

SOUTH AFRICA / JUDGMENT

Sippel v S (A160/2016) [2017] ZAGPPHC 187 (12 May 2017)

[2017] ZAGPPHC 187

COURT

North Gauteng High Court, Pretoria

BEFORE

H.J Fabricius, Ranchod, S. P. Mothle

CASE / FILE NUMBER

A160/2016

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IN

THE HIGH COURT OF SOUTH AFRICA

(GAUTENG

DIVISION, PRETORIA)

Case

Number: A160/ 2016

12/5/2017

Reportable

Not

of interest to other judges

Revised.

In

the matter between:

GERHARD

SIPPEL APPELLANT

And

THE

STATE RESPONDENT

JUDGMENT

Fabricsius J,

1.

This appeal against the conviction on a count of murder was previously on the roll on 25 November 2016, and it was ordered that the State file Supplementary Heads of Argument in respect of certain alleged irregularities committed by the trial Court.

2.

Appellant raised four grounds In the Heads of Argument in respect of which the fairness of the trial was challenged. Counsel for the State filed comprehensive Supplementary Heads covering all aspects of the trial, as well as these four grounds, and Adv D. Broughton is thanked for his efforts.

3.

He pointed out that none of the relevant grounds relating to the fairness of the trial were raised In appellant's written and oral

application for leave to appeal. The only ground of appeal was whether circumstantial evidence produced at the trial was sufficient

to establish the guilt of the Appellant on the murder charge beyond a reasonable doubt. At all times, Appellant had been legally

represented.

4.

The Court a quo (Maumela J) also granted leave to appeal solely on that basis,

5.

State's Counsel pointed out that if such Important Issues such as those relating to the constitutional right to a fair trial had been raised In the application for leave to appeal, the Court a quo could have pertinently dealt with such issues In its Judgment on the application, and this Court would have had the benefits of the Court's reasons on such issues, when a trial Judge is best placed to make a decision, based on the facts of a case, where the fairness of the trial Is in issue. I agree with that contention. Reference was also made to *Key v Attorney-General*, CPD [1996] ZACC 25; 1996 (2) SACR 113 (CC), where Kriegler J said the following:

"[13] In any democratic justice system there is a tension between, on the one hand, the public interest in bringing criminals to book and, on the other, the equally great public interest in ensuring that justice is manifestly done to ell, even those suspected of conduct which would put them beyond the pale. To be sure, a prominent feature of that tension is the universal and

unceasing endeavour by international human rights bodies, enlightened legislatures and Courts to prevent or curtail excessive zeal by State agencies in the prevention, investigation or prosecution of crime. But none of that means sympathy for crime and its perpetrator. Nor does it mean a predilection for technical niceties and Ingenious legal stratagems. What the Constitution demands is that the accused be given a fair trial. Ultimately, as was held in *Ferreira v Levin*, fairness is an issue which has to be decided upon the facts of each case, and the trial Judge is the person best placed to take that decision. At times fairness might require that evidence unconstitutionally obtained be excluded. But there will also be times when fairness will require that evidence, albeit obtained unconstitutionally, nevertheless be admitted".

6.

It was therefore submitted by State Counsel that if an issue is raised in argument on appeal, but was not raised as a ground in a Notice of appeal or application for leave to appeal upon which leave was granted, such issue would ordinarily not properly be before the Appellate Court. An Appellant has no right to argue matters not covered by the terms of the leave granted, and even less so where such matters were not even raised in the application for leave to appeal.

7.

In *Legal Aid Board v The State* 2011 (1) SACR 166 at 176, Ponnann JA said the following in this context: ... Counsel contended that, after the abandonment in the Court below of the first ground of appeal, this Court had no jurisdiction to hear and adjudicate upon it. But as this Court has previously held, it will not necessarily consider itself bound by the grounds upon which leave had been granted. If this Court is of the view that in a ground of appeal (I underline) not covered by the terms of leave granted there is sufficient merit to warrant consideration of it, it will allow such ground to be argued.

[17] This does not mean that the Court will always be free to enlarge the issues whether mero motu or at the request of the parties. The question of prejudice may arise..."

As I have said, the issues relating to the alleged unfair proceedings in the trial Court, were not even raised in the application for leave to appeal.

8.

With reference to *S v Safatss and Others* 1988 (1) SA 868 (A) at 877 A - D, the following was said in *Minister of Safety and Security v Mohamad* 2012 (1) SACR 321 at 328 f -J.

"[17] "It is generally accepted that leave to appeal can validly be restricted to certain specified grounds of appeal ... In practice this is frequently a convenient and commendable course to adopt, especially in long cases, in order to separate the wheat from the chaff. On the other hand, this Court will not necessarily consider itself bound by the grounds upon which leave has been granted. If this Court is of the view that in a ground of appeal not covered by the terms of the leave granted there is sufficient merit to warrant the consideration of it, it will allow such a ground to be argued. ... In my view, however, it requires to be emphasised that an Appellant has

no right to argue matters not covered by the terms of the leave granted. His only "right" is to ask this Court to allow him to do so.

[18] The principle above was stated in relation to this Court as it had jurisdiction to extend the grounds on which leave to appeal was granted. The Court a quo had no such jurisdiction. If the Appellants, for example, were not satisfied with the fact that Samela AJ granted leave to appeal on one ground alone, they had to direct a petition to this Court, not the Full Court, to extend the grounds of appeal – other than when a point of law arose - it had no jurisdiction to do so. *Harleek-Jonas Treasure Architects CC and Others v University of Fort Hare* 2002 (5) SA (E) at 511 - 528, and *Queenstown Girls High School v MEC, Department of Education, Eastern Cape, and Others* 2009 (5) SA 183 (Ck) at 186G 187A."

9.

It is therefore clear in my view that we do not have the power as a Full Court to extend the grounds of appeal in the present instance.

10.

It is in any event clear from the proceedings as a whole and from the judgment of the Court a quo, that the trial of the Appellant was substantially fair in all respects. That is the only question. We do not take a formal or contextual approach, let alone an approach that seeks unfairness where none exists, on the basis that a Judge may have used an inappropriate word or phrase in the proceedings or in a judgment, where it is abundantly clear, such as in this case, that the Judge was fully aware of questions relating to evidence, the onus of proof and the constitutional safeguards provided by the provisions of Section 35 (3) of the Constitution. Criminal trials are to be conducted in accordance with open-ended notions of basic fairness and justice and a narrow textual approach is likely to miss important features of the fair trial provision.

9

See: *S v Jaipal* [2005] ZACC 1; 2005 (1) SACR 215 (CC) at par. [28], and *Sanderson v Attorney-General, Eastern Cape* [1997] ZACC 18; 1998 (1) SACR 227 (CC) at par. [22].

11.

In the present instance, no actual or substantial prejudice caused to the Appellant was established. It suffices to refer to one example: at the close of the State's case against Appellant, an application for his discharge was made in terms of the provisions of Section 174 of the Criminal Procedure Act It was refused. Reasons were given in the judgment on the merits.

In *Sv Lubaxa* 2001 (2) SACR 703 (SCA) at par. [10], the following was said:

[Section

174) "permits a trial court to return a verdict of not guilty at the close of the case for the prosecution if the Court is of the opinion that there is no evidence (meaning evidence upon which a reasonable person might convict ...) that the accused committed the offence with which he is charged ..."

12.

The Court a quo was quite aware of this test and of the constitutional right of an accused not to testify during the proceedings, but used the alleged inappropriate phrase that Appellant "needed" to explain certain incriminating evidence.

13.

It is clear that what the Judge meant was that if there was no explanation forthcoming, this could be a factor that would be weighed-up with all the relevant facts to determine whether the State had proven guilt beyond a reasonable doubt. It is clear from the evidence that the learned Judge correctly refused the application. Appellant was not prejudiced in that context, and the alleged irregularity is of no moment, even if it is one. Contextually reference can also usefully be made to *S v Lavhengwa* 1996

(2) SACR 453 W at 485 c - e, per Claassen J, Cameron J concurring where the following was said:

1. 'The State has the duty to begin. It has to make out a case against the accused before he needs (I underline) to respond, whether by testifying, adducing evidence or otherwise'.

14.

It is clear from this dictum that once a prima facie case has been proved by the State, an accused can legitimately be expected to respond, or in other words, there is a need for the accused to respond. If the accused does not present a defence, he runs the risk of being convicted.

See on this topic: Zeffsrt and Paises, *The South African Law Of Evidence*, 2nd Edition, p. 170 - 171.

15.

There is therefore no merit in the criticism of the proceedings in the Court a quo. No prejudice of whatever kind has been shown.

In *Osman and Another v Attorney-General Transvaal* [1998] ZACC 14; 1998 (2) SACR 493 (CC), it was pertinently said in this context at par. [22], that an accused who fails to produce evidence to rebut a case is at risk that the prosecution's case may be sufficient to prove the elements of the offence.

16.

The Court a quo elucidated what aspects of the State's case called for an answer. This approach cannot justifiably be criticized.

17.

As far as the conviction of murder is concerned, the circumstantial evidence produced by the State called for an answer, and after the discharge was refused, the Appellant did give evidence.

18.

The deceased and the accused were in a relationship for some time which the deceased, a teacher at the German School at which Appellant was a care-taker, threatened to end. Appellant could not accept this, and killed her by bludgeoning her with a hammer found in her apartment and strangling her with a rope that was tied around the neck of the deceased. That was the conclusion of the trial Judge, and in my view his reasoning cannot be faulted.

19.

The relevant facts relied upon for the inferential reasons were the following:

1. "The Incident occurred at the deceased's apartment or flat at Simonsberg sub-estate within Equetria Estate in Pretoria. There was no forced entry at the deceased's flat (no one broke into the flat) and no robbery accompanied the murder; nothing had been stolen. The accused gave no evidence to gainsay this fact. Moreover, on the evidence, nobody else had a motive to kill the deceased.
2. The deceased's flat is located in a security estate. The evidence showed that one needed a tag to enter Equestria Estate and one also had to enter a pin code to enter Simonsberg sub-estate, where the deceased lived.
3. It was common cause that when the deceased's body was found in the morning of 16 April 2009, the wooden door which opens into her flat was open and her key found inside. The steel security gate was locked. A sliding door at the premises, was also securely closed. To gain access, the window had to be broken.
4. It was common cause that the accused and deceased were lovers but the accused, shortly before the murder of the deceased, thought that he had been jilted by the deceased. In addition, the deceased also told the accused that she had had sexual relations with her former boyfriend and may have been pregnant with his child. Breaking up with the deceased was devastating for the accused, so much so that he wanted to end his life; he could not picture himself going on in life without the deceased.
5. It was common cause that the accused not only had a tag to enter Equestria Estate, but also the pin code for Simonsberg sub-estate. In addition, he had the keys to both the wooden door and the steel security gate which opened into the deceased's flat. by virtue of his relationship with the deceased. It was further not in dispute that only the deceased and the accused had those tags and keys. There were two tags and two sets of keys; one in the possession of the accused and the other which the deceased had.

6. It was common cause that on the night of 15 April 2009, when the deceased was killed, the accused entered the estate where the deceased resided at 19:20 and left at 20:45. The accused used the tag for the estate which he had in his possession.
 7. According to the evidence of Jan Bekker, the estate manager of Equestria Estate, the deceased arrived at the estate on the night in question at around 19:00 and did not leave the estate again. However, he no longer had the records to confirm that the tag allocated to the deceased was shown as having entered the estate at that time. The evidence of Maya Dahlberg, a friend of the deceased, was that on the evening of 15 April 2009, she attended ballet classes with the deceased at Pro Arte in Alphen Park, Pretoria. She testified that the class ran from 18:30 to 19:30 on the evening in question, and that she then chatted with the deceased until 20:20. The witness indicated that depending on the traffic situation, it would take approximately 15 to 20 minutes to drive from Pro Arte in Alphen Park to where the deceased resided in Equestria. This last piece of evidence was also supported by the defence witness, Christo Janse van Rensburg.
 8. Although therefore there was a discrepancy in the State's case as to the time when the deceased arrived back at home on the night of the murder, the fact remains that on either version she arrived home at a time before the accused, according to his tag, was shown as having left Equestria Estate.
 9. The DNA evidence of Sergeant Matome Manyama showed that blood of the Appellant was found on the left sleeve of a long-sleeved T-shirt of the accused. This evidence was not disputed by the defence. It was common cause that the accused had placed the T-shirt in the washing machine at his residence after the Appellant's blood came to be thereon. The accused in fact alerted police to the presence of the T-shirt in his washing machine after his arrest outside Parys.
- 20.

Appellant's version in essence was that on the night of the murder, he intended to get away to end his life because of the break-up with the deceased. He left the keys to the deceased's flat, which he possessed, on the dining room table in his house. Whilst in the process of driving towards Johannesburg, he decided to turn around and proceed straight to the deceased's estate with the intention of attempting one last time to resuscitate his relationship with the deceased. He used the tag he possessed for Equestria, to gain entry to the estate. Upon arriving within the estate and the sub-estate, he parked his vehicle and waited for the deceased. He then fell asleep in his vehicle. When he awoke he decided that it would be futile to try to patch things up with the deceased since it was clear to him that there was no future for the two of them. He then left the estate without seeing or making contact with the deceased, and drove from the estate directly towards Parys. Outside Parys, he was feeling tired and decided that it was then that he had to end his life. The accused took out blades and started to cut himself. He also had a gun in his possession which he intended to use to shoot himself. He moreover started to take tablets, including sleeping tablets. The accused testified that he then passed out and he could not

remember how he stopped his car. He later awoke to find that there was sunlight and he was outside his vehicle. He thereupon approached the driver's door and was then confronted by the police and apprehended.

21.

The Court a quo considered the objective facts, Appellant's version and took quite correctly so, a holistic view of all the evidence as required.

See: S v Van der Meyden 2014 (1) SA 254 (GNP) at par. [182].

22.

No material mis-direction has been shown to exist.

If the accused did not kill the deceased, the coincidence would be too considerable to be reasonably possibly true that the accused just happened to be at the deceased's estate roughly at the time that the deceased was killed, that the deceased just happened to be killed with a hammer resembling the one which the accused had and with a rope similar to that which was used at the German School and which the accused had access to. This together with the presence of the blood on the T-shirt of the Appellant and the locked security gate at the deceased's flat with nothing having been taken from the flat, rendered the accused's version, insofar as it was in conflict with the State's case, so highly improbable that it could not be reasonably possibly true. This was the State's contention, and I agree with it. An important question is: if the blood on the T-shirt can be explained by an innocent event, why wash it? Appellant obviously thought that it was deceased's blood. The irony is that it was his own.

23.

The conclusion is that Appellant was rightly convicted of murder.

The appeal against the conviction is dismissed.

JUDGE H.J FABRICIUS

JUDGE OF THE HIGH COURT GAUTENG DIVISION, PRETORIA

I Agree

JUDGE RANCHOD

JUDGE S. P. MOTHLE

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