

SOUTH AFRICA / JUDGMENT

Mphahlele v S (A592/2016) [2017] ZAGPPHC 669 (17 October 2017)

[2017] ZAGPPHC 669

COURT

North Gauteng High Court, Pretoria

BEFORE

Maumela, Ranchod, Van der Westhuizen

CASE / FILE NUMBER

A592/2016

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REPUBLIC

OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

(GAUTENG

DIVISION PRETORIA)

Case

No: A 592/2016

REPORTABLE

OF

INTEREST TO OTHER JUDGES

REVISED

17

OCTOBER 2017

In

the matter of:

Matekola

Collen

Mphahlele Appellant

And

The

State Respondent

JUDGMENT

Maumela J.

1. This matter came before court as an appeal with leave of the court a quo. The appeal is against both conviction and sentence. Appellant, Matekola Collen Mphahlele, who was legally represented throughout the trial, was charged with murder read with the provisions of section 51 (1) of the Criminal Law Amendment Act 1997: (Act No: 105 of 1997).
2. The allegations were that upon or about the 24th of December 2012, at or near Mthembu Street, Kwa-Thema in the district of Springs, the accused did unlawfully and intentionally kill Nonhlanhla Martha Mesia, a 32 year old female. Appellant pleaded not guilty. He neither tendered a plea explanation nor made admissions in terms of section 115 of the Criminal Procedure Act.
3. The state led evidence, so did the defence. The court a quo accepted the version of the state and rejected that of the defence. Appellant was convicted of murder as charged. He was sentenced to undergo 18 years of imprisonment.

BRIEF**FACTS.**

4. The accused and the deceased were married to one another in accordance with custom. They begat a boy child together. At the time of the incident in issue they had separated. They were both employed under SAPS, and deployed in Pretoria. At a point in time, the deceased obtained a court interdict against the appellant in terms of the Domestic Violence Act 1998: (Act No 116 of 1998). On the 24th of December 2012, as arranged between the deceased and the appellant, the latter who stayed in Pretoria at the time went to the deceased's parental home in Kwathema; (Springs), to fetch his son.
5. The couple agreed that appellant keeps custody of the child at his place over Christmas. On the day of the incident, while approaching Springs, appellant phoned his father-in-law to announce his impending arrival. At his father-in-law's insistence; the two of them met at a local police station. His father-in-law insisted and he agreed that the two of them consult a traditional healer for a 'divine' revelation relating to the problems in his marriage.
6. At that time, there were no tensions between appellant and the deceased. Appellant was first to arrive at the deceased's parental home and after he waited, the deceased arrived later. The two of them discussed aspects concerning the child's return to her after Christmas. They also discussed related matters. Appellant stated that shortly after he set on his way back to Pretoria the deceased called him asking him to fetch the child's bicycle from a house in Mthembu Street where she was staying at the time.

7. At the deceased's place of residence, he found two gentlemen unknown to him. He subsequently came to know the two men as Vusumuzi Masemola and Banele Mahlangu. The two men were doing mechanical work on a BMW sedan that was parked in the yard. On being informed that the deceased has arrived, he entered the house led by his son. Appellant contends that upon entering the house, he

met head-on with the deceased who walked towards him in a manner that gestured for him to retreat backwards so as to exit.

8. Once he was outside Lesedi, his son emerged from the house carrying a bicycle. There was a man walking behind his wife. All of them walked towards the gate. He had to pass near their BMW vehicle on which mechanical work was underway. He and his wife discussed the birthday of the boy, Lesedi which was supposed to be on 2nd of January 2013. They agreed that he would bring the child back

so as to be in time for his birthday party on the 2nd January 2013.

9. As he passed near the BMW he was surprised when someone tripped and felled him. He said that he was armed with his pistol, which was on his waist. He noticed one of the two men who were fixing the BMW vehicle wielding a wheel spanner against him while the second man wielded a screwdriver. While he strove to rise from where he had fallen he saw Nico Mahlala, his wife's boyfriend who testified earlier on opening the rear door of the BMW.
10. According to the appellant Nico took some object out of the BMW and handed it to the deceased. He realised that the object Nico handed to the deceased is a firearm. He said that the deceased cocked the firearm. He quickly drew his firearm and started shooting. He saw Nico Mahlala, Hanele Mahlangu and Vusumuzi Masemola retreating and fleeing . At the same time he heard the sound of several other gunshots ringing. Fearing for his and the child's safety he placed the child in the vehicle and took off. He was in a confused state.
11. Appellant denied having stopped shortly after taking off. He denied that he reversed his vehicle. He said that he could not have reversed because at that time, all he was concerned with was to flee to safety. He contends that Nico Mahlala, Hanele Mahlangu and Vusumuzi Masemola are the ones who re-arranged the scene before the arrival of the police. He argues that the objective of the

reconstruction of the scene was to falsely implicate him. Alternatively appellant submits that onlookers who arrived at the scene and milled around could also have contaminated the crime scene and shifted objects around.

12. Witnesses told court that upon exiting the house, appellant drew a firearm and shot the deceased in the stomach. He shot her for the second time. The deceased attempted to flee but she fell. She strove to rise from where she had fallen. Appellant put his child into his car and pulled off. Noticing that the deceased is making efforts to rise, he stopped his vehicle and reversed. It is alleged that he alighted, approached the deceased where she fell and bent towards her, (the deceased), whereupon he fired two shots into the deceased's head before driving off.
13. Evidence is to the effect that appellant fired more shots after exiting the premises of the deceased's residence. Ballistic tests linked six cartridges found at the scene after the incident to appellant's firearm. In the post-mortem report relevant to the deceased; the 'cause of death' is indicated as: "veelvuldige skietwonde"; meaning, "multiple gunshot wounds." Appellant contended that in shooting the deceased he acted in private-defence and that his act was not unlawful.
14. Appellant's version of the chronology of events leading up to the attack upon the deceased differs from that of the state. Appellant contends that upon exiting the house where he had seen the deceased and a male person, he was walking to his vehicle when one of two gentlemen who were fixing a BMW vehicle launched an attack upon him.
15. The court is to determine whether or not the court a quo was correct in convicting appellant. The court is also to determine whether or not the court a quo exercised its discretion correctly in imposing the sentence it did upon appellant.

RE: CONVICTION.

16. There is no dispute about the cause of death. Appellant does not deny having fired shots at the deceased. However, he contends that he did so in order to defend himself because he was under attack. He also suggests that the deceased might also have been struck by bullets from firearms other than his.
17. Ballistic tests proved that six cartridges retrieved from the crime scene relevant to this case matched appellant's firearm. While it seems that there were indeed more than six shots fired, six cartridges that matched appellant's firearm were retrieved from around where the deceased's body lay after the shooting.
18. Appellant submits that the crime scene got subjected to contamination, affecting negatively the quality of the ballistic evidence retrieved. He also suggests that someone, if not some people, set up the crime scene or reconstructed it so as to falsely implicate him. He does not tell how such person or people without ballistic expertise managed to select six of the cartridges that lay around which matched his firearm excluding every other cartridge.

19. Evidence shows that at some point the deceased was fleeing while appellant fired shots at her. The deceased fell down. At some point appellant was driving off. He stopped and reversed. He approached the deceased where she had fallen. It is alleged that appellant lifted deceased up and literally pumped two more shots into her head. Eye witnesses in the form of state witnesses corroborated this.
20. In his publication, Criminal Law[1] C.R. Snyman provided the following definition of private defence: "A person acts in private defence, and her act is therefore lawful, if she uses force to repel an unlawful attack which has commenced, or is imminently threatening, upon her or somebody else 's life, bodily integrity, property or other interest which deserves to be protected, provided the defensive act is necessary to protect the interest threatened, is directed against the attacker, and is no more harmful than necessary to ward off the attack."
21. According to our law, an act which might otherwise be unlawful may be taken as constituting self-defence or private defence, if it complies with requirements set. Such requirements are the following:
 - (a) The act must be directed at the attacker.
 - (b) The defensive act must be necessary.
 - (c) There must be a reasonable relationship between the attack and the defensive act.
 - (d) The attacked person must be aware of the fact that she is acting in self-defence.
22. In this case evidence proved that the deceased was walking away from the appellant when the latter drew a firearm. Upon noticing this, the deceased endeavoured to wrestle him, pushing the firearm away. Appellant fired the first shot at the deceased's stomach. He followed up with a second shot, upon which the deceased fled whilst screaming for help before she fell.to the ground. Eyewitnesses attested that at a stage, the deceased was fleeing from the appellant who was chasing at her whilst still firing shots. The deceased fell again.
23. A witness told the court a quo that appellant put his child inside his vehicle. He drove away for a short while before he stopped and reversed towards the deceased who lay on the ground. He alighted from the vehicle. He approached and bent over the deceased as she lay on the ground. He drew his firearm again. He held the deceased on the neck or head. He pumped two more shots into the head of the deceased.
24. Appellant's act in both instances where he fired shots at the deceased are inconsistent with the definition of private defence as provided by C.R. Snyman in his publication[2]. The deceased was walking away from the appellant when the initial two shots were fired at her. After the initial shots she attempted to flee whilst appellant gave chase. He was firing shots at her at the same time and she fell down again.

25. In his defence appellant contended that the deceased together with the people she was with at her residence launched an attack against him. He stated that two men who appeared to be fixing a vehicle attacked him first. He stated that one of the men tripped and felled him. According to him, the men wielded each a wheel spanner and a screw driver respectively against him.
26. However appellant has no plausible explanation for why he directed his defensive attack at his wife instead of the two men he alleges to have launched an attack against him. He claims that Nico Mahlala, the deceased's then new boyfriend fetched an object from a BMW vehicle which he handed over to the deceased. According to him when the deceased cocked the object, he realised that it is a firearm. He states that it is for this reason that he shot at the deceased.
27. Evidence to the effect that appellant reversed his vehicle to where the deceased lay fallen is corroborated by ballistic evidence and the post mortem report both of which show that two shots were fired at the deceased's head at close range. This evidence contradicts appellant's account on how he shot at the deceased because appellant did not state that he ever shot the deceased at close range. Eye witnesses corroborated the ballistic evidence and the post mortem report. Ballistic evidence showed among others that two shots were fired to the deceased's head at close range.
28. It is necessary to contrast appellant's contention that he acted in self-defence with the evidence at hand. The court has to determine whether or not appellant's act satisfied requirements so that he can be regarded as having acted in self-defence. In that regard the following is notable:
 - (a) Appellant claims that one of two males who were fixing a BMW vehicle tripped and felled him and they both wielded weapons against him. However he fired shots at the deceased and not at the two men. He claims that he did so in order to defend himself.
 - (b) If the appellant was attacked as he claims it would have been necessary for him to fire shots.
 - (c) The attack appellant was repelling was launched by two males who were fixing a BMW vehicle. His act was directed at the deceased. There is therefore no relationship between appellant's act and the attack he was fending off.
 - (d) The point is moot whether or not appellant was aware at the time he acted that he is acting in self-defence.

The court finds that appellant's act does not satisfy requirements to be regarded as self-defence.

29. The court a quo convicted appellant on the basis of the above evidence. The court is to determine whether or not the court a quo was correct or not in convicting appellant on the basis of the evidence outlined. In *S v Hadebe and Others*,^[3] the court stated the following: "It is well to recall yet again the well-established principles governing the hearing of appeals against findings of fact, which were, in short, that in the absence of demonstrable and

material misdirection by the trial court, its findings of fact were presumed to be correct, and would only be disregarded if the recorded evidence showed them to be clearly wrong."

RE: SENTENCE.

30. The court a quo sentenced appellant to undergo 18 years of imprisonment. He argues that the sentence the court a quo imposed on him is in excess of what should have been imposed. The murder charge put to appellant was read with the provisions of section 51 (1) of the Criminal Law Amendment Act 1997.
31. Having found that appellant did not premeditate the murder, the court a quo determined that life imprisonment as a prescribed sentence under section 51 (1) should find no application to appellant.
32. The court a quo found appellant guilty of murder read with the provisions of section 51 (2) (a) (i) of the CLAA. This section provides as follows:

"(2). Notwithstanding any other law but subject to subsections (3) and (6), a regional court or a High Court shall sentence a person who has been convicted of an offence referred to in-

(a). Part II of Schedule 2, in the case of-

(i). a first offender, to imprisonment for a period not less than 15 years."
33. In imposing sentence upon appellant, the court a quo considered the application or otherwise of the minimum prescribed sentence provided under section 51 (2) (a) (i) of the CLAA which is 15 years imprisonment. The record of the proceedings before the court a quo shows clearly that in imposing sentence the court a quo moved from the premise that 15 years imprisonment stands prescribed as the minimum sentence.
34. Relevant to this appeal section 51 (3) (a) of the CLAA provides the following : "If any court referred to in subsection (1) or (2) is satisfied that substantial and compelling circumstances exist which justify the imposition of a lesser sentence than the sentence prescribed in those subsections, it shall enter those circumstances on the record of the proceedings and must thereupon impose such lesser sentence..... "
35. Appellant is a 41 year old father to two; a 21 year old girl and a much smaller boy. He lost his employment as a Captain under SAPS as a result of the incident in this case. He was still challenging his dismissal at the time he was sentenced. At the time of his arrest he had taken up employment as an educator in Limpopo. His dependants are; his mother who receives an old-age pension grant, his deceased sister' child, a 22 year old male who was in his third year at a tertiary institution at the time he was sentenced.

36. Before the court a quo it was submitted on behalf of appellant that over and above the personal circumstances indicated above, the court should consider that he is a first offender and that he committed the offence due to the influence of passion. It was submitted that the court a quo has to find that substantial and compelling circumstances are attendant to the person of appellant. It was submitted that the court a quo has to consider imposing upon appellant a sentence below the prescribed minimum.
37. The court a quo determined that appellant's personal circumstances do not qualify to be categorised as substantial and compelling. On that basis, consciously and deliberately, the court a quo determined that there is no basis upon which to impose upon appellant a sentence below the prescribed minimum. The court a quo imposed upon appellant a sentence of 18 years imprisonment, which is in excess of the prescribed minimum. Appellant seeks for the court to interfere with this sentence.
38. The offence of which appellant stands convicted is serious. It does not only involve violence but, the violence in it is directed against an unarmed, unsuspecting and a defenceless woman. From the beginning, she was subjected to an armed attack from behind.

Before, during and after the attack she never provoked appellant or fought back.

39. The offence in this case was committed in full view of the deceased and the appellant's child. The presence of this child was not enough to deter appellant from shooting the deceased in cold blood. It did not deter him when he noticed that the deceased is striving to rise, from reversing, alighting and pumping two more bullets from close range into the head of the deceased who lay haplessly and helplessly on the ground. This cannot be self-defence.
40. Appellant's account of the chronology of developments before he attacked the deceased is not borne out by any of the witnesses. As indicated, the question arises why appellant did not direct his defence against the man whom he alleges to have tripped him. The question arises further why he fired so as to empty the magazine of his firearm. The question arises further why it became necessary to shoot the deceased only when he alleges that the attack against him was launched by much more people than just the

deceased.

41. The appellant's counsel submits that there should be mitigation in the fact that the crime was sparked by passion and that appellant was provoked by a realisation that his wife, was in a love relationship with another man. By then the two of them had separated from one another and she had left their common home. A family gathering has failed to resolve the marital problem in place. Deceased was not bound to be allegiant to appellant yet he subjected her to a violent attack, unarmed and harmless as she was while he used a weapon.
42. Were the court to countenance appellant's submission that his was an act of passion; the vulnerable who are in love relationships that falter will be laid bare to the tyranny and the callousness of the strong.

43. These are the factors, among others, which the court a quo took into consideration in determining the sentence it imposed upon appellant. It is trite that an appellate court can interfere with a sentence imposed by a trial court only if the sentence imposed by the trial court induces a sense of shock or where it is disproportionate to the offence of which an accused stands convicted.
44. The seriousness of the offence of which appellant stands convicted justifies the imposition of a stiff sentence. Society frowns upon such. offences. Murder is rife within societies and the world over. Society expects courts to participate in stemming this unwelcome spate of offences that cost lives on end. Should that not be done, some in societies may end up taking the law into their own hands in order to either avenge the crimes committed or to deter other would-be offenders.
45. In the case of *R v Karg*[4], the court remarked as follows: "it is not wrong that the natural indignation of interested persons and of the community at large should receive some recognition in the sentence that courts impose, and it is not irrelevant to bear in mind that if sentences for serious crimes are too lenient, the administration of justice may fall into disrepute and injured persons may incline to take the law into their own hands."
46. In the case of *S v Rabie*[5], the court stated: "In every appeal against sentence, whether imposed by a magistrate or a judge, the court hearing the appeal:
- (a) Should be guided by the principle that punishment is 'pre-eminently a matter for the discretion of the trial court' and
 - (b) Should be careful not to erode that discretion: hence the further principle that the sentence should only be altered if the discretion has not been 'Judicially and properly exercised.' The test under (b) is whether the sentence is vitiated by irregularity or misdirection or is disturbingly inappropriate."

47. In the case of *S v Anderson*[6] the court stated the following regarding appeals against sentence: "Moreover, a court of appeal will not alter a

determination

arrived at by the exercise of a discretionary power merely because it would have exercised that discretion differently."

48. The sentence imposed on appellant exceeded the minimum prescribed in the CLAA. However the determination of a minimum sentence through legislation does not do away with the sentencing discretion of the trial court. Over and above that, the minimum sentence legislation prescribed a minimum sentence only. Such a sentence, (minimum sentence), only denotes a sentence below which a sentencing court is not supposed to go for a given offence.

49. The CLAA did not prescribe a maximum sentence. The court views that it is within the discretion of the court a quo to impose the sentence it did upon the appellant.
50. On the basis of the above, the appeal against conviction and sentence stands to be dismissed and the following order is proposed:

ORDER.

1. The appeal against conviction and sentence is dismissed.

T.A Maumela

Judge of the High Court of South Africa.

I agree.

Ranchod J.

Van der Westhuizen.

Acting Judge of the High Court of South Africa.

[1] Fourth edition, at page 103.

[2] Supra

[3] 1997 (2) SACR 641 (SCA), at page 642.

[4] 1961 (1) SA 231 (A), at page 236 B.

[5] 1975 (4) SA 855 (A).

[6] 1964 (3) SA 494 (A), at page 495 G.

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