

SOUTH AFRICA / JUDGMENT

Ngobeni v S (A309/16) [2017] ZAGPJHC 205 (3 July 2017)

[2017] ZAGPJHC 205

COURT

South Gauteng High Court, Johannesburg

BEFORE

M Mabesele, R Mokgoathleng, C Van Veenendaal

CASE / FILE NUMBER

A309/16

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REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: A309/16

Not reportable

Not of interest to other judges

Revised

In the matter between:

EMMANUEL TSUNDZUKA NGOBENI Appellant

And

THE STATE Respondent

J U D G M E N T

Mabesele, J (Mokgoathleng J and Van Veenendaal AJ concurring):

[1] The appellant is convicted of murder.¹ He was sentenced to 12 years imprisonment. Four years of this sentence is suspended for a period of five years on condition that

the appellant is not convicted of the same offence, committed during a period of suspension.

- [2] The offence arose from an incident that took place on 24th May 2013 at Greenhills, Randfontein, where the deceased, a student then at Tshwane University of Technology, was shot and killed by the appellant, a police officer in the employ of the SAPS, when a vehicle in which the deceased was a passenger was searched by the police officers. The vehicle was driven by Reneilwe Sekobuane who was a student, too, at the same university.
- [3] The appellant, with leave of the trial court, appealed against both the conviction and sentence.
- [4] After we had read the record, in preparation for the hearing of the appeal, we were of the view to consider an increase in sentence should conviction be confirmed. For this reason, we gave proper notice² to both parties of our intention, and are grateful of submissions made, in response. These submissions will be dealt with later.
- [5] It is common cause that on the abovementioned date, at approximately 19:00, the deceased and four of his fellow students were travelling in a red toyota corolla vehicle to a funeral service at Mohlakeng, outside Randfontein. They lost their way in Randfontein, in the vicinity of Greenhills, and decided to follow a marked EPR security guard vehicle with the aim to find their way to Mohlakeng. At that stage they noticed another security guard vehicle driving behind them, followed by the police vehicle with blue lights

flashing. That incident occurred after the appellant and his senior, Warrant Officer Botha, whilst doing patrol duty, had received a telephonic tip-off from one of the security guards that he had information of a gold coloured Golf vehicle with five armed occupants

who were seen in the vicinity of Pick 'n Pay Supermarket.

- [6] The red toyota corolla, whilst followed by the police vehicle, travelled slowly and turned into the Caltex filling station not far from the main road. It came to halt next to the petrol pumps. The security guard and police vehicles stopped next to it. The area at which these vehicles had stopped was lit due to lights from both the filling station and police vehicles.
- [7] Mr Reneilwe testified that after he had alighted from the vehicle, unarmed, Botha pointed him with a firearm and instructed him to put his hands on top of the vehicle. He obeyed the instructions whilst facing in the direction of the deceased who was seated in the front passenger seat. Botha asked him why they were travelling around that vicinity of Greenhills. He responded that

they were students and had lost their way to Mohlakeng. Botha did not accept his explanation. He said Botha pulled out of the vehicle one of the passengers who had occupied the backseat on the right-hand side and hit him against the vehicle. The other two passengers were pulled from the backseat by the appellant and the security officers. Both passengers were ordered to lie with their stomachs on the ground whilst the deceased was ordered to remain seated in the front passenger seat with his hands on the dashboard. Save the appellant who was armed with an R5-rifle, Botha and the security officers were armed with 9 mm pistols.

- [8] The witness said whilst he was facing in the direction of the deceased and looking at him through the window he saw the deceased open the door and alighting from the vehicle after he was ordered to do so. The appellant was standing at the distance of approximately a metre away from the deceased.
- [9] He testified that the deceased got shot whilst he was in the process of coming out of the vehicle. One of the deceased's legs had already touched the ground when he got shot. He did not see who fired the shot but was able to see the appellant carrying a firearm. His version that the police were aggressive and did not want to listen to them was corroborated by his fellow student called Ngakanyane. Ngakanyane testified that none of them offered resistance when they were instructed to alight from the vehicle. He said that he and his fellow students who had occupied the backseat were ordered to lie with their stomachs on the ground.
- [10] Ms Van der Merwe is in the employ of the South African Police Service. She is a human resources manager, stationed at Randfontein.

She has access to personal files of all the police officers, including the appellant.

She testified that the appellant was employed as a police trainee in 2009. He became a constable in 2011 after he had completed a two year training which require, inter alia, proper use of R 5-rifle. She said the appellant is competent to use an R 5 rifle because he successfully completed the training.

- [11] Mr Mohotsi is in the employ of the South African Police Service Academy. He holds a rank of warrant-officer. His duties include training of police officers to operate the firearms such as 288 parabellum, R 5 rifle and shot guns.
- [12] He testified that the police officers who carry R 5 rifle protect or give cover to the crew members when they conduct a search. He said the police officers are taught that R 5 rifles should always be at a point of 45 degrees to the ground when a search is conducted and can only be pointed at a suspect when a shot is fired.
- [13] When he was asked about the distance at which the appellant should have been when he fired a shot at the deceased, he responded that the police officers are trained to fire from the distance of 15 to 25 metres when using R 5 rifle.
- [14] Mr Visser is a Lieutenant Colonel. He is attached to the Forensic Science Laboratory as an examiner of forensic ballistics.

He described an R 5 rifle as an automatic rifle which fires one bullet at a time. He said when put on semi-automatic, more than one bullet may be released, accidentally.

- [15] Dr Nkondo is a forensic pathologist in the employ of the Department of Health, in Gauteng. She performed a post mortem examination on the body of the deceased.

[16] She confirmed her findings with regard to the cause of the deceased's death, being a gunshot wound to the head. She

described the wound as 'stellate wound' which she said is consistent with a gun which was held at close contact to the head of the victim.

[17] The version of the appellant is that they stopped their vehicle behind the red toyota corolla at the filling station. They were joined by three security vehicles. One of the vehicles stopped in front of the red toyota corolla whilst the other two stopped on the right hand side of the corolla. Botha alighted from the vehicle and instructed the occupants of the corolla to alight from the vehicle. He, also, alighted from the vehicle and stood on the left hand side of the corolla.

[18] He said the driver of the corolla and those who occupied the backseat alighted from the vehicle whilst the deceased remained seated in the front passenger seat. He said the conduct of the deceased resulted in him approaching the left passenger door. At that stage, he said, a security officer called Kruger, who was standing in front of the corolla, instructed the deceased to alight from the vehicle whilst raising up his hands. He said the deceased obeyed the instruction and opened the door. Thereafter he took his left foot out of the vehicle whilst at the same time turning as if he was picking up something from his right waist. He then thought that the deceased was producing a firearm. He said he became scared and shot the deceased with the aim to protect himself. His version is that he pressed the trigger once but two shots went off. He could not remember how far he was from the

deceased when he shot him. After he shot the deceased he gave the firearm to Botha. Thereafter he did not ascertain whether the

deceased had indeed carried a firearm.

[19] When he was asked about the mode of the firearm before shots were fired he responded that when he alighted from the vehicle he moved the button from safety mode to automatic mode. He said he only realised after a second bullet went off that the firearm was in a semi-automatic mode.

[20] He said all the security officers, including Botha, were armed with firearms at the scene.

[21] Botha corroborated the version of Reneilwe that after the vehicles came to a halt at the filling station, Reneilwe alighted from the corolla and raised up his hands, on his instructions. He said Reneilwe helped him open the back passenger door so that he could take out passengers from the backseat. He continued to say that since one of the passengers did not want to stand still he grabbed him by his shoulders, turned him around and pushed him against the vehicle and instructed him to put his hands on the roof of the vehicle. In the process, he heard someone shouting 'whaa, whaa'. That, he said, was followed by two shots.

He did not see who fired the shots.

- [22] Mr Hiebner was one of the security officers who assisted Botha to search the occupants of the corolla.
- [23] He testified that when the occupants were searched Kruger was standing in front of the corolla whilst he stood close to the front left passenger door, next to the appellant. Both he and Kruger were armed.
- [24] He testified that he and the appellant instructed the deceased, first, to put his hands on the dashboard and then get out of the vehicle. He shouted at the deceased twice as he removed his hands from the dashboard because he was not ordered yet, to alight from the vehicle. He said as he shouted whaa, whaa, he heard two shots being fired. He closed his ears and turned around.
- [25] He testified during cross-examination that once the left front passenger door was opened the appellant pointed the muzzle of his R5-rifle close to the deceased's chest. He said once the deceased started moving his hands towards his right, he lifted his firearm but did not pull it out of the holster. He said he would only shoot the deceased if the deceased possessed a firearm and posed a threat. His version that a muzzle of the appellant's R5-rifle was placed close to the deceased's chest was corroborated by Dr Nkondo and Reneilwe who testified that the appellant was standing close to the deceased when he shot him.
- [26] Evidence is clear that the deceased and his fellow students did not pose a threat to either the police officers or security officers from the time that the officers drove behind them until they all stopped at the filling station.
- [27] Upon arrival at the filling station the police and security officers alighted from the vehicles, carrying firearms, including R 5 rifle. The deceased's fellow students were pulled out of the vehicle without offering any resistance. None of them had carried weapons. They obeyed instructions to raise up their hands and lie on the ground
- [28] The deceased, who remained inside the vehicle, was instructed by both Hiebner and the appellant, first to, put his hands on the dashboard and then to get out of the vehicle. The appellant, according to Hiebner, had pointed the muzzle of his R 5 rifle close to the deceased's chest.
- [29] The conduct of the appellant obeying the instruction to get out of the vehicle was appreciated by the appellant by stating the following:
- "That person complied by opening the door. He took out one of his feet of which it was the left foot....."*
- [30] Despite the appellant appreciating the deceased's co-operation he nevertheless shot the deceased. There is no evidence that the deceased ever threatened or attempted to threaten the appellant when he got out of the vehicle. Therefore, the appellant's version that he shot the deceased on reasonable suspension that the deceased was attempting to pull out a firearm from his waist, as he got out of the vehicle, thus threatening his life, was correctly rejected by the trial court.

- [31] The appellant had placed a muzzle of his R 5 rifle close to the chest of the deceased whilst he was aware, at the same time, that Hiebner and Kruger, too, who stood close to him, had carried firearms. The appellant had no reason to fear the deceased who he shot inside the vehicle. Therefore his version that he panicked and became confused and acted in a state of automatism was correctly rejected by the trial court. The court rejected, also, and rightly, the appellant's version that he accidentally shot the deceased. The appellant, according to Van der Merwe and Mohotsi, received proper training to use R5-rifle.
- [32] The offence which the appellant was charged with, is read with the provision of section 51(1) of Act 105 of 1997 which prescribes a sentence of life imprisonment when the offence was planned by the offender or premeditated. The court, rightly, found absence of planning or premeditation. Its finding that the state proved the intent of *dolus eventualis* is correct. In that regard, reliance was sought on *S V Combrik*³ wherein the conviction of the accused for murder with the form of intention being *dolus eventaulis* was confirmed, on appeal, because of the evidence that he shot at the deceased who was unarmed and posed no threat. It was held that the accused reconciled himself with the harm that he subjectively foresaw.

For these reasons the appeal against conviction must fail.

- [33] The appellant was facing a sentence of 15 years imprisonment for murder. However, the trial court was of the view that the personal circumstance of the appellant together with the intent of *dolus eventaulis* do constitute weighty consideration that justify a lesser sentence than prescribed.
- [34] The trial court was of the view, also, that imposition of such sentence would be unjust. In this regard, reliance was sought on *S v Malgas*⁴ wherein the following was said:

"If the sentencing court on a consideration of the particular case is satisfied that they render the prescribed sentence unjust in that it would be disproportionate to the crime, the criminal and the needs of the society, so that an injustice would be done by imposing that sentence, it is entitled to impose a lesser sentence."

- [35] The court went further to suspend four years of the sentence which it had imposed on the appellant, thereby compelling the appellant to serve an effective term of eight years imprisonment.
- [36] The question is whether the eight years imprisonment sentence justify interference on the basis that it does not fit the appellant as well as the crime, committed, and not fair to the society⁵ or is disturbingly inappropriate.
- [37] The test for interference by an appeal court is whether the sentence imposed by the trial court is vitiated by irregularity or misdirection or is disturbingly inappropriate.
- [38] In *S v Qamata*⁶ an appropriate sentence was explained as a sentence in accordance with blameworthiness of every individual offender.

[39] In *S v Van Wyk*⁷ it was said that the appellate court would interfere with sentences imposed by a trial court, only where the degree of disparity between the sentence imposed by the trial court and sentence which the appellate court would have imposed was such that interference was competent and required.

[40] The personal circumstances of the appellant are recorded as follows:

He was 31 years old when the offence was committed; He matriculated in 2003 and qualified as a police officer in 2010. He is a first offender and holds the rank of a constable. He is married and a breadwinner. He has two dependent children. It was argued, also, that when the present incident occurred the appellant was still suffering the after effects of the past traumatic stressful experience of being involved in a shooting incident with suspects in 2012. On this issue, it is important to mention that the appellant was not hurt in that incident in that harm was not directed at him and that his fellow police officers suffered minor injuries. Therefore this factor does not carry any weight in favour of the appellant.

[41] In contrast, the following aggravating factors were placed on record:

The deceased, born in 1991, was due to graduate in March 2014. The health of his 51 year old mother and domestic worker has since deteriorated due to the tragic death of the deceased. The girlfriend of the deceased, who was pregnant with the child of the deceased, miscarried on hearing about the deceased's death. The trial court considered as an aggravating factor, too, the fact that the appellant, a trained police officer, endangered the life of an innocent young person who he was expected to protect. In addition, the appellant, who appreciated the co-operation of the deceased to get out of the vehicle after he was ordered to do so when the vehicle was searched, placed the muzzle of the R 5-rifle close to the chest of the deceased and shot the deceased, who was unarmed, on the chest and head when the deceased was in the process of alighting from the vehicle. The deceased did not pose any threat to either the appellant or any of the police officers who were present at scene and all armed with firearms. The appellant was supposed to have kept a distance of 15 to 25 metres away from the scene, protecting his crew members whilst searching the vehicle. On the same breath, the security officers and the police, including the appellant, were aggressive towards the occupants of the corolla. This is evident from the conduct of Botha, grabbing one of the occupants by his shoulders and pushing him against the vehicle. The conduct of police instructing the occupants of the vehicle to lie on the ground, whilst unarmed, demonstrated aggression, too, towards them.

[42] In my view, these aggravating factors outweigh, by far, the personal circumstances of the appellant. Therefore, the sentence imposed by the trial court as compared to that which this court would have imposed, had it been that court, is disturbingly inappropriate.

Therefore it stands to reason that this court is at large to impose sentence afresh⁸.

[43] It was submitted on behalf of the appellant that he initially applied for leave to appeal against the conviction only, but was virtually invited by the trial judge to apply for leave to appeal against the sentence as well because the judge was of the

view that reasonable prospects of success existed. This submission does not advance the appellant's case, in my view. The reason is that the appellant's counsel did not show in what way does the view expressed by the trial judge with regard to the reasonableness of prospects of success, on appeal, amounts to prejudice, particularly when the appellant, having applied his mind on the views expressed, made his own decision to lodge an appeal against sentence.

[44] Importantly, this court afforded the appellant sufficient opportunity⁹ to weigh his options. He had the option of withdrawing the appeal against the sentence, with leave of this court, but preferred to proceed with the appeal. Therefore it cannot be said that the appellant did not receive a fair trial.

[45] For these reasons, I am of the view that the sentence of 18 years imprisonment is appropriate for this horrific crime.

[46] The appellant was granted bail. The outcome of this appeal now compels him to serve his sentence.

[47] In the result, the following order is made:

47.1 The appeal against conviction and sentence is dismissed.

47.2 The sentence imposed by the trial court is set aside and substituted with the sentence of 18 years imprisonment.

47.3 The appellant's bail is withdrawn.

47.4 The appellant should hand himself over to the Johannesburg Prison within 48 hours from the date of this order.

M M MABESELE

JUDGE OF THE HIGH COURT

I agree, it is so ordered:

R MOKGOATLHENG

I agree:

C Van VEENENDAAL

ACTING JUDGE OF THE HIGH COURT

Hearing date : 21 April 2017

Judgment delivered : 30 June 2017

Appearances

Appellants Counsel : Mr J.O van Schalkwyk

Instructed by : BDK Attorneys

Respondents Counsel : Adv. A.D Maharaj

Instructed by : The Director of Public Prosecution

1 Read with the provision of section 51(2) of the Criminal Law Amendment Act, 105 of 1997 which prescribes a minimum sentence of 15 years imprisonment for a first offender.

2 S v Bogaards 2013 (1) SACR 1 (CC) at 21 para [60].

3 2012(1) SACR 93 (SCA)

4 2001 (1) SACR 469 (SCA) at para [25].

5 See, S v Khumalo 1973 (3) SA 697 (A).

6 1997 (1) SACR 479 (E) at 483a.

7 2015 (1) SACR 584 (SCA) at 594, para [31].

8 See S V Cwele 2013(1) SACR 478(SCA) where the sentence of 12 years imprisonment imposed by the high court on the appellants for dealing in dangerous dependence-producing drugs (cocaine) was set aside and replaced with a sentence of 20 years imprisonment. See, also, Director of Public Prosecutions, Kwa Zulu-Natal V Ngcobo and others 2009(2) SACR 361(SCA)

9 Through the proper notice for possible increase of sentence

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