

SOUTH AFRICA / JUDGMENT

Sithole v S (A 149/10) [2013] ZAGPPHC 480 (3 December 2013)

[2013] ZAGPPHC 480**COURT**

North Gauteng High Court, Pretoria

BEFORE

N Kollapen, F G Preller, H L Alberts

CASE / FILE NUMBER

A149/10

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Source record**IN THE NORTH GAUTENG HIGH****COURT, PRETORIA****(REPUBLIC****OF SOUTH AFRICA)****CASE****NO: A149/10****DATE:**

3 December 2013

Not

reportable

Not

of interest to other judges

IN

THE MATTER BETWEEN

AMON

MAGEBA

SITHOLE.....APPELLANT

AND

THE

STATE.....RESPONDENT

JUDGMENT**KOLLAPEN J**

1. On 27 November 2008, SATCFIWELL J convicted the appellant on one count of murder and one count of attempted murder. He was sentenced to 16 years imprisonment on the murder charge and 4 years imprisonment on the charge of attempted murder. The Court ordered the sentences to run concurrently, rendering the sentence to be effectively 16 years.

Leave was granted to appeal against both the conviction and sentence.

2. The appeal came before a full Court on the 01st of February 2012.
3. During the course of argument, the question arose as to whether or not an irregularity had occurred during the trial with regard to the failure by the trial Court to call as a witness, one Vusi Kdiaba in terms of the provisions of Section 186 of the Criminal Procedure Act 51 of 1977.
4. After considering the matter, the full Court made the following order:

i. The appeal is postponed sine die.

ii. The appellant is granted leave to apply to the Court for a special entry in terms of the provisions of Section 317(1), read with Section 317(2) of Act 51 of 1977 on the basis of the failure of the learned Judge to call Vusi Khaba as a witness in terms of the provisions of

Section 186 of Act 51 of 1977.

iii. If the application referred to in paragraph 2 above is not delivered within 21 court days from the date of this order, the order in paragraph 2 above shall lapse, in which case this court shall be notified forthwith by the State for purposes of disposal of the appeal'

5. The application for a special entry contemplated in the order of the full Court was duly made and considered by the trial Judge and on the 11th of September 2012. the application for a special entry was dismissed.
6. The appeal, which had previously been postponed sine die, has now been re-enrolled for hearing.
7. Accordingly, what is before this Court (notwithstanding the dismissal of the special entry) is:
 - i. Whether the failure by the trial Court to call Vusi Khaba as a witness in terms of Section 186 of the Act constitutes an irregularity

justifying the setting aside of the conviction and sentence;

ii. Whether, on the merits, the appeal against conviction and sentence should succeed.

8. In *SEFA TSA and OTHERS v A TTORNEY GENERAL, TRANSVAAL and ANOTHER* 1989 (1) SA 821 (A), the Court stated the following (per RABIE ACJ at 843F-844A):

‘Section 317(1) provides for the making of a special entry relating to an irregularity or illegality in the proceedings at a trial . . . The special entry procedure is designed to furnish an accused who has been convicted with a ground on which he can appeal against his conviction, in the same way as, say, an alleged lack of sufficient evidence would constitute a ground on which he can appeal. The procedure is a useful, or perhaps even necessary, one when the irregularity or illegality complained of is discovered only after the conclusion of the trial. The procedure need not, however, be followed when the irregularity or illegality appears from the record of the case, for in such an event the irregularity or illegality can be made on the ground of an appeal under Section 316 of Act 51 of 1977 (See eg *R v Nzimande* supra at 775A-D).

Sections 316 and 318 therefore both contemplate an appeal against a conviction. They do not provide for different remedies, but merely for different ways of bringing an appeal before the Court, the one (under Section 316) based on a point of law or fact which appears on or arises from the record of the case, and the other (under Section 318) on an irregularity or illegality in the proceedings at the trial. But as I have indicated, an irregularity or illegality in the proceedings which appears from the record can be made a ground of appeal in an appeal as contemplated in Section 316’.

9. Accordingly and given that the alleged irregularity appears from the record, the argument around whether Section 186 should have been applied can be considered on the basis of the record of the trial Court as it stands.

THE FACTUAL BACKGROUND

10. The accused and the deceased had been in a common law union from the beginning of 1992 and were living together at 3753 Zone 2 Zonkezizwe

in the district of Vereeniging.

On the 23rd of October 2005, a shooting incident occurred at the house of the accused resulting in the death of his common law wife, Lungile Goodness Sithomo, and the shooting of his brother Vusi Khaba.

11. The following facts were not in dispute:

- That the accused and the deceased were husband and wife;
- After many years of marriage with three children, there were apparently no marital difficulties;
- On the day in question, the accused attacked the deceased by placing both his hands around her neck and attempted to throttle or strangle her;
- The accused is the lawful owner of a firearm identified as a 9 millimetre parabellum Norinco model;

- On the day in question, four bullets were fired from this firearm;
- Three of these bullets entered the body of the deceased and killed her, giving rise to count 1 (murder). One of these bullets entered the body of the deceased's brother, giving rise to count 2 (attempted murder).

THE DISPUTE

12. The State alleges that the accused shot the deceased and Vusi Khaba with the intention to kill. The accused avers that he attempted to commit suicide by shooting himself in the head and that whilst he was holding his gun and attempting to do so, there was a struggle with both his brother and the deceased. In the course of this struggle four shots went off, killing the deceased and injuring Khaba. The accused says that he had no intention to kill.
13. The State called a number of witnesses, including the mother of the deceased, a neighbour of the deceased, the investigating officer and the doctor who performed the post-mortem.
14. It was not in dispute that the only persons present when the shooting occurred were the accused, the deceased, and Vusi Khaba.
15. The name of Mr Khaba (the complainant on count 2), appeared on the list of State witnesses. The State did not call him but made him available to the defence, who likewise declined to call him. Neither the State nor the defence requested the Court to call Mr Khaba in terms of Section 186 of the Criminal Procedure Act.
16. The court a quo in dealing with Vusi Khaba as a potential witness said the following:

'Quite clearly Vusi Khaba is a very important eyewitness. We know that he was shot on the day in question. We know that he was shot by the accused's gun. We know that the accused took him to hospital. It has never been in dispute that he was' present at the time of the shooting of the deceased, Mrs Sithomo. I repeat that he is therefore an important eyewitness. However he was not called as a witness by either the State or the defence ... It is my decision not to speculate as to the contents of the statement or the reasons for failing to call this witness. '
17. The appellant contends that the Court was under an obligation to call Mr Khaba and that the failure to do so amounts to an irregularity.

THE LAW

18. In *GABAATLHOL WE and ANOTHER v STATE* 2003 (I) All SA 1 (SCA) the Court stated the following (per HEHER AJA at 4B-E):

'In Section 186 'essential to the just decision of the case ' means that the court, upon an assessment of the evidence before it, considers that unless it hears a particular witness it is bound to conclude that justice will not be done in the end result. That does not mean that a conviction or acquittal (as the case may be) will not follow but rather that such conviction or acquittal as will follow will have been arrived at without reliance on available evidence that would probably (not possibly) affect the result and there is no explanation before the court which

justifies the failure to call that witness. If the statement of the proposed witness is not unequivocal or is non-specific in relation to relevant issues it is difficult to justify the witness as essential rather than of potential value.

The parties will often possess insights into the contribution which a witness could make not apparent to the judge or magistrate and their views should always be canvassed before the decision is taken (as the judge did in this case). The best indication to the trial court of the importance that a party attaches to calling a witness is the assiduity which that party applies to ensuring that the witness is available to it. In this case the defence made no attempt to subpoena the witness. The explanation that he was hostile was both unconvincing and insufficient. The Court was not asked to exercise its powers although it had made perfectly plain that its earlier ruling was limited to the stage at which it was made. Nor was any indication given that defence counsel regarded his earlier submissions about the essentiality of the witness as being of continued validity. '

19. BOTHA JA said the following in *ST A AT v SEliERl en AND ERE* 1964 (1) SA 29 (at 33G), in dealing with the manner in which a discretion is to be exercised :

'Die diskresie om die verdaging of uitstel van die verhoor ingevolge art. 160 of 161 van die Strafproseswet, 56 van 1955, toe te staan of te weier, het klaarblyklik uitsluitlik by die Verhoorhof herus. en met die uitoefening van sy diskresie kan hierdie Hof nie inmeng nie, tensy die Verhoorhof sy diskresie nie op regterlike wyse uitgeoefen het nie, dit wil sê op willekeurige wyse of volgens verkeerde beginsels en nie op wettige gronde nie '.

20. Accordingly the question is not whether this Court would have acted differently but whether the trial Court's failure to call Vusi Khaba constituted an irregularity resulting in an injustice. My view is that it did not. The following is relevant in this regard:
- i. The Court carefully considered the potential value of the witness and in particular the election by both the State and the defence (both of whom consulted with the witness and had seen his written statement). The conclusion that he would support neither the State's nor the defence's case was properly founded, under the circumstances. Accordingly on that basis, he could hardly have been of assistance in the sense of an essential witness to the Court.
 - ii. In the circumstances and on account of the above, it could hardly be said that his evidence would probably have affected the result that the Court ultimately arrived at.
 - iii. The discretion that was exercised not to call him in my view was founded on the correct principle and is unassailable.
21. There is accordingly no basis to conclude that the failure by the trial court to call Vusi Khaba as a witness in accordance with the provisions of Section 186 of the Act constituted an irregularity.

MERITS

22. The judgment of the trial Court deals extensively with the network of evidence including what the trial Court referred to as certain objective facts including the plan of the house at the crime scene, the ballistics report, the evidence of the ballistic expert, the doctor's evidence, the medical report on Mr Khaba's injuries and a further plan of the house.

From an assessment of this evidence, the following emerged:

- i. The deceased was throttled on the day of the shooting following an argument between her and the appellant. The throttling was severe in nature and resulted in subcutaneous bleeding and bruising.
 - ii. Four bullets were fired from the appellant's gun. Three bullets entered the body of the deceased and one bullet struck Mr Khaba. One bullet entered the head of the deceased and the other two bullets entered her chest and abdomen. The latter two bullet wounds had downward tracks. Therefore all of the bullets that had been fired struck the deceased and Mr Khaba.
 - iii. The appellant's version was that his initial actions were as a result of the anger he had towards his wife, resulting in him throttling her. He testified however that he had changed his stance and then decided that he wanted to take his own life, which he says resulted in the struggle between the deceased, his brother and the appellant.
 - iv. The trial court described the appellant's version as 'hardly credible and improbable in the extreme'. If there was a struggle, it is incredible that in the course of the struggle, all of the shots that were fired struck two persons. If the deceased truly was involved in a struggle, it is more likely that the bullets would have struck her in the arm or the upper arm or in the armpit.
 - v. The shots were not wild or scattered. The trial Court concluded that three of the shots had been fired at close quarters, and were fired directly and neatly into the deceased and at least one and possibly all three fatally so.
 - vi. It could only have been the appellant's finger on the trigger even if there was a struggle. He was not dispossessed of the gun (according to him) and his finger was on the trigger at all times.
 - vii. Each separate shot would have required the trigger to be activated - it was not possible for continuous pressure to have discharged four shots. This militates against accidental firing in the course of a struggle.
 - viii. It was inconceivable that the deceased or Mr Khaba would still engage in a struggle after being shot.
23. Accordingly the court proceeded to convict the appellant on both counts after assessing all of the evidence including the evidence of the appellant, which it rejected as improbable, implausible and inconsistent with the objective facts.

24. In my view there is no reason to interfere with the conviction in respect of Count 1 (the murder charge).

25. in respect of Count 2, the Court said the following:

'The second piece of evidence before me is that the gun was in the hand of the accused as the gun was facing his brother. I must find that the accused must have known that the bullet ejected from this firearm would go into his brother's body, because the gun was facing in the direction of his brother and at his body when the trigger was pulled. The third piece of evidence before me is that the accused was the owner of this firearm. The firearm is licenced to him. He therefore knew and must have known that the ejection of a bullet would cause physical harm when entering the body of his brother. The bullet entered the upper arm/shoulder of his brother and went through his brother's chest to lodge in his brother's back. With this evidence before me / therefore must find that the accused was reckless as to whether the death of his brother ensued or not. I had initially thought that the accused could not be found guilty of attempted murder. Indeed the State did not even argue for his conviction. The State only asked for the unlawful pointing of a firearm.'

In my view the existence of the necessary intention to shoot Vusi Khaba is less clear. The appellant intended to kill the deceased and indeed did kill her. I am not sure if the State has succeeded in proving that the appellant was reckless in causing the shooting of his brother. It may well be that the brother sought to intervene in order to save the life of the deceased. There must be some doubt with regard to whether the intention necessary to sustain a conviction for attempted murder was proved. Accordingly the appellant should be acquitted on Count 2.

SENTENCE

27. After considering the evidence in mitigation, the Court found that there were substantial and compelling circumstances that justified a departure from the minimum sentence of fifteen years prescribed by Act 105 of 1997. However the Court proceeded to sentence him to sixteen years imprisonment in respect of Count 1.
28. I find that the Court misdirected itself - having found substantial and compelling circumstances, the Court was at liberty to depart from the minimum sentence prescribed by Act 105 of 1977. Instead the Court sentenced the accused to a period of imprisonment which is in excess of the minimum. In the result, I find that this is a ground on which to interfere with the sentence of the trial Court.

ORDER

29. In the circumstances I propose the following order:

In respect of conviction:

- i. The appeal against conviction in respect of Count 1 is dismissed.
- ii. The appeal against conviction in respect of Count 2 is upheld and the accused is acquitted in respect of Count 2.

In respect of sentence:

iii. The sentence in respect of Count 1 is set aside and replaced with the following:

The accused is sentenced to twelve years imprisonment.

N KOLLAPEN

JUDGE OF THE HIGHCOURT

I AGREE

F G PRELLER

JUDGE OF THE HIGH COURT

I AGREE

H L ALBERTS

ACTING JUDGE OF THE HIGH COURT

IT IS SO ORDERED.

A149/10

HEARD ON: 13 FEBRUARY 2013

FOR THE APPELLANT: ADV B ROUX SC

INSTRUCTED BY: VAN DER WESTHUIZEN & ASSOCIATES

FOR THE RESPONDENT: ADV J CRONJÉ

INSTRUCTED BY: THE DIRECTOR OF PUBLIC PROSECUTIONS

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