

SOUTH AFRICA / JUDGMENT

Ehlers v S (A88/2016) [2017] ZAGPPHC 733 (14 November 2017)

[2017] ZAGPPHC 733

COURT

North Gauteng High Court, Pretoria

BEFORE

Maumela, Pienaar

CASE / FILE NUMBER

A88/2016

Source: saflii.org · Research copy typeset by Esheria. Not court-issued or certified.

Source record

REPUBLIC

OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

(NORTH

GAUTENG HIGH COURT, PRETORIA)

14/11/2017

CASE

NO: A88/2016

Reportable:

No

Of

interest to other judges: No

In

the matter between:

Christiaan

Benjamin

Ehlers Appellant

And

The

State Respondent

JUDGMENT

Maumela J.

1. This matter came before court as an appeal against both conviction and sentence. Before the Regional Court for the District of Benoni, (the court a quo), the appellant, Christiaan Benjamin Ehlers was charged with the following offences:

1.1 Murder.

1.2 Contravention of section 90 read with sections 1; 103; Controls Act; 2000: Act No 60 of 2000), "Firearms Controls Act": Unlawful Possession of a Firearm and

1.3 Contravening section 90 read with sections 1; 103; 117; 120(1) (a); 121, and schedule 4 of the Firearms Controls Act; 2000: Act No 60 of 2000), "Firearms Controls Act": Unlawful Possession of Ammunition without a licence.

Before the court a quo appellant was legally represented throughout the trial.

2. He pleaded not guilty to all three charges. He submitted a written statement in terms of section 115 of the Criminal Procedure Act 1977. The statement was admitted into the record of the proceedings of this case as an exhibit. In the statement, appellant admits having caused the death of the deceased. However he denies that his act was unlawful. In terms of section 93ter Magistrates Court's Act 1944: (Act No 32 of 1944), appellant successfully applied before the court a quo for his trial to proceed without the participation of assessors.
3. The state called three witnesses. The accused also testified in defence. On a mero motu basis, and in terms of section 167 of the Criminal Procedure Act, the court called three witnesses. This section empowers the court among others to recall any witness in given proceedings. By consent, a number of exhibits were admitted into the record of the proceedings. The appellant takes issue with the fact that after evidence had been led, the court a quo called additional evidence, so did the defence.
4. The court a quo upheld the version of the state and rejected that of the accused. On the 11th of March 2015 the accused was found guilty on all three charges. On the 9th of April 2015 he was subjected to an effective sentence of 20 years imprisonment.
5. Before the court a quo, appellant applied for leave to appeal against both conviction and sentence. Only leave to appeal against sentence was granted. Appellant successfully petitioned this court, (the North Gauteng High Court), for leave to appeal against conviction as well. Hence this appeal is against both conviction and sentence. The question before this court is whether or not the court a quo was correct in convicting and in sentencing the appellant.

BACKGROUND.

6. On the 20th of December 2012, at the Duck Inn Pub, in Petit, Benoni, there was a fierce argument about money between the appellant, Mr. Ehlers and the deceased; Mr. Roos. The argument culminated in repeated fisticuffs which appellant lost. After the fight, the two hurled verbal abuse against one another. The deceased appeared to move away. Cathy, who is Griggs's wife told the deceased to stop his unacceptable behaviour. Shortly thereafter, appellant mumbled inaudibles. He leaned under the bar counter and felt with his hand. From under the counter, he took possession of a firearm which one Koos, also called Koos Boom, had negligently placed under a counter.
7. Griggs told court that he pleaded with appellant, asking the latter to put the firearm down. One Christo Leonard intoned to the effect that they are all friends, reiterating that appellant should place the firearm down, but to no avail. At that point the deceased had drawn further from appellant, at a distance of about 5, 5 meters, with the bar counter positioned between him and appellant.
8. A witness called Griggs told court that appellant pointed at the deceased with the firearm. The deceased uttered words to the effect of something like: "As jy my wil fokken skiet, skiet my." (loosely translated; "If you want to shoot me; go ahead"). He said that appellant then shot the deceased with fatal consequences.
9. The court is to determine whether or not appellant acted in self-defence in killing the deceased. It is also to determine whether

the sentence to which appellant was subjected is correct or not.

10. Before the court a quo there was consensus between the state and the defence about the following:
 - Appellant fired one fatal shot at the deceased.
 - The incident happened at about 21h30 in a bar.
 - Both the appellant and the deceased had imbibed strong alcoholic drinks in the bar, however the applicant had apparently taken more quantities of alcohol as compared to the deceased. This was because the latter had arrived at the bar earlier than the deceased.
 - The appellant and the deceased were friends.
 - Before the incident there was a minor altercation between the appellant and the deceased which degenerated into some fisticuffs.
 - The deceased gained the upper hand in the fisticuffs, flattening the appellant on more than one occasion.

Witnesses advance divergent versions, however there is also an allegation that the deceased struck appellant with his elbow, stumped him with his head, and kicked him.

- At the timing of the incident there was a power blackout inside the bar. Illumination was provided through several candles, lanterns as well as torches.
 - The appellant moved away from where the fisticuffs took place, to a point behind the bar counter. There is no clarity about why the deceased also moved to the same direction. However the appellant got under the impression that the deceased is pursuing him.
 - At some point after moving to that direction, appellant armed himself with a firearm with which he shot the deceased. He produced the firearm from somewhere under the counter.
 - The fire arm used belonged to one of the witnesses.
 - There is no clarity about how the firearm got to be brandished as well as what words got uttered before the shooting.
 - The specific positioning at the moment the fatal shot was fired as well as the positioning of the deceased's body are disputed.
 - When the fatal shot was fired, there were several witnesses in attendance within the bar.
 - The crime scene was attended by the police forensic unit. Several photos were taken, however the applicable distances were not measured, neither were any other processes conducted with a view to reconstruct the scene.
11. Appellant raises the question whether or not he was afforded a fair trial. In that regard appellant cites *S v Zuma*[1] where the court stated the following: "That caveat is of particular importance in interpreting section 25(3) of the Constitution. The right to a fair trial conferred by that provision is broader than the list of specific rights set out in paragraphs (a) to (j) of the subsection. It embraces the concept of substantive fairness which is not to be equated with what might have passed muster in our criminal courts before the constitution came into force..... Since that date section 25(3) has required criminal trials conducted in accordance with just those "notions of basic fairness and justice". It is now for all courts hearing criminal trials or criminal appeals to give content to those notions. "
12. It was submitted on behalf of the appellant that each accused person has the right "to adduce and challenge evidence" in terms of section 35 (3) (i) of the constitution. Appellant contends that before the court a quo, his right to challenge evidence was undermined. He argues that the police failed to accurately measure the crime scene or to reconstruct it. He argues that viewing of the deceased's corpse was not correctly conducted. He contends that as a result, he was denied the opportunity to confront the evidence gathered at the crime scene.

13. Appellant submits that the court should not only focus on the admissibility of the evidence given, but also on its reliability. He raises the fact that the exact position of the deceased at the time he was struck by the bullet was not determined. He argues further that the inquest report compiled by one Dr. Skosana leaves much to be desired, much as the learned Regional Magistrate also criticized it.

14. Section 35 (3) (i) of the Constitution provides as follows:

35 Arrested, detained and accused persons.

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

(i) to adduce and challenge evidence;

15. Appellant contends that his right in this regard was seriously undermined before the court a quo. He argues that it is not only that the police failed to measure and to reconstruct the crime scene accordingly, but also that the post mortem on the body of the deceased was not properly conducted.

16. The respondent contends that the presiding magistrate did not prejudice the appellant by refusing the application for a witness

called Griggs to be recalled. In handing down judgment on leave to appeal, the magistrate provided reasons for refusing the application

for the re-call of that witness. The reason is that there was no indication that upon being recalled the evidence of Griggs would have changed.

17. Respondent submits that the allegation that the presiding magistrate descended into the arena during the proceedings is unfounded. All the magistrate did was to ask questions of clarity. It is submitted that she was not pre-decided about the merits of the case. Respondent submits that contradictions between Griggs's version in his testimony in court and the one in the statement he made to the police are not material.

18. In this respect the case of *S v Mafaladiso en Andere*[2] comes into focus. In this case the court dealt with the aspect of self- contradictions by witnesses, including instances where a witnesses' statement to the police contradicts a statement by that same witness before court. In that regard the court stated as follows: "The juridical approach to contradictions between two witnesses and contradictions between the versions of the same witness (such as, inter alia, between her or his viva voce evidence and a previous statement) is, in principle (even if not in degree), identical.

Indeed, in neither case is the aim to prove which of the versions is correct, but to satisfy oneself that the witness could err, either because of a defective recollection or because of dishonesty. The mere fact that it is evident that there are self-contradictions must be approached with caution by a court. Firstly, it must be carefully determined what the witnesses actually meant to say on each occasion, in order to determine whether there is an actual contradiction and what is

the precise nature thereof In this regard the adjudicator of fact must keep in mind that a previous statement is not taken down by means of cross-examination,

that there may be language and cultural differences between the witness and the person taking down the statement which can stand in the way of what precisely was meant, and that the person giving the statement is seldom, if ever, asked by the police officer to explain their statement in detail. Secondly, it must be kept in mind that not every error by a witness and not every contradiction or deviation affects the credibility of a witness. Non-material deviations are not necessarily relevant. Thirdly, the contradictory versions must be considered and evaluated on a holistic basis. The circumstances under which the versions were made, the proven reasons for the contradictions, the actual effect of the contradictions with regard to the reliability and credibility of the witness, the question whether the witness was given a sufficient opportunity to explain the contradictions - and the quality of the explanations - and the connection between the contradictions and the rest of the witness' evidence, amongst other factors, to be taken into consideration and weighed up. Lastly, there is the final task of the trial Judge, namely to weigh up the previous statement against the viva voce evidence, to consider all the evidence and to decide whether it is reliable or not and to decide whether the truth has been told, despite any shortcomings.' (At 593e - 594h.)"

19. In *S v Govender and Others*[3], the court held the following regarding contradictions between witnesses' statements to the police and their statements before

court: "A proper approach to discrepancies between a witness' statement and the evidence he or she gave in court entailed the following: it was necessary to determine what the witness meant to say on each occasion in order to decide whether or not there was an actual contradiction and, if so, what the nature thereof was; language and cultural differences between the person giving the statement and the person writing it down could affect its precise meaning; not every contradiction, error or deviation was material; the circumstances under which the two versions were given, the effect of any contradictions on the witness' credibility, and the quality of any explanation given by the witness for such contradictions must be taken into account. (At 325f - 326b.) In assessing the quality of a witness' explanation for a contradiction or omission, regard must be had to the type of person the witness was. Less intelligent or less sophisticated witnesses were more likely to react in an unsatisfactory way, believing that they were in a predicament due to the variance between what they had told the police and what they had said in court. The same was also true, at times, of educated and sophisticated people. However, an unfavourable reaction on being taxed with a contradiction did not necessarily mean that the evidence of that witness was to be rejected. Even where it was concluded that a witness was being untruthful in his or her attempts to explain contradictions, it did not mean that all that witness' evidence should be rejected. (At 326d - h.)"

20. The court concludes that the presiding magistrate was within her rights to refuse the application for the re-call of the witness,

Griggs. The contradictions in the statement Griggs made to the police and the statement he made in court are not material. There is therefore no basis upon which to set aside the proceedings before the court a quo.

21. The uncontested post-mortem report noted among others that the cause of death is: "Gunshot wound." The post mortem report revealed that the bullet entered the deceased through the mouth and lodged in the neck-muscles. The actual trajectory of the bullet was never established. The question of the position in which the deceased was when he was struck by the bullet was a subject of contention between the state and the defence. It was established that the deceased was in a standing position when the bullet struck him. An inspection of the bar was conducted.
22. It is fact that only one shot was fired. The post mortem revealed that only one shot struck the deceased and it proved fatal. Evidence showed beyond doubt that it is appellant who wielded a firearm, pointed it at the deceased, and fired a shot. It is the appellant who killed the deceased.

RE: CONVICTION.

23. The court is to determine whether or not the court a quo was correct in convicting appellant on the basis of the evidence outlined.

Appellant contends that he was acting in self- defence when he fatally shot the deceased. According to appellant, after the initial fisticuffs between him and the deceased, he moved away from the deceased who followed him. Appellant does not reveal why the deceased followed in the direction he moved. In his publication, Criminal Law[4] C.R. Snyman provided the following definition of private defence: "A person acts in private defence, and her act is therefore lawful, if she uses force to repel an unlawful attack which has commenced, or is imminently threatening, upon her or somebody else's life, bodily integrity, property or other interest which deserves to be protected, provided the defensive act is necessary to protect the interest threatened, is directed against the attacker, and is no more harmful than necessary to ward off the attack."

25. According to our law, an act which might otherwise be unlawful may constitute self-defence or private defence, if it complies with requirements set. Such requirements are as follows:
 - (a). The act must be directed at the attacker.
 - (b). The defensive act must be necessary.
 - (c) There must be a reasonable relationship between the attack and the defensive act.
 - (d). The attacked person must be aware of the fact that she is acting in self-defence.
26. Griggs is the only witness who saw the whole incident unfolding. He told court that the deceased never issued threats against the appellant before the latter shot him. The witnesses Oosthuizen and Leonard corroborated Griggs on this aspect. Leonard told court that appellant was in no danger when he fired the shot at the deceased.

27. Appellant's account of the moment shortly before he shot the deceased is contradicted by the evidence of Griggs and Leonard. On the basis of the available evidence, the court finds that appellant's version to the effect that he was under threat or that his life or safety was in jeopardy at the time he shot at the deceased cannot be reasonably possibly true. Griggs and Leonard told court that appellant was not under attack or threat of attack from the deceased when he shot the latter.
28. In the event where the court were to find that the deceased was moving in the same direction as the appellant at the time he was shot, the question still arises as to whether the act on the part of the appellant, where he shot at the deceased was or was not proportionate to the danger in which he perceived himself to be. It is not appellant's evidence that he took possession of the firearm, pointed it at the deceased, and warned the deceased not to advance further towards him, failure of which he would shoot.
29. Evidence is to the effect that appellant leaned over a bar counter, took possession of a firearm and aimed it at the deceased. Evidence is to the effect that the deceased stood still and told the accused to go ahead if he wants to shoot him. It is then that appellant shot at the deceased. The above sequence of events does not satisfy the requirements of self- defence. Therefore the court does not find that appellant acted in self-defence when he shot the deceased.
30. It is trite that appellate courts may disregard findings made by trial courts only where the recorded evidence proves the findings to be wrong. In the case of *S v Hadebe and Others*[5], the court stated: "It was well to recall yet again the well- established principles governing the hearing of appeals against findings of fact, which were, in short, that in the absence of demonstrable and material misdirection by the trial court, its findings of fact were presumed to be correct, and would only be disregarded if the recorded evidence showed them to be clearly wrong."
31. Appellant submits that in shooting at the deceased, he aimed at the latter's feet. This contention is not borne out by the post mortem and the forensic evidence available. By connotation appellant's conviction on count 1 dictates that he is to be found guilty on counts 2 and 3 as well. He shot at the deceased using a firearm and ammunition the possession of which he is not licenced. The court finds that on appeal there is no basis upon which to interfere with the convictions arrived at by the court a quo.

RE: SENTENCE.

32. It was argued on behalf of appellant that the court has to take into consideration factors that should have the effect of mitigating

sentence. The said factors are the following:

- 25.1. That appellant had imbibed strong, intoxicating liquor on the day of the incident.
- 25.2. That appellant was subjected to a serious beating by the deceased before he shot the latter.

25.3. It was argued that both of the above factors suffice for purposes of mitigating against sentence in their individual capacity. When taken together, they reduce notably the moral blameworthiness of the appellant.

25.4. Appellant is a first offender.

25.5. Before arrest, appellant was employed and was responsible for the upkeep of the members of his family.

25.6. Appellant and the deceased were friends.

25.7. There is no evidence showing that the offences in this case were premeditated.

25.8. Emotions were heightened because of issues of money owed between the appellant and the deceased. This was exacerbated by the insults the two hurled at one another.

25.9. The social worker found it highly unlikely that appellant may ever repeat the offence.

33. It was not scientifically proven that appellant had imbibed strong, intoxicating liquor on the day of the incident to such an extent that he could no longer appreciate the consequences of his actions. Actually, although he had imbibed intoxicating liquor, he could still put up a fight in his fisticuffs with the deceased. In the fisticuff he was defeated but he too did land blows on the deceased. The court cannot see how appellant's friendship with the deceased can mitigate against sentence if he is the one who killed the deceased. On the contrary, the friendship should aggravate sentence because as a friend, appellant should protect the deceased instead of attacking him.

34. It was submitted on behalf of appellant that the court a quo over-emphasized the fact that appellant continued to plead innocence even after he had been convicted. Appellant seeks for the court to set aside the sentences meted out to him by the court a quo. He contends that the sentences meted out to him induce a sense of shock.

35. In our law, appellate courts do not have powers to interfere with and to substitute sentences passed by trial courts at will. This also applies to sentences passed by lower courts. Appellate interference is only possible where the sentences sought to be interfered with are a consequence a discretion that was exercised unreasonably by the trial court. In the case of *S v Pieters*[6], the Honourable Botha JA stated at 7340-F that: "the decisive question facing a Court of appeal on sentence was whether it was convinced that the court which had imposed the sentence being adjudicated upon had exercised its discretion to do so unreasonably. If so, the Court of appeal was entitled to interfere and, if not, then it cannot."

36. Appellant makes the point that the court a quo should have ordered the sentences in respect of all three charges to run concurrently.

Section 280(2) of the Criminal Procedure Act: 1977, empowers the court to order that punishments passed in respect of several offences run concurrently. The offences in this case were committed at the same time.

37. In count 1 appellant was convicted of murder read with the provisions of section 51 (2) of the Criminal Law Amendment Act. For such an offence a sentence of 15 years imprisonment stands prescribed. In the case of *S v Malgas*[7], the court ruled that the court should not avoid the imposition of a minimum sentence prescribed for flimsy reasons. On page 479 of this case, the court stated: "When applying the provisions of section 51, a trial court is not in trial mode. It is not confronted by a prior exercise of judicial discretion attuned to the particular circumstances of the case and which is *prima facie* to be respected. Instead it is faced with a generalized statutory injunction to impose a particular sentence, which injunction rests,

not upon all the circumstances of the case, including the personal circumstances of the offender, but simply upon whether or not the crime falls within the specific categories spelt out in Schedule 2. Concomitantly, there is a provision which vests the sentencing court with the power, indeed the obligation to consider whether the particular circumstances of the case require a different sentence to be imposed. And a different sentence must be imposed if the court is satisfied that substantial and compelling circumstances exist, which justify it".

38. The offences of which the appellant stands convicted are serious. Violence was applied when the deceased was shot with fatal

consequences. In the case of *S v Mnguni*[8], the court stated that: "there is aggravation where an accused person inflicts a brutal, cruel, and inhuman attack on a helpless, unarmed harmless victim." In this case the deceased was unarmed and was therefore harmless against the appellant when the latter shot him.

39. In *S v Makwanyane & another*[9], the court stated: "The need for a strong deterrent to violent crime is an end the validity of which is not open to question. The State is clearly entitled, indeed obliged, to take action to protect human life against violation by others. In all societies there are laws which regulate

the behaviour of people and which authorize the imposition of civil or criminal sanctions on those who act unlawfully. This is necessary for the preservation and protection of society. Without law, society cannot exist. Without law, individuals in society have no rights. The level of violent crime in our country has reached alarming proportions. It poses a threat to the transition to democracy, and the creation of development opportunities for all, which are primary goals of the Constitution. The high level of violent crime is a matter of common knowledge and is amply borne out by the statistics provided by the Commissioner of Police in his amicus brief. The power of the State to impose sanctions on those who break the law cannot be doubted. It is of fundamental importance to the future of our country that respect for the law should be restored, and that dangerous criminals should be apprehended and dealt with firmly. Nothing in this judgment should be understood as detracting in any way from that proposition. But the question is not whether criminals should go free and be allowed to escape the consequences of their anti-social behaviour. Clearly they should not; and equally clearly those who engage in violent crime

should be met with the full rigor of the law. . . . "

40. It is trite that sentences passed by our courts have to be tinged with a measure of mercy. In *S v V*[10] Holmes JA emphasised that "the element of mercy, a hallmark of civilised and enlightened administration, should not be overlooked". Holmes JA added that mercy was an element of justice and referred with approval to *S v Harrison*[11] , where the learned judge had said: "Justice must be done; but mercy, not a sledge-hammer, is its concomitant."
41. Where multiple offences need to be punished, the court has to seek an appropriate sentence for all offences taken together. When dealing with multiple offences a court must not lose sight of the fact that the aggregate penalty must not be unduly severe. In *S v Zinn*[12], the court stated that in imposing the sentence, the court has to take into consideration, the crime committed, the interests of the accused, and the interest of the community".
42. Considering the nature of the crime committed in this case, appellant is deserving of a stiff sentence. He is deserving of a custodial sentence. However, taking into consideration that the three offences were committed at the same time, there is cause to order that sentences in respect of all three offences run concurrently.
23. In the result, the appeal against conviction stands to be dismissed. The appeal in respect of sentence stands to succeed. I propose the following order:

ORDER.

1. The appeal against conviction is dismissed.
2. The appeal against sentence is upheld. The sentence passed against the appellant by the court a quo is set aside, and substituted by the following sentence:
 - (a). On Count 1 appellant is sentenced to undergo 15 years imprisonment.
 - (b). On Count 2 appellant is sentenced to undergo 6 years imprisonment.
 - (c). On Count 3 appellant is sentenced to undergo 5 years imprisonment.
3. The sentences in respect of counts 2 and 3 shall run concurrently with the sentence in respect of count 1.

T.A Maumela

Judge of the High Court of South Africa

I agree.

Pienaar AJ.

Acting Judge of the High Court of South Africa.

- [1] 1995(4) BCLR 401 CC.
- [2] 2003 (1) SACR 583 (SCA).
- [3] 2006 (1) SACR 322 (E).
- [4] Fourth edition, at page 103.
- [5] 1997 (2) SACR 641 (SCA), at page 642.
- [6] 1987 (3) SA 717 (A).
- [7] 2001 (1) SACR 469 SCA.
- [8] 1994 (SACR) 579 (A), at page 583 paragraph E.
- [9]
- [1995] ZACC 3; 1995 (2) SACR 1 (CC), at paragraph 117.
- [10] 1972 (3) SA 611 (A), at page 614 D - E.
- [11] 1970 (3) SA 684 (A), at page 686 A.
- [12] 1969 (2) SA 537 (A).
-

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.saflii.org/za/cases/ZAGPPHC/2017/733.html>

CASE PAGE <https://chat.esheria.ai/case-law/south-africa/ehlers-v-s-unknown-topic-agpphc-2017>

Prepared on 23 October 2026 · Esheria