

10/6/2011

IN THE HIGH COURT OF SOUTH AFRICA
(NORTH HIGH COURT, PRETORIA)

CASE NO: A1068/10

In the matter between:

TSHEPO MBUNGI, APPELLANT

(1) REPORTABLE: YES/NO.
(2) OF INTEREST TO OTHER JUDGES: YES/NO.
(3) REVISED.

And

2011/06/10
DATE SIGNATURE

THE STATE

RESPONDENT

JUDGMENT

[1] The appellant an adult male aged 44 years old was on 16 November 1998 convicted by Els J on one count of murder, attempted murder and possession of firearms and ammunition in contravention of s2 and 36 of Act 75 of 1969. He was sentenced to 43 years imprisonment.

[2] The appellant was after eleven years granted leave to appeal against conviction only by Van der Merwe DJP. The grounds of

Count 5 unlawful possession of ammunition at or near Schoeman Street in Pretoria on 28 June 1996, in contravention of Act 75 of 1969;

[4] The appellant was through out the trial duly legally represented by *pro deo* counsel Mr. C.E. More. Accused 1 was legally represented by counsel Mr. W R Malan. The appellant and accused 1 both pleaded not guilty to all the counts including the alternative counts to count 3. They exercised their right of silence. Various admissions in terms of s220 were made. These were in respect of the identities of the deceased and that they died as a result of gun shot wounds sustained at the scene of crime on that particular date. The correctness of the two post mortem reports were admitted as exhibits B and C. The admission document itself was accepted as exhibit A.

[5] The conviction of the appellant is a sequel to an abortive attempted robbery in the gun shop of the deceased Mr. Antonin Mirolsav Gotfried at Schoeman Street in Pretoria on 28 June 1996. A shooting ensued in the shop, resulting in the fatal gun

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shot wounding of Mr. Antonin Mirolsav Gottfried and Mr. Zachariah Tladi.

- [6] Sergeant JVR Van Zyl and Sergeant L Coetzee fortuitously happened to arrive in the vicinity of the shop and were looking for parking when they were attracted by gun shots from the direction of the shop. At that point in time they saw a man stumbling out from the shop and collapsed at the door. This man was later identified as the late Mr. Zachariah Tladi. At the very moment they observe the appellant with hands outstretched forward walking backwards out of the shop and tripping over the deceased at the door. Sergeant Coetzee with his firearm drawn, rushed to the door and instructed the appellant who fired a shot inside the shop, to drop his firearm. Once the appellant was neutralized, sergeant Coetzee observed in the shop the deceased Mr. Antonin Mirolsav Gottfried was lying on the floor. He observed accused 1 and instructed him to open the door from inside. The latter after some hesitation and shouting by both Coetzee and Van Zyl eventually pressed the opening knob that unlocked the door.

[7] Mr. Doctor Stemmer Tlaka testified for the State. He testified about the conspiracy between the appellant, accused 1, himself and the deceased Tladi to rob the shop of the deceased in Pretoria Central. Only the appellant, accused 1 and Tladi went to the shop. Mr. Tlaka arrived later as he did not use the same transport with the others to get to the shop. When he was in the vicinity of the shop he observed the appellant and accused 1 being placed in the police vehicle. He returned home to report the arrest of the accused 1. He did not know the appellant but had met him only once when the conspiracy took place.

[8] The version of the appellant in chief was very brief. He said that the shooting started when he was entering the shop. He pressed the door bell and heard the door opening and entered. He pulled the door. Just as he was entering the shop but still at the door but inside steel door in the shop, the door closed and he immediately heard shots. He immediately squatted in front of the steel door before he set next to the gate. He was asked whether he heard the evidence that he had conspired with other

people to rob the place. He denied this. He further denied that he had a firearm at the shop. That completed his evidence in chief.

- [9] Under cross examination the appellant stated that he knew Zacharia by his name only but did not know his surname. He knew him because he used to wash his motor vehicle. On the day in issue he walked into the shop because he saw Zacharia going into the shop. He was looking for work and went into the shop so as to speak to Zacharia about that. When asked whether he would have gone into the shop had he not seen Zacharia getting therein, he said that he could neither deny nor admit same. He further explained that while in the shop, he heard someone entering the shop and immediately thereafter there was shooting. He squatted next to the door. He denied having fallen over the deceased. While he was between the wooden door and the burglar door two armed men came in and pointed him with firearms. Later police came and arrested him. Needless to state that his version was rejected thus the

conviction. The version of accused 1 was equally rejected. He was as a matter of fact arrested inside the shop.

[10] The appellant was duly legally represented through out the proceedings at the court *a quo*. In assailing the conviction of the appellant Mr. Strijdom has submitted that the legal representative of the appellant only posed three questions to the State witness Mr. van Zyl and a terse version of the appellant to this witness. The cross examination of State witness Mr. Doctor Tlaka consisted of only three short questions and that the appellant denies the conspiracy. The cross examination of the State witness Mr. L Coetzee consisted of short version that the appellant did not possess the firearm. Mr. Strijdom has further submitted that whereas the identification of the appellant by the State witnesses is premised on his height, being the shorter of the two persons in the dock, this was not challenged by his counsel. The Court pointed out that both the appellant and accused 1 were seemingly of the same height. It is submitted that this is just

another indication that the appellant did not receive a fair trial because of the inadequate handling of his trial.

[11] It is further submitted that the cross examination of the State witness did not measure to the demands of s35(3) because the legal representative of the appellant was not real but illusory and the appellant did not have proper and effective and competent legal representative. In this regard we have been referred to the matter of *S v Halgryn* 2002 (2) SACR 211 SCA and *S v Mafu and Others* 2008 (2) SACR 653 WLD at 654 and *S v Chabedi* 2004 (1) SACR 477 (WLD). It is further submitted that it is the duty of the appeal court to objectively inquire whether the appellant has had a fair trial. We are edged to find that the appellant did not receive a fair trial and therefore set the conviction aside.

[12] Mr. Roberts who appears on behalf of the State submitted that the Court must place itself in the position of the counsel who represented the appellant at the time, who had the prime responsibility of conducting the defense of the appellant. He

further quite correctly submitted that the test to be applied is an objective one, to determine whether the defence counsel had acquitted himself properly of his instructions. In this regard he too referred us to the matter of *S v Halgryn supra*. I will cite in detail this authority herein below.

[13] Mr Roberts has further submitted that the fact of the matter is that the appellant was duly represented. The appellant did not raise any complaint about his legal representative during the trial. In the matters where the conviction was set aside because of the alleged "incompetence" of counsel, the complaint was raised during the trial, which is not the case *in casu*.

[14] It brooks no argument that the appellant, like any accused person has the right to legal representation. Section 35 provides inter alia, that:

"(3) Every accused person has a right to a fair trial, which includes the right—

- (f) to choose and be represented by, a legal practitioner and to be informed of this right promptly;

(i) to adduce and challenge evidence.*

[15] Indeed, for an accused person to realize the protection envisaged by affording him legal representative, even at the State's costs, s35 presupposes that the legal counsel will not be perfunctory but effective in acquitting himself of his task of defending the accused. It presupposes competency on the part of the legal representative. This aspect is, with respect, aptly stated in the matter of *S v Halgryn (supra)* at 216h-217c which I find myself obliged to cite in detail where the Supreme Court of Appeal stated:

"The constitutional right to counsel must be real and not illusory and an accused person has, in principle the right to a proper, effective or competent defence. Compare *S v Majola* 1982 (1) SA 125 (A) at 133 D-E. Whether a defence was so incompetent that it made the trial unfair is once again 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 defence counsel. The assessment must be objective, usually, if not invariably, without the benefit of hindsight. Compare *S v Louw* 1990 (3) SA 116 (A) at 125D-E. The Court must place itself in the shoes of defence counsel, bearing in mind that the responsibility in conducting the case is that of counsel who has to make decisions, often

wit little tie to reflect (*cf R v Matonsi* 1958 (2) SA 450 (A) at 456 as explained in *S v Louw (supra)*). The failure to take certain basic steps, such as failing to consult, stands on a different footing from the failure to cross-examine effectively or the decision to call or not to call a particular witness. It is relatively easy to determine whether the right to counsel was rendered nugatory in the former type of case but in the latter instance, where counsel's discretion is involved, the scope for complaint is limited. As the Supreme Court noted in *Strickland v Washington* 466 US 668 (1984) at 689:

'Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has been unsuccessful, to conclude that a particular act or omission of counsel was unreasonable.'

[16] The question of the competence or lack thereof of the appellant's counsel cannot be determined on the basis of the number of questions he asked, nor these in isolation. The crucial question is what prejudice has the appellant suffered. The answer to all these questions must be sought in the matrix of all the evidence that was led, bearing in mind that it is for the appellant to demonstrate the prejudice that resulted on the basis of the alleged incompetence of his counsel; *vide*

Hlantlalala and Others v Dyantyi N.O an Another 1999(2) SACR 541 at 545g¹. I do bear in mind that at no stage during the trial did the appellant raise any complaint about his counsel.

[17] In the matter of *May v S All SA November* [2005] 4 All SA 334 (SCA)

338d the Supreme Court of Appeal stated that:

“Whether or not prejudice has resulted from lack of legal representation is really a question that can be determined only by having regard to the whole trial, and the way in which it was conducted by the judicial officer; and the ability, as shown during the course of the trial, of the accused to represent himself adequately; and to whether the evidence adduced has led justifiably to the conviction and sentence.” In my view, this finds true also where the complaint is about the lack of competency or incompetence of the appellant’s legal representative.

[18] The submission on behalf of the appellant that his legal representative failed to challenge the identification of the

¹Vide *Hlantlalala and Others v Dyantyi N.O an Another* 1999 (2) SACR 541 (SCA)

at 545g where Mpati AJA (as he then was) said:

“The crucial question to be answered is what legal effect such irregularity had on the proceedings at the appellant’s trial. What needs to be stressed immediately is that failure by presiding judicial officer to inform an unrepresented accused of his right to legal representation of his right to legal representation, if found to be an irregularity, does not *per se* result in an unfair trial necessitating the setting aside of the conviction on appeal (See *S v Radebe*; *S v Mbonani* 1988 (1) SA 191 (T) at 1961; *S v Mabaso and Another* 1990 (3) SA 1851 (A) at 205 D-E, compare also *S v Shikunga and Another* 1997 (2) SACR 470 (Nm) at 431(i))”

appellant as the shorter person of the two accused, is in my view of no consequence. Sergeant Van Zyl did not identify the appellant only on height. He also identified him on built because he said 'the smaller one'. If the appellant disputed that he was not the person who fell over Zacharia at the door and had instructed his counsel otherwise, certainly this would have been challenged, but it was not.

[19] In any event, counsel for accused 1 extensively canvassed with the State Van Zyl the aspect of who fell over the deceased at the door.² The witnesses was adamant that it was the appellant who fell over the deceased. I agree with the submission made by Mr. Robert that counsel for the appellant simply rode on the back of the counsel for accused 1. It was never disputed that appellant fell over the deceased. The only issue disputed was possession of the appellant of a firearm.

[20] The witness Mr. Tlaka who testified about the conspiracy, placed the appellant in the scene where the conspiracy to rob

² Page 24 typed record line-8.

was discussed and the appellant being the originator of the robbery³. Counsel for accused 1 cross examined this witness about this aspect.⁴ Indeed this aspect was disputed on behalf of the appellant, although in not so many words.⁵ It did not require any much cross examination to put the simple statement that the appellant dispute that he was part of the conspiracy.

[21] The appellant was also afforded an opportunity to present his defence under oath. His version was very terse. He preferred to confine himself to the essentials and say as less as possible. Nothing precluded the appellant from being more elaborate in detailing his defence. He denied the essential facts and this robbery and that he had a firearm. He denied these allegations.⁶

[22] In my view, it does not seem to me from the record that the appellant has in any way been prejudiced by the brevity of the question posed by his counsel. If there was any prejudice in brevity by counsel, this was neutralised by the very fact that the appellant was afforded an opportunity to relate his version. If

³ Page 19 of the record line 10-18.

⁴ Page 30 of the record line 19-22.

⁵ Page 37 line 14-17.

⁶ Page 56 line 22-25.

appellant also choose to resort in brevity in answering questions, he simply cannot complain that he was not afforded an opportunity and that he had unfair trial. The question of unfair trial depends must be determined on case by case. There is no blanket yardstick for unfair trial.

[23] The trial court evaluated the evidence presented to it, by both the State and the defence. The trial court also made value judgment on the impressions of the State witnesses and accused 1 and the appellant. It found the State witnesses to be credible witnesses. It nonetheless appreciated that the appellant and accused 1 were terse in the respective versions. The trial court decided the guilt of the accused and the appellant on the improbabilities of their versions and concluded that their respective versions are contradictory and rejected both their versions and preferred the evidence of the State witnesses. The version of accused 1 was that he was first to enter the shop and the door closed behind him. Then the door bell rung once and then someone stood next to him and said "Here I am" the shooting started. On the version of the appellant, it would mean that accused 1 was the first to gain entry into the shop and the door closed behind him. The door would have then rung for the second time to allow Zacharia. On the third occasion the door bell would have rung to allow the appellant in. When the door opened the appellant was still at the door when the shooting started. The trial court found that the version consequently rejected both of them.

[24] What is of importance, is that the trial court gave proper consideration of the version of the appellant. In my view, it does not seem from the record that the appellant has in any way been prejudiced by the manner his counsel conducted his defence. What is significant, is that the trial court judge carefully applied his mind to the totality of the evidence before him, including the version of the appellant. In the result I am of the view that the appeal must fail.

[25] In the result I make the following order:

1. That the appeal against conviction is dismissed;
2. That the conviction of the appellant on all the counts is confirmed.

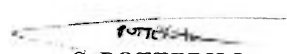

N.M. MAYUNDLA

Delivered on 10 June 2011

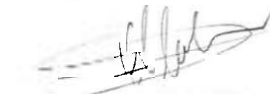
JUDGE OF THE HIGH COURT

I agree

I agree


S. POTTERILL

JUDGE OF THE HIGH COURT


M. M. OJANE

JUDGE OF THE HIGH COURT