

SOUTH AFRICA / JUDGMENT

S v Morake (58/2017) [2017] ZAFSHC 94 (15 June 2017)

[2017] ZAFSHC 94**COURT**

Free State High Court, Bloemfontein

BEFORE

N. Snellenburg, J. P. Daffue

CASE / FILE NUMBER

58/2017

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Source record**IN****THE HIGH COURT OF SOUTH AFRICA,****FREE****STATE DIVISION, BLOEMFONTEIN****Review No. :****58/2017****THE****STATE****versus****LOBISI****MORAKE****CORAM:**

DAFFUE,

J et

SNELLENBURG, AJ

JUDGMENT**BY: SNELLENBURG, AJ****DELIVERED ON: 15 JUNE 2017**

- [1] Lobisi Morake, a 26 year old male, who was legally represented during the trial, was convicted and sentenced in the Regional Court on a charge of murder. The accused was sentenced to 6 years imprisonment in terms of the provisions of section 276(1)(i) of the Criminal Procedure Act, 51 of 1977 [CPA]. No order was made in terms of section 103(1) of Act 60 of 2000.

- [2] On 15 December 2016 it came to the Magistrate's attention that she erroneously sentenced the accused in terms of the provisions of section 276(1)(i) whilst it was her intention to sentence the accused in terms of the provisions of section 276(1)(b). The sentence of 6 years imprisonment is not competent in terms of the provisions of section 276(1)(i) of the CPA, but it would be competent in terms of the provisions of section 276(1)(b).
- [3] The Magistrate requested a review of the sentence in terms of the provisions of section 304(4) of the CPA.
- [4] The review has become protracted as result of enquiries directed by the reviewing Judge before whom the review initially served. The query was responded to and the review subsequently served before me. In the reasons for the review the Magistrate indicated that she had some trouble reconstructing the record. When the record served before me it was still not complete. It was further reconstructed but, as it turns out the evidence in chief of the accused's witness, Ms Khota, is still amiss.
- [5] It is necessary to deal with the matter, in light of the aforementioned, as this Court needs to determine whether the proceedings as a whole were in accordance with justice, bearing in mind the Magistrate's erroneous application of section 276(1)(i) of the CPA and the fact that the evidence in chief of Ms Khota is not available.
- [6] The mere fact that the record is incomplete does not by necessary implication lead to the conclusion that there was a failure of justice. It similarly does not imply that the review on the record as it stands will prejudice the accused. To this end the remarks of Brand, JA in *S v Chabedi* 2005
- (1) SACR 415 (SCA) paras 5 and 6 are instructive:
- "[5] On appeal, the record of the proceedings in the trial court is of cardinal importance. After all, that record forms the whole basis of the rehearing by the Court of appeal. If the record is inadequate for a proper consideration of the appeal, it will, as a rule, lead to the conviction and sentence being set aside. However, the requirement is that the record must be adequate for proper consideration of the appeal; not that it must be a perfect recordal of everything that was said at the trial. As has been pointed out in previous cases, records of proceedings are often still kept by hand, in which event a verbatim record is impossible (see, eg, S v Collier 1976 (2) SA 378 (C) at 379A - D and S v S 1995*
- (2) SACR 420 (T) at 423b
- f).
- [6] The question whether defects in a record are so serious that a proper consideration of the appeal is not possible, cannot be answered in the abstract. It depends, inter alia, on the nature of the defects in the particular record and on the nature of the issues to be decided on appeal."^[1]

The principles are equally applicable to these review proceedings. It follows that the proceedings need to be considered in totality to determine whether the defects in the record result in the proceedings not being in accordance with justice or having the result that the conviction and sentence should be set aside.

[7] The state's case can be summarised as follows:

7.1 Mrs Maarman testified that during the evening of 27 August 2011 at about 19h00 she, her mother, her son-in-law, youngest child and her uncle, Mr Johnson Mvundle [the deceased] were underway in a motor vehicle when they saw the accused in the company of two ladies. The accused was assaulting one of the ladies. The deceased requested Mrs Maarman's son-in-law, who was driving the vehicle, to stop the vehicle to enable the deceased to render assistance to the woman being assaulted. The deceased verbally confronted the accused as to what he was doing. This aggravated the accused who cursed at him and started to approach the deceased. It was clear that the accused intended to confront the deceased. The occupants of the vehicle told the deceased that they should rather leave; they got back into the vehicle and started driving off. Whilst driving away they heard what sounded like stones hitting the vehicle. Mrs Maarman recognised the accused, in the company of another gentleman, throwing stones at the vehicle.

7.2 Mrs Maarman then requested her son-in-law to stop the vehicle; she got out and asked the accused what he wanted. The accused responded that he did not want trouble with her, but wanted the driver of the vehicle. At that stage she noticed a group of boys, numbering 7 to 8, approaching them. The deceased had in the meantime joined her. The group of boys grabbed the deceased and started to assault him. The accused hit the deceased repeatedly with an object which looked like a knopkierie or iron rod or something of that sort. Mrs Maarman could not see exactly where the deceased was being hit, but she saw the accused hitting the deceased with this object whilst the group of boys also assaulted the deceased. Mrs Maarman hid at a nearby church from where she observed the assault. She was approximately 8 to 10 metres away. She focussed on the accused and clearly saw him repeatedly hit the deceased with the object he was wielding. There was sufficient lighting. Mrs Maarman last saw the group dragging the deceased to a veld. She could hear the deceased crying and screaming. Her son-in-law and the remainder of the occupants had by that time

left. She assumed that they had gone to the police station to seek help. This turned out to be a correct assumption.

7.3 Mrs Maarman left the scene and ran to the 'township' to seek help. On her way she met the lady the accused had assaulted earlier and she asked her who the accused was. The lady identified him as Lobise. She then went home to seek assistance from the gentleman with whom she resided. When she reached her home she met two off-duty police officials. One of them, Mr Elias Smith, was well known to her. She asked them to accompany her to where her uncle was being assaulted, but when they reached the place where she had last seen him neither the deceased nor the persons who had assaulted him were there. On their way back, at the exact place where she had met the lady who had been assaulted by the accused she saw the accused.

7.4 Mrs Maarman pointed out the accused to Constable Smith as one of the people that had assaulted her uncle. Constable Smith approached the accused and asked him where Mrs Maarman's uncle was. The accused responded by pointing and saying "I left that guy there". The accused pulled a knife from his jacket but Constable Smith told him that they were not there to fight him, they were only interested in finding Mrs Maarman's uncle. The accused then repeated that "he had left him there".

7.5 In the meantime Mrs Maarman's mother and son-in-law accompanied the police to the place where they had last witnessed the assault. Mrs Maarman's mother informed her by means of cellular phone that they were with the police pursuant to which she went back to the place. She saw police vehicles and an ambulance. The deceased was already in the ambulance. The deceased succumbed away from his injuries two to three days after the assault.

7.6 Mrs Maarman's mother had in the meantime suffered a stroke and can no longer speak or walk. Her daughter and son-in-law had relocated to the Eastern Cape and was separated at the time of the trial and she lost contact with her son-in-law.

7.7 It would not be unfair to remark that the cross-examination did not yield any material contradictions or deviations in her testimony.

7.8 Constable Smith testified that he and a colleague went to Mrs Maarman's house to borrow money. It was well-known that Mrs Maarman conducted a small shop from her home. She was not home. As they were leaving her yard they saw her approaching. He understood from Mrs Maarman that people had taken her uncle and were fighting him. They accompanied her to the place where she believed the assault was taking place, but there was nobody at that place. On their way back she pointed out the accused as one of the persons who assaulted the deceased. Constable Smith knew the accused and recognised him. They approached the accused and asked him where Mrs Maarman's uncle was. The accused pointed with his arm and said "we had left that guy there". Mrs Maarman was upset and wanted to confront the accused who then pulled a knife. Constable Smith stopped Mrs Maarman and advised her to report her uncle as a missing person and to lay charges with the police if he had been injured.

7.9 The identification of the deceased, transport of his body without further injuries to the corpse and post mortem report were admitted by the defence. Suffice it to say that the post mortem confirms that the deceased suffered a brutal assault. The post-mortem shows amongst other injuries, that the deceased had numerous abrasions and lacerations to the head and face; massive deep scalp haemorrhages presented over most of the left and left-frontal parts of the skull and a shallow stab wound on the right side of his back. The cause of death was head injuries.

[8] The defence case can be summarised as follows:

8.1 The accused testified that on the evening in question he was on his way home with a friend. He had to pass the home of one Boniwe, who was standing outside her house with his partner, Letsego when they approached. The ladies asked him to buy them cold drinks whereupon he informed them that he had money at home. They accompanied him to his home. When they

approached his house a vehicle was parked in front of his gate. He was unable to gain entrance to his yard because the vehicle obstructed his access. He knocked on the passenger side window and when it was lowered he requested the occupants to move the vehicle away from his gate. The occupants ignored him and he repeated his request. The driver of the vehicle then insulted him. The accused responded by returning an insult to the driver of the vehicle. The occupants of the vehicle, four gentlemen and two ladies alighted from the vehicle. The driver assaulted him by using his hands whilst the two ladies who were in his company were assaulted by the female occupants of the car. He testified that Mrs Maarman was one of the occupants of the vehicle who assaulted them. He started throwing stones at the people who were assaulting them. The assailants at a stage realised that the accused was back in his yard, whereupon they got into the vehicle whilst he was throwing stones at them and drove off. He chased after them but could not catch up with the vehicle.

8.2 The accused testified that Boniwe had a blue eye as a result of the assault and some of Letsego's hair had been pulled out. He gave the ladies the money they had requested to buy cold drinks and told them he was going to watch a soccer game. As he was locking his house, Boniwe asked that he rather stay with her because she was afraid after the assault. He accompanied them to her house to watch the soccer game there. During the second half he heard people calling him. He saw that it was Constable Smith. He went outside to speak to Constable Smith. After they had greeted each other Mrs Maarman approached him aggressively and said to Constable Smith "here is Lobise". She asked him where her uncle (the deceased) was. The fight earlier was fresh in his memory and he went into Boniwe's house to fetch a knife. When he walked out with the knife in his hand Letsego, Boniwe and Constable Smith "apprehended" him. He reported the fight to Constable Smith and requested him and Mrs Maarman to leave, which they did.

8.3 Letsego Khota, the accused's partner also testified on his behalf. Her evidence-in-chief is amiss from the record. From the cross-examination it is evident that she gave a very similar recollection of events pertaining to the reason for the fight and the fight itself as well as how they ended up at her house. Ms Khota refused to concede that the accused at any time had a knife in his possession and was selective regarding what she could hear of the conversation between the accused and Constable Smith. Suffice it to say that she denied that the accused would have admitted that he left Mrs Maarman's uncle (the deceased) somewhere. In cross-examination Ms Khota was taken to task about the fact that if the events she was testifying to truly transpired as she wanted the court to believe it was inconceivable that she would not have heard the accused admitting that he "left that guy there". She was also confronted with the fact that even the accused admitted fetching the knife and that her sole purpose was to promote the accused's version at any costs, not to be truthful regarding what truly transpired.

[9] The Magistrate was alive to the fact that the totality of evidence needs to be evaluated.[2] She was alive to the fact that there were contradictions in both the State and defence cases and what the correct approach to such contradictions were[3]. The Magistrate did not merely recite the case law and pay lip service to the principles enunciated. It appears from her judgment that she carefully evaluated the evidence and applied the legal principles that she

referred to. The Magistrate in my view correctly concluded that Mrs Maarman's evidence, as single witness, was satisfactory in all material aspects. Her evidence regarding the accused's reaction when asked where the deceased was, was collaborated by Constable Smith who, save for the fact that he had absolutely no reason to give false evidence, withstood the rigours of cross-examination with distinction. Constable Smith made all the concessions one would expect from an objective witness, contrary to Ms Khota who refused to make any concessions whilst it is clear that she should have made concessions. The Magistrate's evaluation of the evidence cannot be faulted. She of course had the benefit of being present when the witnesses testified in court. The record does not reveal any material misdirection in the evaluation of the evidence.

[10] I accept that Ms Khota confirmed the accused's version regarding the alleged altercation, save for the aspects that appear

from the cross-examination. The judgment notes a further contradiction in Ms Khota's evidence in chief regarding the altercation, namely that she testified that when the accused asked the driver of the vehicle to back away from the gate, the driver got out and insulted the accused.

[11] When considering the evidence it is clear that the accused's version was rightly rejected by the Magistrate or put differently the Magistrate's finding that the State rebutted the presumption of innocence by proving the accused's guilt above reasonable doubt cannot be faulted. The Magistrate says that the accused made a poor impression on her, was mendacious and that his version was farfetched and improbable. I agree.

[12] The accused was the main instigator and participant in the assault. Ms Maarman saw him repeatedly striking the deceased with an object which was described by Mrs Maarman as being the like of a knopkierie or iron rod. The post-mortem shows that the majority of injuries were to the deceased's face and head. The deceased passed away as result of severe head trauma. The Magistrate found that the accused had common purpose with the group of boys that assaulted the deceased. Even if there was no agreement, the evidence clearly shows that the accused was present at the scene where the acts of violence were being committed; he knew or must have been aware of the attack; he intended to make common cause with the perpetrators of the violent acts; and he manifested this intention by himself performing acts of association with the conduct of the others that assaulted the deceased.[4]

[11] The incomplete record does not result in the inability to consider the matter, nor does it result in the failure of justice. I am satisfied that the conviction must be confirmed.

[12] As far as the sentence is concerned, I am satisfied that the Magistrate intended to sentence the accused to 6 years imprisonment

and merely referenced the wrong subsection when sentencing the accused. That stands to be corrected. The sentence itself appears to be very lenient if all the relevant facts are considered.

[13] I make the following

orders:

1. The conviction is confirmed.
2. The sentence, duly amended to read, “In terms of section 276(1)(b) of the Criminal Procedure Act, 51 of 1977 the accused is sentenced to 6 (six) years imprisonment”, is confirmed.

N. SNELLENBURG, AJ

I concur.

J. P. DAFFUE, J

- [1] Also see *Machaba & Another v The State* 2016
- (1) SACR 1 (SCA); [2015] 2 ALL SA 552 (SCA) para 4 & 5.
- [2] *DPP v Moloi* (1101/2015) [2017] ZASCA 78 (2 June 2017). The Magistrate quoted passages from *S v Van der Meyden* 1999 (1) SACR 447 (W) where Nugent, J (as he then was) explains the correct approach at the end of the trial in order to determine whether the State has satisfied its onus, more specifically the requirement that the trial court must never look at evidence implicating the accused in isolation in order to determine whether there is proof of reasonable doubt. The Magistrate also referred to the judgment of *S v V* 2000 (1) SACR 543 (SCA) at 456a-c.
- [3] The Magistrate relied on the dictum in *S v Mkohle* 1990 (1) SACR 95 (SCA) dealing with the evaluation by a trial court of contradictions. [4] *S v Mgedezi & others* 1989
- (1) SA 687 (A) at 705I-706B.
- [3] The Magistrate relied on the dictum in *S v Mkohle* 1990 (1) SACR 95 (SCA) dealing with the evaluation by a trial court of contradictions.
- [4] *S v Mgedezi & others* 1989
- (1) SA 687 (A) at 705I-706B.

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