

SOUTH AFRICA / JUDGMENT

Sonnenberg v S (A195/2019) [2020] ZAFSHC 173 (29 October 2020)

[2020] ZAFSHC 173**COURT**

Free State High Court, Bloemfontein

BEFORE

Reinders, Opperman, Majosi

CASE / FILE NUMBER

A195/2019

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Source record**IN****THE HIGH COURT OF SOUTH AFRICA,****FREE****STATE DIVISION, BLOEMFONTEIN****Case****number: A195/2019****In****the matter between:**JUAN
PIETER
SONNENBERG Appellant
and
THE
STATE Respondent**CORAM:**REINDERS, J,
OPPERMAN, J et MAJOSI, AJ**JUDGMENT****BY: MAJOSI, AJ****HEAR OD ON: 16 SEPTEMBER 2020****DELIVERED ON: 29 OCTOBER 2020****JUDGMENT****Majosi, AJ (Reinders, J et Opperman, J concurring)**

- [1] This is an appeal against the convictions and sentences imposed by a judge of this division. The Appellant was convicted of three counts of murder and one count of contravening section 90 of the Firearms Control Act 60 of 2000 despite his plea of not guilty. He was sentenced to life imprisonment on each count of murder and three years' imprisonment on the possession of ammunition charge.
- [2] The court a quo granted the Appellant leave to appeal to the full bench of this division on the murder counts only. Condonation for late filing of heads of argument was granted to Appellant with no opposition by the Respondent in order for us to hear arguments in the appeal.
- [3] I find it convenient to deal with the evidence presented at the trial at this stage. The chronological order of events is pivotal in understanding the testimony of no less than eighteen State witnesses inclusive of numerous exhibits consisting of affidavits, photographs, three post-mortem reports and three reports emanating from a forensic anthropologist who examined the individual skulls of the deceased.
- [4] Ms. Natasha Wilson testified that on the 15th of February 2015 she was at the Grant household in the company of her boyfriend Riaan Ruiters, Jerome Grant and his girlfriend, Martha Sibeko. The men were indulging in alcoholic beverages since the morning. At some stage during the afternoon, Michael Grant, the brother to Jerome, came into the yard with great speed, fetched a stick and ran out of the yard in the direction of Lucky Seven tavern. His haste caused Riaan and Jerome to follow him. This was confirmed by Ms Sibeko during her testimony. All three men never returned home that evening.
- [5] On the 16th of February 2015, Wilson indicated that Riaan's mother, Sophie Ruiters, visited her residence in the morning to enquire about his whereabouts and she confirmed that he did not return home the previous evening. After a few inquiries, it was discovered that not only was Riaan missing, but the two Grant brothers as well. This caused them to report the three, now deceased men, missing at Christiana Police Station.
- [6] Warrant Officer Smith received this report from her and other members of the respective families and he also learned that the family had also engaged the services of the police based at Hertzogville Police Station to visit the farm of the accused due to the allegations that the three men were last seen in the company of the accused in Christiana, and going over the bridge leading into Hertzogville, Free State Province. This aspect was later confirmed by Colonel Seretse, who testified that they visited Diamant Farm but could not gain access to its grounds.
- [7] On the 17th of February 2015, Smith together with two of his crew and members of Hertzogville SAPS went to Diamant farm but could not gain entry as it was access controlled with a remote and visible electric fencing. The stepson of the accused was then fetched who informed them that only he, his mother (wife of Appellant) and the Appellant had remotes to the gate and it was his first visit there in over eighteen months.

- [8] Once the gate was opened with the remote, they encountered the farmhouse deeper into the grounds surrounded by electric fencing.

This is where the Appellant was spotted and was requested to open a second gate to allow them access to the actual farmhouse. No one else was on the property as the accused's wife was said to be in Russia.

- [9] When Smith enquired about the whereabouts of the three missing men the Appellant denied any knowledge that he had been in their company or that he had been in Christiana on the 15th of February 2015. He found it strange that the accused denied being in Christiana on the set date as he, whilst performing SAPS duties, personally observed the accused driving his red convertible with the top down dressed only in a pair of boxer shorts. They then left the farm without ascertaining the whereabouts of the three missing persons. For the sake of chronology, I will return to the remainder of the evidence of Smith and Seretse later.
- [10] Refilwe Maleke, testified that on the 15 of February 2015, she was at home with her aunt and fellow State witness Ellen Selekisho, when the Appellant, known to them as Manny, arrived at their residence with a red convertible motor vehicle dressed only in boxer shorts. He then requested Selekisho to accompany him to his farm and she in turn asked Maleke to go with her. The two were then driven to his farm in Hertzogville where they were given food to eat and remained until they indicated their desire to leave and go back home. The Appellant then changed motor vehicles and drove them back home in a white Toyota bakkie.
- [11] Maleke further testified that when they got into their neighbourhood, the Appellant was driving slowly and several persons got onto the back of the bakkie including the three deceased persons. By the time he stopped at their place of residence for them to disembark, several persons remained on the bakkie. Her testimony was largely confirmed by Selekisho. Mpho Motshabi testified that she had observed the Appellant earlier during the day visiting the Selekisho residence, driving a red convertible.
- [12] Later the very same day, she observed the Appellant driving a white bakkie slowly in the main road of her neighbourhood with Selekisho and Maleke. She hopped onto the back of the bakkie to catch a lift. The three deceased whom she knew well and Mohau Maphoso and Thabo Seselo, followed suit. Although she and two other ladies got off the bakkie at some stage, she witnessed the now three deceased persons, Maphoso and Seselo remaining on the bakkie driving toward Christiana town. This aspect of her evidence was corroborated by Lina Ruiters.
- [13] Maphoso testified that he and Seselo indeed caught a lift with the Appellant, but disembarked in town. The three known deceased remained on the bakkie and continued to drive with the accused even when he drove over the bridge which not only leads to the town of Hertzogville but also to the accused's farm which was not far from the bridge. His testimony was confirmed by Seselo. This was the last time they observed the three men alive. Both also knew the Appellant well.

- [14] After Smith and Seretse had no luck in tracing the three missing persons, their investigations lead them back to the farm of Appellant as several State witnesses mentioned herein above, stated that the accused was seen driving with the three deceased across the bridge bordering the town of Christiana and Hertzogville. Armed with this knowledge, a joint South African Police Service Task Team was organized to search the Appellants' farm.
- [15] The search party comprised of ordinary police officers, a diving unit to conduct a search in the river bordering the farm of the accused, a helicopter for an aerial overview, a mounted unit, a dog unit comprising of sniffer dogs with their handlers and more importantly, forensic analysts. Members of these respective units also testified namely Sinyanya, Van Heerden, Briers, Blignaut and Harmse and their respective testimonies relate to the eventual search of the farm between 10 – 18 March 2015 and confirmed the evidence of Smith. It is not necessary to repeat the evidence.
- [16] On the 10th of March 2015, after obtaining a search warrant through the requisite legal channels, the accused farm was approached and searched after they gained entry through two separate access points comprised of a remote controlled outer gate and an inner gated area surrounding the farmhouse with electric fencing. The search of the grounds of the farm yielded several rounds of ammunition, spent cartridges, a firearm and a ghastly discovery of a decomposing corpse buried in a shallow grave.
- [17] When the Appellant was pertinently asked of his knowledge of the corpse, he remained silent and did not provide any explanation. No other persons were observed on the farm besides him. He was consequently arrested and detained on a charge of murder.
- [18] The search of the farm continued until the 18th of March 2015 with the wife of the Appellant now giving them access and a further two decomposing bodies were found buried in shallow graves. All three bodies were identified as the three missing persons by their respective families and were still clothed in the attire they were last seen wearing on the 15th of February 2015. Dr Ferreira, a Pathologist and author of the three medico-legal post mortem reports, testified that all three bodies were examined and found to be in an advanced state of decomposition and she confirmed the bodies had somehow been crushed as the remainder of their mortal remains revealed multiple fractures to the bones. All three skulls indicated that they had sustained gunshot wounds to the head.
- [19] Forensic Anthropologist, Ms Keough, testified as per her report that she examined the three skulls of the now deceased and her findings were consistent with gunshot wounds to the back of the head which caused the skulls to rupture where the bullet entered and exited. Upon closer examination of one of the skulls, she established that one of the persons had been shot twice. The expert evidence of these medical experts was left unchallenged by the defence.
- [20] Mr Sinyanya, a member from Park Road Local Criminal Record Centre testified that he took photographs and compiled the key to numerous photographs taken at Diamant farm during the search of the farm inclusive of the bodies of the deceased. Although a front loader

machine was found and photographed by him and he suspected to have crushed the bodies of the deceased, no DNA evidence could be recovered from it to link it to the bodies of the deceased as it was exposed to the elements over a period of time. I see no need to deal with the rest of the evidence as it pertains to the conviction in terms of the Firearms Control Act which is not the subject of this appeal due to leave to appeal being refused by the court a quo save to say that Ms De Lange, the wife of the Appellant, confirmed that she was in Russia and upon her return the Appellant was already in custody and she gave the police further access to the farm.

[21] I must pause here and mention that throughout the lengthy trial and numerous State witnesses' testimonies, not once did the Appellant via his legal representative provide a defence in the wake of the serious allegations against him. Though a plea explanation was given at the start of proceedings that he did not kill the three deceased, this was never put to any of the State witnesses for them to either agree with, elaborate on or to dispute. At the end of the State's case, the Appellant exercised his constitutional right to remain silent and did not testify in his defence and closed his case. The court a quo was thus faced with one version only, that of the State.

[22] It is quite clear from the record there is no direct evidence linking the accused to the three murders and that the State case was based on circumstantial evidence. The trial court evaluated the evidence and deployed the cardinal rules of logic as set out in *R v Blom*[1] and came to the conclusion that the only inference that could be drawn from the facts is that the accused drove with the three

deceased to his farm, killed them by shooting them in the back of their heads and concealed and buried their bodies in shallow graves on his farm.

[23] The court also took into consideration that the State witnesses who were adamant that the three deceased were last seen in his company were not provided with the version of the Appellant to dispute, elaborate on or agree with. The court also considered the principles laid down in *S v Boesak*[2] as the accused elected to remain silent in the wake of the undisputed evidence presented by the State.

[24] The judgment also referenced *S v Tshabalala* 2003 (1) SACR 134 SCA[3] and that the accused ought to have provided an acceptable explanation in response to the State's case. The court thus concluded that the only inference that could be drawn from the undisputed facts is that the Appellant murdered all three deceased as they were last seen in his Toyota bakkie in Christiana town and driving over the bridge into Hertzogville, which is quite close to his farm. A farm where access could be gained only via a remote controlled gate and an electric fence. The very same farm where the bodies of the deceased were found after they were reported missing.

[25] The Appellants' compressed grounds for appeal assail the court a quo's conviction based on circumstantial evidence. It is contended that the evidence presented by the State leads to more than one inference to be drawn besides the inference that the accused murdered the

deceased as he was the last one to be seen in their presence before their bodies were discovered on his farm.[4] The Appellant also contends that the court a quo erred in its reliance on the testimonies of Maphoso and Seselo as their uncorroborated evidence was not only contradictory in nature,

but unreliable as they were heavily under the influence of alcohol[5] when they initially got onto the bakkie.

[26] The Respondent supports the trial courts' conviction of the Appellant on all three counts of murder. It is contended that the circumstantial evidence presented throughout the trial was left unchallenged by the Appellant and the court correctly drew the inference that he was the last person to be seen with the deceased. Until such time their bodies were found on the Appellants' farm nearly a month after they were reported missing by their respective families. Furthermore, it was also contended that the court correctly applied the principles laid down by *S v Boesak supra* and criticism levelled against the court's judgment is not warranted as the circumstantial evidence was sufficient to sustain a conviction on all three counts of murder. Due to the Appellants' silence, the court did not have the luxury of weighing up his version against the State's.

[27] It is trite that an appeal court may only interfere with a conviction where there is a clear misdirection in finding of facts.[6] As mentioned herein above, the Appellant did not dispute the evidence of multiple State witnesses who placed him in Christiana on the 15th of February 2015. Maleke and Selekisho corroborated Warrant Officer Smith's version that he was seen earlier on the said date driving his red convertible dressed only in a boxer shorts as he arrived at their place of residence dressed in this fashion. These witnesses' testimonies also explained that the accused changed motor vehicles when he drove them back to their residence in a white Toyota bakkie.

[28] This ties in perfectly with the testimonies of Motshabi, Maphoso and Seselo that they, together with the three deceased boarded the back of the white Toyota bakkie whilst it was driving slowly in their neighbourhood. This was never disputed in any shape or form during the trial. The assertion by the Appellant that the testimony of Maphoso and Seselo is not corroborated is simply not true as highlighted by the Respondents in it's heads of arguments. The testimony of Lina Ruiters and Motshabi specifically corroborates this aspect of their evidence. The contradictions in their evidence was correctly found to be mere discrepancies which was indicative that though their evidence was not streamlined, it did not materially affect the rest of their evidence. The court a quo's findings of fact cannot be faulted as it is based on undisputed facts.

[29] The court in *S v Boesak supra* paragraph 24 stated:

“The fact that an accused person is under no obligation to testify does not mean that there are no consequences attaching to a decision to remain silent during the trial. If there is evidence calling for an answer, and an accused person chooses to remain silent in the face of such evidence, the court may well be entitled to conclude that the evidence is sufficient in the absence of an explanation to prove the guilt of the accused.”

[30] The Appellant in the wake of these undisputed facts, elected not to provide his version to the State witnesses to respond to and he remained silent after the closure of the State’s case. This is his Constitutional right. The practical effect thereof as correctly found by the court a quo is that his silence left the State case unrefuted and required him to provide an explanation. In my view, the court a quo, correctly convicted the Appellant on all three counts and its reasoning and evaluation of the totality of the evidence cannot be faulted as the undisputed facts called for an explanation and not deafening silence. The appeal against all three convictions of murder must thus be dismissed.

[31] I now turn to the sentences imposed. The Appellant was sentenced to life imprisonment in respect of each count of murder. The Appellant submitted in its heads of argument that the court misdirected itself in applying section 51(1) of the Criminal Law Amendment Act 105 of 1997 (‘the CLAA’) and finding that the murders were premeditated as the said sub-section 1 was not specifically reflected in the charge against the accused.

[32] This ground for leave to appeal is not contained in the notice of appeal filed with the Registrar on the 18th of October 2019. It however cannot be ignored as it creates the impression the Appellant’s right to a fair trial were vitiated

as he was not aware of possible minimum sentences which may be imposed upon conviction. The Respondent aptly argued that the court

of appeal can only interfere with a sentence imposed if the sentencing court did not exercise its discretion appropriately

and if the sentence imposed is disproportionate to the offence. The Respondent was adamant that no such reasons had been advanced by the Appellant and referenced cases such as *S v Matyityi*[7] and *Tshonga v The State*[8] which delve into the legal position pertaining to prescribed minimum sentences in support of their argument.

[33] The Appellant’s submission is without merit as the indictment refers to section 51 of the CLLA although subsection 51(1) is not included. It is evident from the record of proceedings[9] that the court a quo canvassed the accused’s awareness of applicable minimum sentences via his legal representative as correctly pointed out by the Respondent in their Heads of Argument.

[34] The court also found that not only did he shoot the deceased in the back of their heads, he crushed their bones and buried them in shallow graves on the farm and did not utter a word when the mortal remains of three persons were found on his farm in the exact time frame and wearing the exact same clothing that they went missing in. These facts were specifically

mentioned as findings of fact by the court a quo in its judgment. Furthermore, the undisputed facts of this case revealed the Appellant transported the three deceased to another town and province, but also to his secluded and secured farm where he was alone and away from prying eyes.

[35] In my view, this demonstrates a fair amount of planning and effort which denotes that the court was alive to the concept of

premeditation. These findings of fact (which were not disputed by the Appellant during the trial) thus invited section 51(1) of the CLLA through the front door together with the power of the court to exercise its inherent jurisdiction to impose life imprisonment.

[36] The actual notice of appeal only states that the sentence imposed was inappropriate and excessive and the court erred in not finding that the mitigating factors inter alia that the Appellant is 61 years of age with bad health constituted substantial and compelling circumstances and should have caused the court to deviate from the prescribed minimum sentence of life imprisonment.

[37] In my view, the court duly considered the traditional factors for sentence such as the Appellant's personal circumstances,

several mitigating factors such as him being a first offender and of advanced age, his ill health, the nature and the seriousness of the offences and the interest of society. It also considered numerous aggravating factors such as the callous manner in which the deceased were killed, the numerous fractures their bodies sustained and the concealment of their remains and the anguish suffered by their respective families in reporting them missing and later having to identify their desecrated bodies almost a month after their disappearance.

[38] The court also appropriately referred to *S v Vilakazi* 2012 (6) SA 353 (SCA) at paragraph 58 where the court stated the following:

"...In cases of serious crime the personal circumstances of the offender, by themselves, will necessarily recede into the background. Once it becomes clear that the crime is deserving of a substantial period of imprisonment the questions whether the accused is married or single, whether he has two children or three, whether or not he is in employment, are in themselves largely immaterial to what that period should be, and those seem to me to be the kind of 'flimsy' grounds that Malgas said should be avoided..."

[39] In my view, the court a quo could not have, in this background, found substantial or compelling circumstances justifying the imposition of a lesser sentence and it correctly applied the sentencing principles as set out in cases such as *S v Malgas*[10] and *S v Legoa*[11]. It (court a quo) could also not disregard that the Appellant was convicted of three counts of murder. The argument that the sentences imposed are

inappropriate and excessive cannot be sustained in light of the fact that the mitigating factors pale in comparison and are outweighed by the extensive aggravating factors. In my view, the court was entirely correct in imposing life imprisonment on each count of murder.

[40] In the circumstances, the following order is made:

The appeal against the convictions and sentences are dismissed.

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O.R. MAJOSI, AJ

I concur.

C. REINDERS, J

M. OPPERMAN, J

On behalf of Appellant: Adv. J. Potgieter

Instructed by:

Peyper Lessing Attorneys

BLOEMFONTEIN

Ref: A DE JAGER/M04306

On behalf of Respondent: Adv. J. De Nysschen

Director of Public Prosecutions

Ref: M101/15

[1] 1939 AD 288.

[2] 2000 (1) SACR 633 (SCA).

[3] Indexed Bundle Volume 5 Page 637.

[4] Appellant's Heads of Argument Page 5 paragraph 5.

[5] Appellant's Heads of Argument Page 5 paragraph 4.1 - 4.4.

[6] R v Dhlumayo & Another 1948(2) SA 677 (A).

[7] 2011 (1) SACR 40 (SCA).

[8] (635/2016) 2016 ZASCA 205 (15 December 2016).

[9] Indexed bundle, Volume 1 Page 13.

[10] 2001 (1) SACR 469 (SCA).

[11] 2003 (1) SACR 13 (SCA).

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