

SOUTH AFRICA / JUDGMENT

Mbekembe v S (CA&R38/2013) [2015] ZAECMHC 78 (19 November 2015)

[2015] ZAECMHC 78

COURT

Eastern Cape High Court, Mthatha

BEFORE

B Majiki, RWN Brooks

CASE / FILE NUMBER

CA&R38/2013

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IN

THE HIGH COURT OF SOUTH AFRICA

(EASTERN

CAPE LOCAL DIVISION, MTHATHA)

CASE

NO. : CA&R 38/2013

Heard

on : 23/10/2015
Date
delivered: 19/11/2015
In

the matter between: MONWABISI
MBEKEMBE
Appellant
And
THE
STATE
Respondent
APPEAL

JUDGMENT**MAJIKI J:**

[1] The appellant, then a 21 year old male member of the South African Police Service (SAPS), set on a journey in a police van to collect the deceased, according to him, in a mission to deliver the deceased to an officer who was investigating the appellant's complaint about the theft of his netting wires. Unfortunately, during the course of that fateful night, after the appellant had dropped the deceased near his home, the deceased succumbed to his untimely death, from serious bodily injuries he had sustained that night. The magistrate found that the appellant had inflicted the injuries on the deceased and therefore caused his death. He sentenced the appellant to fifteen years imprisonment in terms of section 51(2)(a) of Minimum Sentences Act 105 of 1997. Five years of the said sentence was suspended for five years subject to specified conditions. The appellant now appeals to this court against his conviction and sentence, having been granted leave upon the petition to the Judge President.

[2] The grounds of appeal against the convictions are:

2.1 The magistrate did not properly analyse and or evaluate evidence of the state witnesses which is fraught with material contradictions and inconsistencies.

2.2 The magistrate erred in admitting hearsay evidence as dying declarations made by the deceased and by not considering the requirements of Section 3 of Law of Evidence Amendment Act 45/1988.

2.3 The magistrate failed to give regard to the fact that the deceased was an interested party in the case, when he made the oral statement, admitted by the magistrate. He was a suspect in the case of theft of the appellant's netting wires.

2.4 The magistrate erred by admitting evidence that the appellant's family members apologised to the deceased's family and that the appellant paid for the deceased's funeral expenses.

2.5 The magistrate erred in finding that the contradiction as to the place of the deceased's assault was not a material.

2.6 The magistrate erred in not taking into account that there was a time lapse between the time the deceased was dropped by the appellant and the time when he was found by the state witnesses in his injured state.

2.7 The magistrate erred in finding that the appellant had the intention to kill the deceased.

2.8 The magistrate erred in not accepting that the appellant's version could reasonable be true.

2.9 The ground of appeal against sentence is that the magistrate erred in not finding that substantial and compelling circumstances exist which justify departure from imposing the minimum sentence of fifteen years. The sentence is also shockingly inappropriate.

- [3] It is common cause that in the evening of 08 February 2010 after 19h00 the deceased was fetched by the appellant who was driving a police van in company of his colleagues Constable Melane and Warrant Officer Ndamase. The deceased left his house keys with his neighbours when he was leaving with the police officers. He had no injuries at the time. Later on, warrant officer Ndamase was dropped at Bityi Police Station. The two other police officers drove with the deceased, the deceased loaded alone at the back of the police van. They were to attend a complaint at an area called Bukicini.
- [4] On their way back from Bukicini they passed the deceased homestead, they also did not go to the police station instead they headed for an area that did not have homesteads. During the course of the journey the appellant alighted from the vehicle a few times together with the deceased for few minutes at a time. Finally, they dropped the deceased.
- [5] The deceased was later found by his neighbours beaten up and severely injured. They took him to his house and laid him in his bed where he was discovered around 06h00, the next morning, having died due to injuries he had sustained. The findings of the post mortem examination recorded his death to have resulted from multiple fractured ribs, ruptured liver and severe blood loss consistent with blunt trauma. He also had multiple bruises on his body and was swollen.
- [6] The state had called 5 witnesses, I will focus on their evidence in as far as it relates to facts that are not common cause. Ms Nobulelo Balasane was deceased's neighbour. At about 22h00 she saw a police van and a person getting into the police van. At about 24 hours they heard the deceased shouting calling her son's name Bulelani. They found him lying on the ground in pains. He was moving sideways on the ground and uneasy. Upon enquiring as to what had happened to him, he told them that he was beaten by the appellant, asking him to tell the truth about the whereabouts of his missing netting wires. He was beaten with bare hands and the appellant was also wearing shoes. The appellant was with two police officers in the police van. The deceased had earlier dropped him next to Lukwetu bridge and later dropped next to his homestead. He then rolled down towards his homestead and started calling for Bulelani.
- [7] Mr Ncedo Mfenguza a relative of the deceased, testified about a delegation that visited them saying they were sent to come and apologise on behalf of the appellant because the appellant had killed the deceased. They offered and paid the costs of the funeral undertakers and contributed 5 sheep towards the expenses of the funeral.
- [8] Warrant Officer Ndamase testified that on the day of the incident he reported on duty at 18h45 for 19h00. He went to fetch the appellant together with constable Melane. He allowed the appellant to pass by the deceased's home after 19h00, the appellant had told him that he wanted to find out something from the deceased about his lost netting wires, the deceased

was also engaged in fencing. They left with the deceased. He remained at the police station. The appellant left with the deceased, on their way to attend to a complaint at Bukicini. The police officers came back between 24h00 and 01h00 and the deceased was not in their company.

- [9] Constable Melane corroborated the evidence of Warrant Officer Ndamase. On their way back from Bukicini the appellant did not go back to the police station. At a place where there were no homesteads, the appellant had alighted a few times from the van. Each time he would open for the deceased to also alight from the back of the vehicle. They never reached Lukwetu Bridge, they stopped about 350 to 500 metres away from the bridge. She never saw what had happened on each occasion. Those moments would not take a very long time but just about two to three minutes. The appellant at some stage drove leaving the deceased. After some distance he loaded the deceased again. They eventually dropped the deceased adjacent to his home, the appellant told the deceased to go fast to his homestead. They probably dropped the appellant around 21h30. Her evidence differed from that of Warrant Officer Ndamase in relation to the time they were back at the police station. She said they arrived there around 22h00 as opposed to 23h00 to 01h00 testified to by Warrant Officer Ndamase.
- [10] The last state witness was Inga Macala (Macala). He testified that two days before the incident of the deceased being taken away by the police van and injured, the deceased arrived at his homestead with the appellant and another police officer. The appellant enquired about his netting wires. When he was not able to give information about it, the appellant assaulted him and the deceased with a stick. They were not severely injured. He then heard 3 days later that the deceased had died.
- [11] The appellant had testified that Macala and the deceased had approached him borrowing a bricklaying machine. After their visit he discovered that his netting wires were missing. He and late Warrant Officer Zote proceeded to enquire from the deceased about the netting wires. The deceased told them he had no knowledge of the whereabouts of the same. The deceased suggested that they enquire from Macala who also said he had no knowledge of the same.
- [12] He denied that on the day he had sent his colleague, moreover that officer was senior to him, to fetch a stick from the car. He denied assaulting Macala and the deceased that day. Two days later when he was preparing to go to work, Warrant Officer Zote informed him that he should bring the deceased for interrogation for his case of theft of netting wires. Warrant Officer Ndamase and constable Melane indeed fetched the deceased around 19h20 and loaded him at the back of the police van. They could not find Warrant Officer Zote at the station. He and constable Melane drove with the deceased to attend to a complaint, with a view to return the deceased.

- [13] On the way he stopped to urinate and also went to check the deceased at the back. The deceased asked him to check an unoccupied house, next to Jabula junction, if the netting wires had not been dumped there. The deceased went there alone, he went to the deceased at the back of the motor vehicle to get a report about his search. They could not find the wires. They dropped the deceased at his home around about 21h00 and they reached the police station around 22h00. He denied that he was ever near Lukwetu bridge. He denied assaulting the deceased. He denied that he sent a delegation to go and apologise to the deceased family on his behalf, and pay any contribution towards the deceased's burial costs.
- [14] Mr Zwelitsha Nganyase testified that he was part of the delegation that went to the deceased's home. They were sent by the appellant's uncle and not by the deceased. He did not know who paid for the funeral expenses and from whose kraal the five sheep came from.
- [15] Firstly, the appellant attacks the magistrate's admission of the hearsay evidence, with reference to what Mrs Balasane stated to have heard from the deceased. In my view, it is not necessary to decide this aspect. My proposition is to deal with this appeal on the basis of the other evidence that was before court.
- [16] According to the appellant, he dropped the deceased around 21h00. They were back at the police station around 22h00. He only stopped the vehicle to ask the deceased if he was fine and at the time the deceased had gone to look for the netting wire from an unoccupied house. He never asked his relatives to go and apologise for him and never assaulted the deceased.
- [17] There is no direct evidence with regard to who assaulted the deceased and inflicted injuries that led to his death.
- [18] Proven or common cause facts so far are that the deceased was a suspect in the case of theft of the appellant's netting wires. The deceased was collected by the appellant around 19h15, he drove with him, stopped to go to him at the back more than once and eventually dropped him at or near his home. The deceased was heard around 24h00 shouting and was found to have been injured and in severe pains. The post mortem report confirmed that he had broken ribs, was swollen and his liver had ruptured. He died as a result of such, including severe blood. His injuries were consisted with blunt trauma.
- [19] From the above, I am able to conclude that the deceased was assaulted severely over a protracted period of time that night. The issue is whether it is the appellant who assaulted him.
- [20] There seems to be a contradiction on the evidence of the state witnesses with regard to the time the deceased was dropped by the appellant. Constable Melane stated that they dropped him around 21h30 and were back at the station around 22h00, which is consistent with the appellant's testimony. Warrant Officer Ndamase stated that the police officers arrived at the station around 24h00 to 01h00. Mrs Balasane seems to have miscalculated even the pick up time as she said it was around 22h00. I will accept in the appellant's favour that the deceased

was dropped around 21h30. According to Constable Melane he was not dropped at his home, but adjacent to it and he heard the appellant saying he must hurry up to go home. In the state he was in, according to Mrs Balasane he was moving side ways whilst on the ground, uneasy and in pain, it is clear that he could not move fast. In fact he had to be carried to his homestead. I will also accept that if indeed he was heard around 24h00, the delay could well have been caused by his struggle to try move closer to the homestead. He could not walk.

- [21] There is no evidence about the deceased having gone anywhere else after he was dropped by the appellant. The last known person to be with him at night was the appellant. When he picked the deceased up, the deceased handed his house keys to Mrs Balasane's children, he was not in pains. When he was found later that night he was in that injured state. On the way the appellant had alighted at an isolated place, also deceased alighted, drove for a short distance, stopped the vehicle, they both alighted again. The appellant had an axe to grind with the deceased. Even though he denied having assaulted him and Macala two days before, interrogating them about the same wires. That evidence is consistent with the pick up of the deceased the travel and stopping a number of times with him at night. There would have been no reason for the magistrate not to accept Warrant Officer Ndamase's testimony that the appellant had told him he wanted to find out something from the deceased about his lost netting wires. This is also consistent with all other proven facts.
- [22] The magistrate found that the appellant assaulted and killed the deceased. From the proved facts, I am also persuaded that the only inference to be drawn from the conduct of the appellant, is that he was assaulting the deceased at the time he stopped the motor vehicle when Constable Melane was left alone in the police van. In *R v Blom* 1939 AD 188 at 202 – 203 Watermeyer JA held that there are two cardinal rules of logic that cannot be ignored when it comes to reasoning by inference:
- “(1) The inference sought to be drawn must be consistent with all the proved facts. If it is not, then the inference cannot be drawn.*
- (2) The proven facts should be such that they exclude every reasonable inference from them save the one sought to be drawn. If they do not exclude other reasonable inferences, then there must be a doubt whether the inference sought to be drawn is correct.”
- [23] It is trite that there is no onus resting on the accused to prove his innocence, his version need only be reasonably possibly true. The state must prove its case beyond reasonable doubt. The magistrate found, correctly in my view, that the evidence proving the appellant's guilt was overwhelming. I am not able to fault the magistrate in his acceptance of the state case. The inferential reasoning on circumstantial evidence is satisfactory that the state proved the guilt of the accused beyond reasonable doubt. The magistrate correctly rejected the version of the appellant, it cannot be reasonably possibly true in the circumstances of this case. He also correctly found that the defence

witness Nganyase, lied. Indeed his evidence was unreliable, he did not assist the court at all, he denied knowledge of even simple

facts, for example, the knowledge of whose sheep they themselves contributed towards the deceased's funeral.

[24] The magistrate found that the appellant had direct intention to kill the deceased. Mr Halam submitted that, if it was found that the appellant caused the death of the deceased, he caused it negligently. I do not agree with this. The appellant assaulted the deceased severely over a protracted period of time. The evidence does not prove that he intended to kill the deceased, but by assaulting him as he did and leave him in the street, without giving consideration to the fact that the deceased needed medical attention, he ought to have foreseen that the deceased's death could result, therefore he killed the deceased with *dolus eventualis*.

C R Snyman's Criminal Law, Fifth Edition page 185 the said authour defines *dolus eventualis* as follows:

"A person acts with intention in the form of dolus eventuslis if the commission of the unlawful act or the causing of the unlawful result is not his main aim but:

- (a) He subjectively foresees the possibility that, in striving towards his main aim the unlawful act may be committed or the unlawful result may be caused, and
- (b) He reconciles himself to this possibility.

..... however, it does not matter whether component (b) is described in terms of reconciliation with the possibility or in terms of recklessness;" i.e. persisting with the conduct reckless whether unlawful act could result.

[25] With regard to sentence both Messrs Halam and Joubert who appeared for the state, submitted that it ought to be interfered with. The magistrate sentenced the appellant in terms of section 51(2) of the Minimum Sentences Act 105 of 1997 (the Act), to 15 years. He however ordered that five years of the sentence to be suspended for five years. This constituted a misdirection on the part of the magistrate, which warrants that this court considers the issue of sentence afresh.

[26] In terms of section 51(2) of the Act when a person is convicted of murder, the sentence imposed is fifteen years imprisonment, unless substantial and compelling circumstances exist which justify imposition of a lesser sentence.

[27] The personal circumstances placed before the court a quo were that the appellant was a 31 year old first offender, he is married and his wife is not employed. He was a breadwinner, gainfully employed with the SAPS from 2008. It was submitted that the sentence to be imposed had to be blended with mercy.

- [28] In aggravation of sentence, the state argued that the offence was a serious one, the injuries on the deceased were serious. It is prevalent. The appellant was a peace officer, a law enforcement agent, but he took the law into his own hands and did the opposite of what was expected of him.
- [29] Mr Halam submitted that there were substantial and compelling circumstances justifying the imposition of a lesser sentence. He submitted further that an effective sentence of 10 years imprisonment was not harsh. Mr Joubert agreed that the court may after finding substantial and compelling circumstances impose a sentence of imprisonment part of which can be suspended.
- [30] In *S v Malgas* 2001 (1) SACR 469 at 481 paragraph 25 Marais JA held that, it is the courts who are to judge whether or not circumstances of any particular case are such as to justify a departure from imposing the minimum sentences. However, in doing so, they are to respect, and not merely pay lip service to, the Legislature's view that the prescribed periods of imprisonment are to be taken to be ordinarily appropriate when specified crimes are committed. The specified sentences are not to be departed from lightly and for flimsy reasons. Speculative hypotheses favourable to the offender, undue sympathy, aversion to imposing first offenders, for example, are to be excluded. The ultimate impact of all circumstances relevant to sentencing must be measured against the composite yardstick (substantial and compelling) and must be such as cumulatively justify a departure from the standardised response that the Legislature has ordained.
- [31] The offence committed was serious. Even though there is no evidence of the use of a weapon on the deceased, the assault was clearly severe and repeated, so as to fracture multiple ribs and rupture the liver. It is surely not in the interests of the society, for anyone, in particular, police officers to assault citizens and not bring them to the justice system in order for them to answer for any offence they may be suspected of having committed. However, when I balance all the factors relevant in this matter I find the fact that the appellant is a first offender, his age, that he was gainfully employed, married with children and had harboured strong suspicion that the deceased had stolen from him and had sought the truth, albeit wrongly, taken cumulatively, do constitute substantial and compelling circumstances that justify a departure from the imposition of a lesser sentence. Furthermore, there is nothing which is indicative of a person with an offending character in his previous conduct.
- [32] In the result the appeal against conviction succeeds to the extent that the appellant is found guilty of murder, without direct intention but with *dolus eventualis*. The appeal against sentence also succeeds to the extent of the period of imprisonment.

In the result, the order of the magistrate is hereby set aside and substituted as follows:

1. The appellant is found guilty of murder with *dolus eventualis*.
2. The appellant is sentenced to undergo 10 years imprisonment antedated to 12 December 2012.

3. The appellant is hereby ordered to be unfit to possess a firearm in terms of section 103 of the Firearms Control Act, 60 of 2000.

B Majiki

Judge of the High Court

I agree, it is so ordered.

RWN Brooks

Acting Judge of the High Court

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