



## THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

### MEDIA SUMMARY OF JUDGMENT DELIVERED

*Doorewaard and Another v The State*

(Case no 908/2019) [2020] ZASCA 155

**From:** The Registrar, Supreme Court of Appeal

**Date:** 27 November 2020

**Status:** Immediate

*The following summary is for the benefit of the media in the reporting of this case and does not form part of the judgments of the Supreme Court of Appeal*

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Today the Supreme Court of Appeal (SCA) handed down judgment in an appeal against a decision of the North West Division of the High Court, Mahikeng (Hendricks J), which turned mainly on the evidence of a single witness in a criminal trial. The appeal was upheld.

The matter concerned the death of a boy, approximately fifteen years old at the time (the deceased), and the subsequent conviction of Messrs Doorewaard and Schutte (the first and second appellants, respectively) by the high court on five counts, namely murder, kidnapping, intimidation, theft, and pointing of a firearm. The deceased met his death after himself and a partner were caught stealing sunflower heads on the farm of the appellants' employer.

The State's case rested entirely on the evidence of a single witness, Mr Sibongile Pakisi, who testified *inter alia* that he had observed the deceased being assaulted and mishandled by the appellants, before being thrown out a moving bakkie driven by the first appellant. Mr Pakisi testified further that, after noticing those occurrences, the second appellant approached him to ask what he had seen. When he replied with 'nothing', he was allegedly assaulted repeatedly and forced to drink strong liquor, before being threatened at gunpoint, instructed to wade into a dirty dam and later to run while shots were fired next to his feet. After feeling dizzy and

vomiting, he was told to consume what he had regurgitated and then returned to the loading bin of the appellants' bakkie, with instructions to keep his head down while the appellants were apparently on their way to the clinic. Mr Pakisi testified that he was then struck by something on the back of his head and lost consciousness.

On the appellants' version, after catching the deceased who had run away from the place where the sunflower heads were abandoned, they arrested him for theft and told him to climb onto the back of the bakkie. The deceased first sat on the side frame of the loading bin, but the first appellant told him to move to the middle and sit with his back to the driver's compartment, which he did. When a brief search for the deceased's partner proved unsuccessful, the appellants decided to take the deceased to the local police station in order to open a case of theft against him. After driving around a bend in the road, the second appellant told the first appellant that he thinks the deceased jumped off the back of the bakkie. The first appellant accordingly turned the bakkie around and stopped next to the deceased, who was lying on the gravel road, injured but still alive. The appellants decided to drive to the police station so that arrangements could be made for an ambulance to be contacted.

The testimonies of Mr Pakisi and the appellants were thus mutually destructive. The high court was satisfied that the evidence of Mr Pakisi was honest, truthful and reliable, and that it was to be accepted. The appellants were accordingly found guilty of murder, kidnapping, intimidation, theft and pointing of a firearm.

The principal issue was thus whether the high court had too readily accepted the evidence of Mr Pakisi, who was a single witness and who had contradicted himself on several occasions during the course of the investigation and the subsequent criminal trial.

The SCA was split on the outcome of the appeal.

Ledwaba AJA (the first judgment) found that Mr Pakisi's evidence was tainted by material discrepancies and that there was nothing to corroborate his testimony. He further found that, although in some respects not satisfactory, the appellants' version was more probable than Mr Pakisi's. The onus remained on the State to prove its case beyond reasonable doubt, which he held it had not, and he consequently took the view that the appeal must succeed.

Molemela JA (the second judgment), too, found that Mr Pakisi's account did not meet the standard set for the evidence of a single witness. She agreed that the appellants were to be acquitted on the charge of murder and that the appeal thus ought to be upheld.

However, in Molemela JA's view, by deciding to arrest the deceased the appellants assumed the duty of care to ensure his safe conveyance to the police station. Given the fact that the appellants had decided to convey the diminutive deceased to the police station, unrestrained in the back of a bakkie without a canopy, she found that the appellants must have had a full appreciation of the risk of the deceased, in the light of all the circumstances, being ejected from the bakkie or deciding to jump therefrom, but failed to take the necessary steps to prevent those risks from eventuating.

Molemela JA further took the view that a reasonable person in the position of the first appellant, as driver of the vehicle, appreciating the reasonably foreseeable risks presented by conveying the deceased at the back of a bakkie without a canopy, and mindful that the arrestee was to be safely conveyed to the police station, would have directed the deceased to sit in the cabin section alongside the driver or ensured that the second appellant sat with the deceased in the loading bin to prevent him being catapulted from the bakkie. She also found that approaching a bend at 60km/h on a gravel road was unreasonable, especially under these circumstances. The facts of this case thus justified an inference of gross negligence. After having held that the death of the deceased was directly linked to the driving of the bakkie in which he was a passenger, Molemela JA concluded that she would have set aside the first appellant's conviction of murder and replaced it with one of culpable homicide.

Ponnan JA wrote a separate concurrence (the third judgment) in which he agreed with Ledwaba AJA that the appeal was good. He felt constrained to disagree with the views of Molemela JA on culpable homicide. After identifying several discrepancies in the evidence of Mr Pakisi, concerning for instance the places to which he was taken by the appellants and also the employment of firearms, Ponnan JA found that his evidence had been deliberately fabricated and accordingly fell to be rejected.

Ponnan JA reiterated that an accused person is entitled to be discharged if, at the end of the State's case, there is no possibility of a conviction other than if he proceeds to testify and incriminates himself. This entitlement arose not only from an accused person's constitutional

rights to a fair trial (including the presumption of innocence), human dignity and personal freedom, but also because of the requirement of reasonable and probable cause to believe that the accused person is guilty of an offence before initiating a prosecution.

Finally, Ponnann JA held that on the established facts, there was no suggestion that the speed at which the appellants travelled was excessive; that their conduct was dangerous or reckless in the circumstances; that the deceased was being thrown around the back of the bakkie; that the deceased lost his balance while the bakkie was in motion; nor that the deceased was flung out of, or catapulted, from the bakkie. Therefore, in his view, the appellants were entitled to their acquittal and the appeal had to succeed.

All three judgments were agreed on the disquieting features of the case, notably the incompetence displayed by the police throughout their handling of the matter.

In the result, the appeal was upheld and the appellants' convictions and sentences were set aside.

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