

SOUTH AFRICA / JUDGMENT

S v Fundamo [2023] ZAGPPHC 398; CC29/18 (26 May 2023)

[2023] ZAGPPHC 398**COURT**

North Gauteng High Court, Pretoria

BEFORE

Mlotshwa

CASE / FILE NUMBER

CC29/18

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Source record**REPUBLIC****OF SOUTH AFRICA****IN****THE HIGH COURT OF SOUTH AFRICA****(GAUTENG****DIVISION, PRETORIA)****CASE****NO:CC29/18****REPORTABLE: YES/NO****OF****INTEREST TO OTHER JUDGES: YES/NO****REVISED****DATE:**

26/05/2023

In

the matter of:

COSTA

FUNDAMO

Applicant

And

The

State

Respondent

JUDGMENT

Mlotshwa AJ:

1. The applicant was charge with one Ere Patrick Nhaca (herein after referred to as Accused 1). The applicant was accused 2 in the matter.
2. The accused were charged with three counts namely:
 - (i) House breaking with the intent to commit a crime unknown to the prosecutor;
 - (ii) Murder, read with the provisions of section 51(1) and part 1 of schedule 2, alternatively section 51(2) and part II of schedule 2 of the Criminal Law Amendment Act, 105 of 1997;
 - (iii) Robbery with aggravating circumstances as intended in section 1 of Act 51 of 1977 and read with the provisions of section 51(2) of the Criminal Law Amendment Act, 105 of 1997.
3. Both the applicant and his co-accused were convicted of the charges of murder and robbery read with the provisions of 51(2) of the Criminal Law Amendment Act, 105 of 1997. They were acquitted on the count of house breaking with intent to commit a crime unknown to the prosecutor.
4. The court found that there were no extenuating circumstances and sentenced both the Applicant and his co-accused to life imprisonment for the murder and 15 years imprisonment for the robbery.
5. The applicant is seeking leave to appeal both the conviction and the sentence imposed upon them by the Honourable trial Judge Barn, who is presently not available to hear this application.
6. In order to succeed with this application, the applicant will have to show that there are prospects of success on appeal. In *Smith v The State*[1] it was held that:

"(7) What the test of reasonable prospects of success postulates is a dispassionate decision based on the facts and the law, that a court of appeal could reasonably arrive at a conclusion different to that of the trial court. In order to succeed therefore, the applicant must convince this court on proper grounds that he has prospects of success on appeal and that those prospects are not remote but have a realistic chance of succeeding. More is required to be established than that there is a mere possibility of success, that the case is arguable on appeal or that the case cannot be categorized as hopeless. There must, rational basis for the conclusion that there are prospects of success on appear
7. The Applicant further sought condonation for the later filing of this Application for leave to Appeal.

8. His reasons for the late filing of this application being that he was ignorant of the process nor step needed to be followed to file the papers for appeal until he was helped by a fellow inmate and his relatives as he does not have relatives in South Africa.
9. The charges against the accused arose out of an incident that occurred on 25 January 2017 at a house in Doornkop, Pretoria. The victim was one Mr Emmunuel Teto Moyambo who was killed in his house and allegedly robbed of his laptop.
10. The evidence against the accused was a confession made by Accused 1 to one Ms D'Ameida, a private person. The confession was allegedly made in the presence of the Applicant who according to Ms D'Ameida nodded and agreed with what Accused 1 said.
11. The Honourable trial judge found that accused found that the State proved beyond reasonable doubt the applicant killed the deceased. The Honourable trial judge found that the applicant was indeed present when accused 1 confessed and he nodded and "agreed" with accused 1 said.
12. It is not quite clear what the learned Judge meant by saying the applicant "agreed" with what accused 1 was saying to Ms D'Ameida. The impression is that the applicant also "confessed" to Ms D'Ameida by nodding to what accused 1 was saying to Ms D'Ameida.
13. "A confession is an unequivocal acknowledge of guilt, the equivalent of a plea of guilty before a court of law" see *R v Becker*[2]. Can it be said that an accused made a confession just because he was present when his co- accused confessed? Adv Roos on behalf of the State insisted that the applicant did confess by not denying what accused 1 was saying to Ms D'Ameida. This court asked Adv Roos if she is saying the applicant confessed by conduct by not denying what Accused 1 said to Ms D'Ameida. This proposition by Adv Roos is not supported by any case law or authorities and she could not relate to the court of any such authority or case law.
14. In fact, Section 219 of the Criminal Procedure Act, 51 of 1977 provides that no confession made by any person shall be admissible against another person. See also *S v Banda*[3] and *S v Molimi*[4]•
15. In respect of the charge of robbery with aggravating circumstances, there was no evidence led during the trial that the accused robbed the deceased of the laptop. There was no evidence as to when last was the laptop seen at the deceased house. The only evidence is that after the deceased was killed the laptop was found to be missing. It does not seem that there was enough evidence to convict the applicant on this charge as well.
16. As far as the sentence is concerned it does seem that the trial court did consider the personal circumstances of the applicant and rightly found that there were no compelling and sustantial circumstances which would have allowed the court to deviate from imposing the minimum sentences in terms of section 51 of the Criminal Law Amendment Act 105 of 1997.

17. In the circumstances I make the following order:

- (1) The application for leave to appeal in respect of the conviction for;
 - (i) Murder, read with the provisions of section 51(1) and part 1 of schedule 2, alternatively section 51(2) and part II of schedule 2 of the Criminal Law Amendment Act, 105 of 1997;

And

- (ii) Robbery with aggravating circumstances as intended in section 1 of Act 51 of 1977 and read with the provisions of section 51(2) of the Criminal Law Amendment Act, 105 of 1997,

is granted.

- (2) The application for leave to appeal against the sentences on the counts of:

- (a). Murder, read with the provisions of section 51(1) and part 1 of schedule 2, alternatively section 51(2) and part II of schedule 2 of the Criminal Law Amendment Act, 105 of 1997; and

- (b) Robbery with aggravating circumstances as intended in section 1 of Act 51 of 1977 and read with the provisions of section 51(2) of the Criminal Law Amendment Act, 105 of 1997,

is refused.

Mlotshwa AJ

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA

Appearances

ON BEHALF OF THE APPELLANT: ADVOCATE KGAGARA INSTRUCTED BY: LEGAL AID SOUTH AFRICA
ON BEHALF OF THE RESPONDENT: ADVOCATE ROOS INSTRUCTED BY: THE DIRECTOR OF PUBLIC PROSECUTIONS

[1] (475/2011) [2011] ZASCA 15 (15 March 2011)

[2] 1929 AD at 171

[3] 1990

(3) SA 466(8)

[4] 2008 (2) SACR 76(CC)

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