

SOUTH AFRICA / JUDGMENT

Marks and Another v S (A156/2023) [2024] ZAGPJHC 594 (20 May 2024)

[2024] ZAGPJHC 594

COURT

South Gauteng High Court, Johannesburg

BEFORE

Ismail, Mabesele, Strydom

CASE / FILE NUMBER

A156/2023

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REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, JOHANNESBURG)

Case No: A156/2023

Heard on: 29 April 2024

Judgement on: 20 May 2024

1. Reportable: YES
2. Of interest to other judges: YES
3. Revised.

20 May 2024

In the matter between: -

BEAUGAN MERVYN MARKS

First Appellant

JANOSKY KADE TRISTAN

Second Appellant

and

THE STATE

JUDGMENT

ON APPEAL

Ismail J: (Concurring Mabesele & Strydom JJ)

· This judgment was handed down electronically by circulation to the parties forwarded to the parties' legal representatives by email and posted to the CaseLines platform on 20 May 2024 at 10h00.

- (1) The first appellant was convicted of murder, read with the provisions of section 51 (1) of the Criminal Law Amendment Act 105 of 1997 (the Amendment Act) as well as two counts of attempted murder. He was sentenced to life imprisonment for murder, and to 15 years imprisonment for each count of attempted murder.
- (2) The second appellant was convicted of unlawful possession of a semi-automatic firearm as well as unlawful possession of ammunition in contravention of the Firearms Control Act 60 of 2000 (the FCA). He was sentenced to 10 years imprisonment for being in possession of the firearm in contravention of the FCA and to 3 years imprisonment for being in possession of ammunition without having a permit or license to possess such ammunition. The 3 years' imprisonment on the ammunition count was to be served concurrently with the 10 years sentence.
- (3) Leave to appeal in respect of the first appellant was refused by the trial court, however he successfully petitioned the Supreme Court of Appeal which granted him leave to appeal in respect of both his convictions and sentence. The second appellant was granted leave to appeal against his sentence only by the trial judge.
- (4) In summary the two appellants were convicted of an incident which occurred on the 5th of June 2021 at a spin and drag racing event. The incident occurred at approximately 7 pm and it was apparently dark, due to load

shedding at the time. It is common cause the surrounding area was lit by means of bins which were lit by fire.

- (5) An argument took place between the first appellant and the deceased which ultimately led to the deceased being shot by the appellant. The deceased's brother, Cole, approached the first appellant and said to him you shot my brother whereupon Cole was also shot by the appellant. Shannon, another brother of the deceased who, was also present when deceased was shot, was also shot by the first appellant.
- (6) According to the witnesses who testified on behalf of the prosecution none of them were armed. Their evidence was that the first appellant for no apparent reason shot them.

- (7) The first appellant testified that the deceased tried to disarm him of his firearm, and in the struggle a shot was discharged which struck the deceased, thereby fatally injuring the deceased. His version was that it was an accidental discharge of the firearm during the struggle. It should be noted that the first appellant never explained how it came about that the trigger of the firearm was pulled.
- (8) His version apropos the shooting of Cole and Shannon was that they approached him aggressively and he fired at them as he feared for his life and safety. During cross-examination the first appellant at some stage changed his version pertaining to the shooting of Shannon from

self-defence to an accidental discharge of the firearm.

- (9) The second appellant was convicted of the offences as he took the licenced firearm belonging to the first appellant without his consent and he fired two shots into the air, in order to prevent the crowd from attacking them. This mean that for a short while he was in possession of his brother's firearm without himself having a licence to possess same. This incident preceded the shooting of Kegan (deceased), Cole and Shannon.
- (10) This in a nutshell was the background of the incident under which the shooting took place.
- (11) The trial court convicted the first appellant of pre-meditated murder and sentenced him to life imprisonment in respect of the killing of Kegan. The gravamen of the appeal is that the trial court erred in finding that the first appellant's actions were pre-meditated, and that the trial court misdirected itself as it did not make such a finding when convicting the first appellant. The finding of pre-meditation was only made in its judgment on sentence and not in its judgment on conviction. This finding of pre-meditation during the sentencing stage was a misdirection according to the appellant as he was not afforded an opportunity to address the court on that question.
- (12) In support of this submission the first appellant relied upon the full court judgment of S v Taunyane 2018 (1) SACR 163 (GJ) at paragraphs

- [8] to [15] Satchwell J stated:

"[11] That a conviction of murder must be identified as being 'planned or premeditated' at the conviction stage indicates the standard of the burden of proof which applies to the description of or the circumstances of the murder of which the accused is convicted".

- (13) The issue raised in S v Baloyi 2022 (1) SACR 557 at 562 e-f is a similar point raised in this appeal namely that it is a misdirection that the trial court only pronounced on the issue of premeditation in its judgment on sentence and not during the pronouncement of the verdict. This was argued to constitute a misdirection, which prejudiced the first appellant. The court in Baloyi referred to Legoa [2003 (1) SACR 13 SCA] and found that the appellant received an unfair trial as a result of the misdirection by the trial court. At para [22] of the judgment the court, stated:

“[22] Failure to make a pronouncement at the verdict stage, as to which provisions of part 1 of sch2 of Act 51 (1) of the CLAA to the accused’s conviction, constitutes a misdirection in every case it occurs. However, such failure will not always prejudicially affect the accused to an extent that the accused will avoid being sentenced to the minimum sentence of life imprisonment. If it were to be the case, it would result in a miscarriage of justice. “

- (14) Whether a crime was pre-meditated requires a consideration of the factual matrix. This consideration should take place during the conviction stage and should form part of a finding of guilt. If this is not done by a trial judge in his judgment on conviction, this in itself, however, does not necessarily amount to an irregularity leading to a miscarriage of justice. The question of prejudice suffered by an accused would need to be considered. There is no need in this matter to consider whether the first appellant was

prejudiced as a result of the trial judge not making a finding on pre-meditation in this matter as a finding whether or not the first appellant was in fact acting with pre-meditation may take away the need to consider any possible prejudice suffered.

- (15) It was submitted that the crime was not pre-meditated or planned but rather that it occurred on the spur of the moment. It was contended on behalf of the first appellant that relying on *S v Raath 2009*
- (2) SACR 46 (C) where it was suggested that in order to determine pre-meditation, one would have to establish the time between the accused forming the intent to murder and the carrying out of the intention.
- (16) In *S v Peloele 2022 (2) SACR 349 SCA* the court found that the question whether a crime was pre-meditated requires a consideration of the factual matrix of each case, in order to establish the state of the perpetrator’s mind when the act leading to the death of the victim took place.
- (17) In casu, the parties were involved in an argument where words were exchanged. The first appellant at some stage pointed his finger at deceased.

After the argument, the first appellant took back his firearm from his brother, who just before this fired two shots in the air. Whilst the firearm was now in the possession of first appellant a shot was fired causing the death of deceased. On the version accepted by the trial court, the first appellant shot at the deceased when the latter was close to him. The deceased was not armed in any fashion or manner at the time. The appellant fired a shot at Cole when he said to the first appellant, “you shot my brother”. It appears that the first appellant was keen to shoot anybody who challenged him, albeit verbally.

- (18) The determination of time from the stage of forming the intent and the actual carrying out of the crime as suggested in Raath’s case is not the sole determinant of pre-meditation. The Supreme Court of Appeal in *S v Kekana (629/13)*

[2014] ZASCA per Mathopo JA held that:

“In my view it is not necessary that the appellant should have thought or planned his action for a long period of time in advance before carrying out his plan. Time is not the only consideration because even a few minutes are enough to carry out a premeditated action.”

- (19) I will now deal with the trial court's findings regarding the murder and attempted murder counts. The trial court found that the killing of the deceased occurred whilst the first appellant and the deceased were a short distance apart. It found that the first appellant's version that there was a struggle for the firearm was not true and consequently rejected the first appellant's version. It found that the prosecution proved that the first appellant shot the deceased whilst they were close to each other, and that the deceased was not armed.
- (20) Shortly thereafter, Cole and Shannon were shot by the first appellant. The time period between the shooting of the deceased and the subsequent shooting of the other two persons occurred within a short space of time. To say moments after the initial shooting of the deceased would not be an exaggeration. Counts 2 and 3 occurred moments after the initial shooting of the deceased. The situation was fluid and there was no evidence of any prior problems between the two appellants and the victims.
- (21) It is not clear what prompted the initial row between the people and the appellants, however the second appellant testified that the group gathered around his vehicle and this set-in motion the attack against him which resulted in him firing two shots, with the first appellant's firearm, into the air. Whatever triggered the altercation, I do not believe that the facts of the case or the factual matrix reflects that the actions of first appellant were planned or pre-meditated.
- (22) In my view, the trial court misdirected itself in its finding that the shot was fired with sufficient pre-meditation for purposes of rendering section 51(1) of the Amendment Act applicable.
- (23) Accordingly, when it comes to the sentence the provisions of section 51(2) of the Amendment Act would apply. It should be noted that according to the indictment the state was relying on a finding that the two appellants acted in the furtherance of a common purpose to bring the murder count within the ambit of section 51(1) of the Amendment Act. There was no evidence to support such a finding and the trial court correctly made no such finding.
- (24) It was contended on behalf of the first appellant that the trial court erred firstly in finding that the killing was pre-meditated and secondly it also erred in finding that there were no substantial and compelling circumstances. Having found that the murder was not pre-meditated there is no need to consider whether substantial and compelling circumstances exist to deviate from the prescribed minimum sentence as contemplated in section 51(1). These circumstances should however be considered within the ambit of section 51(2) of the Amendment Act. It should be noted that the sentence of 15 years imprisonment prescribed for murder mentioned in Part II of Schedule 2 is a minimum sentence. What needs to be considered is not only circumstances favouring the appellant but also the aggravating

circumstances.

- (25) Mr. Kruger, submitted that the following factors taken cumulatively amount to substantial and compelling circumstances favouring the first appellant to a sentence less than the prescribed minimum sentence, albeit that the submission was made within the context of the sentence being imposed in terms of section 51(1) of the Amendment Act.

25.1 The first appellant was relatively young namely 27 years old at the time;

25.2 He had no previous convictions;

25.3 He was a sickly person in that he used a stoma bag;

25.4 He had been in custody for 11 months from the verdict being pronounced, until he was finally sentenced.

- (26) The question of differences and contradictions in a witness's evidence per se do not lead to the rejection of a witness's evidence – see *S v Mkhole* 2 001 (1) SACR 97 (W). In *S v Sauls and others* 1981 (3) SA 172 (A) whilst dealing with the evidence of a single witness remarked:

“There is no rule of thumb test or formula...The trial judge will weigh his evidence, will consider its merits and demerits and having done so, will decide whether it is trustworthy and whether despite the fact that there are... shortcomings or defects or contradictions, in the testimony, he is satisfied that the truth has been told ...”. (My underlining)

- (27) The test in weighing up the evidence in a criminal trial has been succinctly stated by Nugent J (as he then was) in *S v van der Meyden* 1999

(1) SACR

“a court does not base its conclusion, whether it be to convict or acquit on only part of the evidence.” - 82 A-B. Further at 82D-E the learned judge continued: “What must be borne in mind, however, is that the conclusion which is reached (whether to convict or acquit) must account for all 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 be found to be only possibly false or unreliable; but none of it might simply be ignored”.

- (28) Similarly, the court in *S v Mafaladiso en Andere* 2003 (1) SACR 583 at 584 held that:

“Where there are material differences between the witnesses' evidence and their prior statement, the first task for the judge is to weigh up the previous statements against viva voce evidence, to put all the evidence together and to decide which is reliable and whether the truth has been told despite any shortcomings. This means that the court is enjoined to consider the totality of the evidence to ascertain if the truth has been told.”

- (29) The golden thread of these cases is that the trial court will weigh the evidence and the inconsistencies and contradictions in the totality of the evidence and determine whether the truth has been told. In my view the trial court did just that, in determining the innocence or guilt of the appellants. At paragraph

[19] of the judgment the court remarked:

“I have carefully listened to the evidence of the state witnesses and taken cognizance of their conduct and behaviour when they testified, and it is clear in my mind that their evidence clearly has a ring of truth. I did not get the impression at any stage that these witnesses had come to falsely implicate the accused in the commission of the crimes...”

- (30) The fact that the three state witnesses also contradict themselves pertaining to how the shot went off is not decisive. The evidence should be considered in its totality together with the probabilities. If this is done the evidence of Robin Brierley to the extent that it is in conflict with the evidence of Cole and Shannon Brierley should be rejected.
- (31) Having considered the evidence the conclusion must be that first appellant had no reason to shoot the deceased. Once he had taken possession of his licenced firearm he acted with bravado and had no regard for the life of the deceased. This in my mind is an aggravating circumstance, Further, he shot more than one person.
- (32) It is clear that the first appellant when he shot the deceased had the direct intent to kill the deceased and he was, correctly in my view, convicted on the murder count. His version on how the fatal shot was fired did not make sense at all. He testified that he at all relevant stages did not have his finger on the trigger. The firearm was pulled by the deceased. Consequently, the deceased also could not apply pressure on the trigger as he was pulling in the opposite direction.
- (33) I am satisfied that the convictions on counts 2 and 3 were sound and that the accused did not act in self-defence. His version that he was attacked by Cole and Shannon was rejected by the trial court. The overwhelming evidence does not support the view that there was an attack on the first appellant and for that reason his version was rejected. Moreover, the first appellant changed his version pertaining to the shooting of Shannon Brierley. It started off that he acted in self-defence and ended in an accidental shooting.
- (34) The two complainants on counts 2 and 3 are fortunate to have survived the shooting incident. The injury that the one victim suffered was particularly serious as he was shot in the face, and he needed to be operated on and he is still experiencing hearing problems. The sentences imposed on these counts was 15 years imprisonment on each count.
- (35) I am of the view that there are substantial and compelling circumstances which would permit this court to deviate from the prescribed minimum sentence and to impose a sentence of more than the prescribed 15 years imprisonment. Having considered the personal circumstances of the first appellant, mentioned hereinabove, together with the aggravating circumstances, I am of the considered view that an appropriate sentence in respect of count 1 would be a term of 18 years imprisonment.

- (36) In my view the sentences imposed in respect of counts 2 and 3 are excessive and it calls for this court's intervention. A balanced sentence, having considered all relevant circumstances, a sentence of 7 years imprisonment on each count is imposed. In terms of section 280 of the Criminal Procedure Act (CPA) I order that these two sentences are to be served concurrently.
- (37) The effective sentence imposed on the first appellant is therefore 25 years imprisonment. The sentence is backdated to 9th November 2022. His appeal against his conviction is dismissed.

Second appellant on sentence only.

- (38) The second appellant was sentenced by the trial court to 10 years imprisonment for being in possession of an unlicensed firearm and to 3 years imprisonment for being in possession of ammunition without having a licence to possess same. The 3 years sentence was ordered to run concurrently with the 10 years imprisonment.
- (39) It was submitted that the sentences imposed were shockingly inappropriate in that it induced a sense of shock. It called for this court's intervention. Mr Kruger submitted that the court should impose a sentence which is wholly suspended bearing in mind that the second appellant only had his brother's licenced firearm in his possession for a very short period of time, literally a few minutes. The firearm was used to fire two warning shots into the air in order to ward off a crowd from attacking him. After his brother took back his firearm the second appellant ran away.
- (40) Mr Kruger relied upon a judgment of the Supreme Court of Appeal, in *Yusuf Mohamed Asmal v S* [2015] ZASCA 22, where the appellant was given a sentence of 8 years for a fully automatic firearm namely an AK47, however appellant 2 was sentenced to 10 years for being in possession of his brother's firearm for a few minutes.
- (41) The second appellant was 21 years old with no previous convictions. He also spent 11 months in custody from the time that the verdict was pronounced until he was sentenced. It was submitted that he already spent 11 months in prison. The facts of this case were unique and distinguishable from the usual cases where persons were found in possession of an unlicensed firearm, sometimes used to commit serious crimes.
- (42) The defence submitted that a wholly suspended sentence in this case would be an appropriate sentence. The state advocate reluctantly conceded that 10 years for possession of an unlicensed firearm and ammunition was severe, however, he maintained that the court should interfere but still impose direct imprisonment of at least 5-6 years.

- (43) Taking all the factors relating to sentencing into consideration and more particularly the uniqueness of the circumstances of the possession of the firearm by the second appellant, I believe that there is some merit to the argument advanced on behalf of the appellant that a suspended sentence would be an appropriate sentence in this case.
- (44) However, we stress that this case should not be regarded as a precedent for sentencing of all crimes relating to unlawful possession of a firearm. The sentence imposed is unique to the facts and circumstances of this case.
- (45) In the circumstances the appeal in respect of the sentence of second appellant is upheld and he is sentenced as follows: The trial court's sentence is substituted with the following sentence:

45.1 5 years imprisonment for being in unlawful possession of a firearm which is wholly suspended for a period of 5 years on condition that the appellant is not found in possession of an unlawful firearm within the period of suspension.

45.2 Second appellant is sentenced to 18 months imprisonment for being in possession of ammunition without having a permit or licence to possess such ammunition. The sentence is wholly suspended for 5 years on condition that he is not found in possession of ammunition without a permit or licence to possess ammunition during the period of suspension.

- (46) The sentences, respectively, are each backdated to 9th November 2022.

M.H.E ISMAIL

JUDGE OF THE HIGH COURT

GAUTENG DIVISION, JOHANNESBURG

I agree,

M.M. MABESELE

R. STRYDOM

APPEARANCES:

Date of Hearing:

29 April 2024

Date of Judgment:

20 May 2024

Appearances:

For the Appellants:

Mr. J. C. Kruger

Instructed by:

David H. Botha, Du Plessis & Kruger Inc.

For the Respondent: Mr. R. Phungo.

Instructed by:

The National Prosecuting Authority

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