

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
(Gauteng Local Division, held at Johannesburg)**

Case no: A217/2015

In the matter between:

AKANI NKUNA

APPELLANT

And

MR H MASHIMBYE

FIRST RESPONDENT

**THE DIRECTOR OF PUBLIC PROSECUTIONS,
JOHANNESBURG**

SECOND RESPONDENT

Neutral citation: Nkuna v The State [A217/2015 SGHC 17 August 2016]

Coram: Van der Linde, J and Mlaba, AJ

Heard: 4 August 2016

Delivered: 17 August 2016

1. Reportable: No
2. Of interest to other Judges: No
3. Revised: Yes

ORDER

Review, alternatively appeal: The Regional Court held at Germiston in the Regional Division of Gauteng.

1. The application for review is dismissed;
2. The appeal against sentence is dismissed

IS Mlaba
Acting Judge
High Court, Johannesburg

I agree and it is so ordered

WHG van der Linde
Judge
High Court, Johannesburg

JUDGMENT

INTRODUCTION

[1] The appellant was convicted of attempted murder on 27 March 2013 in the Regional Court Germiston. He was sentenced to undergo 7 years imprisonment.

[2] Throughout the proceedings appellant was legally represented albeit by different legal representatives.

[3] He now brings an application in terms of rule 53 of the Uniform Rules of the High Court for the review and the setting aside of his conviction (pursuant to his admissions in terms of section 220 of the Criminal Procedure Act 51 of 1977(CPA)).

THE FACTS

[4] The following are the facts upon which the review application is premised: The appellant who was a member of the South African Police Services was arraigned in the Regional Court Germiston on a charge of attempted murder. He pleaded not guilty. He was at this stage represented by an attorney, Mr Strydom who confirmed that plea was in accordance with instructions. Appellant denied any intent to kill as he averred that a shot went off accidentally.

[5] In proving its case, State led evidence of 4 witnesses (including complainant), two of whom were present when the incident occurred. Both eye witnesses

testified how they saw appellant pointing a firearm at the complainant and how he ignored their warning about the danger of his conduct.

[6] The last witness, a member of the South African Police Services, testified, that accused is a member of the South African Police Services and therefore must have undergone training as to how to handle firearms.

[7] At the close of the case for the State an application in terms of section 174 of the CPA was brought but dismissed. Immediately thereafter appellant appointed a new legal representative, an attorney, Mr Buthelezi.

[8] Having failed to appear more than once, Mr Buthelezi instructed Mr Khumalo who informed court of the accused's intention to make admissions in terms of section 220 of the CPA. Subsequently section 220 admissions were made, read into the record, confirmed by the appellant and admitted as evidence by the Regional Magistrate.

[9] Aggrieved by the sentence imposed, the appellant sought leave to appeal in terms of section 309B of the CPA against his sentence only, which was granted by the court below.

[10] Dissatisfied with the conduct of the proceedings by his attorney of record, the appellant instructed a new legal team, Coert Jordaan inc Attorneys, on whose advice this review is sought. This application is brought simultaneously with an Appeal.

[11] It is opposed by the State.

GROUND OF REVIEW

[12] The grounds upon which the proceedings of any Magistrates' Court may be brought under review before a court of a Division are set out in section 22 of the Superior Courts Act 10 of 2013:-

- (a) Absence of jurisdiction on the part of the court;
- (b) Interest in the cause, bias, malice or corruption on the part of the presiding judicial officer;
- (c) Gross irregularity in the proceedings; and
- (d) the admission of inadmissible or incompetent evidence or the rejection of admissible or competent evidence.

[13] The review is sought on the basis, amongst others, of the alleged incompetence of the former legal representative, Mr Khumalo in drafting the section 220 admissions. It is further contended that Appellant was not afforded proper consultation with the said attorney. As a result appellant's fair trial rights under the constitution have allegedly been infringed. Paragraph 22 of the Appellant's Heads of Argument reads:-

"I am of the view that justice and fairness has failed me dismally. I am severely prejudiced by my lawyer's behavior of not coming to court which resulted:

- (i) in the case rushed to dispose of it;
- (ii) that because of this behavior there was no proper consultation with me;
- (iii) that I at no stage intended to change my plea as I maintain that it was an accident;

(iv) that because of the circumstances beyond my control I did not have a fair trial-See S v Tandwa and Others 2008 (1) SACR 613 SCA at para 7.”

[14] Counsel for the Appellant relied on S v Tandwa above, in which the Supreme Court of Appeal held “Incompetent lawyering can wreck a trial, thus violating the accused’s fair trial right. The right to legal representation therefore means a right to competent representation.”- you may also see: - S v Halgryn 2002 (2) SACR 211 (SCA) as per Harms JA at 216h-217c.

[15] Whether a defense was so incompetent that it made the trial unfair is a factual question that does not depend upon the degree of *ex post facto* dissatisfaction of the litigant. Convicted persons are seldom satisfied with the performance of their defense counsel- S v Majola 1982 (1) SA 125 (A) at 133D-E.

[16] In the matter before us, when the section 174 application was refused, appellant terminated the mandate of his legal representative Mr Strydom without any justifiable reasons. Paragraph 11 line 2 of the Appellant’s Heads of Argument reads....”at that point in time I was afraid because my application was not granted for a discharge. I was advised by some former colleagues to change lawyers and I appointed *Mr Buthelezi* there in the passage of court to continue with my matter.”

[17] Consequent to termination of his mandate on 1st February 2013, Mr Strydom applied for withdrawal as attorney of record which was duly granted. Immediately thereafter there was a new legal representative before court, a Ms Tonise. Appellant confirmed instructions.

[18] With the court's indulgence the proceedings were adjourned until the 27th February 2013 for the defence case. On 27 February 2013 again the court granted a further postponement for the defence attorney to listen to the transcribed record. At this stage it was Mr Buthelezi who appeared on behalf of the applicant.

[19] On 27 March 2013 at 15h30, the proceedings were further adjourned to 9 April 2013 at the instance of the appellant, who at that stage was represented by Mr Khumalo. Suddenly at 15h35 the appellant and his Legal Representative, Mr Khumalo were back in court. The Court was informed that section 220 admissions had been prepared. The admissions were read into the record, confirmed by the appellant and accepted by the Respondent.

[20] At no stage did the Appellant show any discontent. It is inconceivable that a Legal Representative would, without any instructions from his client stand before the court and read into the record admissions on such serious allegations. The matter of *De Villiers v The State & Another* (20732/14) [2016] ZASCA 38 (24 March 2016) could not have been decided at a more appropriate time.

[21] The facts were more or less similar to the facts in the review before us. The appellant, an accountant, was charged with amongst others, Fraud. He pleaded guilty to theft; his plea was read into the record by his counsel and confirmed by appellant. Like appellant before this court, he admitted that he pleaded guilty freely and out of own volition, without undue influence. He was duly convicted. After imposition of sentence, appellant sought leave to appeal against sentence only, but this was refused by the Regional Magistrate. A subsequent Petition was

also unsuccessful. Ultimately review was sought on the basis of an irregularity *ex vitiae curiae* which vitiated the whole proceedings in the Regional Court. It was contended on his behalf that he had pleaded guilty under duress.

[22] Having applied the abovementioned case of *Tandwa* as well as *S v Dalindyebo* (090/2015)[2015] ZASCA 144; [2015] All SA 689(SCA paras 22-23 the court alluded to the fact that “It is equally well established that a legal representative never assumes total control of a case, to the complete exclusion of the accused. An accused person always retains a measure of control over his or her case and, to that end, furnishes the legal representatives with instructions.”

[23] The court further referred to a separate concurring judgment in the case of *R v Matonsi* 1958 (2) SA 450 (A) at 458 A-B where Van Blerk JA expressed his view and stated that “while a legal representative assumes control over the conduct of the case, that control is always confined to the parameters of the client’s instructions. The other side of the coin is that, in the event of an irresolvable conflict between the execution of a client’s mandate and the legal representative’s control of the case, the legal representative must withdraw or the client must terminate his or her mandate where such an impasse arises. An accused person cannot simply remain supine until conviction.”

[24] It is further mentioned that the ultimate choice whether to plead guilty or not guilty is that of the accused.

[25] Back to the facts in the case before us, the appellant is a constable in the South African Police Services. He was capable of terminating mandate of his first legal representative with immediate effect. Nothing prevented him from doing the same with Mr Khumalo.

[26] Regarding the contention that in drafting the section 220 admissions, Mr Khumalo simply regurgitated the elements of the offence without explaining in detail what actually transpired one should not lose sight of the purpose of the section which is, to allow the proof of facts that are not in dispute.

[27] This was clearly put by Rumpff CJ in *S v Seleke en ander* 1980 (3) 745 (A) at 745A-B where he stated "When an admission is made in terms of s 220, it means that the accused cannot later allege that, that which was admitted has still to be proved by the State. The words "sufficient proof" therefore absolve the State from the burden of proving in any other manner the particular fact which has been admitted, unless the State, for special reasons, wishes to adduce before the trial court further evidence concerning the fact. Sufficient evidence is naturally not conclusive evidence (*afdoende bewys*) and can later be rebutted by the accused, eg, on the grounds of duress or mistake or by other legally acceptable facts. It speaks for itself that the section must be limited to that which is intended by the section, namely only a pure fact which has been placed in issue and which is admitted by or on behalf of the accused. If explanations or statements appear with the admitted fact, the court can take notice of them, subject to further

evidence which might be adduced before the trial court, but only the pure fact which was put in issue and is admitted is regarded as sufficient proof.”

[28] When these admissions were made the State’s case was already closed; evidence was therefore on record detailing what transpired. The evidence together with the section 220 admissions was evidence before the court.

[29] We are therefore satisfied that the proceedings were conducted in accordance with justice. In the result we make the following order:

The application for review is accordingly dismissed.

APPEAL

[30] We move now to consider the sentence only, as leave was granted only to appeal sentence.

The approach of the appeal court on sentence

[31] The imposition of sentence is a matter falling within the discretion of the trial court.

A sentence will not be altered unless it is found that no reasonable man ought to have imposed such a sentence or the sentence is found to be totally out of proportion to the gravity or magnitude of the offence; or it invokes a feeling of shock or outrage:-S v Fhetani 2007 (2)SACR 590 (SCA)254c-f ; or where the trial judge failed to exercise his discretion properly or that it was in the interest of justice.

[33] The court held in *S v Malgas* 2001 (1) SACR 469 (SCA at 478d-e) that to do so would be to usurp the powers of the trial court.

[34] In the case before us, there is no persuasive argument that the Regional Magistrate misdirected himself in imposing the sentence nor that the sentence was shockingly inappropriate.

[35] A perusal of his judgment on sentence shows clearly that the Regional Magistrate took into account all the relevant factors before imposing sentence.

[36] Apart from the personal circumstances of the appellant, not only did he consider the interests of society in general but specifically considered the impact of the offence on the victim.. He took into account the extent of the injuries sustained by the victim. He expressly considered the fact that when he testified he was still on crutches. The record it reflects that the incident occurred on 30 April 2011 and he testified on 18 September 2013. This means that after almost 17 months he was still on crutches. Regarding impact of the offence on the victim see *S v Blaauw* 2000 (2) SACR 255 (CPD) at 257 in which the court held that the interest of the victim are a critical factor to be taken into account in reaching an appropriate sentence.

[37] He further considered the nature and the circumstances under which the offence was committed.

[38]The Regional Magistrate was prepared to accept as mitigating factor the fact that the appellant lost his employment as a result of the incident. He further took into account the fact that the matter took long to finalise.

[39]Our courts view attempted murder in a very serious light. In *Grigor v The State* (607/11) [2012] ZASCA 95 (1 June 2012), a road rage incident resulted in the appellant stabbing complainant with a knife. He was convicted of attempted murder in the Regional Court and sentenced to 6 years imprisonment. Appeal to the North Gauteng Local Division was dismissed. A subsequent appeal to the Supreme Court of Appeal met with a similar fate.

[40]*S v Ntsime* (48/04) [2005] ZANWHC 30 (14 April 2005) is another example in which the appellant was convicted of attempted murder in the Regional Court despite the fact that complainant did not sustain any gunshot wound. He had fired two shots at the complainant but missed. He then attacked him by hitting him with the butt of a gun. The Regional court imposed 12 years imprisonment. His appeal on sentence to the North West High Court was successful. The high Court found that the court below failed to exercise its discretion judicially. The sentence was found to be disturbingly inappropriate and completely out of all proportion with the offence committed.

[41] The sentence of 12 years imprisonment was substituted with:

“Five years imprisonment, two years one month thereof is suspended for a period of five years on condition that the Appellant is not found guilty of the offence of attempted murder committed during the period of suspension.”

Unlike in Ntsime's case above, complainant in our review was shot on the chest.
He sustained very serious injuries.

[42] There is therefore no basis to interfere with the sentence imposed by the

Regional Magistrate and the appeal against sentence must also fail.

[43] In the result I propose the following order:

The appeal against sentence is dismissed.

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(admitted in terms of article 4 (2) Act 62 of 1995)
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