

SOUTH AFRICA / JUDGMENT

S v Chonco (SS69/2012) [2017] ZAGPJHC 278 (26 September 2017) [2017] ZAGPJHC 278

COURT

South Gauteng High Court, Johannesburg

BEFORE

Spilg

CASE / FILE NUMBER

SS69/2012

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IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: SS 69/2012

Not reportable

Not of interest to other judges

Revised.

26 September 2017

THE STATE

v

CHONCO, CLIFF SAKWABI Application

JUDGMENT

APPLICATION FOR LEAVE TO APPEAL

SPILG, J:

INTRODUCTION

1. Firstly, condonation for the late filing of the application for leave to appeal is granted.

2. On 14 December 2012 Coetzee J convicted and sentenced the applicant. The convictions were for the premeditated murder of Mr Ndlovu (count 1) and for the unlawful possession of a firearm and ammunition (counts 2 and 3). The accused was sentenced to 20 years imprisonment in respect of count 1. He was sentenced to 3 years in total for the unlawful possession of a firearm and ammunition which was ordered to run concurrently with the sentence imposed in respect of count 1.
3. Adv Mzamane submitted that the court should not have accepted the extra curial admission made by the applicant because it was common cause that when the applicant came with his uncle and approached a police officer to make a statement his rights were not explained to him before he gave a verbal exculpatory statement to the officer. This was prior to the taking down of a written statement to the same effect after the applicant's rights were read to him.
4. The judgment was delivered in 2012. This was prior to the decision of *S v Makwaza* 2016 (1) SACR 53 (SCA). Adv Mzamane relied on paras 17 and 18 of the

judgment.

It is evident from the facts set out in the judgment in the present case that the officer to whom the statement was made intended arresting the applicant prior to the applicant making his verbal statement. Albeit exculpatory, the verbal statement contained an admission to the murder.

5. It is not for this court to decide whether the statement in para 17 of *Makwaza* that:

"It is clear that the rights in question exist from the inception of the criminal process, that is, from arrest, until its culmination (up to and during the trial itself)"

would include the period when the police officer intends effecting an arrest (as were the facts found in the present case) but waits for the suspect to give a version before actually arresting him. Whether this is different from an unsolicited statement which catches a police officer totally unawares (and I believe that I have convicted in such circumstances in a previous case) may also require consideration.

6. I was not the trial judge and therefore am at a distinct disadvantage. As I have indicated in a previous leave to appeal application from a decision which was not mine, I would prefer to err on the side of the caution.

In this context the findings may be construed as accepting the accused's statement in part but not necessary for the explanation which led to the murder. I also bear in mind that the applicant changed his version which then was his undoing as the court was obliged to convict, since it had no exculpatory version before it as to why the applicant may have believed that his life was threatened and if the threat was sufficiently grave and imminent to either satisfy the requirements of self-defence. And if not, whether it nonetheless might have reduced the degree of moral blameworthiness further for purposes of sentence.

7. There is a claim of lack of proper consultation prior to the hearing which resulted in trial prejudice. It is unmotivated in the manner that I believe is required; namely by at least requesting the involved counsel to comment on it and to establish when the consultations did in fact occur (as one would expect it to be noted with Legal Aid and at the detention facility when counsel went to consult). (See e.g.; the Botswana case of *S v Maauwe and Motswetla*)
8. By reason of the issue raised by counsel regarding the application of Makwaza leave to appeal is granted to the Supreme Court of Appeal in respect of both conviction and sentence.

SPILG J

DATE OF HEARING: 19 September 2017 DATE OF JUDGMENT: 26 September 2017

FOR APPLICANT: Adv Mzamane

FOR THE STATE: Adv Mothibe

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