

SOUTH AFRICA / JUDGMENT

Koboka v S (CC39/2011) [2016] ZAECPEHC 56 (13 September 2016)

[2016] ZAECPEHC 56

COURT

Eastern Cape High Court, Port Elizabeth

BEFORE

C Plasket

CASE / FILE NUMBER

CC39/2011

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IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE LOCAL DIVISION, PORT ELIZABETH)

CASE NO: CC39/2011

Date heard: 6 September 2016

Date delivered: 13 September 2016

Not reportable

In the matter between

LUVOYO KOBOKA

and

THE STATE

JUDGMENT

PLASKET J:

- [1] I convicted the applicant of robbery with aggravating circumstances, murder, two counts of unlawful possession of a firearm and two counts of unlawful possession of ammunition. I sentenced him to terms of imprisonment ranging from two years to life imprisonment. He seeks leave to appeal against both conviction and sentence.
- [2] As a result of a long delay in bringing this application, condonation was sought. The State did not oppose that application. A full explanation of the delay has been given. Condonation was accordingly granted.

- [3] I turn now to the issue of leave to appeal against conviction.
- [4] The most damning piece of evidence against the applicant was a confession. It implicated him in all of the offences of which he was convicted. He claimed that despite being savagely tortured by the police, he never made any statement to them. The investigating officer, on the other hand, denied that the applicant had been tortured and testified that he had made the confession freely and voluntarily.
- [5] A trial-within-a-trial was held. As the true issue was whether the applicant made the statement, it was, in fact, unnecessary but, as I said in my judgment, no harm was done. I found – on the basis, inter alia, of expert evidence led by both the State and the defence – that the signatures on the confession were the applicant's and that he had made the confession.
- [6] That finding is attacked in this application. After detailing the evidence led by both parties, I concluded as follows in my

judgment

(from para 40-45):

[40] What stands out in the evidence of both Rheeder and Cloete is the following: first, neither says that the accused did not make the disputed signatures; secondly, that it was extremely unlikely that the disputed signatures were forgeries; and thirdly, that it would have taken a person of rare skill to have forged the disputed signatures.

[41] The issue that I have to decide is whether the accused signed the statement as Mayi alleges. The accused's version, after all, is that no interview with Mayi took place, he made no statement and that consequently he never signed the statement in question. The beatings and torture that he says that he endured are irrelevant to the issue. If I disbelieve him on his version, I cannot see on what basis I can accept that he was in fact beaten and tortured and then conclude that despite his evidence to the contrary, those beatings and torture induced him to make a statement he denies making.

[42] If the accused's version is to be accepted it also has to be accepted that the police – probably Mayi – first concocted the statement and then procured the services of a highly skilled professional forger to forge the accused's signature; and that the forger first studied the accused's signature and its natural variations before forging some with one of the natural variations and some with another. This is improbable in the extreme.

[43] Mayi's evidence may be subjected to criticism to an extent. For instance, he was clearly not open with the court when he denied that the accused had at some stage soiled himself. The purpose of his denial is beyond me because he had, in the accused's bail application, given evidence that the accused had indeed soiled himself. For the rest, he was attacked in cross-examination for minor errors in filling in the form on which the statement had been taken. By and large, however, on the central issue of whether he interviewed the accused on 4

December 2009, whether he warned the accused of his rights, whether he took the statement and whether the accused signed it, he was a satisfactory witness. His evidence is supported too by

the probabilities.

[44] The accused, on the other hand, gave a version that suffered from a number of problems. He claimed to have been severely assaulted by the police kicking him, inter alia, on the head a number of times but does not appear to have suffered any visible injuries as a result. He made no complaints of injuries when booked into the cells at Despatch and no injuries on him were noted by anyone there. He claimed that the police planted two firearms in his backpack but, as it happened, ballistic testing established months later that one had been used to shoot the deceased, a fact that the police could not have known at the time. But perhaps most tellingly, the accused's version simply cannot answer the overwhelming improbabilities that are highlighted by the evidence of both Rheeder and Cloete. As a result, it cannot be reasonably possibly true. On the other hand the State's version accords with the probabilities and I also accept the evidence of Mayi that he interviewed the accused, warned him of his rights, took down the accused's statement and saw the accused sign the statement on each page.

[45] As a result, I concluded that the State had proved the making of the statement by the accused beyond reasonable doubt. I accordingly admitted the statement.'

[7] The second line of attack on my judgment relates to my acceptance of the evidence that the applicant was in possession of a particular cellphone and the expert evidence of Ms. Hilda Du Plessis as to where and when that cellphone was used.

[8] The applicant denied that he owned a cellphone. I rejected his evidence. Once I had accepted that the cellphone in question

was his, his confession taken with the evidence of Ms. Du Plessis destroyed his alibi in respect of the murder conviction.

[9] A number of issues rendered the applicant's version untenable. First, the investigating officer testified that during the course of his investigation he had obtained the applicant's cellphone number. On his arrest, a cellphone was found on him and the number accorded with the information that the investigating officer already had. He also checked the cellphones of the applicant's associates and found that his number was listed on them under his nickname, Ray. Moreover, in his confession he spoke of having been phoned and alerted to the presence of the deceased at a night club. I found this evidence to be overwhelming.

[10] I have set out, in some detail, the evidence and my findings in relation to the confession and the cellphone evidence. I am satisfied that there are no reasonable prospects of a court of appeal arriving at conclusions, contrary to those arrived at by me in respect of this evidence and the convictions they support.

[11] In the result, there is no merit in the application for leave to appeal against conviction.

[12] I turn now to the application for leave to appeal against sentence.

[13] I departed from the prescribed sentences of 15 years imprisonment in respect of the robbery and possession of firearm counts. I did so largely on the basis of the generally favourable personal circumstances of the applicant. At the same time, I recognised the inherent seriousness of these offences.

[14] I was, however, unable to find substantial and compelling circumstances to justify a departure from the life sentence for the

murder conviction. I concluded that the 'favourable personal circumstances of the accused must bow to the gravity of the offence – a callous, brutal, planned and pre-meditated execution of a State witness – and the interests of society in the due and proper administration of justice and the investigation and prosecution of crime'.

[15] In my view, there are no reasonable prospects of a court of appeal interfering with the sentences I imposed.

[16] As a result, the application for leave to appeal against both conviction and sentence is dismissed.

C. PLASKET

JUDGE OF THE HIGH COURT

Appearing on behalf of Applicant: C van Rooyen

Instructed by: Port Elizabeth Justice Centre

Appearing on behalf of Respondent: M Sanden

Instructed by: Office of the Director of Public Prosecutions, Port Elizabeth

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