
SOUTH AFRICA / JUDGMENT

Mhomo v S (CA&R218/2016) [2017] ZAECGHC 8 (3 February 2017)

[2017] ZAECGHC 8

COURT

Eastern Cape High Court, Grahamstown

BEFORE

M Makaula, M J Lowe

CASE / FILE NUMBER

CA&R 218/2016

Source: saflii.org · Research copy typeset by Esheria. Not court-issued or certified.

Source record

IN

THE HIGH COURT OF SOUTH AFRICA

(EASTERN

CAPE LOCAL DIVISION, GRAHAMSTOWN)

CASE

NO: CA&R 218/2016

Heard

on: 30 November 2016

Delivered

on: 03 February 2017

In

the matter between:

DUMISANI

MHOMO

Appellant

and

THE

STATE

Respondent

APPEAL

JUDGMENT

MAKAULA J:

A.

Background:

- [1] With the leave of the Judge President, the appellant appeals against the conviction of murder and the subsequent sentence of ten years imprisonment.
- [2] The deceased, through the brother of the appellant Lindile Ngcobongolwana (Lindile), leased a room at the home of the appellant. Seemingly the appellant did not have a good relationship with the deceased. The appellant ascribes the bad relations to the fact that the deceased sold dagga from his room. The appellant confronted both the deceased and Lindile about that, insisting that the latter should terminate the lease with the deceased. Things came to a head when a fight ensued between the deceased and the appellant culminating in the untimely death of the deceased on 7 December 2013 at the hands of the appellant.

B. The respondent's evidence:

- [3] Lindile testified that he is the brother of the appellant. They both resided at their parental home. It is common cause that the appellant and Lindile had a bad relationship. They were always at each other's throats over small matters. The bad relations between the deceased and the appellant spilt over, the appellant insisting that Lindile should expel the deceased from their home, so he testified.
- [4] On the day of the death of the deceased, Lindile testified that whilst lying on his bed watching television, the appellant came to the kitchen, took rice, poured it in a pot and threw it at him. The appellant went out thereafter and he followed him. The appellant went to the deceased's shack and started to dismantle it. Lindile summoned the deceased who was at a nearby homestead. After a short while, he was alerted to a fight. He went out to investigate. He saw the deceased fighting with the appellant.
- [5] Lindile went back to the house. After a short while, the appellant came in and went to the cutlery cupboard (which I assume was a cutlery drawer) and took out a fixed blade knife (that was about 20-25cm long as estimated) and went outside. He followed the appellant shortly thereafter. As he came out of the house, he noticed that the deceased had been stabbed and he was bleeding. He testified that the appellant came back to the house and went to his room to lie on his bed. After a while he left the house and went out of the gate. The appellant did not return that day.
- [6] The second witness called by the state was Mbuyiselo Memani (Mbuyiselo). Mbuyiselo testified that he knew both the deceased and the appellant as they were his neighbours. On the day of the death of the deceased he was in front of his house enjoying his beer. He had

just returned from work. The deceased walked out of his yard carrying a hammer asking for the appellant. He told the appellant that he did not know his whereabouts. Shortly, thereafter, he saw the deceased assaulting the appellant with a hammer at a neighbouring house. He quickly went to them and intervened. At that juncture the deceased was on top of the appellant as the latter was lying on the ground. Community members assisted him and the two were separated. He took the hammer from the deceased. The appellant was not armed with anything at the time of the fight. Though he did not observe any injuries on the appellant, however, he saw him clutching the back of his head. After he successfully intervened, he returned to his house with the hammer and continued drinking his beer. The deceased returned to his shack. Realising that they had stopped fighting, he handed the hammer back to the deceased over the wall. The appellant also came back and went to his house.

- [7] After a short while i.e. two to three minutes, the appellant came out and went round the house towards the shack of the deceased. The appellant met the deceased at the corner of the house. Suddenly, he saw the deceased bleeding having been stabbed by the appellant. He did not witness the actual stabbing. The deceased stood still with a hammer in hand for a while and then fell to the ground.
- [8] Whilst the deceased was lying on the ground, with the assistance of other people, he managed to dispossess the appellant of the knife. The knife broke in the process. The deceased was taken away by ambulance and a report later came through that he had died. He did not see the deceased hit the appellant with the hammer. Mbuyiselo denied the version of the appellant put to him. He was adamant that both incidents took place outside the house.

C. The appellant's case:

- [9] The appellant testified in his defence. He confirmed the version of Lindile in so far as their bad relationship was concerned. He reported that the bad blood stemmed from the fact that Lindile leased some of the rooms to various tenants including the deceased without his approval. The bad relationship between him and the deceased was exacerbated by the fact that the deceased sold dagga from his room. Furthermore, the deceased smoked dagga with Lindile. On several occasions he terminated the deceased's lease and instructed him to vacate his room. On the day of the deceased's death, he had an argument over the same matter with the deceased. He left the deceased and went to Maradebe's shop (the shop) opposite his house to buy cigarettes. The deceased followed him to the shop. The deceased assaulted him with a hammer on the head, left arm and all over his body. He managed to dispossess him of the hammer and they continued to fight with fists. Mbuyiselo came and intervened. He had sustained an injury to his head. He left and proceeded to his house leaving the deceased at the shop. He went to his bedroom and lay on the bed. The deceased kicked the door opened and attacked him with a hammer. He got hold of the hammer, took it and threw it away in the passage. The deceased took out a knife. He grabbed the knife and they struggled over it. He succeeded in taking the knife away from the deceased. Having

disarmed the deceased of the knife, he stabbed him 'around the shoulder area'. Subsequently he pushed him outside and the deceased fell on the grass outside in front of the house.

[10] The appellant testified that he went back to his room to lie on his bed. After a while he heard people talking. He went out and noticed that a crowd had gathered and the deceased was still lying on the grass. He left his house to visit his girlfriend who stayed at Wells Estate. In the early hours of the following morning, he received a phone call from a certain lady who advised him that the deceased had died.

[11] The appellant disputed the version of Mbuyiselo. He denied that he was tackled to the ground by Mbuyiselo and dispossessed of a knife. He was adamant that he and the deceased were inside the house at the time he stabbed him. He further denied the version of Lindile that he came to fetch the knife from the kitchen.

[12] However, under cross-examination, the appellant admitted that the deceased was unarmed at the time he stabbed him stating thus:

"I did give him a first chance when he assaulted me with the hammer and also on the second occasion he attacked me with the hammer inside the house. Now what was I supposed to do on the third occasion when he came to attack me? Was I supposed to fold my arms?"

The appellant went further to state:

"That is correct, I stabbed him whilst he was not in possession of a weapon."

The cross-examination by the public prosecutor went on as follows:

"So he wasn't doing anything whilst you stabbed him – He was taking steps back."

D.

Analysis:

[13] It is apparent that at the time the appellant stabbed the deceased, on his own version, he was not posing any danger to him. The deceased was neither armed nor attacking the appellant but merely retreating after the appellant had dispossessed him of the knife, according to the appellant. In the light of the appellant's version of events the criticism by the appellant of the evidence of the state witnesses does not take the case of the appellant anywhere on appeal.

[14] Ms Mazibukwana, for the appellant, in a nutshell, relied on her heads of argument and in argument before us on the following aspects of the evidence of the state witnesses.

14.1 that the deceased was the aggressor in that he was armed, on two occasions with a hammer and was seen attacking the appellant (i.e. at the shop and when both had returned to their house);

14.2 the fact that Mbuyiselo did see the deceased lifting the hammer in a striking position but never saw the appellant stabbing the deceased;

14.3 that there was no corroboration of the evidence of the appellant's brother that the appellant fetched the knife from the kitchen.

[15] With respect, I do not agree with the submission that in the light of the above the magistrate erred in convicting the appellant. As alluded to, Mbuyiselo and the appellant's brother corroborated each other on the aspect that the stabbing of the deceased occurred outside the main house. Mbuyiselo testified that after the incident at the shop, the deceased returned and he gave him the hammer. After a short while, the appellant also returned, entered the main house for about two to three minutes and came out. That the appellant entered the main house and immediately went out is confirmed by the appellant's brother albeit on a disputed version by the appellant that he took a knife and went out.

[16] Mbuyiselo went on to state that the deceased and the appellant met at the corner of the house and it is at that stage that he assumed that appellant stabbed the deceased because he saw the deceased bleeding. At the time the appellant was armed with a knife. Mbuyiselo testified that the appellant fell to the ground and they wrestled over the knife and he managed to take it away from the appellant as stated above.

[17] The court a quo correctly, in my view accepted the evidence of the state in this regard and rightfully rejected the evidence of the appellant that the stabbing took place inside the house. There is no misdirection on the part of the magistrate. The appeal against conviction stands to be rejected on this basis and even on the basis of the evidence of the appellant. The evidence in totality does not support the contention that the deceased was posing any danger to the appellant at the time the deceased was stabbed. No evidence can be found that the appellant was acting in self-defence.

Ad Sentence:

[18] The appellant averred that the court a quo 'erred in not requesting a probation officer's report to satisfy itself of the impact of imprisoning appellant as a primary caregiver of his minor daughter'. The sentence is further assailed on the basis that the court a quo failed to take into account, amongst others, the age of the appellant, that he was employed for 8 years at the time of his arrest and that there was overemphasis of the seriousness of the offence, the interests of the community at the expense of the personal circumstances of the appellant.

[19] Dealing with the aspect of the appellant's minor child, the regional court magistrate in his judgment reasoned:

“Further than that you still have a child who is dependent on you and it is so that in the S v M (sic) it was argued that the court should consider the rights of children at the sentence (sic) but if you carefully read that judgment also it stated in that very same judgment if a case before a court calls for imprisonment the court should give imprisonment. We cannot argue that because you have children you should not go to jail. However I do accept that your child still has a vested right in the processes of today and will I with appropriate orders try and deal with this later on.” (sic)

[20] Later on the court a quo, amongst other orders, made the following order:

“I further order that the clerk of the court informs the Department of Social Welfare that they immediately take care of your child that you have in George and to take care of her or contact relatives to assist in the proper care of the child and to ensure your reunification with your child once you are released.”

For purposes hereof, I shall not comment on the appropriateness of this order.

[21] Mr Mtsila, for the respondent, argued that the court a quo had regard to the interests of the minor child in the light of the order made and in the same breath relying on the judgment of Plasket AJA in S v Chetty 2013

(2) SACR (SCA) 142 at para 11, he further submitted that the regional court magistrate was not obliged to obtain a probation officer's report before sentencing the appellant.

[22] Sachs J in S v M (Centre For Child Law as Amicus Curiae)[1] referred to by the court a quo set the following guidelines to be taken into account when a primary caregiver is to be sentenced:

“There is no formula that can guarantee right results. However, the guidelines that follow would, I believe, promote uniformity of principle, consistency of treatment and individualisation of outcome.

- (a) A sentencing court should find out whether a convicted person is a primary caregiver whenever there are indications that this might be so.
- (b) A probation officer's report is not needed to determine this in each case. The convicted person can be asked for the

information and if the presiding officer has reason to doubt the answer, he or she can ask the convicted person to lead evidence to establish the fact. The prosecution should also contribute what information it can; its normal adversarial posture should be relaxed when the interest of children are involved. The court should also ascertain the effect on the children of a custodial sentence if such a sentence is being considered.

- (c) If on the Zinn-triad approach the appropriate sentence is clearly custodial and the convicted person is a primary caregiver, the court must apply its mind to whether it is necessary to take steps to ensure that the children will be adequately cared for while the caregiver is incarcerated.

- (d) If the appropriate sentence is clearly non-custodial, the court must determine the appropriate sentence, bearing in mind the interests of the children.
- (e) Finally, if there is a range of appropriate sentences on the Zinn approach, then the court must use the paramountcy principle concerning the interests of the child as an important guide in deciding which sentence to impose.”
- [23] In the instant matter, the legal representative of the appellant in the court a quo, stated that the appellant was married and has two children who were aged 14 and 8 years respectively. His wife and the eldest son passed away[2]. The 8 year old daughter remained with his employer, Mr Deon Venter for whom the appellant had worked for eight years. It may be gleaned from these statements that the appellant is the primary caregiver of his 8 year old daughter. All that his legal representative stated categorically is that he is a breadwinner. However, it is apparent from the reasoning of the regional court magistrate referred to in para 19 above that he took into account that the appellant was a primary caregiver hence his comments.
- [24] Sachs J states in para 39[3] that the approach he recommended makes it clear that a court must sentence an offender, albeit a primary caregiver, to imprisonment on the ordinary approach adopted in *State v Zinn*[4] if a court finds that a custodial sentence is the proper punishment. Furthermore, Plasket AJA, as he then was, stated in *S v Chetty* (supra) that *S v M* is not authority for the proposition that when incarceration is otherwise appropriate, the fact that it will cause collateral harm

for the criminal’s children is sufficient to render that sentence inappropriate.[5]

- [25] The regional court magistrate had regard to these factors and correctly in my view, found that the circumstances of the case merit a custodial sentence. I am unable to discern any misdirection on his part and cannot find any reason to interfere with the sentence he imposed.

Consequently, I make the following order:

The appeal against both conviction and sentence is dismissed.

M MAKAULA

JUDGE OF THE HIGH COURT

I agree:

M J LOWE

Appearances:

Appellant: Ms Mazibukwana instructed by

Legal Aid South Africa

69 High Street

GRAHAMSTOWN

Respondent: Mr Mtsila instructed by

The National Director of Public Prosecutions

[1]

[2007] ZACC 18; 2008 (3) SA 232 CC at para 36.

[2] The son died on the morning of the mitigation proceedings.

[3] S v M (supra)

[4] 1969 (2) SA 537 (A)

[5] Paragraph 16 thereof

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.saflii.org/za/cases/ZAECGHC/2017/8.html>

CASE PAGE <https://chat.esheria.ai/case-law/south-africa/mhomo-v-s-unknown-topic-aecghc-2017>

Prepared on 26 October 2026 · Esheria