

SOUTH AFRICA / JUDGMENT

Mcoseli v S (CA&R129/2011)

[2011] ZAECGHC 63; 2012 (2)

SACR 82 (ECG) (2 November 2011)

[2011] ZAECGHC 63

COURT

Eastern Cape High Court, Grahamstown

BEFORE

J.D. Pickering, P.T. Mageza

CASE / FILE NUMBER

CA&R129/2011

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IN THE

HIGH COURT OF SOUTH AFRICA

(EASTERN

CAPE, GRAHAMSTOWN)

CASE

NO: CA&R129/2011

DATE

HEARD:

DATE

DELIVERED:02/11/11

In the

matter between

LUZUKO

MCOSELI

.....Appellant

vs

THE

STATE

.....Respondent

JUDGMENT**PICKERING J:**

The appellant was charged in the regional court, Port Elizabeth, with murder (count 1), unlawful possession of a 7.65mm semi-automatic

pistol (count 2) and unlawful possession of 2 rounds of 7.65 calibre ammunition (count 3). Despite his pleas of not guilty to these

charges he was convicted as charged and sentenced to undergo 15 years imprisonment, the three charges being taken as one for purposes of sentence. Leave to appeal against his convictions and sentence was refused by the regional magistrate but appellant was granted the requisite leave to appeal to the Full Bench of this Division on petition to the Judge President.

It is common cause that the deceased referred to in count 1 died on 29 October 2007 in consequence of gunshot wounds to the head and abdomen. It is further common cause that two cartridges which were found at the scene next to the body of the deceased had been fired by the 7.65mm pistol referred to in count 2.

The State adduced the evidence of two witnesses. The first such witness, a Mr. Jijana, commenced his evidence in chief by stating

that he knew nothing whatsoever of the circumstances leading up to the death of the deceased referred to in count 1. His evidence in this regard was that at approximately 01h50 he was at one Maqweko's tavern. He had had a number of drinks and decided to leave. As he was going out of the tavern he heard gunshots. It was dark and he could not see who was shooting and at what or whom the shots were being directed. He was scared and ran away. Later the same night he was at his home when the police arrived in the company of a friend of the deceased, one Mabuti. The latter alleged that Jijana had been present when the shots were fired. Mabuti told the police that Jijana knew where the appellant was staying because they were both drivers of taxis. Jijana then took the police to appellant's home.

He reiterated that he knew nothing of any incident at the tavern concerning the deceased. He said further that he had not seen the appellant at the tavern.

The prosecutor, stating that Jijana was a hostile witness, then put to him a statement purportedly made by him to the investigating officer in which he had implicated appellant in the shooting of the deceased. Jijana stated in reply that he "did not recall some of the contents of this statement" and that in any event not only was the statement incorrect but that he had also "never signed the statement. I even did not write the statement." He stated further that he had told the investigating officer that he had never seen anyone shooting "because it was a dark place."

Despite Jijana's allegations concerning the statement the investigating officer was never called to testify. The statement was then handed into Court as an exhibit, after Jijana was declared to be a hostile witness.

It was placed on record by the prosecutor that the whereabouts of the aforementioned Mabuti were unknown at the time of the trial.

The second state witness, Inspector Tshangela, testified that he had attended the scene of the shooting in the early hours of the morning of 29 October 2007. He confirmed that he had spoken to Jijana who led him and other policemen to the home of appellant. He stated that on arrival at appellant's home Jijana remained in the police motor vehicle. The police knocked on the door of the main house for a long time before a light came on in the kitchen and appellant opened the door. Appellant allowed the police to search the house. During the course of the search the 7.65mm firearm referred to in count 2 was found by Inspector Ndema under the refrigerator in the kitchen. At that time Tshangela, other policemen and the appellant were all in the kitchen. Tshangela could not deny that appellant stayed in a flat at the back of the main house. Inspector Ndema did not testify.

The appellant testified in his defence. He stated that on the night in question he had gone to a tavern known as Monkungku's in order to look for his girlfriend who stayed in a room behind the tavern. He spoke to the deceased outside the tavern at approximately

11pm asking him about the whereabouts of his girlfriend. The deceased told him that he had not seen her. After that the appellant left and went home. He had no quarrel with the deceased. He stated that he resided in a shack which was situated at the back of the main house. On his return from the tavern he went straight to the shack. He was in the shack when he heard knocking on the door of the main house. He saw the police who accused him of having shot the deceased. He denied this. He gave the police permission to search the house and the shack. He alleged that during the search he was in a police vehicle whence he had been taken prior to the search commencing. He denied therefore that he had been present in the kitchen when the firearm was found and he alleged that he had not been shown the firearm that night.

He stated that he did not stay alone on the premises. The property belonged to his mother who, however, did not reside there. There was, however, "during that time a person who was asked to look after the main house." He stated that this person, one Thozamile Standi, stayed in the main house. He had seen Standi earlier in the day. Standi had his own key to the main house. When appellant returned from the tavern he went straight to his shack. He did not know whether or not Standi was present in the house at the time but he did notice that the house was dark.

He accordingly denied having been in possession of the 7.65mm pistol or having shot the deceased.

The regional magistrate's judgment reads as follows in its entirety:

“Accused I will not go through the evidence in this matter, we have dealt with this matter just recently and the evidence is still clear in our minds. Must then the argument of the state indicates me what I have heard and thought going through this evidence? (sic) It was worse when you took the stand here, you wanted to deny everything, even a straight forward question which needed yes or no. Your sentences started like this “as I have already said”. Your sentences when you were in the witness box would start with “as I have already said”. You were in difficulty to explain why the police would want to frame you. In another colour you wanted to deny that this firearm was found at your place. Your version, or the story is highly improbable. We accept the story of the state’s matter, you are found GUILTY on all these counts.”

It is regrettable to have to criticise the calibre of a judgment of a regional magistrate but this particular judgment falls so far short of the minimum standard which can reasonably be expected of a magistrate, much less a regional magistrate, that I would be failing in my duty were I not to do so. So shoddy and careless is the judgment that it amounts, in my view, almost to a dereliction of the regional magistrate’s duty as a judicial officer. This is all the more so when it is borne in mind that appellant was facing two charges in respect of each of which he could be sentenced (and indeed was) to a minimum term of imprisonment of 15

years.

The regional magistrate failed to set out the evidence at all. This is unacceptable. In *Value Truck Rental (Pty) Limited v John Dirker Engineering (Pty) Ltd* Case no 127/2007 Plasket J had occasion to comment on a magistrate’s judgment in a civil trial where a magistrate similarly failed to set out the evidence, merely stating that “Proceedings were mechanically recorded therefore I will not dwell much on facts.”

Plasket J remarked that the word “much” was out of place because the magistrate thereafter did not deal with the facts at all. The learned Judge then stated in para 5:

“He is required to do so in a judgment: the facts, whether they are common cause or contested have to be applied to the applicable legal principles in order for a judicial officer to arrive at a rational conclusion; and where the facts are in dispute, it is incumbent on the magistrate to decide, on the basis of well established rules, whether the facts asserted by the plaintiff or defendant are more probably true.”

In *Mphalele v First National Bank of SA Ltd* [1999] ZACC 1; 1999 (2) SA 667 (CC) the following was stated at 671E – H:

“There is no express constitutional provision which requires Judges to furnish reasons for their decisions. Nonetheless, in terms of s1 of the Constitution, the rule of law is one of the founding values of our democratic state, and the Judiciary is bound by it. The rule of law undoubtedly requires Judges not to act arbitrarily and to be accountable. The manner in which they ordinarily account for their decisions is by furnishing reasons. This serves a number of purposes. It explains to the parties, and to the public at large which has an interest in courts being open and transparent, why a case is decided as it is. It is a discipline which

curbs arbitrary judicial decisions. Then, too, it is essential for the appeal process, enabling the losing party to take an informed

decision as to whether or not to appeal or, where necessary, seek leave to appeal. It assists the appeal Court to decide whether or not the order of the lower court is correct. And finally, it provides guidance to the public in respect of similar matters. It may well be, too, that where a decision is subject to appeal it would be a violation of the constitutional right of access to courts if reasons for such a decision were to be withheld by a judicial officer.”

The regional magistrate further made no effort whatsoever to analyse the evidence which was tendered on behalf of the State, contenting himself with a criticism of appellant’s evidence. His criticism of the manner in which the appellant testified, namely, by failing to answer straightforward questions and instead starting his replies with “as I have already said”, is entirely unjustified and not borne out by the record. Appellant’s evidence covers 18 typed pages of the transcript of the proceedings. In the course thereof appellant used the phrase “as I have said” on no more than four occasions. In none of these instances could it fairly be said that appellant was being evasive in replying in that manner. It is clear that he was instead emphasising the evidence which he had given previously. For instance, asked by the prosecutor as to how the firearm could have ended up in the kitchen he replied “as I said to the Court your Worship, there is a person who was asked to look after the house.”

As appears further from the judgment the regional magistrate does not deal with the evidence of Jijana or Tshangela at all. By implication he has accepted that Tshangela was telling the truth inasmuch as he states that appellant was unable to provide a reason why the police should have falsely implicated him and inasmuch as he found that appellant’s evidence was highly improbable. In this latter regard the regional magistrate appears to have lost sight of the fact that there was no onus upon the appellant to provide a motive for the conduct of the police; that the onus of proving its case beyond reasonable doubt rested throughout on the State; and that should the appellant’s evidence be found to be reasonably possibly true he would be entitled to his acquittal.

Even if it is accepted for present purposes that the firearm was indeed found under the refrigerator in the main house that is not the end of the matter. As was stated in *S v Mtsweni* 1985 (1) SA 590 (AD), untruthful evidence does not always justify the conclusion that the accused is guilty. The weight to be attached thereto must be related to the circumstances of each case. The regional magistrate was obliged to consider and to take into account the factors enumerated in *Mtsweni’s* case, *supra*, at 591 H – I. One of those factors was whether in the circumstances of this case the appellant, even were he not to have

been in possession of the fire-arm, might have feared that its presence in the main house would incriminate him in the commission of the offences. The regional magistrate had to decide whether or not, in all the circumstances, the appellant was in possession of the firearm. He, however, made no effort whatsoever to deal with this issue.

No reference whatsoever was made to appellant's evidence that another man not only had access to the main house with his own key but also slept there. This evidence was not seriously contested by the State. There is no reason whatsoever to reject it. Once it is accepted that appellant was not the only person who had access to the house at the relevant time then it cannot be said beyond reasonable doubt that appellant, who slept in the shack and not in the main house, was in possession of the firearm and that it

was appellant who hid the firearm under the refrigerator. It would appear that the regional magistrate must have been influenced,

although he does not say so, by the statement purportedly made by Jijana to the effect that appellant had shot the deceased. That

statement, however, is obviously of no evidential value whatsoever. Despite cross-examination by the prosecutor Jijana persisted in his averments that the statement was not only incorrect and had not been read back to him but that he had never signed it. The policeman who took the statement was never called to testify to refute these allegations.

With regard this statement the record reads as follows:

"Prosecutor: I would like your statement which he read into the record now, to be admitted and continue with the application to declare him a hostile witness. Obviously the Court can make a decision to accept some of his evidence or not at the end of the day, because it will be followed up by Inspector Tshangela, which then follows from his evidence onwards to Luzuko (the appellant), which will confirm the contents of the statement that must be correct. At this stage I have no further questions your Worship that will be exhibit F.

Court: The statement is accepted as exhibit F.

Ms. Wolmarans: As the Court pleases.

Court: The witness is declared in a hostile witness." (Sic)

It is a matter of considerable surprise that the defence did not object to the handing in of the statement. Section 190(2) of Act 51 of 1977 reads as follows:

"(2) Any such party who has called a witness who has given evidence in any such proceedings (whether that witness is or is not, in the opinion of the court, adverse to the party calling him), may, after such party or the court has asked the witness whether he did or did not previously make a statement with which his evidence in the said proceedings is inconsistent, and after sufficient particulars of the alleged previous statement to designate the occasion when it was made have been given to the witness, prove that he previously made a statement with which such evidence is inconsistent." (My emphasis)

In the light of Jijana's denial that the statement correctly reflected what he had told the investigating officer or that he had even signed it, it was incumbent upon the prosecutor to call the police officer who took the statement in order to prove such statement. See *S v Dolo* 1975 (1) SA 641 (Tk) where the following was stated by Munnik CJ, as he then was, at 643G – H:

“If the witness denies having made the statement, or any part thereof put to him, the prosecutor is entitled, in terms of the section, and must, in order to succeed in his purpose, namely that of discrediting the witness, call the person who took the statement. The prosecutor’s failure to do so in these circumstances, would mean that the State is bound by the witness’ denial and therefore the making of the previous statement inconsistent with the present testimony has not been proved. (See R v Nyede 1951 (3) SA 151 (T))”

In the light of what I have said above the prosecutor’s submissions to the regional magistrate were misleading and devoid of merit. In all the circumstances it is clear that the regional magistrate erred in declaring Jijana to be a hostile witness before the requirements of the proviso to section 190(2) had been complied with by the prosecutor.

The regional magistrate was therefore required to disabuse his mind entirely of the contents of the statement. The only admissible and acceptable evidence tendered on behalf of the State which therefore remained was that the firearm had been found in the main house to which another man also had access and in which he slept. In these circumstances it was not the only reasonable inference to be drawn that appellant was in possession of the fire-arm. The State therefore failed to prove beyond reasonable doubt that the appellant was in possession of the firearm and that he was therefore the person who had fired the shots which killed the deceased.

He was therefore entitled to his acquittal.

There is a further matter which must be raised.

Upon conviction, counts 1 and 2 carried with them the obligatory minimum sentence of 15 years imprisonment unless the regional magistrate were to find the presence of substantial and compelling circumstances such as would justify a lesser sentence. The regional magistrate’s judgment on sentence reads as follows in its entirety:

“In sentence I will consider that your legal representative has clearly stated that you are a young man of 23 years, and at the time of the commission of this offence you were 20 years. Also your (indistinct), in the case of that you are working and earning R50 per day, and that you contribute in the maintenance of (indistinct). You committed a very serious and heinous crime. I will consider that you have been in awaiting trial for 2 ½ years, also that your legal representative requested the court to treat these counts as one for purposes of sentence. Anything you wish to add on sentence? Prosecutor: No your Worship. Ms. Wolmerans: No your Worship. Court: You are to undergo FIFTEEN (15) YEARS IMPRISONMENT.”

It is apparent therefrom that the regional magistrate made no reference whatsoever to the minimum sentencing provisions and to the issue as to whether or not substantial and compelling circumstances may or may not have been present. His judgment on sentence is of so poor a quality that one may infer therefrom that he failed entirely to apply his mind to the issue of substantial and compelling circumstances. Furthermore his query to the prosecutor and the defence attorney at the end of his judgment as to whether they wished to add anything on sentence is inexplicable and entirely misplaced.

I should add that this is not the first time that the regional magistrate has been criticised with regard to his deficient judgments. In *S v Vika* 2010 (2) SACR 444 (E) Roberson J, having set out the regional magistrate's "very short" judgment on sentence, stated, inter alia, as follows at 448 h – j:

"In these few lines there is no mention of the appellant's personal circumstances, and the magistrate seems to have had regard only to the seriousness of the offences.."

And:

"No mention was made of substantial and compelling circumstances, the absence or existence of which the magistrate was obliged to consider before imposing the minimum sentence."

In *S v Bruintjies and Others* unreported case no CA&R71/2010 Eastern Cape Division, Chetty J, with whom Dambuza J agreed, stated:

"Although the transcript of the evidence amounts to one hundred and thirty two pages, the magistrate's judgment is regrettably rather terse. Courts of law are required to hand down reasoned judgments and it is lamentable that the magistrate ignored this salutary practice for exigencies of time. This no doubt contributed to the obfuscation of the triable issues for the judgment proceeds on the assumption that the issue which fell for decision related to identification. Identity was not the real issue given the admitted common cause fact that the complainants and the appellants lived in the same area and were well acquainted with each other. The

appellant's defence throughout was that the complainants, for reasons of their own, had conspired to falsely incriminate them. Consequently, the court was called upon to analyze and evaluate the evidence and make credibility findings."

It is to be hoped that the regional magistrate will in future take heed of the criticisms set out above.

In the circumstances the appeal succeeds and the convictions and sentence are set aside.

J.D. PICKERING

JUDGE OF THE HIGH COURT

I agree,

P.T. MAGEZA

ACTING JUDGE OF THE HIGH COURT

Appearing on behalf of Appellant:

Instructed by:

Appearing on behalf of Respondent:

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