

SOUTH AFRICA / JUDGMENT

Gonyonga v S (A100-2018) [2019] ZAGPPHC 323 (18 July 2019)

[2019] ZAGPPHC 323

COURT

North Gauteng High Court, Pretoria

BEFORE

Makhuvele, Bam

CASE / FILE NUMBER

A100/2018

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IN THE HIGH COURT OF SOUTH
AFRICA

GAUTENG DIVISION, PRETORIA

(1)

Reportable: NO
(2)
Of
interest to other judges: NO
CASE NO: A100 / 2018
18/7/2019
In

the matter between: BONGILE
GONYONGA
Appellant
and
THE
STATE
Respondent

JUDGMENT**MAKHUVELE J****Introduction**

[1] This appeal is against the conviction and sentence that was imposed on the appellant by the Regional Court at Oberholtzer where he was arraigned on one count of murder read with the provisions of Section 51 of the Criminal Law Amendment Act 105 of 1977 where it is alleged that on or about 10 April 2011 he unlawfully and intentionally killed

one David Adams (the deceased) by stabbing him with a knife.

[2] He pleaded not guilty. He did not tender any plea explanation but it transpired during cross examination of the state witnesses that his defence was an alibi. He indicated that he left Carltonville on 27 March 2011 and went to Sasolburg where he had obtained new employment and never returned.

[3] It appears from the transcript of the record of proceedings that the appellant was legally represented throughout the trial. It is also evident that he had a fair trial in that at the request of the Public Prosecutor and after charges were put to him, the Magistrate explained to the appellant that the sentence that can be imposed on him can be up to life imprisonment, that he had a right to appeal the conviction and sentence and that he may be declared unfit to possess a firearm if convicted. He also explained the various applicable competent verdicts.

Relevant background facts leading to the conviction and sentence

[4] The circumstances under which the deceased died appear from the evidence of the witnesses that testified on behalf of the State, who, except for one, were not at the scene of crime. The appellant testified and also called one witness, his sister, to confirm his alleged alibi.

State case

[5] The first witness was Majukijela. He is the police officer who attended to the crime scene. He confirmed that he found the deceased lying on the floor, in the street near Chesa. The deceased was still breathing, but his eyes were closed. He had a wound on his head and two other wounds on his back. There were two men with the deceased at the scene. He was advised that the one that stabbed him had run away.

[6] The second witness was Christopher Twabi. He knows the appellant and the deceased as they were all employed at Chesa By Night. He was a 'bouncer'. He did not mention the type of work that the appellant and the deceased were doing.

- [7] On the day in question they were drinking at their work place until very late. Before closing time they decided to go and buy food at a nearby garage. They then went to eat at Tower Butchery as they did not want to be seen eating tinned food.
- [8] The appellant and the deceased then got into an argument about their nationality, dissing each other about one (appellant) being coloured and the other (deceased) being Xhosa . The deceased became angry and pushed the appellant, also known as Small who hit against the wall. The appellant pushed back. He separated them and they continued eating.
- [9] The quarell between the appellant and the deceased started again, and this time it became serious. He moved to separate them again but realised that the deceased, who was moving away from the appellant was injured. He asked the appellant what he had done to the deceased, but he did not answer. The deceased fell on the grass. He ran to Chesa By Night and asked the security officer to

call an ambulance.

- [10] On much probing by the State Prosecutor, he confirmed that the reason the deceased fell on the grass was because the appellant stabbed him with a knife, about two times. He also confirmed that of the three of them, the deceased was more intoxicated and that is the reason he was trying to restrain the appellant from what he was doing.
- [11] The appellant ran away with the knife that he used to stab the deceased. The deceased was not armed.

[12] Under cross examination, he testified that:

[12.1] Other than the three of them, were no other persons at Tower Butchery when the incident occurred.

[12.2] He was sitting a little bit further from the deceased and the appellant when they quarrelled, hence he had to stand and go and separate them.

[12.3] He did see the stabbing and the knife that the appellant had after that.

[12.4] The deceased and the appellant were 'best friends'.

[12.5] He denied the version of the appellant that he left Carltonville, and Chesa By Night employment on 27 March 2011. He was adamant that the appellant was on duty with him and the deceased on the day in question and that after they knocked off they went to buy food as he had testified. He was also adamant that the appellant stabbed the deceased, and that he ran away after that. The knife remained in the appellant's hands after he had stabbed the deceased.

- [13] The third witness for the State was Mr. Makwa. He was also employed by Chesa By Night. He confirmed that the deceased, Christopher and the appellant were amongst the people who were sitting there finishing their drinks just before they closed. They moved away to the direction of the filling station. He heard their voices when they came back because he was upstairs. Christopher came back running to him after about an hour and reported that the

deceased and the appellant were fighting and that the latter had stabbed the former. He went downstairs and found that indeed the deceased had been injured. He called the ambulance. The police arrived first. The appellant was not there at this stage.

[14] Under cross examination he confirmed what Christopher told him and that he knew all three as they work together but the deceased at the time had already left and was working at SAB, but on the day in question the three were together drinking at Chesa By Night. He denied the appellant's version that he left Carltonville on 27 March 2011.

[15] The State also handed in a post-mortem report and other documents relating to identification of the deceased and hospital records.

[16] After close of the defence case, the State was granted leave to reopen

its case to deal with the appellant's defence of an alibi. In this regard, Mr Somezembe, a 'Supervisor of security' at Chesa By Night was called to testify.

[16.1] He testified that he knew the deceased. On the day in question he was in Johannesburg. He received a call from the deceased who advised him that he was drinking with the appellant and Christopher at Chesa By Night. He promised to see him the next day. He received a call at about midnight from one of the security officers advising him that the deceased had been stabbed and was taken to hospital. In the morning he went to work and received a report about what happened.

[16.2] He went to see the deceased at Sybrand Hospital but was advised that he had been transferred to Leratong Hospital. He went to look for the appellant at his place of residence in Khutsong. He did not find him and the room was locked. He was advised that he left that morning with one Dex.

[16.3] He confirmed that the appellant was on duty on Saturday night.

[16.4] During cross examination the questions that he was asked were about his memory since the incident happened seven years before the trial, why he did not report the appellant to the police since he went looking for him after he heard that he is the one who stabbed the deceased. His response was that his staff gave him the report because he is in charge and he went to appellant's place to hear his version. The police were already investigating the matter and had taken statements. He denied the appellant's version that he was no longer working there. He confirmed that the appellant did not attend the deceased's funeral and raised concerns about this because as a friend, he should have known about his death because on his version he was in Sasolburg.

Defence case

[17] The appellant testified that he was arrested on 17 January 2017 at Cape Town.

[18] He left Carltonville on 28 March 2011 for Sasolburg where he had obtained another employment. The deceased was the only person amongst his friends who knew that he was leaving because he is the last person he

was with before the incident and before he left. The other person who knew that he was leaving is his sister, with whom he is very close. He stayed at Sasolburg and was renting a room from a person called Cedi, but he does not have the contact details as that is a long time ago. He also does not have contact details of where he was working at Sasolburg.

[18] His employer (Chesa By Night) did not know that he had left. He left in the morning of 27 March 2011.

[19] Over the years after he left, he tried to contact the deceased by telephone but he could not get through. He only heard about his death on the day of his arrest.

[20] He knew the State witness, Chistopher as they worked together at Chesa By Night, but they were not friends.

[21] He denied knowledge of what all state witnesses had testified about him.

[22] Under cross examination;

[22.1] He confirmed that he knew the witnesses who testified because he worked with them at Chesa By Night. He does not know their motives for implicating him in the murder of the deceased.

[22.2] He confirmed that the deceased had resigned from Chesa By Night and that he he did not resign, but simply left because he was not permanently employed.

[22.3] He also confirmed that he did not tell any of the people who arrested him about his alibi or that he had a witness because they did not want his statement.

[23] Gasikwa Gonyago the appellant's sister, testified as a defence witness.

[23.1] She testified that the appellant telephoned her in March and told her that he had found employment at Sasolburg. She did not see him leave Carltonville, but she visited him once at Sasolburg. She could not remember the date.

[23.2] The appellant was in Sasolburg during the time that it is alleged he committed the crime in question. He did not come back to Carrltonville as he was working in Sasolburg.

[23.3] Under cross examination she was unable to answer questions such as whether the appellant resigned from Chesa By Night or not and how he came to be in Cape Town.

Ad conviction: Findings and reasons

[24] The defence of alibi was abandoned during argument on the merits of the charge. It is rather strange that the counsel for the appellant raised the defence of alibi in his heads of argument when it clearly appear from the record that this was abandoned. The Magistrate in his written reasons for judgment also wrote the following:

" The appellant , a male aged 29, was sentenced to 15 years imprisonment on a count of Murder.

The appellant throughout denied his presence on the scene. However in his final argument he, with tongue in the cheek, submitted that Indeed he was on the scene and that he indeed assaulted the deceased, but that he did not have the necessary intention to kill. (Transcript page 48 line 10). We are aware that a false explanation tends to support the state's case (S v Nkomo 1966 (1) SA 831 (A), but we nonetheless duly considered the aspect of intent (Transcript page 54 lines 18-25). We did not want to create the impression that intention was found only because his alibi was rejected."

[25] Having abandoned the defence of alibi, the remaining dispute between the state and the appellant was whether the latter is the person that killed the deceased and whether he had the requisite intention to kill.

[26] On the question of identity, the Magistrate took into account the fact that there was a single eye witness to the stabbing, and as such, he had to apply the necessary caution. There was overwhelming evidence to corroborate the fact that the appellant was at the scene. Furthermore, most of the witnesses for the state were friends or colleagues of the appellant.

[27] The Magistrate indicated that he did not notice any sign of prejudice because even the supervisor was on social terms with the appellant and used

to attend celebrations at his home. Furthermore, the eye witness, Christopher , made a concession that the deceased was the first to push the appellant.

[28] Taking into account all evidence tendered, the Magistrate found that the 'probabilities were on the side of the state.'" There was also corroboration with regard to the presence of the appellant at Chesa By Night.

[29] The Magistrate considered the versions given by the appellant and his witness. The appellant was not consistent with the date that he left Carltoville for Sasolburg. At first he said 27 March, then changed to 28 March . His sister did not know the date on which he left.

[30] He also dealt with the issue of the alibi, which in any event was abandoned during argument. Before us it was raised as a main ground of appeal, and intention to kill as an alternative .

[31] On intention to kill, the Magistrate considered the number of times that the deceased was stabbed and the fact that he had 'a 7 centimetre wound among others right through the skull'. The deceased was drunk and unarmed but the appellant continued stabbing him even as he was falling down

Ad sentence: reasons

[32] The appellant's personal circumstances were taken into account.

[32.1] He is 29 years of age, unmarried with three children with ages ranging between 2 and 7 years. He was employed, earning an Income and was supporting his immediate and extended family.

[33] The appellant spent 12 months in custody whilst awaiting finalization of the trial.

[34] The circumstances under which the offence was committed were also taken into account, namely;

[34.1] Intoxication,

[34.2] the provocation, which was actually more of a nuisance that the deceased had been on him, which he could have ignored as the latter was drunk and not posing a danger to him.

[34.3] Even though one cannot say that the murder was premeditated, the appellant readily had a knife in his possession.

[35] He also took into account the prevalence of violent crimes and the interests of society because many offenders are not arrested or get away without being punished.

[36] He also took into account the fact that a big knife was used and that he has a previous conviction. He then stated that if they were not there he would find compelling circumstances.

[37] The appellant was sentenced to 15 years imprisonment and also declared unfit to possess a firearm.

The grounds of appeal and the parties' oral submissions

[38] The appellant's counsel argued the merits of the conviction on two grounds, namely, the evidence of the single witness and the alibi.

[39] During oral argument he could not take the issue of alibi any further than as it has been presented in the record of proceedings. He then relied on absence of intention as an alternative ground.

[40] He argued that the cumulative effect of the mitigatory circumstances constitute compelling and substantial circumstances that the Magistrate should have considered and deviated from the prescribed minimum sentencing regime.

[41] The State in its heads of argument conceded that the Magistrate failed to make findings on whether there are compelling and substantial circumstances to justify a deviation from the minimum sentencing regime.

We were however urged to use the court's common law jurisdiction and accept the sentence passed.

Evaluation of the evidence and applicable legal principles

Identification and evidence of a single witness

[42] The issue of alibi and identity of the person that stabbed the deceased are intertwined. In my view, having disposed of the alibi, and the overwhelming evidence regarding the presence of the appellant in the group that comprised of himself and, the deceased and Christopher is sufficient proof that there is no mistaken identity here. In any event, identity was not seriously contended.

[43] The principles that guide resolution of identity dispute are as follows:

[43.1] Due to the fallibility of human observation, courts normally approach the evidence of identification with some caution.[1]

[43.2] The identifying witnesses must be honest. The reliability of their observations must be tested bearing in mind factors such as lighting, visibility, eyesight, the proximity of the witness, her opportunity for observation both as to time and situation, the extent of her prior knowledge of the accused, the mobility of the scene, corroboration, suggestibility, the accused's face, voice, build, gait and dress as well as the evidence by or on behalf of the accused. These factors must be weighed one against the other, in light of the totality of the evidence and the probabilities.

[43.3] Caution must be applied when evaluating the evidence of a single witness by considering its merits and demerits. Despite shortcomings, defects or contradictions in her evidence if any, if the trial court is satisfied that the witness has told the truth, it ought to accept it. The exercise of caution must not be allowed to displace the exercise of common sense.[2]

[43.4] In the normal course of events, the evidence of a single witness would only be accepted if it is in every important respect satisfactory or if there is corroboration for that evidence. The corroboration required is confirmatory evidential material outside the evidence that was being corroborated.[3]

[44] I am satisfied that the Magistrate has carefully weighed the evidence and applied the necessary cautionary rules. There is sufficient corroboratory evidence with regard to material issues that are in dispute, namely, the identity of the person that stabbed the deceased.

Intention to kill

[45] The appellant stabbed the deceased with a big knife, under circumstances where the deceased was defenceless, unarmed and drunk . Moreover. they were best friends.

[46] The types of injuries that he sustained and the part of the body on which they were inflicted indicate that the appellant did not care whether he dies or not. In fact, he reconciled himself with the fact that he will die, hence he pulled the knife out after stabbing him and ran away, disappeared from that community, never returned until he was arrested about seven years later at Cape Town. It is worth mentioning that the crime took place in Gauteng Province.

Whether there is any misdirection on the sentence imposed_

[47] It is trite that the appeal court can only interfere with the discretion of the lower courts to impose sentences only if :

[47.1] There was an irregularity during the trial or sentencing of an accused person.

[47.2] The lower court misdirected itself in respect of the imposition of the sentence.

[47.3] The sentence imposed by the court could be described as disturbingly or shockingly inappropriate.

[48] The question is not whether the sentence is right or wrong, but rather whether the lower court exercised its discretion properly and judicially[4].

[49] Much has been said about the omissions of the trial court with regard to making a finding on whether there are substantial and compelling circumstances to justify a deviation from the prescribed minimum sentences.

[50] I referred to the record where the Magistrate appeared to indicate a constraint on him to make such a finding. He was reluctant to do so because of what he considered to be aggravating factors, such as the big knife and the previous conviction.

[51] The concern for me though is that the trial court went along with the failure by the legal representatives to mention or argue whether there were substantial and compelling circumstances justifying a departure from the minimum sentencing regime.

[52] This failure by the trial court to *mero motu* raise the issue is in my view a misdirection. In fact, the very factors that the trial court considered when passing sentence may constitute substantial and compelling circumstances to justify a departure from imposing the minimum prescribed sentences.

[53] The proper approach to sentencing under circumstances where the provisions that created a mandatory minimum sentencing regime, Section 51(3)(a) of Act 105 of 1997 are applicable was formulated by Marais JA in the leading case of *S v Malgas* (117/2000) [2001] ZASCA 30; (600113 All SA 220 (A) (19 March 2001)[5].

[54] In Paragraph 25, Marais J summarized the proper approach by examining the provisions that created the minimum sentencing regime as well as the specific offences referred to in Part 1 of Schedule 2. With regard to the latter, the learned Judge stated that the court's discretion in imposing sentence has been limited, and not eliminated. The usual factors that

a trial court would take into account when sentencing are still applicable, such as proportionality of the sentence to the crime, balancing the various competing interests, and the nature of the offence.

[55] It is clear from the charges preferred on the appellant that the State indicated its intention to rely on the prescribed minimum sentences. The Magistrate was asked to explain the competent verdicts and possible sentences. He did this.

It is therefore suprising why at the end he did not deal with this issue in clear terms, and not in a roundabout way.

Conclusion

[56] There is no reason for this court to interfere with the conviction of the appellant, however, due to the misdirections that I have highlighted above, this court is entitled to interfere with the sentence imposed.

[57] I have already stated that the very factors that the court took into account could constitute substantial and compelling circumstances to justify a departure from imposing the minimum prescribed sentences.

[58] There is no need to remit the matter back to the trial Magistrate because the factors have been identified and form part of the record. This court is in a position to impose a fresh sentence .

[59] In my view, the fact that the Magistrate did not find any evidence of premeditation and the fact that the group were drinking, the provocation by the deceased and the fact that the appellant spent 12 months in prision whilst awaiting trial are amongst others factors that the Magistrate should have taken into account as justification for a departure from the minimum sentencing regime.

[60] Taking into account all the relevant factors the appropriate sentence in my view is 12 years imprisonment.

Order

[61] Accordingly, I make the following order,

[61.1] The appeal on conviction is refused.

[6.2] The appeal against the sentence of 15 years Imprisonment is upheld . The order of the Magistrate is set aside and substituted as follows;

"The appellant Is sentenced to 12 years imprisonment"

TAN MAKHUELE J

Judge of the High Court

I agree, and it is ordered,

NN BAM AJ

Acting Judge of the High Court

APPEARANCES

Appellant:

Mr. S.M Moeng

Instructed by Legal Aid South Africa

The State:

Advocate R Molokoane

On behalf of the Office of the Director of Public Prosecutions, Pretoria,

Date heard:

20 May 2019

Judgment

delivered on:

18 July 2019

[1] S v Mthethwa 1972 (3) SA 766 AD at 7680.

[2] S v Sauls and Others 1981 (3) SA 172 (A).

[3] S v Miggel 2007 (1) SACR 675 (C) at 678A.

[4] S v Pillav 1977 (4) SA 531 (A) at p 535 E-G

[5] Reported in the South African Criminal Law Reports as S V Malgas 2001 (1) SACR 469 (SCA)

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