission. In fact, concerned about the issue of the alleged lack of direct evidence being raised, I enquired from counsel for the applicant if in fact he had read the judgment at the very least. My suspicions were, to my bewilderment,

confirmed as counsel confirmed that he last read the judgment in his laptop shortly after it was emailed to him. He never bothered to read it in preparation for this application. Needless to say that this is both disappointing and unacceptable, to put it mildly. I do not understand how one can come to court and argue an application for leave to appeal without either the record of the proceedings and most importantly, the judgment appealed against being part of the preparations. The application for leave to appeal emanates from the findings of the court in its reasons for the verdict. The admission by counsel that even during the hearing he did not have a copy of the judgment with him was a shocking revelation. It would be both remiss of this Court and indeed a dereliction of duty were I to turn a blind eye to that degree of lack of preparation.

[7] In the judgment there are a few paragraphs dealing with the evidence in which the section 204 witness, Nontsebenzo Yalwa, directly implicates the applicant. Secondly while the applicant elected not to testify in his defence and therefore chose not to place a version of events before court he did give a plea explanation. In his plea explanation, the applicant placed himself at the thick of the things that were happening at the Manundu homestead during the incident that led to the death of the deceased. It appears in his plea explanation that he was engulfed with anger after Samkelo's mother asked him to come and hear what Zintle was saying about the late Samkelo. He returned to the Manundu homestead and participated in questioning Zintle about the death of Samkelo. Zintle mentioned the deceased. He then questioned the deceased about where Samkelo and a person he named as J who died in 2018 were. It later transpired in evidence that J was Sihle who had died in 2018. The deceased allegedly said that they were in her homestead. He was amongst those who took the deceased to her homestead but he received a call

before reaching the deceased's homestead which is why he did not enter those premises.

[8] The evidence established beyond reasonable doubt that the people who drove and dragged and assaulted the deceased from the Manundu homestead all the way to her homestead were the accused including the applicant. However, the evidence did not establish that he entered the deceased's homestead.

[9] The issue is whether an accused person charged with the murder of a deceased person in which he participated in the assault with other people should be convicted of common assault instead of assault with intent to do grievous bodily harm as a competent verdict to murder. This question cannot be answered in a vacuum. It must be answered on a case by case basis depending on what the evidence in fact establishes. In this case the assault, the dragging, the driving and general degrading treatment meted out on the deceased in which the applicant participated was on an elderly woman estimated at the time of her death to be 92 years old. The attack on and abuse of the deceased in this case is not just an aberration. Such attacks are in fact intolerably too common including cases of accusations of witchcraft such as this one. Our law reports are literally littered with cases where elderly people, especially women, are attacked and often killed on wild, senseless and possibly misogynist and toxic masculinity inspired violent abuse which often leads to killings. That behaviour cannot, in a constitutional democracy based on rule of law, be punished with a slap on the wrist. This is especially where the deceased suffered so many assault injuries. A conviction of common assault would, in my view, in this case, have amounted to complicity to the conduct of the accused.

[10] In fact the applicant got off very lightly in not being convicted of murder considering that he played a leading role in the unfolding events that lead to the deceased's ultimate death. There is no doubt in my mind that the applicant was correctly convicted as there was a direct link between the assault he participated in and the death of the deceased. I am fortified in this view by the sentiments expressed by the Constitutional Court in *S v Phakane* 2018 (1) SACR 300 (CC) at page 311 paragraph 43 in which Zondo J, as he then was, said:

“Assault is a competent verdict for murder only if there is a link between the assault and the charge of murder. The second judgment accepts that the charge of murder and that of assault were based on separate incidents. The assault relied upon is alleged to have taken place on 20 August 2006. There is no basis in the record for this latter statement. That there must be a link between the factual basis of the main count and the competent verdict means that the assault must at least have been part of the actus reus on which the charge of murder was based. In this case the cause of Ms Boshomane's death is unknown. If we do not know the cause of the deceased's death, we cannot know what verdict would be competent to the charge of murder.”

[11] The evidence of Dr Jwaqa, the forensic pathologist who conduct the post mortem examination of the deceased gave detailed evidence of the numerous injuries the deceased suffered which are consistent with assault. This is besides the other injuries that are related to the burns. The evidence was that the assault on the deceased by the accused started at the Manundu homestead and continued as she was driven and dragged like a dog to her homestead. This abuse was on an elderly woman of 92 years old. I cannot, within a clear conscience, regard that kind of assault as assault common. The nature of the assault, the injuries sustained and the age and frailty of the deceased must surely be some of the weighty considerations that the court must take into account in determining the type of assault with which the accused must be convicted.

[12] This brings me to the issue of the appropriateness of the sentence imposed which amounts to an effective sentence of 5 years in total which the applicant must serve. The fact that the applicant had already spent about two years in custody before he was sentenced makes little, if any difference at all on the facts of this case and was in fact taken into account. Such factual matrix includes the fact that the applicant testified for purposes of the mitigation of sentence. Instead of taking responsibility for his actions, he questioned his conviction contending that he was wrongly convicted. This amounted to utter disrespect for the court and its processes. Most importantly, he never showed any remorse even one limited to the extent of his admitted participation. He was non-repentant with no penitence or regret for what ultimately happened to the deceased. He could not even express the kind of regret that would be expressed even solely on the basis of humanity and empathy for the suffering of others. Even worse a suffering deliberately inflicted with his participation and encouragement as was the case in this matter.

[13] There is yet another reason why I consider the sentence imposed to be appropriate. That is that the pockets of our society that regard themselves as being entitled to conduct kangaroo courts, persecute and mete out extrajudicial punishment including the killing of the elderly women who are regarded as witches is a cancer and an abomination. It is a blight in our society that must be exorcised. I do believe that appropriately severe punishment is one such method of dealing with this tumorous cancer in our society one incident at a time. Imputation of witchcraft especially where it leads to violent abuse and killing must also be punished with an appropriately severe sentence.

[14] For all the above reasons I am not of the opinion that the appeal would have a reasonable prospect of success nor is there a compelling reason why the appeal

should be heard. This is the test provided for in section 17 (1)(a) of the Superior Courts Act 10 of 2013. Therefore, the application for leave to appeal stands to be dismissed.

[15] In the result the following order shall issue:

1. The applicant's application for leave to appeal against conviction and sentence is dismissed.

M.S. JOLWANA

JUDGE OF THE HIGH COURT

Appearance

Counsel for the applicant: V. Ntshangase

Instructed by: Legal Aid South Africa

UMTATA

Counsel for the respondent: L. POMOLO

Instructed by: National Director of Public Prosecutions

UMTATA

Date heard: 03 October 2022

Date delivered: 06 October 2022