

SOUTH AFRICA / JUDGMENT

Wentzel v S (CA&R189/2011) [2011] ZAE CGHC 89 (17 November 2011)

[2011] ZAE CGHC 89

COURT

Eastern Cape High Court, Grahamstown

BEFORE

N. Dambuza, J.W. Eksteen

CASE / FILE NUMBER

CA&R189/2011

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IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE – GRAHAMSTOWN)

Case No.: CA&R189/2011 Date heard: 26 October 2011 Date delivered: 17 November 2011 In the matter between: PATRICK WENTZEL Appellant and THE STATE Respondent

J U D G M E N T

DAMBUZA, J:

The appellant was charged with and convicted of murder before the Regional Court, Port Elizabeth. He was sentenced to undergo 15 years imprisonment. He now appeals, with leave of the court a quo, against the conviction and the sentence imposed.

A remark is made in the appellant's Heads of Argument that the (magistrate's) judgment in this matter is very short and does not deal with "certain aspects of the evidence". The submission is that the magistrate failed

to deal with the evidence of the first state witness Angelina Zuka and, instead incorrectly stated that the witness Luzuko Jacobs was the first state witness to testify when he was, in fact, the last state witness to testify.

Indeed the judgment reveals very little, if anything, on the magistrate's reasons for convicting the appellant. His summary of the evidence tendered at the trial is in many respects incorrect and is incomplete. But apart from the incorrect summary of the evidence, his reasons for judgment barely communicate why the appellant was convicted. In his reasons the magistrate states that:

“The evidence of Mcebisi Jacobs is reliable in all material respects. His evidence is confirmed by the photo-album that was handed in, in court and partly by Rozetta’s evidence that the accused threw a beer bottle at the deceased and hit him. That deceased turned to face the accused having been hit by a bottle. Accused stabbed the deceased. The deceased ran away towards the garage and accused chased him

Rozetta was cross-examined on this issue and a question was put to her that accused will say that he never chased after the deceased, because he saw that the knife has broken off, her response was: “He did chase the deceased”. When the question was asked that the deceased came to the accused and hit him with an Amarula bottle trice, Rozetta responded that there is no such.

The court finds that the evidence of Mcebisi Jacobs was reliable in all material respects and accused is accordingly found GUILTY of murder”.

One would expect that since the magistrate relied, to a large extent on the evidence of Rozetta Mama as confirmation of Jacobs’ evidence, he would have given a summary thereof. If the magistrate had given a summary of Mama’s evidence, he would then have become aware of the discrepancies between the evidence of Jacobs and Mama. I revert to this issue later in the judgment.

It is of serious concern that recently, in an appeal that I heard together with Schoeman J, we remarked about the failure, by the same magistrate, to give reasons for his judgment. In *Silwanyana v The State*, Case No.: CA&R338/2010, an unreported judgment of this Division (Grahamstown) we (per Schoeman J) had the following to say about the judgment of the magistrate:

“[2] The magistrate did not evaluate any evidence. He very briefly summarised the evidence of the state witnesses (incorrectly). The judgment comprises less than a page of the record. Although the provisions of

s. 146 of the Criminal Procedure Act 51 of 1977 do not apply to magistrates, it remains a duty of a magistrate to give cogent reasons for his findings of fact and of law. There is a duty on all presiding officers to make credibility findings and to state why certain facts are accepted and others rejected.

[3] Howie JA (as he then was) discussed this in *S v Calitz en ’n Ander*¹, in respect of sentence when he said:

‘Hoe dit ook al sy, dit moet beklemtoon word dat die behoorlike beskerming, enersyds, van ’n appellant se grondwetlike reg tot appèl en, andersyds, die gemeenskap se belang dat oortreders behoorlik gestraf word, van ’n regterlike amptenaar vereis dat deeglike aandag gegee word aan die formulering en verstrekking van vonnisredes. Daarsonder word gesonde strafregpleging belemmer.’

[4] I am of the view that it is equally applicable to a judgment on the merits.

[5] In the instant matter the magistrate failed to deal with the evidence of the appellant and convicted the appellant without stating the reasons for doing so. He failed to state why he accepted the evidence of the state witnesses and which evidence he accepted. The magistrate failed to give any reasons why the version of the appellant was rejected. It seems from the judgment as if the magistrate approached the matter on the basis that the state witnesses must be believed and therefore the appellant is guilty. The magistrate deplorably failed in his duty to give a reasoned, cogent judgment as he is obliged to do.”

Regrettably, these remarks are equally applicable in this matter. See further; *Mcoseli v The State*, an unreported decision of this Division (Grahamstown) handed down on 3 November 2011; *S v Vika* 2010 (2) SACR 444 (E) and *S v Bruintjies and Others*, Case No.: CA&R71/2010, in which I sat together with Chetty J. Much has therefore been said about the magistrate’s failure to give properly reasoned judgments. The “judgment” in this matter, once more, leaves an impression that the magistrate did not apply his mind to the case. Further, having granted leave the magistrate duly received the record of the proceedings and had to furnish further reasons for his judgment. He stated that he had “nothing to add to the reasons already given on merits and in respect of the sentence”.

It would appear that the magistrate does not appreciate the seriousness of his failure to give a properly reasoned judgment. Apart from the general duty on judicial officers to give reasoned judgments,² the Magistrate’s Court Rule 67 (5) which governs the procedure to be followed subsequent to the granting of leave to appeal, provides that the magistrate must, within 15 days of receiving the record (in anticipation of an appeal) prepare a written statement in which he sets out the facts that he finds as proven as well as his reasons for the factual findings that are referred to in the notice of appeal. In that statement, the magistrate is expected to analyse the evidence. He may not rely on a statement that he accepted certain evidence above other evidence but must convince the court of appeal that he gave intelligent and judicial consideration to the important features of the case. This sub-rule is intended to ensure that the magistrate pays special attention to the points raised on

appeal so that his response thereto is available to the court of appeal.³ It follows that it is only where a comprehensive and/or a properly reasoned judgment is given at the end of the trial that a magistrate may not have to comply with Rule 67 (5).

In this case the magistrate did not set out the evidence in a comprehensive and coherent manner. No credibility findings were made. There is no indication as to what facts he found to have been proved and which evidence constituted proof, beyond reasonable doubt, of the appellant’s guilt. For that reason it is necessary that this court reconsider the evidence to determine which version is acceptable.

The first state witness to give evidence was Angelina Zuka, the deceased’s girlfriend (also referred to as Sindiswa). Her evidence was that on the evening of the incident she was at a shebeen, and was sitting next to the deceased when an argument ensued between the appellant and Mcebisi Jacobs, a friend of the deceased. The appellant and Jacobs were standing near a pool table, some

distance away from where the deceased and Zuka were sitting. The appellant then slapped Jacobs with an open hand. The deceased went to intervene. The appellant's friends approached the scene and drew knives. It appears that there was some intervention and the appellant, the deceased and their friends were told to leave the tavern. Zuka, the deceased and their friends left through the front exit whilst the appellant left through the backdoor.

Outside the tavern, the appellant threw an empty bottle at the deceased but missed him. The appellant then charged at the deceased and stabbed him once on the neck and his knife broke. Thereafter the appellant tried to take a piece of timber lying nearby but Zuka stepped on it. The appellant then chased after the deceased and Jacobs who were crossing the street in front of the tavern.

Rozetta Mama, Zuka's aunt, was also at the tavern that night. She was playing pool "at the front of the tavern". Whilst playing pool she was told that Jacobs and the appellant were arguing. She went to the "back" of the tavern where she found her brother trying to intervene in the argument. The argument stopped and everyone left the tavern. Thereafter the appellant "came around" from the backdoor through which he had exited the tavern, to the front where the deceased's group was. An argument again ensued. The appellant threw a bottle at the deceased. As the deceased turned to look at the appellant the latter stabbed him. The deceased ran away; the appellant chased him for a short distance and returned to the tavern.

Mcebisi Jacobs also testified that the deceased intervened in an altercation between the appellant and Jacobs. Thereafter all those involved in the altercation were told to leave the tavern. Outside, the appellant threw a bottle which struck the deceased on the leg. The deceased who, until then, had had his back to the appellant, turned to look at the appellant. It is then that the appellant stabbed the deceased on the neck. The deceased ran away and the appellant chased after him.

The appellant's version was that when he arrived at the tavern some of the patrons were playing pool. But no one had reserved to play the following game. The appellant then booked the next game by putting his bottle cap on the pool table. When his turn to play came, the deceased demanded to play. An argument started between the appellant and the deceased. There was some pushing and pulling between the two of them. The deceased who had an empty bottle of Amarula alcoholic drink in his possession, charged at the deceased. The other patrons, amongst whom was Rosetta Mama, intervened and the appellant and the deceased were instructed to leave the tavern. They left the tavern through different entrances. But the deceased who had left through the front exit came around to the appellant and assaulted him with the "Amarula bottle" on the head. The bottle broke and the deceased then stabbed the appellant with the broken bottle on the mouth. As the deceased continued to charge at the appellant the latter took out a knife and stabbed the deceased once on the neck. The knife broke, leaving the blade embedded in the deceased's neck. The deceased ran away.

From the foregoing and as submitted in the appellant's Heads of Argument, it is common cause that the incident that led to the deceased's death originated inside the tavern. All those who gave evidence before the court a quo had consumed liquor. The extent of their intoxication or whether

they were intoxicated at all is not ascertainable from the record. The deceased's blood alcohol content was 0,13g/100ml. All those involved in the altercation, including the witnesses, left the inside of the tavern without injuries. The appellant and the deceased left the tavern through different exits and when they were outside, the appellant stabbed the deceased.

According to the post mortem report the deceased sustained a stab wound which penetrated the left side of the neck and chest, resulting in perforation of the left subclavian artery and left lung. The broken knife blade was found impacted in the wound track. The cause of death is stated as "application of sharp force to the neck and chest. Major vascular injury".

There are inconsistencies and contradictions in the evidence of the state witnesses. Contrary to the submission on behalf of the respondent my view is that contradictions are material as they are an indication of whether or how the witnesses observed the incident. The contradictions relate to whether the deceased had a bottle in his possession at the time of the altercation; whether the bottle which the appellant threw at either the deceased or his group, did strike the deceased and if so where it struck him and the exits through which the appellant and the deceased left the tavern.

With regard to the first issue both Zuka and Jacobs admitted, albeit reluctantly, during cross-examination, that the deceased was in possession of a bottle at the time of the confrontation between himself and the appellant. Mama disputed that the deceased was in possession of such a bottle. But Mama's evidence was also that she "could not see" what was in the deceased's hands "because everything happened quickly".

As to the bottle thrown by the appellant at the deceased, Zuka's evidence was that the bottle never struck the deceased as he "ducked". Mama's evidence was that the bottle struck the deceased on the back of his head. According to Jacobs the bottle struck the deceased on the leg. When confronted with Zuka's evidence in this regard during cross examination, Jacobs' response was that he was standing a distance away from the appellant and the deceased and could therefore not see clearly what was going on.

Regarding the exits used by the appellant and the deceased when leaving the tavern, during cross-examination Zuka changed her earlier evidence that the appellant and the deceased left the tavern through different exits and said that they left through the same door. Further and contrary to the evidence of Zuka and Mama, Jacobs insisted that the deceased's group left the tavern through the backdoor.

The record reveals that during argument before the trial court these inconsistencies were pertinently raised by the appellant's legal representative, but the magistrate did not refer to them at all in his judgment. In the context of these inconsistencies, the fact that the State witnesses had consumed alcohol, and they had witnessed a moving scene, I do not agree with the finding by the magistrate that Jacobs' evidence was reliable. In my view, none of the three witnesses testified with such clarity and consistency that their evidence, either on its own, or cumulatively, could be considered sufficiently reliable to found the appellant's conviction. Apart from the common cause facts, their evidence on the disputed issue of self-defence was, in my view,

unreliable. When these discrepancies are carefully considered, the version of the appellant cannot be discounted as not reasonably possibly true, a factor that the magistrate never considered.

Zuka's further evidence during cross-examination was that after the appellant had thrown the bottle which, according to her, struck the deceased at the back of his head, the deceased went to fight the appellant "with his bare hands". In the light of evidence that the deceased went to fight and her later admission that the appellant had a bottle in his possession, it cannot be said the appellant's version that the deceased struck and stabbed him with that bottle is not reasonably possibly true.

Earlier during cross-examination and when Zuka still persisted that the deceased had been in possession of a bottle it was put to her that the deceased had assaulted the appellant with the empty bottle and then stabbed him on the face when the bottle was broken. She replied that she never saw the deceased with an empty bottle in his hands. When she was asked whether it was possible that she did not recall because she had been drinking she admitted that that was possible.

Even further, Jacobs' confession that he could not see clearly what was going on, should have alerted the magistrate to the problems with his evidence.

More significant is the fact that none of the state witnesses disputed that the appellant also sustained injuries during this altercation, to the extent that the police had to first take him to Dora Nginza Hospital for medical treatment before arresting or detaining him. The record reveals that, at some stage during the trial the state prosecutor, was afforded time to investigate the issue of the appellant's injuries. However the matter was not taken forward at the resumption of the proceedings.

In the end it was always incumbent upon the state to prove the case against the appellant beyond reasonable doubt. I agree with the submission by Mr de Jager who appeared on behalf of the appellant that, had the magistrate done a proper evaluation of the evidence he would have found that the appellant's version of self-defence is reasonably possibly true and that the appellant should be accorded the benefit of doubt.

Consequently the appeal succeeds and the following order shall issue:

The conviction and sentence are set aside.

N. DAMBUZA

JUDGE OF THE HIGH COURT

EKSTEEN, J

I agree.

J.W. EKSTEEN

For the appellant: Adv A De Jager instructed by Grahamstown Justice Centre

For respondent: Adv D Els instructed by the National Prosecuting Authority

1 2003 (1) SACR 116 (SCA) at para [12].

2 See: the discussion on the duty on judicial officers to give reason for judgment as set out in *Mphahlele v First National Bank of SA Ltd* [1999] ZACC 1; 1999 (2) SA 667 (CC) quoted by Pickering J in *Mcoseli v The State* (supra) at para [5].

3 Du Toit et al; *Commentary on the Criminal Procedure Act* at 30-30.

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