

SOUTH AFRICA / JUDGMENT

Seboe v S (A540/16) [2017] ZAGPPHC 1093 (8 September 2017) [2017] ZAGPPHC 1093

COURT

North Gauteng High Court, Pretoria

BEFORE

Millar, Mothle

CASE / FILE NUMBER

A540/16

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IN THE HIGH COURT OF
SOUTH AFRICA
(GAUTENG
DIVISION, PRETORIA DIVISION)

(1)

NOT REPORTABLE

(2)

NOT OF INTEREST TO OTHER JUDGES

(3)

REVISED

Case No. A540/16

8/9/2017

In

the matter between:

CHRIS
SEBOE
APPELLANT
and
THE
STATE
RESPONDENT

JUDGMENT

MILLAR, AJ (Mothle J concurring)

1. On 24 February 2016, the appellant, a 35-year-old man was convicted in the Regional Court Pretoria of premeditated murder (count 1), unlawful possession of a firearm (count 2) and unlawful possession of ammunition (count 3). He was sentenced to life imprisonment for the premeditated murder and to 15 years imprisonment for the unlawful possession of the firearm and one year for the possession of the ammunition respectively. The sentences for the possession of the firearm and ammunition were to run concurrently with that for murder.
2. The appeal before this court is against conviction and sentence.
3. The appellant was legally represented throughout the proceedings. He pleaded not guilty on all counts. The state called six witnesses to testify. The appellant was the only witness for the defence.
4. The state called Ms. Tiny Selowa ("Selowa") as a witness. She testified that on 5 May 2012 she had been at home in Brazzaville, a residential area in Atteridgeville. At approximately 18h00 to 19h00 the appellant had come to her home looking for her husband Mr. Elvis Sibusiso Mokoena ("the deceased") - he was known also by the nickname of "Zane". The appellant had been friends with him and they all knew each other. When the appellant had come to her home he had been carrying a gun, openly, held against his body.
5. The appellant had asked where the deceased was and Selowa told him she did not know where he was. She was concerned by the presence of the gun and the appellant appearing to be angry. The appellant left and she tried to 'phone the deceased to tell him that the appellant was looking for him. His "phone went to voicemail". She then decided to go and see if she could find him. On leaving her home she heard the sound of gunshots but thought nothing further of it. She went to the home of a certain "Funky" but did not find him there. She returned home and on arrival there was met by Sylvester Mokena ("Mokoena") and Sibusiso Sithole ("Sithole"). They told her that the deceased had been "gunned down" and went with her to the Kalafong Hospital where the deceased had been admitted for the treatment of his wounds.
6. She was asked to sign some forms at the hospital which she did and afterward went to the Police station where she found Mokoena and Sithole. They had made statements to the police. They all then went home. Later that night she was awoken by a telephone call from the hospital to inform her that the deceased had succumbed to his injuries.

7. The second witness called to testify for the state was Sithole. He testified that he knew both the deceased and the appellant. On the day in question and at about 18h45 he had left his home to go to a tavern called Sam's Place in order to watch a football match that was starting at 19h30. He arrived and was seated on the veranda outside

when he heard the sound of the appellant's voice. He turned to look and saw the appellant together with the deceased and someone called Motsepe.

8. The deceased and Motsepe were standing together and the appellant who had a gun in his hand was shouting at them. The appellant fired two shots into the ground to the side of the deceased and Motsepe. The deceased then pushed Motsepe out of his way and moved toward the appellant. The appellant was at this point in time holding the gun up and pointed at the deceased. While the deceased was moving towards the appellant further shots rang out and Sithole ran to hide. A few minutes later when it was quiet, he came back and saw Mokoena holding the gun and heard him saying to the deceased "Uncle, Uncle - wake up I have the gun". He saw the deceased lying on the ground and the appellant standing up and dusting himself off. He saw that the appellant had blood on him, some appeared dry while some was still "dripping".

9. The appellant then left in the direction of his parental home. Sithole helped arrange for someone to take the deceased to the hospital but did not accompany them in the car. He went to tell Selowa what had

happened and later went to the police station. He testified that he had been present when the police had taken possession of the gun from Mokoena at the home of the deceased and had then gone to the scene of the incident to investigate. The appellant had telephoned him later that day to find out how the deceased was and he had told him he did not know how he was. It was put to him that the deceased had been the one in possession of the firearm that evening and he denied this.

10. Dr. Sybrand Greet testified that he had been on duty at the Kalafong Hospital on the evening of 5 May 2012. A patient, the deceased had been admitted at approximately 19h48. He had been diagnosed with multiple gunshot wounds and before he could be stabilized and treated he had succumbed to his injuries. He was pronounced dead at 20H40 by Dr. Greet on that day. His evidence was not disputed.
11. The fourth witness called to testify for the state was Mokoena. He testified that at 15h00 on 5 May 2012 he had been at a shop in "Moshungu" playing snooker. His uncle, the deceased was outside. He had been told the deceased was outside quarrelling with the appellant. He had gone towards them. He struck the appellant with the snooker cue in his hands and the appellant then struck him with an open hand in the face. The appellant told Mokoena that he "would

not sleep that night". Later that day and at approximately 19h00 he had been in the company of the deceased. They had parted company so that Mokoena could go to visit his girlfriend. He had gone a distance when he heard the sound of gunshots. He ran back to where he had parted with the deceased. It was near Sam's place.

12. When he got there, he saw the deceased. Motsepe arrived followed shortly by the appellant. The appellant had said he was going to "kill this dog" referring to the deceased. Motsepe took flight and the deceased and the appellant had begun to grapple with each other. The appellant was holding a firearm pointed at the deceased who had grabbed it by the barrel. Five shots were fired. Mokoena testified that he had grabbed the gun from the appellant while he and the deceased were grappling with each other on the ground and had run to hide it at home. By the time he arrived back at the scene the deceased was being put in to a car to be taken to hospital.
13. He then went with Sithole to tell Selowa what had happened and then went with her to the hospital. He later went to the police and made a statement and went with them to the house so that the police could take possession of the firearm. He testified that the gun he had taken had not been fired by him and had had no bullets in it. He was shown that it had no bullets in it by the police. It was put to him that the deceased had been the owner of the firearm and he denied that the deceased had owned any firearm.
14. Student Constable Manganye testified that she had been on duty on 5 May 2012 attending scenes. Selowa, Sithole and Mokoena had come to the police station to report what had happened. Mokoena had reported that he had

the firearm in his possession that the appellant had used to shoot the deceased and that he had taken it to his home. She testified that she had gone and retrieved it and that it was a 9mm pistol that did not have a serial number. It did not have any bullets in it. She had then been taken to the scene of the incident by Mokoena and she had found two spent casings. This had been at approximately 21h00. Although the Apollo lights in the area were on she had used her car lights to improve visibility that night.

15. Dr. Moosa Aubrey Makhoba testified. He was a senior registrar at the department of forensic medicine at the university of Pretoria. He conducted the post mortem examination of the deceased on 10 May 2012. He concluded that the deceased had died from gunshot wounds to the chest and abdomen. He testified that he specifically found " six sets of gunshot wounds involving the neck, chest and abdominal regions, in keeping with six entrance and six exit gunshot wounds" . This was the evidence for the State.
16. The appellant testified. His evidence was on the day in question he had been told where to find the deceased. He had wanted to see him as the deceased had borrowed R70,00 from him and was to pay it back that day so that the appellant would be able to pay for transport to and from work the next day.

17. He had found the deceased at about 15H00 in the afternoon playing dice. When he had approached, him the deceased had become angry with him telling him that he was bringing him bad luck. An altercation had ensued during which the accused had been hit on the head by Mokoena, who had intervened, with a snooker cue. The appellant said that he

had fled and had gone home to clean his wounds. He had intended to find Sithole, a mutual friend to ask him to assist in sorting the matter out with the deceased. According to him he had been called by his wife to meet her and on his way to her and in the vicinity of Sam's place he had come across Motsepe who was in the company of the deceased.

18. Motsepe had shouted to warn him but the next he saw was the deceased approaching him with a gun in hand. He moved toward the deceased and grabbed at the gun and the deceased and, they had tripped on a pothole in the road and fallen. He had fallen on top of the deceased and was struggling with him for the firearm.

19. During this struggle, the deceased fired two shots into the ground. He had pinned the deceased when Mokoena, the deceased's nephew had appeared and had put his boot onto the hands holding the gun and he had picked

it up. The appellant twisted to keep Mokoena at bay and had pinned his arm in his armpit. It was at this time that Mokoena started

firing the gun. He did not see how he fired the gun or see the deceased being shot. When the shooting stopped, Mokoena broke free

and disappeared and he did not see him again. He denied that he was the one who had been in possession of the gun, had shot the deceased or that he had left the scene.

20. It was his evidence that he had arranged for his cousin, a policeman to take the deceased to hospital and had helped to put him into the car although he did not go with to the hospital. He had then gone home and informed his family what had happened and had at the request of his mother gone a few days later to Mpumalanga. He stayed there for about ten days before returning and handing himself over to the police.

21. In the judgment of the court a quo the evidence tendered by the respective parties was analyzed as a whole and the court had no hesitation in accepting the evidence of the state over that of the appellant.

22. The evidence of Selowa and Mokoena was correctly accepted. The evidence of Sithole was accepted where it corroborated the evidence of the other state witnesses. There was never any evidence by the appellant to explain why Selowa and Sithole in particular would have testified that he was the one with the gun in his possession when on his

version they had no reason to harbor any ill will towards him.

AD CONVICTION

23. In my view, there can be no doubt that the appellant, after the earlier altercation with the deceased and Mokoena went out and procured a gun. He brandished the gun in front of Selowa while searching for the deceased. His intentions were clear and there can be no doubt that he had the intention to use the gun to shoot the deceased. He sought the

deceased out despite having ample time and opportunity to change his course of action.

24. There is in the circumstances, no reason to interfere with the factual findings of the court a quo in respect of the convictions on counts 1,2 and 3.

AD SENTENCE

25.

The appellant was convicted, on Count 1 of a crime referred to in Part 1 of Schedule 2 of The Criminal Law Amendment Act 105 of 1997 and the court a quo was obliged to impose the prescribed minimum sentence of life imprisonment in terms of Section 51(1)(a) of that Act, absent substantial and compelling

circumstances. See *S v Malgas*[1].

26. Consideration must be had to whether the prescribed minimum life sentence was appropriate or whether there were substantial and compelling circumstances to impose a lesser sentence.

27. The appellant is a 35-year-old male. He completed school to grade 11 and was unable to continue his education because of his family's

financial circumstances. He left school and started working to assist with the support of his family. The appellant was at the time of the offences working together with his father and supporting a wife and small child. He also assisted with the support of his siblings. The social workers report submitted in mitigation of sentence indicated that the appellant was not known to be a violent person[2].

28. The appellant acted in a premeditated manner and the deceased died as a result thereof. While he had a previous conviction for domestic violence 3 years before, it certainly cannot be said that the appellant was inherently violent or that he poses an ongoing danger to the community and that the minimum sentence of life imprisonment which was imposed was appropriate. A compelling factor to be considered is the circumstances under which the murder was committed. The appellant is clearly unable to control his anger and it is this lack of control which led to his prior and present convictions.

Having said that, the social worker opined after having interviewed a number of persons who know the appellant, that this was not a frequent occurrence.

29. There are in the circumstances prospects for the appellant to be rehabilitated should he be given the opportunity to learn to control

and deal with feelings of anger in a more constructive manner. It is unlikely that the appellant will commit any further violent crimes if he attends such a course and the possibility of him doing so will at the very least be minimized.[3] That imprisonment is appropriate is not in issue but rather the period of such imprisonment.

30. The trial court overemphasized the interests of the community[4] and was dismissive of the personal circumstances of the appellant[5]. While the appellant had testified at the trial, the State led no evidence in aggravation by the family of the deceased in order to provide the trial court with a greater insight into the interests of the specific community where this crime occurred.

31. There are in the present case substantial and compelling reasons for the court to have departed from the minimum sentence in respect of count 1 and it should have done so. An appropriate sentence having regard to all the mitigating and aggravating factors is 25 years imprisonment[6].

32. In regard to the sentence in respect of Count 2, the argument was advanced on behalf of the appellant that the minimum sentence

provisions of s 51(2) of the Act are in conflict with the provisions of section 121 of the Firearms Control Act[7]. This issue was decided in *S v Baartman*. [8] The provisions of s 120(10) (b) read together with s 121 of the Firearms Control Act provide for a maximum penalty for the possession of a firearm with intent to commit an offence of 25 years, a period in excess of that prescribed in terms of the minimum sentence regime[9]. However, in the present case, the appellant was not charged in terms of S 120(10) (b) but with a contravention of S 120(10) (a) for which the maximum sentence in terms of the Firearms Act is 10 years. The sentence imposed in respect of count 2 was a misdirection, and should be set aside and replaced with a sentence of 10 years.

33. The sentence in respect of count 3, for the possession of ammunition, is significantly lower than the maximum sentence[10] of 15 years and in the circumstances, cannot be described as disturbingly or shockingly inappropriate.

34. In the circumstances, I propose the following order:

34.1 The appeal against the convictions on counts 1,2 and 3 is dismissed.

34.2 The appeal against sentence on count 1 is upheld and replaced with a sentence of 25 years imprisonment of which 5 years is suspended on condition that:

34.2.1 The appellant completes an anger management course; and

34.2.2 The appellant does not commit an offence of which violence is an element during the period of suspension

34.3 The appeal against sentence in respect of count 2 is upheld and replaced with a sentence of 10 years.

34.4 The appeal against sentence on count 3 is dismissed.

34.5 The sentences in respect of counts 1,2 and 3 are to run concurrently.

34.6 The sentences are antedated to 26 February 2016.

A MILLAR

ACTING JUDGE OF THE HIGH COURT

I AGREE, IT IS SO ORDERED

SP MOTHLE

JUDGE OF THE HIGH COURT

HEARD ON:

4 SEPTEMBER 2017

JUDGMENT

DELIVERED ON:

9 SEPTEMBER 2017

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INSTRUCTED BY:

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INSTRUCTED BY:

THE STATE ATTORNEY

[1] 2001 (1) SACR 469 (SCA) at paragraph 8

[2] Exhibit J page 315 - 321 and especially at 317.

[3] See SM Radebe v The State (A105/2015)(2016} ZAGPPHC 188 (17 March 2016).

[4] See the Record pages 268 and 269 - the finding of premeditation together with the number of shots fired as well as the amount of money involved were taken considered. The fact that the appellant could not control his anger considered as an aggravating factor but was not also considered as a mitigating factor in his circumstances.

[5] See the Record page 266 - the only circumstances taken into account were the level of the appellants education and that he was

supporting a minor child. None of the other circumstances referred to by the social worker appear to have been given any proper

consideration.

[6] See *S v Mhlakaza* 1997 (1) SACR 515 (SCA) and *S v Vilakazi* 2009 (1) SACR 552 (SCA)

[7] 60 Of 2000

[8] 2011 (2) SACR 79 (WCC)

[9] *S v Madikane* 2011 (2) SACR (ECG) and *S v Motloun* 2015 (1) SACR 310 (GJ)

[10] S 90 read together with Schedule 4 of the Firearms Act.

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