

SOUTH AFRICA / JUDGMENT

Sebele v S (A782/2016) [2018] ZAGPPHC 654 (28 August 2018)

[2018] ZAGPPHC 654

COURT

North Gauteng High Court, Pretoria

BEFORE

Andrews, C J van der Westhuizen

CASE / FILE NUMBER

A782/2016

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IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

(1)

REPORTABLE

(2)

OF INTEREST TO OTHER JUDGES

(3)

REVISED

CASE NO A782/2016

28/8/2018

In the

matter between:

WILLIAM
MOSIMANE GAPE SEBELE
and
THE
STATE

JUDGEMENT

Andrews AJ

On 16 August 2018 this appeal came before us. The Appellant appealed against both conviction and sentence. Having read the record and having heard counsel for the Appellant and the State, we granted the following order:

- 1). The Appeal against conviction and sentence is upheld.
- 2). The conviction is set aside.
- 3). The accused is acquitted and is to be immediately released.

We indicated that the reasons for the above order will be delivered later. These are the reasons.

PROCEDURAL HISTORY

[1] The Accused, William Sebele, a 51 year old male, was convicted of Murder in the Pretoria-North Regional Court 1 on 29 July 2015.

[2] On 23 March 2016 the accused was sentenced to 15 years' imprisonment. The trial court did not find any substantial and compelling circumstances which justified the imposition of a lesser sentence. The accused is presently serving time in the Correctional Facility, Pretoria-Central.

[3] An application for leave to appeal against the conviction was dismissed

by the Magistrate on 23 March 2016. On petition, leave to appeal was granted against conviction and sentence on 21 October 2016 by the Honourable Baqwa J and Awakoumides AJ. An application for bail pending appeal was summarily refused by the Magistrate.

BACKGROUND

[4] The deceased, his wife, A N M, his daughter, N G M, and their two grandchildren (children of the accused) lived in Soshanguve Extension. The daughter and the appellant, who at the time of the shooting incident was a detective at the Loate Police Station, had been in a relationship for some years. The daughter testified that the relationship between the deceased and the appellant was good and that the appellant was very fond of the deceased and his wife.

[5] On the night of the shooting the daughter testified that she, the appellant

and the deceased sat in the dining room of their house watching a soccer match, until the appellant left to go to bed. The wife of the deceased had already gone to bed - and the daughter decided to follow the appellant. The daughter testified that she and the appellant had a misunderstanding three days prior and the appellant suggested that they discuss such

misunderstanding. She refused since it was late and she preferred to sleep, to which he replied: No otherwise I am going to leave. She attempted to persuade the appellant not to leave because of the lateness of the hour. The accused nonetheless left on foot and left his car at the house of the deceased. The daughter was concerned about his safety in light of the fact that the appellant had not previously left late in the night - and on foot. She made an attempt to ask the Akasia Police for help, with no avail.

[6] The appellant returned later, knocking on the window and asking her to let him in, which she did. In the meantime her parents, hearing the sounds, wanted to know what was wrong and whether the appellant

and their daughter were quarrelling. The daughter indicated to her parents that she and the appellant had resolved their problems and they went back to sleep.

[7] The appellant then told the daughter that he wanted to take their son, Siphomanga, to his home. Due to the late hour the daughter refused - which led to somewhat of a struggle. Upon finding out the cause of the struggle, the wife of the deceased reminded the appellant that he had no right to take his son even though he had paid lobola. The appellant seemed cooperative and returned to the bedroom.

[8] When the appellant emerged from the bedroom with a firearm tucked underneath a blanket, the deceased, his daughter and his wife grabbed the appellant, who stated that he would not shoot - and that deceased

should let go of him. The daughter testified that neither she nor her parents were threatening the accused, nor did they have any firearms. The appellant reassured them that he did not want to shoot anyone.

[9] When the appellant left, the daughter contacted the police again and received no assistance. She then phoned her brother, Derick, who promised to accompany them to the Loate Police for assistance.

[10] The daughter of the deceased returned to her bedroom where she heard the appellant call out that the police had arrived and that he would open the gate to let them in. She was about to put her son to bed when she heard a shot being fired outside and she heard her mother calling out "Sebele ... come and shoot me as well. The wife of the deceased repeated this in her evidence. The wife and daughter of the deceased then went outside and the house found the deceased lying on the ground. It was about 5.00 a.m. The daughter testified that she heard four shots and that she did not know the whereabouts of the appellant.

[11] There were no eye witnesses to the shooting incident. The version provided by the accused, at the time a detective in the SAPS, was that deceased, Butane Elias Mabuse, a male at the time aged 65, grabbed his firearm and that shots were fired in the struggle for possession of the firearm. The deceased died as a result of multiple gunshot wounds through the upper lobes of both lungs, through the thoracic aorta, and through the left abdominal wall.

- [12] The daughter and the wife of the deceased were called by the state as witnesses. Neither witnessed the actual incident in which the deceased was shot. Two police officers testified in relation to the arrest of the accused, the finding of the firearm and ballistics report. They too were not witnesses to the shooting incident.

ISSUE

- [13] Whether the state had proved beyond a reasonable doubt that the appellant acted with the intent to kill the deceased.

THE LAW

- [14] The essential elements of the crime of murder are the actus reus (causing the death of another human being) and the intent.

GROUND OF APPEAL

- [15] Irregularity Regarding the Charge Sheet and Notification to the Appellant: Counsel for the appellant argued that a copy of the charge sheet showed that a charge of Attempted Murder was amended to a charge of Murder, with the word attempted struck out. He argued therefore that the provisions of the Criminal Procedure Act 51 of 1977, in relation to the amendment of the charge sheet, was on the face of it not followed when it was shown to the appellant on 21 January 2014, in that the charge sheet does not refer to the Criminal Law Amendment Act (CLAA) of 1997. Counsel for the appellant argued further that the appellant was not informed personally of the provisions of the CLAA prior to the plea and that this was an irregularity by the Magistrate.
- [16] As recently as 2017 the Constitutional Court reiterated the principle that failure to inform the accused of the applicability of the minimum sentence is a fatal irregularity that may result in an unfair trial in respect of sentence. In *S v Ndlovu* 2017 (2) SACR 305 (CC) Justice Khampepe (in a unanimous decision) set aside the decision where the procedure on the charge sheet was not followed.

The Court found that the magistrate simply said in his judgment "convicted as charged" which did not correspond with the charge sheet including the references to the CLAA - and it should have been corrected. A sentence of life imprisonment was set aside and instead a sentence of 15 years' imprisonment imposed. See also *Machongo v S* 20344/14) [2014] ZASCA 179 where the SCA found that the trial court erred in relying on the provisions of section 51

- (1) of the Act because no mention was made in the indictment to inform the appellant of the applicability of the Act. Nor did the trial judge warn the appellant of its applicability.

- [17] Error in Conviction: The magistrate found as follows:

Op die klagte is die Hof dan van oordeel dat gegewe die direkte getuienis van die getuies, die omvang en (onduidelik-sic) van die deskundige getuienis en die omstandighedsgetuienis wat daarmee gepaard gaan die Staat we/ daarin geslaag het om die saak teen die beskuldigde bo redelike twyfel te bewys. Word die beskuldigde dan in hierdie omstandighede skuldig bevind aan 'n aanklag van moord soos aangekla. [Judgement page 33 lines 11 to 16]

Counsel for the appellant argued that the prescribed minimum sentence may only be imposed if in the conviction the facts are found on which the minimum sentence is based. Counsel argued that the Magistrate did not appropriately analyse and evaluate the evidence of witnesses, including expert witnesses.

[18] There were several ways in which the forensic and other pieces of evidence submitted at trial allowed for conflicting inferences to be drawn. In addition, the contradictory evidence of the expert witnesses, including the medical doctor and police forensic experts, as well as the testimony of the wife and daughter of the deceased, could not have allowed the court a quo to come to firm and incontrovertible conclusions, despite the finding of the magistrate. The appellant was the only witness to the event, his plausible

account precluded a finding of guilty of the crime of murder beyond a reasonable doubt. Indeed, one of the expert witnesses did not discount the possibility of a struggle, especially with the downward trajectory of the bullet wounds. This would be an indication of a struggle - with hands held aloft.

[19] Clear inferences or conclusions to be drawn from the evidence were also hindered by the delay in gathering the forensic evidence.

The police forensic expert was only able to reconstruct the shooting event nine months later, including an inspection of the clothing worn by the deceased, thereby casting doubt on the authenticity and accuracy of the evidence obtained.

[20] The evidence was contradictory in several ways:

- (a) Whether the shooting took place inside or outside of the house. The evidence is unclear whether the deceased was shot outside or inside of the kitchen door. Although the expert witnesses acknowledged that a struggle took place outside the house, it was not so clear whether the shots were fired where the struggle took place, or also inside the kitchen door.
- (b) Which shot was the fatal one? The expert witnesses differed in their conclusions and none could predict with certainty the sequence of shots and which shot was the fatal one.
- (c) From what distance the shots were fired? Because the crime scene was reconstructed so much later, as well as an examination of the clothing of the deceased, the expert witnesses were unclear and contradictory in their testimony as to the distance from which the shots were fired. The suggested distances are in conflict with the evidence relating to the wounds and presence of primary residue on the hands of the deceased.

- (d) The primary residue found on the hands of the deceased. The police forensic expert testified that in her examination she found that the deceased tested positive 100% on his left hand and 37% positive on the right hand for primary residue. She said it could have been as a result of him firing the shot or standing very close to where shots had been fired. Furthermore, the suggested distances are in conflict with the linking of primary residue on the deceased's hands.
- (e) The status and meaning of the suicide note written by the accused. The reason for the suicide note and to whom it was addressed is unclear, even though the arresting officer attempted to suggest that

it was a confession. During examination the arresting officer suggested that the appellant admitted to shooting the deceased before

he was read his constitutional rights. The arresting office also later suggested that the appellant showed some remorse for the

shooting. The meaning and status of the suicide note was not pursued in cross-examination and no confessions or admissions were attached to it.

[21] Absence of Mens Rea (Intent): The state failed to prove the requisite intent to establish proof beyond a reasonable doubt. First, the uncontroverted evidence was that the appellant and the deceased had a good, almost familial, relationship. The wife of the deceased testified that she and the appellant had a very good relationship. The evidence presented by the wife and the daughter of the deceased indicated that on the night that the deceased died, the interaction between the appellant and the deceased, his wife and daughter were in the mode of support. The evidence was that the first time that the appellant left the house, they were very concerned about him. Similarly, when he tried to leave a second time, after they had persuaded him not to take his son, they were genuinely concerned and asked him not to leave. The constant checking in on the

night of the incident, between the deceased and his wife on the one hand, and the appellant and their daughter, on the other, indicated

that there was a lot of concern among them. In fact, the testimony seems to suggest that the appellant was treated like a son-in-law,

even though he was married and had another family.

Secondly, even when the appellant appeared carrying a gun, which he concealed under a blanket, the wife and daughter of the deceased were not really scared of him, but more concerned for him. They were used to him carrying a gun, since he was a police detective. The daughter of the deceased testified that they believed his reassurances that he did not want to shoot anyone.

[22] The version offered by the appellant, namely that there was a struggle to secure his firearm, could not be rejected as improbable.

[23] In *S v Shackell* 2001 (2) SACR 185 (SCA) Brand JA stated in paragraph 30:

It is a trite principle that in criminal proceedings the prosecution must prove its case beyond reasonable doubt and that a mere preponderance of probabilities is not enough. Equally trite is the observation that, in view of this standard of proof in a criminal case, a court does not have to be convinced that every detail of an accused's version is true. If the accused's version is reasonably possibly true in substance the court must decide the matter on the acceptance of that version. Of course it is permissible to test the accused's

version against the inherent probabilities. But it cannot be rejected merely because it is improbable; it can only be rejected on the basis of inherent probabilities if it can be said to be so improbable that it cannot reasonably possibly be true. On my reading of the judgment of the Court a quo its reasoning lacks this final and crucial step. On this final enquiry I consider the answer to be that, notwithstanding certain improbabilities in the appellant's version, the reasonable possibility remains that the substance thereof may be true. This conclusion is strengthened by the absence of any apparent reason why the appellant would, without any motive, decide to brutally murder the deceased by shooting him in the mouth at point blank range. As a consequence the matter must be decided on the appellant's version. According to the appellant's version he never intended to fire a shot. On the acceptance of this version there is no room for a finding of *dolus* in any of its recognised forms. It follows that the conviction of murder cannot stand.

[24] The quoted passage is in my view opposite to the present instance and the appellant's version of a struggle for the firearm and the subsequent shots being fired as a result of such struggle has sufficient substance that it cannot be ruled as being not reasonably possibly true. The presence of primary residue on the deceased's hands and the trajectory of the wound support the probability of the appellant's version. That being so it cannot be said that the appellant's version is false and stands to be rejected. It therefore cannot be said that the state has proved the guilt of the accused beyond a reasonable doubt.

[25] It follows that the appeal against conviction stands to be set aside and that the appellant is to be acquitted.

[26] In view of all the foregoing the order recorded earlier was granted.

P.E. ANDREWS

ACTING JUDGE OF THE HIGH COURT

I agree

C J VAN DER WESTHUIZEN

JUDGE OF THE HIGH COURT

Date Heard:

16 August 2018

Counsel for the Appellant: Adv AC Klapper

Counsel for the State:

Adv JJ Kotze

Judgment

Delivered:

30 August 2018

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