

SOUTH AFRICA / JUDGMENT

Myaka and Others v S

(A5040/2011, 215/2005) [2012]

ZAGPJHC 174 (21 September 2012)

[2012] ZAGPJHC 174

COURT

South Gauteng High Court, Johannesburg

BEFORE

Satchwell, Claassen

CASE / FILE NUMBER

A5040/2011, 215/2005

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REPORTABLE

SOUTH GAUTENG HIGH COURT

JOHANNESBURG

CASE

NO: A5040/2011

215/2005

In

the matter between

MYAKA,

DISCO C

.....1st

APPELLANT

MAHLABANE,

LUNGISANI

D.....2ND

APPELLANT

NDLOVU,

SIFANELEYANA E

.....3RD

APPELLANT

and

THE

STATE.....RESPONDENT

Neutral

citation: Myaka and 2 others v the State 2012 SA (GSJ)

Coram: CLAASSEN AND SATCHWELL JJ (MAILULA J IN ABSENTIA)

Heard: 11 April 2012

Delivered: 21st September 2012

JUDGMENT

SATCHWELL J:

INTRODUCTION

- [1] This appeal was heard by a Full Bench of the South Gauteng Division of the High Court (Claassen J presiding) on 11 April 2012. The senior judge allocated the writing of this judgment to another member of the Full Bench (Mailula J). In the intervening five month period, which included a five week administrative recess in court sittings, I have not received a draft judgment on which I may comment nor has there been any indication from my colleague that a judgment is in production.
- [2] I understand from the senior presiding judge that he has made a number of approaches to the judge assigned to write this judgment – at the time of the hearing on 11th April, during the week of 23rd July and in writing on both 1st and 6th August. He has received no indication that any judgment has been prepared or is underway.
- [3] The attorney for the appellants wrote to the senior presiding judge on 26th July 2012 requesting an indication when the judgment may be expected. There after the appellants’ attorney in a telephone call to the senior judge’s secretary, made a further enquiry as to when the judgment will be available. The senior judge is not in any position to provide such indication in the absence of any communication or intimation from the assigned judge. This untoward delay in finalizing the judgment, is deprecated.
- [4] This appeal concerns, not only the proper administration of justice but also, the liberty of the individual. Three men were convicted on 21 September 2006 on counts of housebreaking with intent to commit murder, the murder of two women, and the unlawful possession of firearms and ammunition. They were sentenced to life imprisonment on 22 September 2006. With leave of the trial court (Willis J) they were granted leave to appeal some 4 years ago against their convictions on 25 September 2008. The hearing of the appeal has been delayed over a number of years by reason of the inability of the Registrar of the South Gauteng High Court to find the audio recordings of the trial proceedings with the result that a transcript of the proceedings could not be produced within the normal time periods. Eventually the missing parts of the record were reconstructed from trial notes prepared by the presiding judge, defense counsel and exhibits contained in the legal representative’s files. As can be seen, appellants have been in custody as sentenced prisoners for a period of some six years

and were in custody as awaiting trial prisoners for some time prior thereto.

- [5] In good conscience, I cannot continue to wait upon a colleague to attend to the writing of a judgment in these circumstances.
- [6] Accordingly, I have prepared a judgment of my own notwithstanding that I have not been requested by the presiding Judge so to do. In the event of the presiding judge signifying his agreement with this judgment, it would in any event constitute the majority judgment of this court of appeal. The absence of the third member's consent to this judgment can only, at worst for the appellants, be regarded as her having not concurred in the majority judgment, for whatever reason.
- [7] In such event the appellants' right to petition the Supreme Court of Appeal for further relief will remain intact and not further delayed.

RECONSTRUCTION OF RECORD

- [8] At the hearing of the appeal, appellants' counsel submitted that the record was incomplete and inadequate for purposes of hearing of and adjudicating upon the appeal. We were presented with the summary of the evidence prepared by the trial judge from his notes.
- [9] When we asked appellants' counsel to indicate to us the inadequacies of the record before us none were illustrated. We have not been referred to any missing or incorrectly recorded evidence. I am satisfied that the appeal court has been provided with a full and adequate record which enables me to consider all issues raised at the hearing of this appeal.

EVIDENCE AT TRIAL

- [10] On the night of 15th May 2005 a number of unknown persons entered a shack where three adult women and their children were living and sleeping. Two of the women were shot dead. South African police recovered spent bullets and casings from at least two different firearms.
- [11] At the trial, the survivor of the shooting incident, Ms. Shonisele Dube, gave evidence to the effect that she had been involved in a relationship with the third appellant from which two children were born and that she knew both first and second appellant who were employed by and related to the third appellant. During the evening of 15th May 2005 Shonisele Dube had been inside the room and had hidden in a cupboard in the room into which the intruders had come and where they had carried out their shooting. She claims to have been able to see the two shooters from where she was hiding in the cupboard, there being sufficient light from outside the house entering through the window to this room. She recognized both shooters as first and third appellants. She described the clothing worn by them. After the shooting, Dube heard someone in the adjacent kitchen saying 'Let's go'.
- [12] Clearly, the evidence of Shonisele Dube was that of a single witness as to the observation of the events. There were no other survivors to the housebreaking and shooting.

[13] The evidence of Shonisele Dube ceased to be that of a single witness when the trial court admitted into evidence two admission statements made by appellants one and two. Both statements were exculpatory or intended to be exculpatory. Common to both statements was the averment that they had each been informed that someone wanted to kill Shonisele Dube, that they accompanied him to Shonisele Dube's accommodation, where the third person opened the door to the accommodation, entered and started shooting. There after both appellants one and two ran away. In addition, the ballistics evidence confirmed her evidence that she had seen two persons

shooting.

[14] In summary therefore, the state's case consisted of the evidence of Shonisele Dube, the two admission statements of appellants one and two and ballistic evidence indicating the use of at least two firearms. In addition there was an incident where the arresting

officer, Sergeant Molemane, testified that appellants one and two behaved as though they had seen 'a ghost' when they saw that Shonisile Dube was still alive after the incident.

ADMISSIONS BY APPELLANTS ONE AND TWO

[15] The admissibility of the statements made in custody by appellants one and two was challenged in trials within a trial. In his judgment, the trial judge commented that the evidence of the South African Police was credible and that the evidence of both appellants was not credible for a number of reasons set out in that judgment.

[16] For myself, I find it wholly unlikely and unbelievable that the South African Police would brutally torture persons in custody in order to coerce those persons merely to regurgitate into a written statement that which was dictated to them by members of the South African Police when that which is regurgitated is either exculpatory or intended to be exculpatory, contains no confessions and constitutes no more than admissions. If indeed the authors of these admission statements were the South African Police themselves, then they would hardly have spent the bulk of those statements in setting out the suspects' ignorance, lack of criminal intention and shock at the criminal activity which they observed. The South African Police Services, as authors of these documents, would have served their cause far better by concocting detailed confession statements sufficient to convict each suspect.

[17] Accordingly, I can see no reason to interfere with the decision of the learned judge that these statements were admissible in evidence against first and second appellant.

[18] The content of the statements was intended to be exculpatory. However, appellant one placed himself at the door of the shack opened by appellant three immediately prior to the shooting took place. It is not believable that appellant one would accompany someone who had announced his intention to commit a murder, observe this taking place and then run away. The purpose of accompanying the murderer to the scene was obviously not to dissuade or stop the murder. Furthermore, appellant two also placed himself at the door to the shack during the shooting. He claimed ignorance as to why the murderer had invited

him to go to the scene of the murders and observe the shooting. It would be incredible for a murderer to invite uninvolved eyewitnesses to such a scene.

- [19] Of course, the ballistics evidence contradicts these statements since it was not one firearm which left spent bullets and cartridges at the scene but two firearms. At least one of appellants one or two must have fired a gun as well. The witness Dube says it was appellant one.
- [20] The learned trial judge discussed in some detail whether or not the admissions of appellants one and two were admissible in evidence against appellant three. In this regard he considered exceptions to the hearsay rule. I do not think that this appeal court should permit the admissions made by appellants one and two, whilst they were in custody, to be admissible in evidence against appellant three.

DEFENCE CHALLENGE TO STATE'S CASE

- [21] First and second appellants testified that they had been asleep in bed on the night in question.
- [22] Appellant three gave evidence that he was in Kwazulu-Natal on the night in question. His father, Mr. Ben Ndlovu, sought to corroborate this alibi but contradicted himself in material respects concerning events at that time, particularly events by which months could be determined. This appellant also called a witness, Thabo Nkosi, whose evidence concerned the burning of a shack which event was not the substance of these criminal charges.
- [23] The defense's challenge to the evidence of Shonisele Dube was not that she had mistakenly identified them but that she had falsely identified them as the housebreakers and murderers. The argument was that she was actuated by malice because of the breakdown in her relationship with appellant three and that she had burnt down her own home a few days prior to the shooting so as to incriminate the appellants as harboring hostility towards her.
- [24] The learned trial judge found that Shonisele Dube was in a position to observe events and see and identify the persons who had entered the room with guns. Her evidence was corroborated in a number of respects. Firstly, the ballistic evidence which indicated at least two firearms having been used. Secondly, through the statements of appellants one and two, that they were present at the scene (although, of course, not their actions).
- [25] It was noteworthy that Shonisele Dube did not implicate the second appellant in the actual shooting. If her evidence were concocted from start to finish then one would have expected her to claim seeing second appellant as well. After all, upon his own admission, he was on the scene. Dube's failure to include everyone in her observations adds credence to her evidence.

CONCLUSION

- [26] First and third appellants were observed by an intended victim to have entered into the shack and to be in possession of firearms and shooting. Ballistic evidence confirms that two firearms were used. Appellant one's statement confirms he was on the scene.
- [27] The learned trial judge found that there was evidence of a conspiracy involving all three appellants and particularly, second appellant. Firstly, second appellant's statement placed himself on the scene and his presence there could hardly have taken place without foreknowledge of and acquiescence in the intended shooting and murders. Secondly, had he wished to disassociate himself from the agreed common purpose to shoot and killing the deceased, he could easily have done so by merely refraining from accompanying the other two appellants to the scene of the crimes. Thirdly, this appellant's response to the survival of Dube – he reacted as if “he had seen a ghost” – indicates he expected her to be dead. I have no doubt that second appellant was in agreement that the murder of Sibonisile Dube and other persons in the room be perpetrated by shooting – this conspiracy was complete as soon as the agreement was reached. Nothing further needed to be done by appellant two in furtherance of this agreement but, in this case, he did act further. He accompanied appellants two and three to the scene. The details of his intended and/or committed actions at the scene of the crimes are unknown. Had they been of a nature indicating any withdrawal from the agreement, no doubt he would have included such in his otherwise exculpatory statement. His failure to do so confirms, in my view, his continued association with the commission of the crimes. His running from the scene after the commission of the crimes is, of course, a neutral and, to my mind, irrelevant fact, which in no way detracts from the above conclusion.
- [28] In the circumstances, I can see no misdirection on the part of the trial judge nor can I see any other reason for interfering in the convictions of the appellants in the court a quo.
- [29] Accordingly, I would make an order dismissing the appeals against all the convictions.

CLAASSEN J:

- [1] I have had the benefit of reading the judgment prepared by Satchwell J. I agree with the reasoning and conclusion therein. However, I wish to add some observations of my own.
- [2] It is correct that I requested my colleague, Mailula J, to prepare the judgment in this Full Bench Appeal. I confirm the fact that the attorney for the appellants have approached me, both in writing and in a telephone call enquiring when judgment in this matter may be expected. I passed on to my colleague, Mailula J, the aforesaid letter under cover of my own requesting her to indicate when we might expect her judgment. After receiving no response to my letter, I sent a second letter reminding her the first and again requesting when we may expect a judgment. Again I have received no response to these requests in writing.

[3] It would be a sad day in the administration of justice in this country if the laches of one member of a three bench tribunal, should cause the stifling of the normal appeal procedures prescribed by law. In my view this approach was necessitated by the conduct of Mailula J not responding to the requests made by the senior judge. In my respectful view, a deadlock occurred preventing the finalization of the appeal.

[4] I am respectfully of the view that drastic approaches are sometimes called for as was adopted by the Supreme Court of Appeal in *New Clicks South Africa (Pty) Ltd v Minister of Health and another* 2005

(3) SA 238 (SCA) at pages 249 – 250, paragraphs [5] – [8]. In this regard it was stated in paragraph [31]:

“The Supreme Court Act assumes that the judicial system will operate properly and that a ruling of either aye or nay will follow within a reasonable time. The Act – not surprisingly – does not deal with the situation where there is neither and a party’s right to litigate further is frustrated or obstructed. The failure of a lower Court¹ to give a ruling within a reasonable time interferes with the process of this Court and frustrates the right of an applicant to apply to this Court for leave. Inexplicable inaction makes the right to apply for leave from this Court illusory.² This Court has a constitutional duty to protect its processes and to ensure that parties, who in principle have the right to approach it, should not be prevented by an unreasonable delay by a lower court.³ In appropriate circumstances, where there is deliberate obstructionism on the part of a Court of first instance or sheer laxity or unjustifiable or inexplicable inaction, or some ulterior motive, this Court may be compelled, in the spirit of the Constitution and the obligation to do justice, to entertain an application of the kind presently before us.”(Emphasis added)

[5] In my respectful view, judges ought not to be the cause for the adage, “justice delayed, is justice denied” to apply to any case. The rendering of judgment within a reasonable time is not merely a matter of courtesy towards the litigants – the public’s respect for the administration of justice is at stake. It was stated more than half a century ago:

“Much more than a matter of courtesy is involved. By such conduct the administration of justice is hampered, and may be seriously hampered, by an arbiter of justice himself, whose responsibility it is to render it effective and not add judicial remissness to its already irksome delays.”⁴ (Emphasis added)

[6] For the reasons set out above I am in agreement with Satchwell J that this matter can no longer be delayed. It concerns the liberty of individuals and the reputation of the administration of justice. Both these considerations are of such importance that I am driven to agree to this majority judgment being handed down.

[7] I therefore agree with the proposed order and such an order is issued:

“The appeals against all the convictions and sentences are dismissed”

DATED AT JOHANNESBURG ON THIS 21st DAY OF SEPTEMBER 2012.

SATCHWELL J

JUDGE OF THE HIGH COURT

C. J. CLAASSEN

APPEARANCES:

APPELLANTS: P J C Kriel

Instructed by BDK Attorneys, Johannesburg

RESPONDENT: GP Van Wyk

Instructed by the State Attorney, Johannesburg

1 In that instance, this was a reference to the delay by two judges of a three-bench tribunal in the Cape Provincial Division to hand down a judgment on an application for leave to appeal its judgment.

2 At this juncture in the judgment quoted, Harms JA made reference in a footnote to the clear failure of justice which occurred in *S v Venter* 1999 (2) SACR 231 (SCA) where the trial court took 8 months to enroll an application for leave to appeal a sentence of four years imprisonment which was, ultimately, reduced to six months' imprisonment on appeal.

3 See section 173 of the Constitution Act 108 of 1996.

4 See *S v Lifele* 1962

(2) SA 527 (AD) at 531F. The context was different.

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Prepared on 11 October 2026 · Esheria