

SOUTH AFRICA / JUDGMENT

Rampersad v S (A194/2020; CC64/2016) [2023] ZAGPPHC 752 (30 August 2023)

[2023] ZAGPPHC 752**COURT**

North Gauteng High Court, Pretoria

BEFORE

Sethusha-Shongwe, Mabuse, Baqwa

CASE / FILE NUMBER

A194/2020; CC64/2016

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Source record**IN****THE HIGH COURT OF SOUTH AFRICA****GAUTENG****DIVISION, PRETORIA****CASE****NO: A194/2020****GD****Case No. CC64/2016****Date:30****August 2023****1.****REPORTABLE: YES / NO****2.****OF INTEREST TO OTHER JUDGES: YES / NO****3.****REVISED: YES / NO****DATE:**

30/08/2023

In

the matter between:

RISHEN

RAMPERSAD APPELLANT

And

THE

STATE RESPONDENT

JUDGMENT

SETHUSHA-SHONGWE AJ (Mabuse and Baqwa JJ concurring)

[1] The Appellant, Mr Rishen Rampersad, was convicted in this division on four counts on the 14 September 2018, namely the following:

1.1 Count 1: Murder;

1.2 Count 2: Robbery with aggravating circumstances;

1.3 Count 3: Unlawful possession of a firearm; and

1.4 Count 4: Unlawful possession of ammunition.

[2] The Appellant was sentenced in count 1 to life imprisonment, in count 2 to 15 years' imprisonment, in count 3 to 15 years' imprisonment and in count 4 to 3 years' imprisonment. No compelling and substantial factors were found justifying a lesser sentence than the prescribed life imprisonment.

[3] The Appellant sought leave to appeal both the sentence and conviction. The application for leave to appeal against both conviction and sentence was dismissed by the trial court on 31 October 2018. The Appellant petitioned the Supreme Court of Appeal and on 6 May 2019, leave to appeal was granted against conviction and sentence to the Full Court of this division.

Factual

Background

[4] On 18 January 2016 between 16h30-17h00 the deceased, who was a member of South African Police Service (SAPS), was shot and killed with his work pistol. At about 19h00 the deceased was discovered by his then life partner, Ms Naidoo, lying dead in their home garage. During the investigation of the murder case the police discovered several empty cartridges at the scene; the deceased's work firearm and motor vehicle were missing. The deceased's motor vehicle was found six to seven kilometres away from his home the following day. The deceased's firearm was recovered three months later from a certain Mr Ally Mohammed ("Mr Mohammed") who later committed suicide.

[5] There is no eye witness to the murder of the deceased. The court a quo convicted the appellant on circumstantial evidence, a confession, pointing out and cell phone records.

- [6] The Appellant denies having made a confession and/or pointing out. He testified that his rights to a fair trial and the right to legal representation were violated. He further submits that he was assaulted by the police and tortured in the process of being forced into pointing out. He states that the confession was in fact prepared in advance by Captain Masilela. He was taken to the Magistrate for signing of the confession which he refused to do after being advised by Legal Aid legal representative.
- [7] Concerning the cell phone evidence presented by the State, he does not deny being in the vicinity as placed by the cell phone tower. His explanation is that he stays about 2km away from the deceased home. He persists with the same explanation regarding why he was in the same area that the car was found. His explanation is that he was in the area and had a problem with his bike. He then asked Mr Moodley to come fetch him.
- [8] He denies any involvement in the shooting and killing of the deceased. He gave a lengthy explanation in his plea. He stated that earlier in the day he went to a shooting range. He had a problem with his bike, and he then hired an old bike from CIT Motorcycle store.
- [9] He called Ms Naidoo asking for money for petrol. Ms Naidoo came to his home and they both went to Ms Naidoo's home which she shared with the deceased. It is the Appellant's version that he remained outside whilst Ms Naidoo got inside the house to give him the money. He took the money and left immediately and that was around 16h30.
- [10] Along the way, the hired bike started giving him problems. He called his friend, a certain Mr Moodley, to pick him up. At around 19h00 he received a call from Mrs Naidoo's daughter called him to come over, as the deceased had been shot, she was crying. He went back to the deceased's house. He stated that he is being falsely implicated because the deceased's family knew of his love relationship with Ms Naidoo.
- [11] The Appellant testified that as a result of the warning statement, he elected to remain silent. Therefore, it is surprising or strange that he could have, elected to make a confession or pointing out freely and voluntarily. He testified furthermore that he was tortured and assaulted by the police and denied legal representation.
- [12] The Appellant states that the police officers, namely Colonel Lieutenant Ramakgoshi and Captain Masilela, planned the story to have him falsely implicated. The Hawks were harassing his erstwhile legal representative, Ms Ives.
- [13] The Appellant testified in a trial-within-a-trial as well as in the main hearing, He called 5 witnesses, including Ms Naidoo, who confirmed his movements for the day and that he left her place just before 16h30. Mr Moodley, a friend that picked him up near where the motor vehicle of the deceased was later discovered by police, and the owner of the motorbike store was also called to confirm that he came into the store and he was loaned a motorbike.

- [14] The Respondent, in proving its case, called the neighbours of the deceased, a Ms Bosch and a Mr Pols who testified about having seen a white BMW at the deceased premises around 15h30 and more importantly that they also heard gunshots around 16h00- 17h00.
- [15] The Respondent also called police officers, including Captain Masilela who gave a detailed testimony in the circumstances under which the Appellant offered to make confession, to the effect that he killed the deceased with his work firearm which he received from Ms Naidoo from the house. Although Colonel Lieutenant Ramakgoshi did not write down what the Appellant was stating to him, he testified that he warned him to guard against self-incrimination. Both police officers Ramakgoshi and Masilela, as well as other police officers, denied having assaulted or forced the Appellant to make a confession or pointing out. They also denied having refused the Appellant his rights to legal representation.

Colonel Lieutenant Ramakgoshi testified that he explained the rights to the Appellant before they proceeded to the pointing out of the crime scene. Photos were also taken from the Appellant prior to pointing out and they showed no injuries. Further, Ms van der Westhuizen, the senior prosecutor was also called to testify. She confirmed having provided the appellant with a legal aid representative.

- [16] Captain Bonstra testified and denied that he told the appellant to falsely implicate Caroline Naidoo. Cell phone record evidence was also presented by the state, the cell phone placed the appellant in the vicinity where the deceased was shot and thereafter where the deceased's car was recovered on the next day.
- [17] During the trial-within-a-trial, the court a quo admitted the contents of what was said to Captain Masilela as a confession as well as evidence of pointing out from Colonel Lieutenant Ramakgoshi. This Court found that there was no violation of constitutional right which occurred during the alleged confession and pointing out.

Are There any Prospects of Success in Relation to the Convictions?

- [18] The appellant argues that the court a quo erred in admitting the confession and pointing out as they occurred in violation of his rights as provided for by section 35(5) of the Constitution, namely, his rights to legal representation and rights to fair trial. He states that despite his refusal to make any confession, he was taken to make a pointing out of various scenes which included the house at 291 where the deceased was shot, the place where the deceased motor vehicle was found and the points where murder weapon was concealed but not recovered.
- [19] Appellant further contends that a confession and pointing out were done after he was taken to a Magistrate to make a confession which did not materialize and he was assaulted and tortured by the police.
- [20] The Appellant further states that the trial court erred in finding that the circumstantial evidence presented by the Respondent passed the test of the 2 (two) cardinal rules of logic as stated in R v Blom 1939 AD, by finding the evidence presented to be conclusive and final.

- [21] The Appellant further contends that the trial court convicted him of robbery with aggravating circumstances, unlawful possession of firearm and ammunition, yet he was not found in possession of the deceased's motor vehicle or firearm, from the facts proven at the trial no inference could be drawn that he was the one who shot and killed the deceased with the purpose of stealing the motor vehicle.
- [22] Further the trial court erred in finding that circumstantial evidence regarding the time of the cell phone records corroborated the state's evidence of the alleged "confession". The state did not lead evidence of the cell phone records of either the deceased, Ms Naidoo or Mr Mohammed.
- [23] Lastly, the Appellant raised concerns regarding interference and remarks made by the trial Judge throughout the hearing which he alleges illustrated bias and a closed mind which vitiated the appellant's right to fair trial and the final judgment the court a quo arrived at.
- [24] The Respondent disputes all the grounds of appeal raised by the Appellant and requests the court to find no misdirection by the court a quo and dismiss the appeal on both conviction and sentence.
- [25] The Respondent denies any violation of constitutional rights by the police officers including any assault on the part of the police officers in the process of obtaining a confession and pointing out. There were photos taken of the Appellant NO injuries were found or depicted.
- [26] The Respondent vehemently denies that Captain Boonstra told the Appellant to confess to the murder and that he must implicate

Caroline Naidoo. The Respondent contends that there was no need to assault the appellant as he was already connected by cell phone

evidence which places the Appellant on the scene which he (the appellant) denied.

- [27] Respondent contends that the version of the Appellant that Captain Masilela typed a confession before he took him to the Magistrates court was not to put to Colonel Masilela must be found to be improbable. Captain Masilela could not have taken a typed statement to a Magistrate, for a Magistrate to sign as a confession.
- [28] Respondent submits that the version of the Appellant is full of contradictions. For instance, his lawyer stated that he "soiled" himself as a result of being assaulted by the police yet the appellant mentioned "wet" himself. Further appellant mentioned that he was pepper sprayed during the assault yet it was not put to any of the state witnesses that the appellant was also pepper sprayed
- [29] This court is to consider whether there was a misdirection by the trial court in convicting the Appellant by placing reliance, amongst other factors, on a "confession" and pointing out, cell phone evidence as well as circumstantial evidence.

- [30] The question is, was the trial court correct to rule that the statement the Appellant said to have made before Captain Masilela qualifies as a confession? The statement before Captain Masilela wasn't reduced to writing, read back and signed by the Appellant. Therefore, it is far from meeting the requirement of a confession. However, that non-compliance with the requirement of a confession must not be looked at in isolation. The issue of whether the appellant was assaulted and or tortured by the police in the process of obtaining the statement for the statements qualify as an admission made before a police officer needs to be interrogated.
- [31] I find it to be farfetched and improbable that he was assaulted and tortured. The Appellant had an opportunity to disclose the assault and torture but he did not do that, for instance when he was in the Senior prosecutor's office, Ms Van Der Westhuizen. Further Ms Van Der Westhuizen did not testify about any injuries on the Appellant. Ms Ives, his lawyer at the time, didn't take any pictures of the Appellant so as to support the version of the Appellant having been assaulted.
- [32] There is overwhelming evidence which shows that the Appellant was not assaulted before making a "confession or pointing out". Colonel Lieutenant Ramokgoshi testified that photos were taken from the Appellant on the day of pointing out and they showed no injuries.
- [33] Therefore, the only inference to be drawn from the facts is that he was not assaulted. The Appellant was a policeman. It is expected that he knew his rights better, even though this doesn't imply that his rights to fair trial and legal representation should not be explained. The police officers who testified for the state indicated that the rights were explained and he was warned to guard against self-incrimination. Further, they testified that the Appellant was afforded an opportunity to have his lawyer present. In my view, if Appellant still needed Ms Ives, his lawyer, to represent him and felt that the police were denying him the opportunity he could have easily told Ms van der Westhuizen that he needed his lawyer, Ms Ives to be present instead of taking the services of Legal Aid when offered by Ms van der Westhuizen.
- [34] I find that pointing out and admission were properly obtained. The fact that the firearm was found from Mr Mohammed months after the incident with a note "I killed that man "doesn't simply mean that Mr Mohammed is the one who committed the offence. It is further unknown who Mr Mohammed was referring to have killed. Therefore, it will be a misdirection to conclude that he was confessing to killed the deceased. Further, we cannot lose sight of the fact that the Appellant and Mr Mohammed were friends. We have to look at the evidence in totality.
- [35] See in this regards Stellenbosch Farmers Winery Group Ltd and Another V Martell ET Cie and Others[1] where Nienabar JA stated the following:

"The technique generally employed by courts in revolving factual disputes of this nature may conveniently be summarized as follows: To come to a conclusion on the disputed issues a court may make findings on (a) credibility of the various factual witnesses; (b) their reliability; and

(c)the probabilities. As to (a), the courts finding on the credibility of a particular witness will depend on the impression about the veracity of the witness. That in turn will depend on a variety of subsidiary factors not necessarily in order of importance, such as (i)the witness s candour and demeanour in the witness box, (ii)his bias ,latent and blatant, (iii)internal contradiction in his evidence with what was pleaded or put on his behalf or with established fact or with his own extracurial statements or actions,(v)the probability and improbability of particular aspects of his own version .(vi)the calibre and cogency of his performance

compared to that of other witnesses testifying of the same incident or events. As to (b), a witness s reliability will depend apart from factors mentioned under (a) (ii), (iv) and (v) above, on (i) the opportunities he had to experience or observe the event in question and (ii) the quality, integrity and independence of his recall thereof As to (c), this necessitates an analysis and evaluation of the probability and improbability of each party s version on each of the disputed issues. In light of its assessment of (a),(b)and

(c) the court will then , as a final step ,determine whether the party burdened with the onus of proof has succeeded in discharging it'[2]

[36] The trial court also placed reliance on the circumstantial evidence which, in my view,is found to be conclusive and final.

[37] See S v Reddy[3] where the Court says:

"In assessing circumstantial evidence one needs to be careful not to approach such evidence upon a piece-meal basis and to subject each individual piece of such evidence to a consideration of whether it excludes the reasonable possibility that the explanation given by an accused is true. The version needs to be considered in its totality. It is only then that one can apply the often quoted dictum in R v Blom 1939 AD 188 at 202-3, where reference is made to two cardinal rules of logic which cannot be ignored. These are , firstly ,that the inference

sought to be drawn must be consistent with all the proven facts and, secondly, the proved facts should be such that they exclude every reasonable inference from them save the one sought to be drawn."[4]

[38] The trial Court rejection of the version of the Appellant and accepted that of the state witnesses. The trial court further found through inferential reasoning that Ms Naidoo indeed supplied the firearm to the murderer. It found that the police could not have known of that fact at the time the statement was made. The trial court further found that it was improbable that Captain Masilela and Colonel Lieutenant Ramakgoshi could have planned to falfely implicate the Appellant as the Appellant wanted the court to believe.

[39] Appellant wants the Court to believe that the police wrote down the statement which was supposed to be a confession in advance, before taking him to the Magistrate for a confession. I find it improbable and not tallying with reality.

- [40] The trial court further in rejection of the Appellant's version relating to the usage of cell phone in the specific areas depicted should not be looked at in isolation, but be looked at in the context of the totality of the evidence.
- [41] Therefore, looking at the evidence in its totality, the relationship that Appellant had with Ms Naidoo, their movements on that day as well as the undisputed presence of the Appellant in the premises of the deceased a few minutes prior to the shooting, that shortly thereafter the neighbours heard several gun shots at the deceased's home. Demonstrates that he deceased was shot and killed by the person who used the deceased's work firearm which was earlier left in his safe at home that he shared with Ms Naidoo. The only person who could gain access to the safe is Ms Naidoo. The inescapable inference is that the Appellant got the firearm from Ms Naidoo.
- [42] Further taking into account of contents of the statement Appellant made to Captain Masilela, as well as the pointing out made by the Appellant before Colonel Ramakgoshi and looking at the evidence presented before the trial court, I find no misdirection on conviction.

Are There Prospects of Success Regarding the Appellants Sentences?

- [43] Before us it was argued that the trial Court handed down life imprisonment without having considered substantial and compelling factors, namely, that the appellant was a first offender and not having considered his a e. Further it was argued that the trial court misdirected itself by convicting the Appellant on charge of robbery with aggravating circumstances with intent to rob the deceased of his motor vehicle yet the motor vehicle was not proven to have been robbed as well as convicting him of possession of fire arm and ammunition as the firearm was not found in his possession instead it was recovered from one Mohamed Ally. Looking at all factors presented and how this murder unfolded I disagree with the: appellant's contention concerning the robbery count and that of the possession of firearm and ammunition. I find that the appellant was correctly convicted and sentenced.
- [44] Respondent correctly submitted that sentencing is the discretion of the court and the Appellant was correctly sentenced. The sentence imposed is appropriate in the circumstances.
- [45] Sentencing is entirely the discretion of the court. The discretion must be exercised fairly and judicially.
- [46] See in this regards S v Malgas[5] which set out the following:
"Prescribed Minimum sentences should not be deviated at for flimsy reasons"
- [47] I find that this Murder was properly planned thus it calls for the imposition of the prescribed minimum sentence. Being a first offender does not on its own qualify one for a lesser punishment. The seriousness of the offence is of paramount importance. In casu, the

Appellant was a policeman he is expected to be the one respecting the law rather than to commit this gruesome murder. The deceased was riddled with 14 shots under the roof of his home where he is expected to be safe. The deceased was a responsible person in the community, a policeman there to curb crime. His life was cut short due to the selfish and evil deeds of the Appellant. I am further satisfied that the appellant robbed the deceased of his motor vehicle hence after the shooting his car was removed from the scene. The fact that the firearm was not found at the pointing out scene nor in the physical possession of the Appellant, instead in the possession of one Mr Mohammed does not exonerate the Appellant from being convicted and sentenced on count 3 and 4 that is being in possession of the firearm and ammunition unlawfully. Mr Mohammed was a friend of the Appellant and I am mindful that firearm is an object that can exchange hands easily.

[48] Our courts should show no mercy to these kind of violent crimes. I find no presence of compelling and substantial factors to deviate from the prescribed sentence of life imprisonment. While such sentence is the harshest punishment that our courts can impose under the constitutional dispensation, considering the manner in which this gruesome murder was committed, the sentence imposed does not induce a sense of shock. There is nothing in the Appellant's circumstances out of the ordinary. The reasons advanced by the Appellant for deviation from the prescribed sentence are unmeritorious. The sentence imposed is found to be fair and just, for these reasons appeal should fail.

[49] Consequently, the following order is hereby made;

The appeal, against both conviction and sentence is hereby dismissed.

N.C. SETHUSHA-SHONGWE

ACTING JUDGE OF THE HIGH COURT

PRETORIA

SAM BAQWA

JUDGE OF THE HIGH COURT

P. M. MABUSE

APPEARANCES

Counsel for the Appellant: MR K MUTHRAY

Counsel for the Respondent: ADVOCATE A ROOS

Date of the hearing: 22 May 2023

Date of Judgment: 30 August 2023

[1] 2003(1) SA 11 (SCA).

- [2] Id at para 5.
- [3] 1996 (2) SACR 1 (A).
- [4] Id at 8C -G.
- [5] 2001 (2) SACR 469 (SCA).
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