THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable
Case No: 1041/2017

In the matter between:

TSUNDZUKA EMMANUEL NGOBENI **APPELLANT**

and

THE STATE **RESPONDENT**

Neutral citation:	*Ngobeni v The State* (1041/2017) ZASCA 127 (27 September 2018)
Coram:	Shongwe ADP, Majiedt, Wallis, Mbha and Mathopo JJA
Heard:	29 August 2018
Delivered:	27 September 2018

Summary: Criminal Law and procedure – appeal against conviction and sentence for murder read with the provisions of Criminal Law Amendment Act 105 of 1997 – appeal against conviction dismissed – appeal against sentence upheld – irregularity committed by the trial court during application for leave to appeal.

ORDER

On appeal from: Gauteng Division of the High Court, Johannesburg (Mabesele and Mokgoatlheng JJ and Van Veenendaal AJ sitting as court of appeal):

1 The appeal against the conviction is dismissed.

2 The appeal against the sentence succeeds.

3 The order of the Gauteng Division of the High Court, Johannesburg insofar as it relates to sentence is set aside and the sentence of the trial court is reinstated, namely:

'(a) The accused is sentenced to 12 years' imprisonment, four years whereof is suspended for five years on condition he is not convicted of murder committed during the period of suspension.'

JUDGMENT

Mbha JA (Shongwe ADP, Majiedt, Wallis and Mathopo JJA concurring):

[1] The appellant was convicted on 3 April 2014 in the Gauteng Division of the High Court, Johannesburg (the trial court) of murder, read together with the provisions of s 51(2) of the Criminal Law Amendment Act 105 of 1997 (the Act). On 5 September 2014, having found that substantial and compelling circumstances justifying a lesser sentence than the prescribed minimum sentence of 15 years' imprisonment were present, the trial court sentenced the appellant to 12 years' imprisonment, of which four years was

suspended for five years on condition that the appellant is not convicted of murder committed during the period of suspension.

[2] On 22 September 2014 the appellant applied for leave to appeal against conviction only, but at the trial court's prompting the appellant's counsel applied in addition for leave to appeal against sentence. Leave to appeal against both conviction and sentence was subsequently granted to the full court of the Gauteng Division of the High Court, Johannesburg which on 3 July 2017 dismissed the appeal against conviction, set aside the sentence imposed by the trial court and imposed an increased sentence of 18 years' imprisonment. Special leave to appeal was granted by this Court, against both the conviction and sentence.

[3] The matter emanates from an incident that occurred on 24 May 2013 at the premises of a Caltex Garage in Greenhills, Randfontein, where the deceased, a 22 year old male, was shot and killed by the appellant, a constable in the SAPS, using a police service R5 rifle. At the time the deceased was a front seat passenger in a red Toyota Corolla (Corolla) motor vehicle driven by Reneilwe Sekobane (Reneilwe). Three of their friends, including M E Ngakanyane (Ngakanyane), were back seat passengers. All five were students at the Tshwane University of Technology and were, on that day, on their way to a funeral service at Mohlakeng Township, outside Randfontein.

[4] Whilst they were driving in Greenhills, they got lost. They then came across a marked EPR security guard vehicle which they followed with the hope of finding their

way out of Greenhills to Mohlakeng Township. Reneilwe was driving slowly when he noticed another security vehicle driving behind them followed by a marked SAPS vehicle, with its blue lights flashing, being driven by Warrant Officer Botha (Botha). The appellant, a constable in the SAPS was a front seat passenger in the SAPS vehicle. Reneilwe drove into the aforementioned garage's forecourt and stopped the vehicle away from the petrol pumps to get directions.

[5] Botha and the appellant had been patrolling in Greenhills when they were alerted by a Tax Security Services officer, Kruger, to a gold or light coloured Golf motor vehicle with five occupants who were allegedly in possession of firearms and were seen in proximity to a mini Pick `n Pay supermarket. While on the lookout for this Golf, they were requested by an EPR security officer Hiepner, to turn their attention to a red Toyota Corolla motor vehicle. Security officer Swiegers of EPR Security informed them that the Toyota Corolla was the car with the firearms. Shortly thereafter an EPR security vehicle appeared, followed by the Corolla driven by Reneilwe. Hiepner, followed by Botha, drove behind the Corolla and they all came to a stop around the Corolla at the aforementioned Caltex Garage.

[6] Reneilwe alighted from the Corolla intending to ask for directions, but was confronted by Botha who had a firearm in his hand. Botha instructed Reneilwe to place his hands on the roof of the Corolla and he did as instructed. Botha also ordered the back seat occupants to alight and they complied. The appellant, armed with a R5 rifle, alighted from the police vehicle and walked to the left front passenger door of the

Corolla and brought the muzzle of the rifle within a metre of the deceased. The witnesses heard two gun shots and when Botha enquired who had fired the shots, the appellant confirmed that he had fired his firearm. It later transpired that appellant had ordered the deceased to exit the car, and shot him while he was in the process of getting out of the car.

[7] The deceased sustained two gunshot wounds, namely, a stellate shaped wound over the right side of the back of the head which resulted in a diffuse subarachnoid haemorrhage over the brain, and an oval shaped grazing wound which was subcutaneous tissue deep over the right chest wall above the nipple. The cause of the deceased's death was the gunshot wound to the head.

[8] At the trial, the appellant's version was that he shot the deceased because when he was ordered to alight from the Corolla, he, in the process of exiting the car, suddenly turned backwards as if reaching for a firearm. The appellant therefore perceived that his life was in imminent danger. In his plea explanation he said that he was acting in private defence. By the end of the trial the defence took a different course. No doubt this was because the evidence by then had demonstrated conclusively that the appellant's life and safety were not, objectively speaking, being threatened by the deceased. The defence then became that he had acted in a state of panic. He said that he feared that his life was in imminent danger, and that he had to take action to avert such danger. He therefore contended that he was in a state of involuntary automatism and that he acted

in putative private defence. He only fired because he thought there was a threat to his life and his reflexes were involuntary due to the state of panic.

[9] This approach conflated two different things. Putative private defence is invoked when there is a genuine, albeit objectively unfounded, fear for one's own safety. It is relevant to the question whether the accused has the necessary intention to commit the crime. Where the charge is one of murder it may mean that the accused may only be convicted of culpable homicide. By contrast, a defence of sane automatism is relevant to the question whether the accused has the capacity to form the intention to commit a crime. It is unclear whether the defence appreciated the difference

[10] The trial court, after meticulously analysing all the evidence of the circumstances of the shooting, rejected the appellant's defence of involuntary automatism. It found that the deceased was in fact unarmed and posed no threat to the appellant and that the appellant had exceeded the bounds of self-defence. It also found the appellant to be untruthful in his narration of the events of the shooting when he stated that it all happened very quickly and that there was no verbal exchange between him and the deceased before he shot him. This was contradicted, the trial court found, by Hiepner and also by the probabilities. Hiepner, a defence witness, testified credibly that he was next to the appellant when they both ordered the deceased first to place his hands on the dashboard and then to get out of the car. The deceased obeyed and was shot as he started getting out of the car.

[11] The trial court found that the appellant had indeed ordered the deceased to put his hands on the dashboard and to thereafter alight from the vehicle after he had placed the muzzle of the R5 close to the deceased. It held that his version that he panicked and became confused and then acted in a state of automatism fell to be rejected as he was conscious of the unlawfulness and wrongfulness of his conduct which meant that fault in the form of culpa or negligence never arose. The trial court then found that as the appellant did not lack awareness of the unlawfulness of his conduct, he had acted with intention in the form of *dolus eventualis* in that he foresaw the harm that ensued and reconciled himself with the outcome. The full court was in complete agreement with all these findings.

[12] Before us it was argued that both the trial court and the full court misdirected themselves in rejecting the defence of putative private defence and, in the alternative, that the appellant was guilty of culpable homicide. No attempt was made to pursue the defence that he acted in a state of automatism. The thrust of the criticism was first that both the trial court and the full court seemingly failed to consider that it was undisputed that the police and security officers involved had information that there were firearms in the Corolla, which appeared suspicious, and this was the reason why it was stopped so that it could be searched. Secondly, in light of the deceased's sudden movement to his right, the appellant as a reasonable man, could not have been expected to wait to ensure that the deceased was indeed reaching for a firearm.

[13] It is trite that in putative private defence it is not lawfulness that is in issue but culpability. Thus, if an accused honestly believed his life to be in danger, but objectively viewed it is not, the defensive steps he takes cannot constitute private defence. If in those circumstances he kills someone, his conduct is unlawful.[1] His erroneous belief that his life was in danger may well, depending on the circumstances, exclude *dolus*, in which case liability for the person's death based on intention will also be excluded; at worst for him he could then be convicted of culpable homicide. Therefore, it must first be determined whether or not an accused acted deliberately or irrationally. In order to gain an impression of an accused's state of mind, consideration must be given to the prevailing circumstances and the testimony of the witnesses in accordance with the testimony of the accused.

[14] In *Coetzee v Fourie & another*,[2] it was held that in order to avoid liability for the deceased's death, the appellant had to show that a reasonable person in the circumstances in which the appellant found himself would have believed that his life was in danger and would have acted as the appellant had acted. The court in *Coetzee* held that the appellant had shot the first respondent believing his life to be in danger, but that none of the facts taken alone or cumulatively, necessarily indicated that the appellant had been in danger of an imminent attack. If the appellant had felt threatened, the circumstances required at least a warning to be given by him that he felt under threat before he was justified in shooting the first respondent. Importantly, the court

[1] *S v De Oliveira* 1993 (2) SACR 59 (A) at 63-64.
[2] *Coetzee v Fourie & another* 2004 (6) SA 485 (SCA) at para 5.

emphasised that a firearm was a potentially lethal weapon which should be discharged in the direction of a person only as a last resort.[3]

[15] In this case, the evidence shows conclusively that the appellant was in a state of safety when he consciously decided to bring the R5 rifle, whose mode he consciously changed from safe to rapid fire when he initially alighted from the SAPS vehicle, in close proximity to the deceased. His life was never in danger at any stage. No action on the part of either the deceased or his friends, caused the appellant to feel that his life was in danger. The deceased made no threats and objectively none of the occupants of the Corolla had a weapon. The scene around the Corolla had been secured by Botha, Hiepner, Kruger and other security officers who were all armed.

[16] The appellant who was properly trained in police duties and in the handling of firearms, in fact defied all the relevant rules and procedures relating specifically to the handling of R5 rifles. Those are that a police officer carrying a R5 rifle had to protect and provide cover to crew members when they conduct a search and are only supposed to fire the weapon from a distance of 15 to 25 metres. Importantly, police officers are taught that a R5 rifle should always be at a point of 45 degrees to the ground and that it could only be pointed at a suspect when a shot is fired. It was not to be inserted inside a vehicle because of the likelihood of it being wrestled away by a suspect. The fact that the deceased had sustained a stellate wound in the head, meant that the firearm was fired at close range to the deceased inside the vehicle, thereby demonstrating that the appellant disregarded his training.

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[3] *Ibid* para 10.

[17] There is no evidence that suggests that Reneilwe drove the Corolla in a suspicious manner. It is clear that the deceased and his fellow students did not pose a threat to either the police officers or security officers from the time that the officers drove behind them until they stopped at the scene of the incident at the Caltex garage. It is undisputed that the appellant never gave any verbal warning to the deceased and neither did he fire any warning shot. It cannot be over emphasised that Hiepner, who was in the same circumstances as the appellant, never deemed it necessary to draw his firearm. Both the trial and the full court correctly determined that there were armed police and security guards around the Corolla that the occupants were obeying police instructions, were co-operative and had posed no threat.

[18] As there is no evidence whatsoever that the deceased threatened or attempted to threaten the appellant when he was getting out of the vehicle, the appellant's version that he shot the deceased on a reasonable suspicion that the deceased by allegedly turning immediately to his right was attempting to pull out a firearm from his waist, thus threatening his life, was correctly rejected by the full court. A further reason why the defence of putative private defence was doomed to fail was that in his evidence the accused said that he did not know how he came to shoot the deceased. A person can only rely on private defence, or putative private defence, if they acted with the intention of defending themselves. (Snyman, *Criminal Law* 5 ed at 113). In other words, a claim that the accused was acting in private defence, whether actual or putative, depends on the accused being aware that they were acting in private defence. As Professor Snyman, supra, 112, correctly says, there is no such thing as unconscious or accidental

private defence. The attempt on appeal in this court to resuscitate private defence and putative private defence could not succeed.

[19] The appellant's version was that he stood between the two left doors of the Corolla when he fired at the deceased. Given the position of the gunshot wound to the right back side of the deceased's head and his position after the shooting is, in my view, open to some doubt. The photo exhibits depict the deceased after the shooting still in the passenger seat, the left front door wide open and his left foot flat on the ground. His upper torso is tilted to the right towards the driver's seat and his blood spattered head is between the top of the two headrests of the front seats. His face is facing towards the roof of the vehicle. To have been able to shoot the deceased from between the two doors as the appellant alleges, would have been, in my view, impossible unless the deceased moved 360 degrees in an anti-clockwise movement. Common sense dictates that if the appellant was at some point between the two left side doors as he claims, then he must have moved to be behind the rear door in order to be able to get the right angle from which he could fire at the deceased. The result is that from where he stood when he fired, he could clearly have seen that the deceased did not possess, nor was he reaching for any firearm. In any event, there was no firearm inside the Corolla.

[20] In light of what I have said above, I am satisfied that all the evidence showed that the appellant was not confronted with immediate peril to justify the level of force that he exercised, and that the appellant foresaw the possibility of death ensuing and reconciled

himself to that event occurring. He did not act in private defence, nor did he believe that he was doing so. Accordingly, the appeal against conviction must fail.

[21] In considering a suitable sentence for the crime of murder committed with *dolus eventualis*, the type provided for in s 51(2) of the Act, the trial court found there were substantial and compelling circumstances in the appellant's case. These consisted of the fact that he had matriculated in 2003 and qualified as a police officer in 2010 holding the rank of constable. He is married with two children and his wife and children were dependent upon him as the family breadwinner. He had made two unsuccessful attempts to apologise to the family of the deceased, which presumably were taken to indicate remorse. He also experienced flashbacks of the incident for which he had sought counselling and assistance. The trial court held that these were 'weighty considerations' justifying a sentence less than the prescribed minimum.

[22] On the other hand the trial court concluded that:

'… [T]he coldblooded and savage manner in which the accused placed the muzzle of the R5 high velocity rifle on the side of the head of the deceased fired into the head of the unarmed and defenceless deceased makes this a case of extreme brutality….'

Given the trial court's conclusion that the murder was cold blooded and savage involving extreme brutality, the sentence imposed and considered appropriate is an effective eight years' imprisonment. When the appellant came before the full court on appeal against both his conviction and sentence, the full court gave notice of its

intention to consider and increase the sentence if the conviction was confirmed.[4] After affirming the conviction, the full court concluded that the aggravating factors outweighed by far the personal circumstances of the appellant and it substituted a sentence of 18 years' imprisonment for the sentence imposed by the trial court.

[23] There could be no criticism of the sentence imposed by the full court were it not for the circumstances in which the appellant came to appeal against his original sentence. Originally he applied for leave to appeal against conviction only. That prompted the trial court to intervene and in so doing the Judge persuaded counsel for the appellant to adopt the course of appealing against sentence as well. The exchange between the trial court and the counsel in this respect was as follows:

'COURT: … [T]here is no leave to appeal which is sought against sentence as it were, you are not . . . (intervenes)

MS MTSHWENI: That is correct, M'Lord.

COURT: The usual thing, it is usually done together, but I know if, quite often if you, sometimes you say that if the appeal is successful on conviction you will have no difficulty with the sentence or rather you will have no difficulty because the sentence will fall away.

MS MTSHWENI: Yes, M'Lord.

COURT: But if it does not succeed and you did not want to hear anything about sentence.

MS MTSHWENI: M'Lord, those were my [instructions] as, as far as the convictions stands. The sentence the court has . . . (intervenes).

COURT: Explained, explained it. Well yes indeed, but I mean you do not think that there is a possibility that another court might see it differently?'

[4] *S v Bogaards* [2012] ZACC 23; 2013 (1) SACR 1 (CC) para 60.

[24] This exchange with the trial Judge obviously caused some confusion in the mind of counsel. That is apparent from a passage in the record that follows shortly afterwards. It reads:

'COURT: You do not think it is arguable? I hear you about your instructions.

MS MTSHWENI: M'Lord, with the court's questions I find myself now in doubt with my instructions.

COURT: Ja, I understand.

MS MTSHWENI: I think under the circumstances, M'Lord for, for the application to, to play it safe it will be proper to then unfortunately ask the court to stand down this matter even if it is just to amend the last portion of our … (intervenes).

COURT: Well, … (intervenes).

MS MTSHWENI: Leave to appeal.

COURT: We can do it …, what I am trying to say is I do not see that it would detract from the appeal application that you are making, because the work is the same, the record will be the same, you will have to read the whole record, you know just to include the application for leave to appeal against sentencing as well.

MS MTSHWENI: As the court pleases.

COURT: There is nothing, there is no adverse inference that can be made against that.

MS MTSHWENI: M'Lord, we, we are indebted to the court.

COURT: Yes, ja.

MS MTSHWENI: And we will take the court's advice.

COURT: Ja, ja.

MS MTSHWENI: And also proceed against sentence.'

[25] It is apparent that the trial Judge interventions and suggestions that the application for leave to appeal should be extended to cover an appeal against sentence, as well as an appeal against conviction, were the determinant factors in counsel adopting that course. As she said in conclusion ‘we will take the court’s advice’.

[26] Although counsel had indicated that she wanted the matter to stand down whilst she took instructions from the appellant, the record reflects that the trial Judge intervened and that the matter was not stood down for her to seek instructions. There is nothing to suggest that she took instructions from her client before expanding the scope of the application for leave to appeal. Nor is there any indication that she was alive to the risk this posed for her client that what appears to be a lenient sentence might be increased by the appeal court, as in fact occurred.

[27] No doubt the trial Judge meant well and intended to be of assistance to counsel. However, the result of his suggestions was that the scope of the appeal was broadened and the risk introduced of the appellant’s sentence being increased. This might not have mattered had there been an application by the prosecution for leave to appeal against the sentence, but in the circumstances of this case, where there was no such application, the consequences for the appellant were disastrous.

[28] All accused persons in South Africa enjoy broad ranging constitutional protection intended to ensure that they are fairly treated in criminal proceedings. Those fair trial rights are embodied in s 35 of the Constitution and include in s 35(3)*(o)* the right of an

appeal to, or review by, a higher court. The appellant wished to appeal against his conviction, but not his sentence. The outcome of the trial court's well-meaning suggestions to his counsel was to induce her to appeal against his sentence and thereby expose him to the substantial risk of an increased sentence being imposed by the appeal court.

[29] A constitutionally guaranteed right to an appeal includes in my view a requirement that the process leading up to the appeal be fair to the accused person. Where the accused has been convicted of a serious crime and sentence has been imposed, a question that immediately arises in considering any appeal is whether the outcome may be that the accused is worse off after appealing than would have been the case had there been no appeal. Where a deliberate decision has been made to appeal against conviction alone, and not sentence, it is inappropriate for the presiding officer to seek to persuade the accused to adopt a different course. When the persuasion emanates from a trial Judge sitting in the relevant division of the high court, it may be particularly difficult to resist. It is unfair to the accused for a presiding officer at a criminal trial to seek to influence a decision that is one to be made by the accused alone, with the assistance of their legal representative.

[30] It follows that in my view the appellant's fair trial rights, especially the right embodied in s 35(3)*(o)* of the Constitution, were infringed when the trial Judge persuaded counsel to expand the scope of the appeal to include an appeal against sentence. The only way in which that infringement of his rights could have been cured

was for the full court not to exercise its power to increase his sentence. In this court all we can do is set aside that decision by the full court and restore the sentence imposed by the trial court. We do so with regret because that sentence was manifestly lenient and inappropriate in regard to the crime committed by the appellant. However, the obligation of the court to protect and vindicate his constitutional right to a fair trial and appeal compels that conclusion.

[31] In the result, the appeal against sentence must be upheld. Accordingly, I make the following order:

1 The appeal against the conviction is dismissed.

2 The appeal against the sentence succeeds.

3 The order of the Gauteng Division of the High Court, Johannesburg insofar as it relates to sentence is set aside and the sentence of the trial court is reinstated, namely:

'(a) The accused is sentenced to 12 years' imprisonment four years whereof is suspended for five years on condition he is not convicted of murder committed during the period of suspension.'

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B H Mbha

Judge of Appeal

APPEARANCES:

For Appellant:	J van Schalkwyk
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For Respondent:	A D Maharaj
Instructed by:	Director of Public Prosecutions, Johannesburg
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