

SOUTH AFRICA / JUDGMENT

Beyers v S (A242/16) [2017] ZAGPPHC 523 (26 May 2017)

[2017] ZAGPPHC 523**COURT**

North Gauteng High Court, Pretoria

BEFORE

C J van der Westhuizen, N Ranchod

CASE / FILE NUMBER

A242/16

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Source record**IN THE HIGH COURT OF SOUTH AFRICA****GAUTENG DIVISION, PRETORIA****26/05/2017****APPEAL CASE NO: A242/16****DPP REF: SA 73/16****Reportable: No****Of interest to other judges: No**

In the matter between: LAWRENCE
 BEYERS APPELLANT
 and
 THE
 STATE RESPONDENT

JUDGMENT**VAN DER WESTHUIZEN, A J**

- [1] The appellant appeals against his conviction and sentence flowing from his arraignment in the Regional Court in Nigel flowing from events that occurred on 27 July 2013. The appellant was charged inter alia with murder, read with s 51(1) of the Criminal Law Amendment Act, 105 of 1997, and assault with the intent to cause grievous bodily harm.
- [2] The appellant was convicted of murder read with s 51(1) of the Act and of assault with the intent to cause grievous bodily harm and sentenced to life imprisonment on the charge of murder and to twelve months on the charge of assault with the intent to cause grievous bodily harm. On the other charges the appellant was acquitted.

- [3] In terms of the provisions of s 10 of the Judicial Matters Amendment Act, 42 of 2013, amending the provisions of s 309 of the Criminal Procedure Act, 51 of 1977, the appellant has an automatic right of appeal against the imposition of the life sentence.
- [4] In order to put the convictions and sentences into perspective, a summary of the events follow.
- [5] The State led the evidence of a number of witnesses who were at the scene when the assault and murder occurred, including that of the victim in respect of the assault. The State's evidence included formal evidence by police officers involved in the investigation of the crime.
- [6] In a nutshell, the evidence on behalf of the State was as follows:
- (a) The appellant arrived at the premises of the bottle store in the company of his friends in a black Corsa motor vehicle. Other friends of the appellant arrived on foot. An altercation arose between the appellant and his friends and the deceased and one Vernon Irvin, the complainant in the assault charge. The deceased intervened. The fracas abruptly came to an end. The appellant and some of his friends left in the Corsa. Vernon also left in his vehicle.
 - (b) A few minutes later, the appellant again arrived at the scene. One of the persons accompanying the accused, shouted "there is the other one" upon which the deceased ran into an alley alongside the bottle store. Whilst standing at the side of his vehicle, the appellant fired a shot and gave chase after the deceased into the alley. The deceased stopped and the appellant caught up with him. At close range, the appellant fired a second shot and the deceased immediately fell down. At the time that the deceased was shot, he had an intact beer bottle in his hand. Thereafter the appellant left the scene in another vehicle. The unknown man who pointed to the deceased, left in the black Corsa.
 - (c) One Clive Lawrence testified that he conducts a casual carwash business at or near the premises of a bottle store. He witnessed part of the fracas. He further witnessed the shooting of the deceased in the alley. He was in a clear position to see the shooting of the deceased. At that stage he had not consumed any alcohol.
 - (d) One Charmaine Roos was also present at the premises of the bottle store. She had consumed alcohol and was to an extent intoxicated. She witnessed some of the initial fracas and heard the shots fired, but did not witness the actual shooting. She had cowered behind another patron at the bottle store.
 - (e) On that fateful day, Kalitia Abrahams was standing at the corner opposite the bottle store with a friend of hers. She saw a black Corsa motor vehicle arrive at the premises of the bottle store and the appellant alighted from the driver's side. The appellant went in the direction of the deceased who ran into the alley. The appellant fired one shot as he entered the alley and fired a second shot shortly thereafter. The appellant appeared from the alley and left in a different vehicle, other than the Corsa. Ms Abrahams went to investigate and found the deceased lying on his stomach in the alley. He had been shot.

- (f) The first police officer at the scene was Constable Kgotle. He found the deceased on his stomach in the alley. Constable Kgotle pointed the deceased out to Warrant Officer Moroke Thebe. The latter investigated the scene. He found a shell casing alongside the deceased and a second shell casing a distance away next to the building of the bottle store. When other of his colleagues arrived, he pointed out the foregoing to them. A report was made to Warrant Officer Thebe implicating the appellant.
- (g) The State produced the evidence of Constable Linda Pala, a member of the South African Police Services stationed at the Local Record Centre in Springs. Pala operated a Sferon camera, a device that captures a crime scene in a 360 degrees manner. Images collected by the said device were reproduced at the trial. From the images produced by that device, witnesses were able to point out various places at the scene of the crime so reproduced.
- (h) Constable Mashut Malima, a member of the SAPS and stationed at the Local Criminal Record Centre, an official photographer and video operator, took photographs at the scene of the crime and compiled an album that was accepted into evidence. Some of the photographs depict a shell casing next to the deceased's body and a second shell casing a distance away, next to the building in which the bottle store is housed. Only two shell casings were pointed out to him, which he photographed and included in the album.
- (i) Vernon Irvin, the complainant in the assault charge, testified that he was with his friends at a lounge in or close to the bottle store. The appellant arrived with his friends. He suddenly noticed the appellant next to him. The appellant hit his friend, one Melvin. Mr Irvin stopped the appellant whereafter the appellant assaulted Mr Irvin with a firearm. The latter retaliated with a beer mug. A fracas ensued that ended outside. Other people intervened and the fracas ended with both Mr Irvin and the appellant leaving the scene. Mr Irvin left the scene and proceeded to the police station to lay a charge of assault against the appellant. A further quarrel arose at the police station between Mr Irvin, the appellant and the latter's friends when the appellant arrived at the police station. During the fracas at the bottle store, Mr Irvin sustained injuries.
- (j) The pathologist, Dr Wietz, who performed the autopsy on the deceased testified. His evidence was that the cause of death was due to a gunshot wound in the neck. As a result of the said gunshot wound, the deceased would not have been able to move after being shot and would have dropped on the spot.
- [7] The appellant testified in his own defence and his evidence can be summarised as follows.
 - (a) The appellant arrived in a Corsa motor vehicle at the said bottle store in the accompaniment of two of his work colleagues. His colleagues went to the bottle store and he remained at the vehicle from which he alighted.

- (b) The deceased allegedly queried the manner in which and the place where the appellant had parked his vehicle. The appellant's response was that he could park anywhere he wanted to. Immediately thereafter the deceased and his friends assaulted the appellant for no apparent reason. Approximately 6 - 7 persons attacked the appellant.
- (c) The appellant retreated to his vehicle for safety. The appellant saw that one of the group attacking him was in possession of a firearm that was visible and pointing in the appellant's direction. In order to protect himself, the appellant fetched his own firearm from his vehicle and proceeded again to the front of the vehicle. The deceased then approached the appellant with a broken bottle and the appellant fired a warning shot into the air. At that time the deceased was about 2m from the appellant. The deceased continued his approach towards the appellant. Being under the impression that the deceased was going to stab the appellant, the

latter, recalling that the deceased was a violent person, fired a shot in the direction of the deceased. At that stage the deceased was 6m away from the appellant. The deceased fell down. The appellant then fired a shot in the direction of the person who was pointing a firearm at him, whereupon the group ran away. Immediately thereafter, the appellant went to the police station.

- (d) At the police station, the appellant reported that he probably had shot someone and handed in his firearm. The police allowed him to go to the hospital as he was injured.
 - (e) The appellant testified that he was at the scene only once. He feared for his life. He testified that he had no alternative, but to shoot in the direction of the deceased. He further denied assaulting Mr Irvin.
- [8] Two further witnesses testified in the defence of the appellant. His mother, whose evidence does not relate to what happened at the scene and one Siphwe Xongo. The latter testified that he was approaching the scene when he saw people assaulting the appellant. The latter put his head into a black vehicle and took out a firearm. Mr Xongo heard one shot and ran away. He witnessed 6 - 7 persons assaulting the appellant.
- [9] Mr Xongo, as witness, only came to light deep into the trial. The court a quo rejected Mr Xongo's explanation why he had only approached the appellant at a late stage and rejected his evidence in its entirety. Correctly so in my opinion.
- [10] The appellant's version of the incident is diametrically opposed to that of the State. There are numerous improbabilities in the appellant's version. To mention a few, it is highly improbable that the appellant would concern himself with the deceased, armed with a broken bottle a distance away, rather than with the person aiming a firearm at him and who could any minute fire a shot at the appellant. Furthermore, the appellant testified that at first the deceased was 2m away whilst approaching the appellant. When the appellant fired a shot at the deceased, the latter was then 6m away. The deceased was found dead 10m into the alley a distance much further away than the appellant described. Either the deceased was retreating, or the version of the appellant is unlikely. The appellant's description of the

incident suffers from multiple inconsistencies, the version being amended as the appellant thought it fit during his testimony.

- [11] The appellant on his own version could have escaped from the crowd without endangering his own or the lives of others. He testified that when he retreated to his vehicle, the group stopped and did not advance further. It is only after he had retrieved his firearm and returned to the front to the vehicle, that the deceased approached the appellant.
- [12] The court a quo found that the State's witnesses were reliable and accepted their evidence. No criticism can be levelled at their evidence. The court correctly rejected the version of the appellant beyond reasonable doubt as false. There are too many improbabilities and inconsistencies in the appellant's version. I did not understand counsel for the appellant to be overly confident in respect of the appellant's version on the merits.
- [13] There is one issue that requires comment. At the commencement of the trial of the appellant in the regional court, the appellant caused an application to be brought for the recusal of the presiding regional magistrate. The grounds of which related to possible prejudice against the appellant in view thereof that, in the past, the appellant's brothers all appeared before the honourable magistrate, were found guilty and sentenced to incarceration. The honourable magistrate considered the application and declined to recuse himself. There is no merit in any suggestion that the magistrate had acted in any improper manner in his conduct of the trial and his refusal to recuse himself is unquestionable.
- [14] The court a quo's findings on the merits cannot be faulted. The necessary caution was applied when dealing with the evidence before the court a quo. The honourable magistrate correctly applied the applicable principles as stipulated by the courts.
- [15] It follows that the appeal against the conviction cannot succeed.
- [16] As recorded above, the appellant also appeals against the sentences meted out against him.
- [17] No previous convictions were proven against the appellant. He denied that he had previous convictions. He stood before the court as a first offender.
- [18] It is curious that the appellant, in person, did not testify in respect of mitigation of sentence. He was content that his legal representative and two experts, a social worker and a psychologist, both of whom compiled reports in favour of the appellant, recorded the personal circumstances of the appellant before court.
- [19] The State relied upon a report filed by a social worker in respect of aggravating circumstances.
- [20] It is to be noted that the psychologist, who reported on behalf of the appellant, did not consider the report by the social worker that reported on the State's behalf.

- [21] From the report and viva voce evidence of Ms Smit, a social worker who testified on the ,appellant's behalf; it is clear that much of her information is premised upon hearsay evidence. None of that information seems to have been independently verified.
- [22] Furthermore, the information upon which the appellant's psychologist relied in his report is equally premised upon hearsay evidence. As recorded above, the report of Ms Deabreu, who testified on behalf of the State, was not even considered, nor commented upon by Mr Schuman, the appellant's psychologist. Mr Schuman's expertise admittedly lies in the field of educational psychology.
- [23] Both Ms Smit and Mr Schuman reported and commented upon issues that clearly fell outside their respective expertise, in particular the issue of Post Traumatic Stress Syndrome. This issue was raised for the first time during argument in respect of the appropriate sentence on the charge of murder. Counsel for the appellant relied heavily upon that issue in argument on the appeal against sentence. It appears that a reliance on the issue of Post Traumatic Stress Syndrome primarily formed the basis of the appeal against sentence.
- [24] In this regard, the appellant laid no factual basis in respect of the issue of Post Traumatic Stress Syndrome from which he allegedly suffered. In this regard the judgment in *Graeme Michael Eadie v The State*[1] is instructive. The Supreme Court of Appeal considered the history in a long line of cases which dealt with the defence of an irresistible

impulse, or unconscionable conduct, or a state of automatism, or lacking criminal capacity when committing a crime, in particular that of murder. The court held in respect of a claim of non-pathological criminal incapacity at [42], [43] and [44] as follows:

"[42] From the judgments of this Court referred to in the preceding paragraphs it is clear that in order for an accused to escape liability on the basis of non-pathological criminal incapacity he has to adduce evidence, in relation to the second leg of the test in *Laubscher's* case, from which an inference can be drawn that the act in question was not consciously directed, or put differently, that it was an involuntary act. It is clear from the decisions in the *Potgieter*, *Henry*, *Cunningham* and *Francis* cases that the defence has been equated with the defence of automatism.

[43] The decisions in the preceding paragraphs show that this Court has approached defences of non-pathological criminal incapacity with caution. In the *Henry* case the phenomenon is

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said to be "most uncommon". In dealing with a natural inference that people act consciously and voluntarily this court has repeatedly stated that the inference is disturbed in "exceptional cases". In the *Wiid* case, *supra*, the only case in this Court in which the defence was upheld, there was doubt whether the appellant had the ability to distinguish between right

and wrong and to act in accordance with that distinction. In that case not only were the stressors severe and aggravated by the intake of a sedative, but also the immediate circumstances and the concussion suffered by the appellant were so extreme so as to

persuade the psychiatrists and the Court that there was a reasonable doubt about her criminal capacity. It is perhaps because of his repeated exposure to the asserted defence that Dr Kaliski is so sceptical. His call for a set of compelling facts before he concedes the validity of the defence in a given case is in line with the dicta referred to above. Dr Kaliski equated automatism with the defence asserted by the appellant in the present case and his explanation makes it clear that in his view the only circumstance in which one could "lose control" is where one's cognitive functions are absent and consequently one's actions are unplanned and undirected. His view is in line with the decisions of this Court.

[44] The approach of this Court in the decisions discussed in this judgment, has been to carefully consider the accused's actions before, during and after the event. It took into account whether there was planned, goal-directed and focused behaviour. In the decisions referred to, a determination was made about whether an accused was truly disorientated - an indicator of temporary loss of cognitive control over one's actions and consequent involuntary behaviour. This Court has repeatedly stated that a detailed

recollection of events militates against a claim of loss of control over one's actions."

[25] From the foregoing passage, an accused is obliged to place evidence of his non-pathological criminal incapacity before the court from which the required inference is to be drawn. That has not happened in the present case. The appellant has led no direct evidence of his alleged suffering from Post Traumatic Stress Syndrome. It is only referred to in the two reports filed on his behalf in respect of mitigating circumstances on the issue of an appropriate sentence other than life imprisonment as prescribed. The allegation, or rather suggestion, that the appellant suffers from Post Traumatic Stress Syndrome was not independently verified either by Ms Smit or Mr Schuman. The impression is created that the appellant, once confronted with a conviction, and as an afterthought, attempted to raise the issue of Post Traumatic Stress Syndrome, but through other witnesses. He himself was not willing to testify to that issue.

[26] The Supreme Court of Appeal further opined in *Eadie*, supra, at [61] that:

"[61] The time has come to face up to the fact that in some instances our courts, in dealing with accused persons with whom they have sympathy, either because of the circumstances in which an offence has been committed, or because the deceased or victim of a violent attack was a particularly vile human being, have resorted to reasoning that is not consistent with the approach of the decisions of this Court. Mitigating factors should rightly be taken into account during sentencing. When an accused acts in an aggressive goal-directed and focused manner, spurred on by anger or some other emotion, whilst still able to appreciate the difference between right and wrong and while still able to direct and control his actions, it stretches credulity when he then claims, after assaulting or killing someone, that at some stage during the directed and

planned manoeuvre he lost his ability to control his actions. Reduced to its essence it amounts to this: the accused is claiming that his uncontrolled act just happens to

coincide with the demise of the person who prior to that act was the object of his anger, jealousy or hatred. As demonstrated courts have accepted such version of events from accused persons."

[26] In my view, there is no merit in the submission that the appellant suffered from Post Traumatic Stress Syndrome. In particular in view of the fact that the court a quo, correctly, rejected his version of the incident as false beyond reasonable doubt. The only version before the court is that of the State witnesses. In that version, there is no room for a finding that the appellant suffered from Post Traumatic Stress Syndrome. There is patently no evidence to support such claim.

[27] The court a quo considered the personal circumstances of the appellant and found that the appellant had failed to place any compelling and exceptional circumstances before the court to warrant a departure from the prescribed life sentence. In my view, the honourable regional magistrate cannot be faulted in his findings in that regard.

[28] It follows that the appeal against sentence cannot succeed.

I propose that the appeal against both conviction and sentence be dismissed.

C J VAN DER WESTHUIZENACTING JUDGE OF THE HIGH COURT

I concur, and it is so ordered

N RANCHODJUDGE OF THE HIGH COURT

On behalf of Applicant: J F van der Merwe

Instructed by:

On behalf of Respondent: PCB Luyt

Instructed by: The State

[1] 2002(1) SACR 663 (SCA)

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