

SOUTH AFRICA / JUDGMENT

Faure v S (A250/2017) [2021] ZAWCHC 166 (20 August 2021) [2021] ZAWCHC 166

COURT

Western Cape High Court, Cape Town

BEFORE

Bozalek, Le Roux

CASE / FILE NUMBER

A250/2017

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Republic of

South Africa

IN THE HIGH COURT OF SOUTH

AFRICA

(WESTERN CAPE DIVISION, CAPE

TOWN)

Case number: A250/2017

Before:

The Hon. Mr Justice Bozalek
The
Hon. Ms Acting Justice Le Roux

Hearing:

28 May 2021
In

the matter between:

RYAN

FAURE

Appellant

and

THE

STATE

Respondent

This

judgment was handed down electronically by circulation to the parties' legal representatives by email. The date and time for

hand-down is deemed to be 15h00 on 20 August 2021.

JUDGMENT

BOZALEK J

- [1] The appellant in this matter was found guilty on 3 March 2017 in the Regional Court sitting at Parow of one count of housebreaking with intent to commit robbery and robbery with aggravating circumstances and one count of murder. On the robbery conviction he was sentenced to 15 years' imprisonment and on the murder conviction to life imprisonment. Exercising his automatic right of appeal, the appellant now appeals against his conviction for murder and the accompanying sentence.
- [2] The appellant was refused leave to appeal against his conviction of robbery and elected not to pursue his right to petition this Court for leave to appeal in that regard. It follows that it must be accepted for the purposes of this appeal that the appellant broke into the deceased's home and, using force, robbed her of a flatscreen television set. As will be seen from the circumstances of this matter, acceptance of this fact poses a virtually insuperable obstacle to the appellant's appeal against his conviction of murder since nowhere in the trial record, nor on appeal, is there any explanation as to how the appellant on the one hand committed the robbery with aggravating circumstances but on the other had nothing to do with the deceased's murder. Be that as it may for the purposes of this judgment I shall approach the appeal against the murder conviction as if it were independent from the associated housebreaking and robbery.
- [3] The State's case against the appellant was that on 22 May 2015 he broke into the home of the deceased, a 79 year old woman, at [...], robbed her of her television set and certain other items and stabbed her multiple times, causing her death. In order to prove its case the State led the evidence of the investigating officer, the appellant's ex-wife and two witnesses, Mr Mario Lottering and Mr Nathan Solomons. Both these last two witnesses had dealings with the appellant shortly after the robbery and murder and testified that the appellant had admitted to them that he had broken into the deceased's home and robbed her and killed her. It was also Lottering's evidence that on the night of the incident the appellant had brought a flatscreen TV wrapped in a blanket to him and asked him to find a buyer for it.

Apart from this evidence the State led no direct evidence implicating the appellant in the robbery and murder, hence the two confessions are critical evidence.

- [4] The appellant testified in his own defence denying that he had broken into or being in the deceased's house on the night in question. Although he admitted being friendly with and having dealings with Messrs Lottering and Solomons he denied making any confession, statement or admission to them that he had either broken into the house or killed the deceased.
- [5] In convicting the appellant, the magistrate accepted the evidence of Lottering and Solomons finding that notwithstanding some hesitancy on both of their part to testify against the appellant and despite some discrepancies between their viva voce evidence and their statements to the police, their evidence was satisfactory in all material respects and was corroborated in key aspects. The magistrate rejected the appellant's version of events as false beyond reasonable doubt taking into account various unsatisfactory features and the improbabilities in his version.
- [6] In his notice of appeal and in argument the principal submissions made on behalf of the appellant were that Messrs Lottering and Solomons were poor and unreliable witnesses. Reliance was placed on the fact that at one stage the State sought to discredit Lottering as a witness due to him deviating from the statement which he had given to the police. The appellant also contended that Solomons was unable to satisfactorily explain why he had initially failed to come to court to testify. In both instances the appellant relied on discrepancies between the evidence of these witnesses and their police statements as indications of their lack of credibility. He also contended that the magistrate had erred by not making a negative finding based on the State's failure to call Lottering's girlfriend to corroborate his evidence. He further contended that the magistrate had erred in not finding that the evidence of the appellant's former wife corroborated his version that he could not have been the person who broke into the deceased's house and killed her.

Discussion

- [7] I shall deal firstly with the evidence of Lottering. He testified that he was a homeless person who had lived for seven years under a bridge close to the flats in which the appellant lived. On the night of 22 May 2015 i.e. the night of the murder, the appellant arrived with the flatscreen TV and asked him to find a buyer. The appellant appeared to be shocked and worried and told him that he should tell no one about the TV set. The following morning the appellant had returned asking whether he had found a buyer for the television set. Together they left to find a buyer but were unsuccessful because at least two of the persons that they approached said that they were not interested because they had heard that an old lady had been murdered the previous night and a television set stolen from her.

- [8] The appellant and Lottering then handed the television set over to a Nigerian man who said he could find a buyer. Shortly afterwards the police had arrived and both the appellant and Lottering had fled leaving the Nigerian man, then in possession of the TV set, to be arrested by the police. The prosecutor then sought to lead Lottering on a conversation he had subsequently had with the appellant

concerning the circumstances in which he had initially obtained the TV set. The witness was evasive however and the prosecutor then began to put to the witness a portion of his statement to the police as a prelude to discrediting him as a witness. This proved not to be necessary however as Lottering admitted that part of his statement, namely, that after fleeing from the police he had asked the appellant where he had obtained the TV. The appellant's answer was that he had killed the old woman at 15 Sakabula Crescent and taken her TV. Lottering was asked by the prosecutor and by the appellant's representative why he had not initially given this incriminating evidence against the appellant and his reply was that he had forgotten to do so.

- [9] As mentioned, the appellant sought to discredit Lottering's evidence inter alia by virtue of his initial hesitancy to give this incriminating evidence. However, as the magistrate noted, the witness was clearly reluctant to testify against the appellant in this regard because they had a long association in which the appellant had assisted him by giving him items to keep or to sell and because of threats which the appellant had made in the event that the witness should tell anyone of the appellant's involvement in the robbery and murder. As was also noted by the magistrate, an important factor is that Lottering's evidence that the appellant had confessed to him that he had robbed and murdered the deceased was not a late fabrication. Lottering was arrested by the police a few weeks after the murder and in a written statement said that the appellant had told him that he had killed the deceased and taken her TV. It was clear furthermore that the police were led to Lottering through their arrest of the Nigerian person found in possession of the flatscreen TV set.
- [10] There are at least two other factors which lend significant support to Lottering's evidence that the appellant confessed to the crimes in question. The first such factor is that, save for the confession, the appellant's own evidence largely corroborates that of Lottering. He confirmed that on the day after the robbery and murder he had accompanied Lottering in an attempt to find a buyer for the TV set which ended when they fled upon the police arriving and arresting the Nigerian man to whom they had just handed over the TV set. According to the appellant, however, it was Lottering who had asked him for assistance to sell a TV set which he had acquired, promising him R500.00 if they were successful. The appellant could not explain what his specific role would be in selling the TV set nor why he should receive R500.00 for doing so little and nor why he had fled from the police if he had no guilty knowledge regarding the television set. The second major factor lending support to Lottering's evidence was the lack of any reason why Lottering should falsely implicate the appellant in the robbery and murder of the deceased through a confession. This was particularly so since the evidence was that there was a good relationship between the two men and the appellant had frequently assisted Lottering in the past.

[11] I turn now to the evidence of Solomons. He testified that he had been friendly with the appellant for a period of 14 years, since

childhood, and that they had often consumed drugs together. Some weeks after the robbery and murder he had met the appellant's

ex-wife in the street and assisted her carrying groceries to her home in Sakabula Flats. There he had come across the appellant smoking a mixture of marijuana and mandrax and had joined him in taking these drugs. The appellant had confronted him asking why he was spreading stories that it was he who had robbed and killed the deceased. Solomons had denied doing so even though this was true. The appellant had then admitted to him that he had in fact killed the deceased, stolen her TV set and had taken it to Lottering to find a buyer.

[12] Solomons testified of hearing a detailed confession from the appellant i.e. how he had been in her garden and observed the deceased watching TV that night, how he had bent her security gate in an effort to gain entrance and that, when confronted by the deceased, he had overpowered her through the gate and used her keys to gain entrance. The appellant had recounted further how the deceased has screamed for help which led him to silence her by stabbing her four times in the chest and once in the neck. The appellant had then laid her on her bed and sexually assaulted her. Solomons testified that he was shocked upon hearing the appellant's confession and by the cruelty of the killing. At a later stage he was approached by the deceased's son and agreed to disclose what he knew to the police. Some weeks after the incident he had given a statement to the police detailing the confession made to him by the appellant. In cross-examination he was challenged, inter alia, on the basis that it had been difficult to procure his attendance in Court and that he was a reluctant witness. Solomons however gave a convincing explanation in this regard. In the first place he had been working as a seaman and it appeared that the police had difficulty in tracing him as a witness after he had given his initial statement. Eventually it had been the deceased's son who had found him and prevailed upon him to testify. Solomons also explained that his brother had been threatened by members of the appellant's family and this had initially led to him being reluctant to testify in Court.

[13] Solomons gave clear and convincing evidence and the detail which he gave of the appellant's confession renders it highly unlikely that this evidence was a fabrication. It contained detail which he could have obtained only from someone who was directly involved in the robbery and murder or someone with a full knowledge of its circumstances such as the police. There was, however, no suggestion that this information was provided by the investigating officer or any other member of the police. It was suggested on behalf of the appellant that Solomons' evidence of the confession was fabricated by him in order to claim the reward offered by the deceased's family for information leading to the arrest of her attacker. Solomons testified, convincingly, that he had no interest in claiming any reward and it was not suggested that he had obtained any reward at all. His credibility was also challenged on the basis that there were discrepancies between his viva voce evidence and the contents of his police statement. However, as has been held by the Courts on numerous occasions, what

is contained in a witness' police statement is more often than not no more than a concise summary of what the witness' evidence will be. Furthermore, the mere fact that there appear to be such discrepancies does not necessarily reflect adversely on the witness' credibility. These must be more closely examined inter alia to ascertain whether the witness' version was correctly recorded in the first place and, secondly, regard must be had to the import and the importance of any such alleged discrepancies. This is particularly the case given the rough and ready manner in which, experience shows, such statements are frequently taken by police officials.[1] When this exercise is done, none of the discrepancies allegedly arising from Solomons' statement are material to his credibility.

[14] As regards the credibility of Solomons generally it is against significant that there is no apparent reason why he would falsely

implicate the appellant through his evidence of the latter's confession to the robbery and murder. On both Solomons' version and that of the appellant they enjoyed a long and friendly relationship, to the extent that they regularly smoked cannabis

together. What also offers strong support to Solomons' evidence is the extent to which it dovetails with the appellant's own version of events. He testified that on the day in question he indeed met with Solomons and that they consumed drugs together. The appellant testified that he had indeed confronted Solomons about spreading stories that it was he who had killed the deceased, adding that it was in fact so that rumours were spreading throughout the neighbourhood that he had been the perpetrator of these crimes. It was common cause that the appellant had lived with this ex-wife only some 50 meters away from where the deceased lived. The appellant testified that he knew the deceased by sight.

[15] It is trite that in evaluating whether the State has discharged its onus in a criminal case of proving the accused's guilt beyond reasonable doubt the evidence must be examined, and accounted for, holistically. As was stated in *S v van der Meyden*,[2] in a passage which has been repeatedly approved by the Supreme Court of Appeal:

'A Court does not base its conclusion, whether it be to convict or acquit, on only part of the evidence. The conclusion at which it arrives at must account for all the evidence ... What must be borne in mind, however, is that the conclusion which is reached

(whether it be to convict or to acquit) must account for all of the evidence. Some of the evidence might be found to be false; some of it might be found to be unreliable; and some of it might simply be found to be only possibly false or unreliable; but none of it may simply be ignored'.

[16] In the present matter two independent witnesses, on friendly terms with the appellant, testified of his confession to them, on separate

occasions, that he was responsible for the robbery and killing of the deceased. The appellant admits the encounters with both witnesses in all material respects save that he denies making the confessions. There is no clear or apparent reason why, in each case, these

witnesses would falsely implicate the appellant since there is no suggestion let alone any evidence which implicated either of them in the robbery or the murder.

[17] In a considered and comprehensive judgment, the magistrate set out her reasons for accepting the evidence of the two witnesses, Lottering and Solomons, and for rejecting the evidence of the appellant as false beyond reasonable doubt. In doing so she was clearly conscious that she was dealing with the evidence of single witnesses in relation to the confessions but she found corroboration for their evidence in the various aspects which I have already mentioned. I can find no convincing basis on which to reject any of the magistrate's findings in this regard.

[18] As to the remaining criticisms or attacks upon the magistrate's finding, she correctly noted that the evidence given by the

appellant's former wife fell far short of establishing that the appellant had an alibi or that he could not have committed the robbery and murder. It is clear that she could not account for his movements on the evening or night in question in any detail. Secondly in this regard, there was no obligation on the State to call the evidence of Lottering's girlfriend with a view to corroborating his evidence of appellant's confession to him as might have been the case if the State's case had rested solely on the appellant's confession to Lottering.

[19] In the result for these reasons I am unpersuaded that the magistrate erred in finding that the State had proved its case against the appellant beyond reasonable doubt.

Sentence

[20] As regards the appeal against sentence, the magistrate found that the appellant had failed to establish the existence of substantial and compelling circumstances justifying the imposition of a sentence other than life imprisonment.

[21] It was contended on behalf of the appellant that the magistrate had misdirected herself in not taking into account all relevant

sentencing factors, more particularly the following:

1. the appellant was 36 years old at the time of sentencing;
2. he was divorced and had two minor children aged 9 and 4 years old;
3. he supported his family financially when employed;
4. although not a first offender, his last previous conviction was more than 17 years previously;
5. he had no history of violent behaviour.

[22] In *S v Malgas* it was held that a Court should not deviate from the prescribed minimum sentence for flimsy reasons. In *S v GK*,^[3] the Court held that there was nothing in the minimum sentence legislation which fettered an appellate court's power to reconsider the matter of substantial and compelling circumstances. What are these substantial and compelling circumstances in the present matter? They can amount to no more than the appellant's personal circumstances and the fact that he was to all intents and

purposes a first offender. Against this, however, stands the brutality and callousness of the murder. The appellant broke into the home of a 79-year-old woman with a view to robbing her. When she cried out for help he stabbed her some 30 times, leaving her for dead. At no stage did the appellant express any remorse for his actions. His victim was someone who was known to him and was in fact a neighbour. The appellant cannot claim to have been young or immature at the time he committed these offences. Nor are the appellant's personal circumstances in any way exceptional. Furthermore, as was held in *S v Vilakazi*:^[4] 'In cases of serious crime the personal circumstances of the offender, by themselves, will necessarily recede into the background. Once it becomes clear that the crime is deserving of a substantial period of imprisonment the questions whether the accused is married or single, whether he has two or three children, whether or not he is in employment, are in themselves largely immaterial to what that period should be. Those seem to me to be the kind of "flimsy" grounds that Malgas said should be avoided'.

[23] Having regard to all the relevant factors I consider that the magistrate correctly found that the appellant failed to establish the existence of substantial and compelling circumstances. In the circumstances the appeal against sentence too must fail.

[24] In the result the following order is made:

1. The appeal against the appellant's conviction for murder and the sentence of life imprisonment is dismissed and the conviction and sentence are confirmed.

I agree.

LE ROUX AJ

For the Appellant

: Mrs A De Jongh

As Instructed

Legal-Aid South Africa

For the Respondent

: Adv C van der Vijver

As Instructed

: The Director of Public Prosecutions

- [1] See in this regard *S v Mafaladiso* 2003 (1) SACR 583 (SCA), *S v Linden* [2016] JOL 36306 at para 91, *S v Mlumbi and Another* 1991 (SACR) 235 A at 248B and *S v Mkohle* 1990 (1) SACR 95A.
- [2] 1999 (1) SACR 447 (WLD) at 449.
- [3] 2013 (2) SACR 505 (WCC).
- [4] 2009 (1) SACR 552 (SCA) at 574.

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