

SOUTH AFRICA / JUDGMENT

## S v Sibiya (SS95/2009) [2018] ZAGPJHC 136 (20 April 2018) [2018] ZAGPJHC 136

COURT

South Gauteng High Court, Johannesburg

BEFORE

Spilg

CASE / FILE NUMBER

SS95/2009

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REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: SS95/2009

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: YES

(3) REVISED.

20 April 2018

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SPILG J

In the matter between:

THE STATE

and

SIBIYA, JACOB MIKE Accused

J U D G M E N T

SPILG J:

1. The accused was convicted of a number of offences which occurred on 23 July 2005. The most serious was that of murder for which he received a sentence of 15 years imprisonment. The others related to the unlawful possession of a firearm and ammunition for which he received sentences of 8 and 3 years imprisonment respectively.

He was also convicted of offences committed some two and a half years later, on 17 December 2008. The most serious was that of rape for which he was sentenced to 8 years imprisonment. He was also convicted of driving a motor vehicle without the owner's consent and of depriving the rape victim of her freedom. For these latter offences he received sentences of 6 months and 3 years imprisonment. The court also ordered that all sentences run concurrently save for the murder and the rape convictions. Accordingly the effective sentence was 20 years imprisonment.

2. The accused seeks leave to appeal against all the convictions and sentences imposed. . At the time of the hearing before me he had served the sentence for rape. I indicated at the commencement of the hearing that the accused would have certain insuperable difficulties if the appeal against the rape conviction was pursued and that an appeal court may take a harsher view of sentence. . That part of the appeal was abandoned.
3. The application is therefore confined to the murder conviction and sentence as well as the allied offences of the unlawful possession of a firearm and ammunition.
4. At the outset it is necessary to indicate that I was not the trial judge and therefore am at a distinct disadvantage. As I have indicated in previous leave to appeal applications from a decision which was not mine, I would prefer to err on the side of the

caution. I am not sitting on appeal and I therefore must guard against applying any test higher than asking whether I am of the

opinion that "the appeal would have a reasonable prospect of success".

5. The grounds for seeking leave to appeal are straight forward. The accused was effectively convicted on the evidence of the brother of the deceased who testified that some two and a half years after the incident the accused, who he never knew before, approached him and said he wanted to apologise for having shot the witness' younger brother as "the thing did not sit well with him".

The witness claimed to have replied that the accused was apologising to the wrong person and that he should apologise to their mother. The witness pointed the accused out at an identity parade held on 28 July 2009.

6. The only other evidence tendered was of the incident when the murder occurred. It was during a night vigil when the deceased came running into the room where the witness and (according to the judgment) about 18 other people were. The deceased shouted for help, saying that "he wants to kill me...". The deceased then hid under the coffin. The assailant entered the room, went up to the deceased and shot him first behind the ear and, as the deceased turned, the next shot struck him in the back. The assailant then fled. No one could

identify him. A spent cartridge was found at the scene and the accused admitted in court that he did not have a valid licence to possess a firearm. Once identity is proven that would suffice for the unlawful possession convictions.

7. Although not argued I am prepared to accept for present purposes that on the evidence, in its context the statement amounted to a confession as to an intentional killing and not just to the shooting.
8. Two points are taken by counsel on behalf of the accused against the judgment of Hattingh J.
9. The first is that as a matter of law, while the court could only convict on the single evidence of a confession if the requirements of s209 of the Criminal Procedure Act 51 of 1977 were satisfied, the only other evidence which was that of the shooting itself. Counsel argues that this is insufficient to trigger

the operation of the section because a link must still be established between the accused to the murder scene.

10. S 209 reads:

Conviction may follow on confession by accused

An accused may be convicted of any offence on the single evidence of a confession by such accused that he committed the offence in question, if such confession is confirmed in a material respect or, where the confession is not so confirmed, if the offence is proved by evidence, other than such confession, to have been actually committed.

11. The last part of s 209 (the alternative leg) indicates that an accused need not be linked to the crime scene. It is sufficient if the crime to which the confession relates was actually committed. In the present case there can be little doubt that the confession to which reference was made could only have been to crime which took place at the night vigil on 23 July 2005- bearing in mind that on the evidence the deceased was the only brother (of the witness) who had been killed by gunshot wounds.
12. The next question is whether the evidence of the witness to whom the confession was made was sufficiently satisfactory to constitute proof beyond reasonable doubt.
13. Not only does the State rely on a confession made out of the blue some two and a half years after the event but there is no corroboration of the meeting and although the evidence is that of a single witness which, in terms of s208 is sufficient for a conviction a court must treat such evidence with caution. The fact that it allegedly took place on 14 December 2008 which was a few days before the rape offence was committed may simply be coincidental, but it should be born in mind that the accused was arrested on 17 December and had previously been incarcerated for another offence.

14. The trial judge did not deal separately with the credibility of the witnesses. It is however clear that the accused was disbelieved, and there can be no quarrel with that, in relation to the rape charge; the court finding that his version was “so improbable that it simply cannot be accepted”. The evidence of the deceased’s brother, to whom the confession was allegedly made, was accepted as satisfactory.
15. It must be accepted that the accused was found to be a liar in regard to the rape and this must colour the view a court takes of the rest of his evidence. One must still bear in mind that unlike most cases, the accused was being tried before the same court

for two completely different offences separated by a number of years and with no common witnesses. .

16. Furthermore, unlike most cases, aside from admitting to know the deceased there was no link between the accused, the deceased and the murder- save of course for the confession which itself occurred in rather unique circumstances and took place a number of years after the incident. In addition it was made to a person who was not asked to explain, by the State nor tested by the accused, as to how the police came to know about the incident for him to be called to an ID parade.

The witness’ explanation of effectively ignoring the accused, of making no enquiries because the accused was brazen enough to be carrying two firearm in each hand in broad daylight in an area where policemen apparently frequent may also raise questions, while none of the 24 persons who were at the night vigil were asked to attend the ID parade let alone describe the assailant’s build . The figure of 18 in the judgment excluded those who were already there.[1]

The first State witness confirmed that there was an incident between the deceased and the assailant immediately before which was known to other people[2] yet no evidence linked the accused to that incident which must have been known to those in the community, yet no one identified what the incident was about or who the other person involved was. Sufficiency of evidence in the circumstances of a case may, when s209 is applied, relate as much to the evidence led as to evidence not led by the State (bearing in mind the nature of the onus and where it lies) if no satisfactory explanation is provided as to the non-availability of witnesses. Furthermore a proper application of s209, where the only other testimony relates to the commission of an offence, may require some other evidence, even if it is only as to motive which ordinarily would be irrelevant.

17. The issue comes down to the sufficiency of evidence and the pragmatic need to allow a court to make findings, as it does, on the evidence of an extra-curial confession made to a member of the public. However, in this case, I am at a distinct disadvantage coming into the case at this stage without the advantage of having observing the witnesses when they testified and without an indication from the judgment regarding their general demeanour. The accused is entitled to the benefit if regard is had to the test which is applied at the leave to appeal stage.

18. The appeal will be referred to the Supreme Court of Appeal as the facts of the case possibly take the confluence of s 208 and s 209 to the boundaries of acceptable testimony capable of sustaining a conviction on a statement that may amount to a confession.

The facts of the case may also expose possible risks inherent in a simple statement allegedly made by an accused which amounts to a confession being capable of receipt as evidence under the last part of s 209, where there are few practical safeguards against manufactured testimony and where consideration may be given to some additional

cautionary measures as mooted earlier.

The case may also engage the question of what constitutes proof beyond a reasonable doubt in respect of one of the charges where credibility findings in relation to a completely unrelated charge for a completely unrelated offence may inadvertently influence its outcome.

#### ORDER

19. Leave to appeal is granted to the Supreme Court of Appeal.

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SPILG J

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DATE OF HEARING: 18 April 2018

DATE OF JUDGMENT: 20 April 2018

FOR THE ACCUSED: Adv S Nobangule

Legal Aid Bureau

FOR THE STATE: Adv Serepo

Director of Public Prosecutions

[1] Record p12 ll 10 to 16

[2] Record p14 ll 12 to 15

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