

SOUTH AFRICA / JUDGMENT

Putter v S (CA50/2017) [2017]

ZAECGHC 106 (20 September 2017)

[2017] ZAECGHC 106

COURT

Eastern Cape High Court, Grahamstown

BEFORE

M Roberson, N G Beshe, M J Lowe

CASE / FILE NUMBER

CA50/2017

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IN

THE HIGH COURT OF SOUTH AFRICA

EASTERN

CAPE DIVISION, GRAHAMSTOWN

CASE NO: CA50/2017

DATE HEARD: 28/08/2017

DATE DELIVERED:

20/09/2017

In

the matter between

BRANDON

PUTTER

APPELLANT

and

THE

STATE

RESPONDENT

JUDGMENT

ROBERSON J:-

[1] The appellant was convicted of robbery with aggravating circumstances and murder and sentenced to life imprisonment and 15 years'

imprisonment respectively. This appeal lies against the convictions and sentences, with the leave of the trial court (Smith

J).

- [2] The victim of the offences was a 32 year old man, Mncedisi Kula (the deceased). In the early hours of 25 December 2011 he was found on a footpath which leads off from Springbok Street in Cradock and runs through an open piece of ground alongside a cemetery. He had extensive head injuries, an open fracture of the jaw, a ruptured liver, and bruising to his chest. The cause of death was recorded in the post mortem report as “blunt force injury to the head”. According to Dr Jan de Beer, who performed the post mortem examination, at least three of the head injuries were consistent with having been inflicted with a spade. The concentration of alcohol in the deceased’s blood was 0,22 grams per 100 millilitres of blood. Dr de Beer said that the deceased was “probably in a state of near passing out”.
- [3] Amongst the admissions made by the appellant in terms of s 220 of the Criminal Procedure Act 51 of 1977 (the CPA) was an admission that a certain Samsung cellphone was the property of the deceased at the time of his death. In his plea explanation in which he denied committing the offences, the appellant said that at some time after the offences were committed he picked up the cellphone on a footpath close to a cemetery and on that same day he sold the cellphone to one Denoline Kleynhans. It was not in dispute that the deceased made two calls from his cellphone on 25 December 2011, one at 12h27 and the second one at 12h39.
- [4] The State called an accomplice witness, Mlungisi Mali, who was warned in terms of s 204 of the CPA. It was accepted that he was a very poor witness whose evidence on its own could not be relied upon. A reading of the record bears out his poor showing as a witness. He had made three different police statements, he was evasive, he transparently tried to minimise his role in the crimes, he adapted his evidence when faced with a material contradiction, and the substance of his evidence was at times highly improbable. It is only necessary to summarise his evidence in broad outline and in respect of those aspects of his evidence where the trial court found objective and reliable corroboration.
- [5] Mali testified that on the evening of 24 December 2011 between 10 and 11 pm he and the appellant, whom he had known for about two months, met at a tavern. At that time Mali was wearing a grey hooded top. Outside the tavern they smoked a dagga cigarette and the appellant showed him a spade which was hidden behind a tree trunk. Thereafter they consumed alcohol in the tavern and the appellant said that they should go to Denoline’s house because food had been prepared there. At the time Mali was in a relationship with Denoline’s sister, Nicola.
- [6] The appellant collected the spade and they walked towards Springbok Street. They realised that they had no money to buy alcohol and the appellant suggested that they should rob a drunk person. At this time they were at the gate of a cemetery which adjoins a portion of Springbok Street. They walked off in different directions, the appellant along Springbok Street and Mali through the cemetery. They intended to meet in Koedoe Street, which is on the other side of the cemetery and according to an aerial map runs roughly parallel to

Springbok Street. If one of them found someone to rob, he was to whistle to the other.

- [7] After he had walked a short distance, Mali heard the appellant whistle. Mali turned back and entered the footpath leading off from Springbok Street. He came across the appellant with another man who was staggering. Mali stood at a distance and told the appellant to leave the man alone. The appellant lifted the spade and Mali heard him hitting the man with the spade. Mali approached and saw the man lying on the ground. He felt the man's stomach and heard him gasping for air. He did not see the man's face clearly because it was dark and did not recognise him. The appellant said that he was going to finish the man off. Mali walked away and heard the appellant, who was still in possession of the spade, again hitting the man.
- [8] Mali heard someone nearby and told the appellant he was leaving. He heard for a third time the sound of someone being struck. Mali and the appellant ran along the footpath in the direction away from Springbok Street. At the suggestion of Mali the appellant threw the spade away. They proceeded to Denoline's house where they looked through a hole in the door and saw people asleep. They did not see Denoline. While it was still dark, Mali and the appellant parted ways.
- [9] Later on 25 December 2011 Mali went to Denoline's house and found her with a cellphone which she said she had bought from the appellant. Mali saw photographs on the cellphone of the deceased, whom he referred to as Bhuti Seun, and realised that the appellant must have taken the cellphone from the deceased. After Mali heard that the deceased had been found, he returned to Denoline's house later that day and deleted the photographs on the cellphone. He did so to protect Denoline so that she would not be asked questions concerning matters about which she had no knowledge. A few days later Mali met the appellant but did not ask him about the cellphone because he had not seen the appellant take the cellphone from the deceased.
- [10] A few days later Mali told a police officer, Goniwe, that he should approach Denoline, who had bought a cellphone from the appellant and which had a photograph on it. When reminded that he had said he had deleted the photographs, he said that he had left one photograph on the cellphone. He did not disclose to Goniwe the significance of the photograph and left Goniwe to investigate.
- [11] Ms Eva Shanack lives at the corner of Springbok Street and a gravel road which runs around the open piece of ground. She testified that just after midnight on 25 December 2011 she and her child returned home in her boyfriend's car and stopped outside her house. She was afraid to get out of the car because it was dark and late. She called her boyfriend to come and open the gate and the door. She waited for him and after a while she heard voices and saw two shadows. The persons crossed over Springbok Street into the open piece of ground where there is a footpath. A little while later she heard someone exclaim and heard three blows which sounded as though someone was digging a hole with a spade. Then she saw a person wearing a white hooded top walking in Springbok Street in the direction of the

footpath. This person said “nee ouens moet nie so maak nie”. She could not say if this person was one of the two she had earlier seen. She could not identify any of them. She called her boyfriend and told him what she had heard. She had been sitting in the car for about 45 minutes at this stage. Her boyfriend arrived and called out towards the open piece of ground. She saw two shadows running

away in the direction of the cemetery. She and her boyfriend drove around in the car and came across the deceased lying in the footpath. Her boyfriend called the police.

- [12] Sergeant Jonathan Johnson testified that he received a report at about 01h30 on 25 December 2011 that a person had been found on the footpath. On his arrival at the scene the deceased had already been declared dead by the ambulance personnel.
- [13] Denoline Kleynhans-Jansen testified that she and her sister Nicola had consumed alcohol at their home on the night of 24 December 2011. During the course of the evening her boyfriend, nicknamed Babatjie, now her husband, had gone to sleep. She was a little drunk (“warm”) but not to the extent that she did not know what was happening. At midnight she and Nicola went to wish their father happy Christmas and returned home between 12h30 and 01h00 on 25 December 2011. After a while the appellant arrived and said he had a phone which he wanted to sell. She estimated the time as between midnight and 01h00. She was not mistaken about the time because she had gone to her father at midnight and then returned home. She knew it was midnight because, in accordance with tradition, people and cars were making a noise in the street. She disagreed when it was put to her in cross-examination that the appellant had first arrived when it was already light. She thought the appellant wanted R150 for the phone but she was not sure. She told him she only had R50 and that he should collect the R100 later. At that stage she did not buy the phone. She and Nicola drank a little more and then went to sleep.
- [14] She got up between 06h00 and 07h00 to clean the house and the appellant again arrived with the phone. She gave him R50 and told him to come again to collect the R100. She received the phone from the appellant and saw that the photo on the screen of the phone was that of a Xhosa man. There were other photos of the man on the phone. The phone did not have a simcard. The next day, 26 December 2011, she was at her mother-in-law’s home when Mali arrived. She told him that she had bought a phone from the appellant. Mali looked at the phone and told her that she must remove the screensaver photo from the phone. He did not answer when she asked him why.
- [15] Two days later, on 28 December 2011, Mali came to her house and said he wanted to see something on the phone. She gave him the phone but did not know what he was looking at on the phone. He left but turned back and said he wanted for the last time to look at something on the phone. She gave him the phone again and when he returned the phone to her she noticed that all the photos on the phone had been deleted.

- [16] Denoline kept the phone and about two weeks later she and Nicola left to work in Cape Town. A few months later the police contacted her and took the phone from her. She was told that the man on the phone had been killed. During her time in Cape Town she received calls from a private number and a man whose voice was muffled told her that if she went to the police she would be hurt.
- [17] The appellant testified and denied that he had been in the company of Mali that night. At the time the appellant lived with one Karools, the brother of Babatjie. He knew Mali because Mali used to visit Karools and Babatjie. On the night of 24 December 2011 the appellant stayed at home alone while Karools went out drinking. He cooked food for himself and went to sleep before midnight. Between 6 and 7 am on the morning of 25 December 2011 he went to visit Denoline and Babatjie. At this time he was sober. On his way he came across the cellphone lying in a footpath in the open area next to the cemetery. He marked on the aerial photograph the place where the cellphone was lying. It was in an open piece of ground below the piece of ground through which the footpath ran. He picked it up and checked to see if it was working. He saw a photograph of a man on the screensaver photograph. He initially said that the man was wearing sunglasses but immediately thereafter said that he could not remember because it was a long time ago.
- [18] Seeing that he was on the way to visit Babatjie and Denoline he decided to sell the cellphone to Denoline because she and Babatjie
- had money. He did not make enquiries in the area to find out whose phone it was. He arrived at Denoline's house and asked R150 for the phone. When asked what Denoline said in response, he said he could not remember anything that happened
- thereafter. All he remembered was that he picked up the phone and sold it to Denoline. He said that Denoline could be right ("kan reg wees") if she said she had only R50 and that he should come later to collect the R100. When asked if Denoline had given him R50 he said that he believed so and that he did not remember if at that time she had given him R50 or R150. When asked if he had returned later to Denoline and then sold the phone, he said that he did not remember when she had given him the money. When asked if he had given her the phone on the first occasion he said he did not remember. He said Denoline was mistaken when she said that he had arrived between 12h00 and 01h00. He did not hear about the murder of the deceased until a few weeks later when a policeman asked him about a phone which he had sold to Denoline.
- [19] Smith J found Mali not to be a good witness and approached his evidence on the basis that his evidence would only be taken into account when it was supported by the evidence of other State witnesses. Smith J was of the view that the other State

witnesses were good and credible witnesses. He found that Mali's evidence was corroborated in the following aspects:

Dr de Beer's evidence that the deceased's injuries were consistent with having been inflicted with a spade; the evidence of Ms Shanack that she saw a person wearing a hooded top who tried to convince the other person not to assault the deceased; and the evidence of Denoline that the appellant arrived at her house between 12h00 and 01h00 on 25 December 2011 with the cellphone. Smith J said that Denoline's certainty about the time was reasonable given that it was Christmas morning. He reasoned that even though she was to a certain extent under the influence of alcohol, it was highly improbable that she would make a mistake. Smith J said that he had no hesitation in accepting Denoline's evidence in this regard. Denoline's evidence and the other evidence concerning the time of the attack on the deceased meant, so Smith J reasoned, that the appellant was in possession of the deceased's cellphone minutes after he was murdered.

[20] In contrast, Smith J was of the view that the appellant was a poor witness and that his evidence was improbable in various aspects, namely that he had spent Christmas eve alone and that he could remember nothing other than that he had found the cellphone and sold it to Denoline. He referred to the evidence of the appellant that he could not remember how much he wanted for the cellphone, whether Denoline had paid him, and whether he had left the cellphone with her that day. Smith J found the appellant's version to be improbable, contrived and false.

[21] Smith J concluded that the only reasonable inference that could be drawn, taking into account all the evidence, was that the appellant was present and took part in the robbery and murder of the deceased.

[22] In my view, the most significant evidence that could be relied upon as corroboration for Mali's evidence was that of Denoline, namely that the appellant was in possession of the deceased's cellphone very soon after the deceased was attacked. The evidence of Ms Shanack corroborated Mali's evidence that there were two persons on the scene, he and the appellant, but her evidence concerning the person in the hooded top did not in my view corroborate Mali's evidence. Mali said that he was wearing a grey hooded top whereas Shanack said the person was wearing a white hooded top. Moreover this person was speaking to more than one person when he said "nee ouens moet nie so maak nie". Dr de Beer's evidence that the deceased's head injuries were consistent with having been inflicted with a spade, while of some corroboration, did not rule out the injuries having been inflicted with another weapon or instrument.

[23] Mrs Crouse, who appeared for the appellant, fairly submitted that if Smith J was correct in accepting the evidence of Denoline, the appeal could not succeed.

[24] In *S v Monyane & others* 2008

(1) SACR 543 (SCA) para [15] the following was said:

“This court's powers to interfere on appeal with the findings of fact of a trial court are limited. It has not been suggested that the trial court misdirected itself in any respect. In the absence of demonstrable and material misdirection by the trial court, its findings of fact are presumed to be correct and will only be disregarded if the recorded evidence shows them to be clearly wrong (S v Hadebe and Others 1997

- (2) SACR 641 (SCA) at 645e-f). This, in my view, is certainly not a case in which a thorough reading of the record leaves me in any doubt as to the correctness of the trial court's factual findings. Bearing in mind the advantage that a trial court has of seeing, hearing and appraising a witness, it is only in exceptional cases that this court will be entitled to interfere with a trial court's evaluation of oral testimony (S v Francis 1991

- (1) SACR 198 (A) at 204e).”

[25] In the present matter I can find no misdirection by the trial court in the acceptance of Denoline's evidence and the rejection of the appellant's evidence. A reading of the record does not afford grounds to conclude that Smith J was wrong. In accepting Denoline's evidence, he took into account not only the impression she made but other factors such as the extent to which she was under the influence of alcohol and the fact that it was Christmas morning. I agree with Mr Turner, who appeared for the State, that it was highly improbable that Denoline would have made a mistake to the extent that she confused a visit by the appellant in the very early hours of Christmas morning, with a visit at least 5 hours later when it was daylight. She was very clear in her evidence that the appellant visited twice, the first time between 12h00 and 01h00 and the second time between 06h00 and 07h00.

[26] Once Denoline's evidence was accepted it meant that the appellant was in possession of the deceased's cellphone within a very short time after the deceased made his last call at 12h39. Given Ms Shanack's evidence of how long she had waited outside her house, she must have she heard the three blows not long after the deceased made his last call at 12h39.

[27] In S v Zwane and Another [2013] ZASCA 165 Majiedt JA stated at para [11]:

“The inference that a person found to be in possession of recently stolen property is the thief or one of the thieves (or, in this instance, one of the robbers) can only be drawn as the only reasonable inference where the nature of the goods stolen and the time lapse between the theft (or robbery) and the discovery of the goods in that person's possession lend themselves to such a finding (see S v Parrow 1973

- (1) SA 603 (A) at 604B-E; S v Skweyiya [1984] ZASCA 96; 1984

- (4) SA 712 (A) at 715 C-D; S v Mavinini 2009

- (1) SACR 523 (SCA) para 6). The crucial question would be whether the items concerned are of the type which can easily and quickly be disposed of, in which event anything beyond a relatively short time lapse cannot be said to be recently stolen (see Skweyiya at 715E).”

- [28] In the present matter it is so that the stolen item, the cellphone, was of the type which can easily and quickly be disposed of. This is demonstrated by the quick sale to Denoline. However it is highly improbable, given the very short time lapse between the assault on the deceased and the appellant's possession of the cellphone, that the cellphone had been acquired by the appellant from another person.
- [29] I am therefore in respectful agreement with Smith J with regard to his conclusion that the only reasonable inference to draw was that the appellant had participated in the robbery and the murder.
- [30] The appeal against convictions must fail.
- [31] The sentences imposed on the appellant were the prescribed minimum sentences in terms of s 51 (1) and s 51 (2) respectively of the Criminal Law Amendment Act 105 of 1997. Smith J found that there were no substantial and compelling circumstances.
- [32] The appellant was 21 years old when he committed the offences. He was not married and had no children. He completed standard 5 at school and at the time of his arrest he was employed part-time as a painter and carpenter. He had several previous convictions: assault committed in 2006; two for theft committed in 2007 and 2013; three for housebreaking with intent to steal and theft committed in 2007 and 2008; possession of suspected stolen property committed in 2008; six for assault with intent to do grievous bodily harm committed in 2006, 2012 and 2013; culpable homicide committed in 2009; and malicious injury to property committed in 2013.
- [33] Smith J was of the view that in the light of the appellant's previous convictions, which he said revealed a propensity for violence and dishonesty, any prospect of rehabilitation was illusory. He referred to the brutality of the attack on the deceased and the fact that the deceased was under the influence of alcohol and thus an easy and vulnerable target. Smith J concluded that the aggravating circumstances were overwhelming and negated any mitigating effect of the appellant's personal circumstances.
- [34] It was submitted on behalf of the appellant that Smith J did not take into account the effect of alcohol on the degree of the appellant's moral blameworthiness. This submission was made on the basis that Smith J accepted that the appellant had been drinking in the company of Mali that night. I do not think that Smith J went that far in his judgment but even if he had, there was no evidence from the appellant that the consumption of alcohol had affected his

judgment.

[35] No misdirections were committed by Smith J in his judgment on sentence. Having regard to the brutality and callousness of the offences and the appellant's poor record, especially for violent crimes, the appellant is clearly a danger to society.

The sentences were utterly appropriate and proportionate and the appeal against the sentences must likewise fail.

[36] The appeal against convictions and sentences is dismissed.

J M ROBERSON

JUDGE OF THE HIGH COURT

BESHE J:-

I agree

N G BESHE

LOWE J:-

I agree

M J LOWE

Appearances:

For the Appellant: Adv E Crouse, instructed by Port Elizabeth Justice Centre

For the Respondent: Adv GG Turner, Director of Public Prosecutions, Grahamstown

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Prepared on 11 October 2026 · Esheria