

SOUTH AFRICA / JUDGMENT

S v Shoba (SS36/2021) [2022] ZAGPJHC 942 (28 November 2022)

[2022] ZAGPJHC 942

COURT

South Gauteng High Court, Johannesburg

BEFORE

S D J Wilson

CASE / FILE NUMBER

SS36/2021

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IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG LOCAL DIVISION, JOHANNESBURG)

Case No: SS36/2021

REPORTABLE: NO

OF INTEREST TO OTHER JUDGES: NO

REVISED.

28 November 2022

In the matter between:

THE STATE

and

NTUTHUKO NTOKOZO SHOBA Accused

JUDGMENT:

LEAVE TO APPEAL

WILSON AJ:

1 On 25 March 2022, I convicted Ntuthuko Shoba of the murder of T [...] P [...]. I found that Mr. Shoba's crime was premeditated. On 29 July 2022, I sentenced Mr. Shoba to life imprisonment. Mr. Shoba now seeks leave to appeal against his conviction and against the sentence I imposed.

The appeal against conviction

2 Mr. Barnard, who appeared for Mr. Shoba, accepted that my judgment was free of factual misdirection or legal mistake. He nevertheless advanced the contention that there is a reasonable prospect that an appeal court would overturn Mr. Shoba's conviction. It may do so, Mr. Barnard submitted, by accepting the facts as I found them, but weighing them differently. By weighing the evidence differently, Mr. Barnard argued, an appeal court may detect reasonable doubt as to Mr. Shoba's guilt, where I found none.

3 Having adopted this approach to the application, Mr. Barnard was bound to persuade me not just that there is a "mere possibility" of a different slant being placed on the facts I found, but that there is a "sound rational basis" for concluding that they may support the reasonable possibility that Mr. Shoba is innocent (See *S v Smith* 2012 (1) SACR 567 (SCA), paragraph 7). Put another way, that entails convincing me that there may be a coherent, reasonably possible account of the facts I found that is inconsistent with Mr. Shoba's guilt.

4 In seeking to advance such an account, Mr. Barnard argued, quite correctly, that the basis on which I convicted Mr. Shoba is that I accepted Mr. Malepane's evidence in all its material respects, and I rejected Mr. Shoba's evidence insofar as it contradicted Mr. Malepane's. The question Mr. Barnard raised was whether I treated Mr. Malepane's evidence with the requisite degree of caution.

5 Mr. Barnard's argument entailed accepting that Mr. Malepane's evidence was not such that it could be rejected in its entirety – especially as important aspects of it were undisputed. Mr. Barnard instead concentrated his submissions on three

aspects of the evidence that I found corroborated Mr. Malepane's account, and meant that I could safely accept the material parts of his evidence. Mr. Barnard argued that an appeal court may conclude that these aspects of the evidence did not corroborate Mr. Malepane's account at all, or at least to the extent that allowed me to accept that account.

The Westlake CCTV footage

6 In the first place, Mr. Barnard focused on the Closed-Circuit Television (CCTV) footage of the encounter between Ms. P [...], Mr.

Shoba and Mr. Malepane outside the Westlake complex on the evening of 4 June 2020. He argued that the footage was consistent with the reasonable possibility of Mr. Shoba not knowing that Mr. Malepane was in fact the driver of the Jeep that took Ms. P [...] away to her death.

7 It was, Mr. Barnard submitted, essential to my reasoning in my judgment convicting Mr. Shoba that there was enough time for Mr. Shoba to see and recognise Mr. Malepane when the two men were outside the complex gate. The stills from the CCTV footage show that Mr. Shoba was outside the gate for no more than two-and-a-half to three minutes, and that he was some distance from Mr. Malepane's

Jeep. In light of this, Mr. Barnard submitted that it was at least reasonably possible that Mr. Shoba could not have seen or recognised

Mr. Malepane as the driver.

8 The problem with this argument is that it misconceives what I made of the incident in my judgment, and it leaves out of account some important aspects of the evidence about that incident.

9 I did not conclude in my trial judgment that Mr. Shoba must necessarily have been close enough to the Jeep for a period long enough to see and recognise Mr. Malepane. I first noted that Mr. Shoba accepted that there had been a conversation between Ms. P [...] and Mr. Malepane. I concluded that Mr. Shoba must have recognised Mr. Malepane's voice. On Mr. Shoba's own version, the two men had met several times before, had known each other for ten years, and had recently had a conversation calling from car-to-car while stationary at a robot on Main Reef Road.

10 Moreover, Mr. Malepane had turned up late at night, drunk, to ferry Mr. Shoba's pregnant girlfriend away. Mr. Shoba accepted

that he was close enough to the Jeep to hear Ms. P [...] tell Mr. Malepane that he was "sloshed". Mr. Shoba presented himself at trial as a caring expectant father. In these circumstances, I found that – had he genuinely been unaware of who was driving the Jeep – Mr. Shoba would have shown some interest in the identity of the person who had arrived to pick up a woman carrying his child late at night in a state of inebriation. I concluded that, in light of the totality of evidence, the only reasonable explanation for Mr. Shoba's lack of interest is that he knew all along that Mr. Malepane was the driver, and also that he knew what Mr. Malepane was going to do after he drove Ms. P [...] away.

11 The fact that the stills from the CCTV footage show Mr. Shoba at a distance from the Jeep, apparently making no effort to see who

was inside, simply begs the question. Mr. Shoba need have made no effort to see and interact with Mr. Malepane if he knew why Mr.

Malepane was there and what was going to happen when he left with Ms. P [...].

12 I am, accordingly, unable to accept that there is any prospect of an appeal court finding reason to doubt Mr. Shoba's guilt in the fact that, on Mr. Shoba's version, he was not close enough to the Jeep for long enough to recognise Mr. Malepane.

Mr. Shoba's explanation for his contact with Mr. Malepane

13 The second leg of Mr. Barnard's argument concerned my rejection of Mr. Shoba's explanation for his contact with Mr. Malepane in the weeks leading up to Ms. P [...]s murder. Mr. Malepane gave evidence that he met with Mr. Shoba to arrange Ms. P [...]s death, and that he had no other reason to do so. Mr. Shoba said that he contacted Mr. Malepane to procure an illegal supply of cigarettes during the ban on their sale under the Covid lockdown regulations, not to arrange a contract killing.

14 Mr. Malepane testified that he did sell alcohol illegally during the lockdown, but that he did not sell cigarettes. Mr. Khumalo, a friend of Mr. Malepane, and Mr. Malepane's former partner both corroborated this. Mr. Malepane's former partner stated, categorically, that, had Mr. Malepane been involved in selling cigarettes from the home that they shared, then she would have known about it.

15 Mr. Barnard pointed to a passage of Mr. Malepane's evidence in which Mr. Malepane equivocates about whether he could have sourced cigarettes for sale had he wanted to. Mr. Barnard pressed the conclusion that this tainted Mr. Malepane's evidence on the separate question of whether he actually sold cigarettes. But that conclusion does not follow. There was, it is true, a degree of inconsistency in Mr. Malepane's evidence about whether he had access to cigarettes. Mr. Barnard accepted, however, that Mr. Malepane was clear and consistent on the point that he did not actually sell cigarettes to Mr. Shoba or anyone else. I am unable to conclude that Mr. Malepane's equivocation on whether he could have sold cigarettes had he wanted to taints his version that he did not actually do so.

16 Mr. Barnard asked me to accept the possibility that Mr. Khumalo and Mr. Malepane's former partner were mistaken in believing that Mr. Malepane did not sell cigarettes. Apart from the fact that neither of these witness' versions was challenged during the trial, I find it particularly difficult to see how I could have rejected the evidence of Mr. Malepane's former partner.

She lived with Mr. Malepane. She knew him and his dealings intimately. Mr. Shoba says he went to buy cigarettes at the house she

shared with Mr. Malepane. She plainly would have known if cigarettes were being sold from her home.

17 I am unable to accept, therefore, that there is any prospect that an appeal court would find that I was wrong to accept Mr. Malepane's evidence that he never sold cigarettes, and to reject Mr. Shoba's evidence that he visited Mr. Malepane for the sole purpose of buying them.

The quality of the State's investigation

18 The third main argument Mr. Barnard advanced involved criticism of the State's failure to investigate the phone number that was used to send some threatening text messages to Ms. P [...] in the weeks leading up to her murder, and the phone number that was used to send the text messages that invited Ms. P [...] to attend an interview at MacDonalds in Ormonde. These text messages

were not sent from the 081 number that the State said that Mr. Shoba used to communicate with Mr. Malepane. This, Mr. Barnard argued, was an anomaly that required examination.

19 I accept that there was no evidence presented at trial that either of these numbers was investigated. But it was common cause at

trial that the State did investigate the possibility that Mr. Malepane was connected with Ms. P [....] other than through Mr. Shoba. It was equally common cause that this investigation came up with nothing. Wherever the threatening text messages came from, the critical question was whether Mr. Malepane had some undisclosed motive for killing Ms. P [....] other than the implementation of a contract with Mr. Shoba on Ms. P [....]'s life. Mr. Shoba's defence team did not criticise the State's investigation of that issue in any way.

20 In those circumstances, I cannot conclude that there is any prospect that an appeal court will find reasonable doubt in the State's failure to present evidence that it investigated the number from which the threatening text messages were sent, or the number that issued the invitation to interview at the MacDonalds outlet in Ormonde.

21 Ultimately, none of the arguments that Mr. Barnard advanced offered the prospect of a coherent and rational account of the totality of the facts established at trial that would have left room for reasonable doubt of Mr. Shoba's guilt. The first and third arguments would not have done so even if they were sound on their own terms. The second argument might have, but the fact remains that there is no reason to suspect that an appeal court would reject Mr. Malepane's version that he did not sell cigarettes, especially as it was corroborated by the unchallenged evidence of two other witnesses.

No other compelling reason to grant leave to appeal

22 Perhaps sensing this difficulty, Mr. Barnard emphasised the profound consequences that this trial has had for Mr. Shoba. He emphasised that I was the sole trier of fact and of law in a process that has led to Mr. Shoba's committal to prison for the rest of his life. Mr. Barnard asked me to consider whether I ought to grant leave to appeal in order to ensure that a process with such profound consequences is subjected to appellate review.

23 A Judge sitting alone in any criminal trial bears a heavy burden. Where the trial has resulted in the imposition of a life sentence, that burden is particularly acute. Throughout these proceedings, I have been keenly aware of the possibility that I might make a mistake, and that the consequences of my doing so, for all involved, would be particularly severe. Given these very high stakes, Mr. Barnard's submissions may count strongly in favour of an unqualified right of appeal for those convicted of a crime for

which they then receive a term of life imprisonment.

24 However, that is not the law. The primary question before me is whether there is a reasonable prospect that I was materially mistaken either in putting together the evidence that led to the conclusion I reached, or in applying the law to that evidence. Only the prospect of a mistake of that nature would ground prospects of success on appeal.

25 If Mr. Shoba's prospects were weak but arguable, I might have been persuaded that, given the consequences of my decision for him, I should grant leave to appeal even if I thought the appeal stood only a remote chance of success. Section 17 (1) (a) (ii) of the Superior Courts Act 10 of 2013 allows for this course to be taken. It accepts that an appeal with few or no prospects of success may nonetheless proceed if there is "some other compelling reason" to allow it to do so.

26 But on the material before me, I cannot conclude that Mr. Shoba's prospects of success rise even to the remote. In those circumstances, there is no sufficiently compelling reason to grant leave to appeal. To do so would be no more than an exercise in judicial vanity, and one which would only lengthen the dull dragging agony that these proceedings have no doubt imposed on Ms. P [...]s family and friends.

Sentence

27 No substantial argument on the prospects of an appeal against sentence was addressed to me. I put to Mr. Barnard that, if I was right to convict Mr. Shoba, I must have been right to sentence him as I did. Mr. Barnard offered no riposte.

Order

28 For all these reasons, the application for leave to appeal against both conviction and sentence is refused.

S D J WILSON

Acting Judge of the High Court

HEARD ON: 25 November 2022

DECIDED ON: 28 November 2022

For the State: F Mohamed

Instructed by National Prosecuting Authority

For the Accused: L Barnard

Instructed by Padayachee and Partners,

Pietermaritzburg care of BDK Attorneys, Johannesburg

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