

SOUTH AFRICA / JUDGMENT

Kock v S (A174/2024) [2024] ZAWCHC 363 (24 October 2024) [2024] ZAWCHC 363

COURT

Western Cape High Court, Cape Town

BEFORE

Van den Berg AJ, Allie J

CASE / FILE NUMBER

A174/2024

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IN THE HIGH COURT OF SOUTH AFRICA

WESTERN CAPE DIVISION, CAPE TOWN

HIGH COURT CASE NO: A174/2024

LOWER COURT CASE NO: ORC78/2022

SET DOWN DATE: 13 SEPTEMBER 2024

DIVISION 1

In the appeal between

ELJU-NICK KOCK

APPELLANT

And

THE STATE

RESPONDENT

JUDGEMENT

DELIVERED ELECTRONICALLY ON 24 OCTOBER 2024

1. The appellant appeals against his conviction on one count of murder as well as the sentence of 15 (fifteen) years of direct imprisonment imposed by the Regional Magistrate S Mandla of Oudtshoorn on 7 June 2023.

2. The tragic events leading to the appellant's conviction illustrate the unacceptably high rates of unlawfulness, violence and alcohol abuse that are prevalent in many of our rural areas and townships.

THE CHARGE, CONVICTION AND PETITION

3. The charge against the appellant reads as follows:

"That the accused is guilty of the crime of Murder (read with the provisions of section 51(2) of the Criminal Law Amendment Act 105 of 1997:

IN THAT upon (or about) the 25.12.2021 and (or near) OUDTSHOORN, in the REGIONAL DIVISION OF THE CAPE, the accused did unlawfully and intentionally assaulted ABRAHAM MAY, a male person, by HITTING HIM WITH A SPADE as a result of which he died on 27.12.2021."

4. The appellant pleaded not guilty and made the following formal admissions at the commencement of the trial:

4.1. The appellant admitted that he hit the deceased once with a spade, which resulted in the death of the deceased.

4.2. The accused alleged that he and his family were under attack and that he defended himself and/or his family.

4.3. In the process, he accidentally hit the deceased, who was standing next to him.

5. The accused, in addition to the formal admissions made, admitted Exhibit A being the post-mortem report compiled by Dr Christa Hattingh reflecting the cause of death being a blunt force head injury. The main postmortem findings included:

"...Deep scalp bruising, intracranial haemorrhage, brain contusions and intraventricular haemorrhage as well as brain swelling."

6. The Court a quo convicted the appellant of murder in the form of dolus eventualis on 31 May 2023 and, after hearing arguments by Counsel, found no substantial and compelling circumstances justifying a deviation from the prescribed minimum sentence of 15 (fifteen) years.
7. The appellant was sentenced on 7 June 2023 to 15 (fifteen) years imprisonment. Leave to appeal was denied, but Justices Fortuin and Cloete granted the appellant's petition against his conviction and sentence on 25 March 2024.

EVIDENCE THE COURT A QUO - CHRISTMAS DAY 2021

8. The State presented only Ms Udene Campher's evidence, and the appellant testified on his own behalf.

9. According to Ms Campher, she was at home on 25 December 2021, sitting outside her house in the yard. Children were throwing stones at a house in Campher Street. One of the children went to the deceased's house, and he (the deceased) came out of his house and went to the house from where the stones were being thrown. A quarrel of sorts ensued between the deceased and the bystanders.
10. A neighbour, David Julies, came out of his house with a spade in his hand. The deceased was standing on the street corner, talking to his son to stop throwing stones at the houses. According to Ms Campher, the appellant walked up to David Julies and the deceased from another street. The appellant took the spade from David Julies and hit the deceased with the back of the spade. Ms Campher denied that the deceased was struck with the spade by accident or that the deceased or the bystanders were attacking the appellant.
11. After the deceased fell to the ground, people started throwing stones at the appellant, and a stone struck him on the right side of his head.
12. The appellant testified in his own defence that he was returning from a local tavern where he had at least 4 (four) beers and other liquor.
13. On his way home, he saw that some people were attacking his brother-in-law. The appellant attempted to walk towards his brother-in-law but was attacked.
14. Under cross-examination, the appellant testified as follows regarding the moments before he struck the deceased with the spade:

“PROSECUTOR: No, sir you already told us you saw David Julies standing there, so your focus was on David at some stage. Right next to David is a man standing why did you not see that man?”

TOLK: ..

BESKULDIGDE: Want is nie hy daar, hy was mos nie alleen daar nie, daar was nog mense by, rondom ons almal daar.

INTERPRETER: Because it was not only he who was there, A YOUR WORSHIP, there were also a lot of people around us, your worship.

PROSECUTOR: Yes, there were people around you.

COURT: So you will be able to see even the people that were around there?

TOLK: So u kon die mense daar rondom ook sien?

BESKULDIGDE: Ja.

INTERPRETER: Yes your worship.

PROSECUTOR: But you did not see the deceased standing right next to David?

TOLK: ...

BESKULDIGDE: Ek het die oorledene eers gesien toe hulle sê hy is oorledene, maar ek het nie hom daar gesien of met hom gepraat of in kontak gewees met hom of enigsins iets nie.

INTERPRETER: Yes your worship, I only saw the deceased after I was told that he is deceased. Your worship, I did not have any contact with him or see him when I was there, your worship.

PROSECUTOR: I think, I think it is for the sake of convenience that you did not see the deceased next to David.

PROSECUTOR: But let us, let us proceed. The deceased was standing next to David, you might not have seen him.

PROSECUTOR: Now you are running away from people chasing you.

PROSECUTOR: They are pursuing you; they are following you; they are about to corner you.

BESKULDIGDE: Ja, besig om te slaan en dan my vas ja sê maar ja.

INTERPRETER: Yes, your worship also hitting at me your worship.”[1]

15. And further,

“TOLK: Nou u vat die graaf by Dawid; jy draai om om die persone te slaan wat jou agtervolg.

PROSECUTOR: So you hitting in the opposite direction of where Dawid is, because these people are coming from behind.

TOLK: So u slaan nou in die teenoorgestelde rigting van wat Dawid is want hierdie mense kom van agter af.

“PROSECUTOR: Yet you missed all those people and connected with someone standing right next to David who is now behind you.

PROSECUTOR: Next to David next to David.

BESKULDIGDE: Dit is, met die swing het ek nie, ek het mos net omgedraai en geswing, ek het nie gekyk waar wie staan, waar wie is; ek het net die swing gedoen, dit is al.

INTERPRETER: Your worship, I only swung. I did not check as to where who was standing, your worship.

PROSECUTOR: Yes, you only swung, but I mean you were not swinging in David's direction?

BESKULDIGDE: Presies.

INTERPRETER: Precisely your worship.

PROSECUTOR: But that is what happened sir, you must have swung in his direction, because the deceased was standing right there next to him.

BESKULDIGDE: Kan dit wees dat die oorledene, soos hy ook gevra het, miskien kan beweeg in die graaf in.

INTERPRETER: Now as the prosecutor also put it earlier, your worship, it could also be that the deceased moved into the spade.

PROSECUTOR: You are a logical man, but the evidence suggest, the witness who saw you hitting the deceased says the deceased did not move, he was standing right next to David. You went to David; you took the spade; picked it up; and hit the deceased.

BESKULDIGDE: Dit is nie waar nie.

INTERPRETER: That is not true, your worship.

PROSECUTOR: But you, you will agree on your version it would have been difficult to connect with someone standing next to David.

INTERPRETER: Yes your worship.”[2]

16. The appellant embellished his version during cross-examination by alleging that the bystanders cornered him and even attacked him with a knife, causing him to act in self-defence. He moved away from the alleged attackers and turned to take the “wild swing”.

COMMON CAUSE FACTS AND ALLEGED CONTRADICTIONS IN THE EVIDENCE

17. The cause of death of the deceased after being struck with a spade against the head by the appellant on 25 December 2021 is common cause. The deceased was hospitalised on the same day and died on 27 December 2021. The cause of the deceased death, as per the medico-legal postmortem examination, is a further common cause fact.
18. The appellant’s version that he took a “wild swing” with the spade in the direction of unidentified persons (not the deceased) who were attacking him forms the essential basis upon which the Court a quo rejected his version.
19. The only issue to be decided regarding the appellant’s conviction is if the State proved murder in the form of *dolus eventualis* beyond a reasonable doubt. In *S v Naidoo*[3] the emphasised that a Court of Appeal does not overturn a Trial Court’s findings of fact unless they are shown to be vitiated by material misdirection or are shown by the record to be wrong. In this regard, it was argued on behalf of the appellant that the Regional Magistrate misdirected herself in not recognising that the single State witness, Ms Campher, made material concessions during cross-examination.
20. I cannot agree with the appellant’s submissions. The concessions, if they are indeed concessions, were correctly made and pertained to aspects that neither disproved the state’s case nor supported the appellant’s version.

21. Regardless of any criticism against the State witness, the appellant's testimony was even more dissatisfactory. The conspectus of the evidence indicates that the bystanders did not attack the appellant before he hit the deceased with the spade; the appellant could not recall the number of attackers and their identities. The appellant could not provide the Court with any corroborating evidence.
22. It may be that some children were throwing stones at houses, but this does not constitute circumstances under which the appellant could have acted in self-defence by "swinging wildly" with a spade at a person who posed no threat. The appellant never claimed that the deceased had threatened him, participated in throwing stones, or pursued him. The deceased stood beside the man from whom the appellant took the spade. Neither one of these men posed a threat to the appellant, yet he decided to swing the spade wildly in their direction. He missed David Julies, from whom he took the spade, but hit the deceased against the head. This is not a case of a mere mistake.

DOLUS EVENTUALIS AND SELF-DEFENCE

23. The first question to be determined is whether the State has shown beyond a reasonable doubt that the accused did not believe that he was lawfully entitled to strike the deceased with the spade in self-defence. In *S v Naidoo*[4] the Court held that if death results from an accused's negligence, i.e. culpa and not from an unlawful intention, i.e. dolus, it cannot be said that he was unlawfully intending to use such excessive force. However, this defence should not be taken

further and applied in circumstances where a person is not under attack and does not need to defend himself but genuinely and reasonably believes that he is under attack. In the *Naidoo* matter, the accused shot his own father mistakenly. He thought

his father was a burglar who attempted to access a kitchen back door.

24. In *S v Maarohanye and another*[5] the Full Court of the Gauteng Division affirmed that the determination of dolus eventualis was, in essence, a subjective value judgment that was reliant on inferential reasoning and based on what the person thought, not on what he should have foreseen. The Court confirmed the comment by Holmes JA in *S v De Bruin & Another* regarding the distinction between objective foreseeability (culpa) and subjective foresight (dolus eventualis), as follows:

"The fact that objectively the accused ought reasonably to have foreseen such possibility is not sufficient. The distinction must be observed between what actually went on in the mind of the accused and what would have gone on in the mind of a bonus paterfamilias in the position of the accused. In other words, the distinction between subjective foresight and objective foreseeability must not become blurred. The factum probanda is dolus not culpa. These two different concepts never coincide."[6]

25. The state of mind relevant to determining dolus must not be confused with motive. If an accused person honestly but erroneously believed that his conduct in killing another was justified, then dolus is excluded[7].
26. There are no grounds for this Court to reject the findings of the Court a quo. The deceased posed no threat to the appellant. The accused intentionally took the spade from David Julies, and he offers no explanation for why he did not see the deceased standing next to Mr Julies. Taking account of the consequence of the blow, namely that death ensued, the evidence does not support the appellant's version of merely taking a "wild swing" at perceived attackers. He intentionally took the spade and hit the appellant, demonstrating dolus. The Court a quo's conviction of murder with dolus eventualis does not fall to be rejected, and the conviction should stand.

THE APPELLANT'S PERSONAL CIRCUMSTANCES

27. The appellant was 27 years of age at the time of his arrest. He is not married but in a relationship with his girlfriend of 6 years. They have a 2-year-old son, but the appellant also supported 2 (two) children of his girlfriend from a previous relationship. The appellant attained Grade 12 and was employed as a barber at the time of the offence. He has no previous convictions.
28. The traumatic and psychological impact of the deceased's untimely demise on his family cannot be understated. It is even more tragic when one considers that the deceased was an elderly defenceless man who was busy attempting to stop children from throwing stones on Christmas day at the surrounding houses.

EVALUATION OF THE LAW REGARDING SENTENCING

29. The court must consider the seriousness of the offence, the personal circumstances of the accused, and the interests of society when determining the sentence. There must be compelling circumstances that warrant the deviation from the prescribed sentence.[8]
30. In *State v Kekana*[9] The Supreme Court of Appeal held regarding the deviation from minimum sentences that, as a general proposition, an accused who wishes for a lesser sentence to be considered must set out the facts on which such a conclusion can be premised.
31. In the matter of *State v SMM* 2013 Vol. 2, SACR 292 SCA at paragraph 13 the following was stated:

"It is also self-evident that sentence must always be individualised, for punishment must always fit the crime, the criminal and the circumstances of the case. It is equally important to remind ourselves that sentencing should always be considered and passed dispassionately, objectively and upon a careful consideration of all relevant factors. Public sentiment cannot be ignored, but it can never be permitted to displace the careful judgment and fine balancing that are involved in arriving at an appropriate sentence. Courts must therefore always strive to arrive at a sentence which is just and fair to both the victim and the perpetrator, has regard to the nature of the crime and takes account of the interests of

society. Sentencing involves a very high degree of responsibility which should be carried out with equanimity."

32. Lastly, in *State v Nkomo* 2007

(2) SACR 198 SCA, the Court reaffirmed:

"In *Malgas*, however, it was held that in determining whether there are substantial and compelling circumstances, a court must be conscious that the Legislature has ordained a sentence that should ordinarily be imposed for the crime specified, and that there should be truly convincing reasons for a different response."

REGARDING THE PROPORTIONALITY OF THE SENTENCE IMPOSED

33. Sentencing is inherently within the discretion of a trial court. This Court's powers to interfere with the trial court's discretion in imposing sentence are limited unless the trial court's discretion was exercised wrongly or where the sentence is shockingly

disproportionate to the offence. The essential enquiry in an appeal against a sentence is not whether the sentence was right or wrong, but whether the court exercised its discretion properly and judiciously. There must be either a material misdirection by the trial court or a gross disparity between the sentence and the nature of the offence. This Court can interfere with a trial court's sentence in a case where the sentence imposed was disturbingly inappropriate^[10].

34. The appellant has shown no real or true remorse, and although he is young, he was not a child or even a youth at the time of committing the murder. The Court a quo highlighted the circumstances throughout why a deviation for a sentence less than the prescribed minimum of 15 years was not justified.

35. There are no substantial and compelling circumstances which may cumulatively justify a departure from the sentence prescribed by the Act.^[11] The Court a quo's finding regarding the objectives of sentence, including reformation, rehabilitation, prevention, and deterrence, was correctly considered

by not deviating from imposing the prescribed minimum sentence.

36. The prescribed minimum sentence of 15 years undoubtedly reflects a comprehensive, correct and careful balance between the personal circumstances of the appellant, the seriousness of the offence and the interest of the victim's family and community. No amount of sentence will bring the life of the deceased back. The appellant should be confronted with the consequences of his crime and receive a sentence that will deter other people from committing similar offences.

37. There is no gross disparity between the sentence which the appeal court would have imposed had it been the trial court and that imposed by the Court a quo. The sentence is not disturbingly inappropriate.

38. In the result, I propose that the following order is granted:

[1] The appeal is dismissed.

VAN DEN BERG AJ

ALLIE, J:

I concur.

ALLIE J

[1]

Record, pp 138, line 17 to 140, line 8

[2][2] Record pp140, line 9 to pp 143, line 4

[3] 2003

(1) SACR 347 (SCA) at para 26

[4]

[1998] JOL 1958 (TK) at pp 12

[5] 2015 (2) SA 73 (GJ)

[6] S v Maarohanye 2015 (2) SA 73 (GJ) at [16] 79I to 80C

[7] S v Dougherty 2003 (4) SA 229 (WLD) at p240, para 34

[8] State v Zinn 1969 (2) SA 537 (A) at 540G

[9] 2019 (1) SACR 1 (SCCA) at para 19

[10] S v Salzwedel and others 1999 (2) SACR 586 at 588A-B [also reported at [1999] JOL 5809 (A);

[2000] 1 All SA 229 (A)

[11] S v Malgas 2001 (1) SACR 469 (SCA) para 25

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