

IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL DIVISION, PIETERMARITZBURG

CASE NO: AR384/15

In the matter between:

MSINDISENI ABEDNEGO SIYAYA

APPELLANT

And

THE STATE

RESPONDENT

JUDGMENT

Delivered on: TUESDAY, 17 MAY 2016

OLSEN J (XOLO AJ concurring)

[1] The late Mr Mbuyiseni Moloi (who I shall call “the deceased”) died on 20 or 21 February 2010. According to the post mortem report and the evidence of its author, a Dr Gumbi, the deceased died as a result of multiple injuries inflicted by more than one instrument. The injuries were of different appearance and of different severity. From other evidence presented it is apparent that these injuries were inflicted by a sjambok and one or more other sticks.

[2] Arising out of the death of the deceased, on 12 November 2014 Mr Msindiseni Abednigo Siyaya was convicted on a charge that he murdered the deceased, and on 17 March 2015 he was sentenced to 12 years imprisonment for that crime. He now appeals against both his conviction and sentence.

[3] The appellant was originally charged with seven other accused. Not all of them were ultimately tried. Those that were belonged to a local Community Policing Forum operating in the area in which the deceased was killed, and for the sake of convenience I will refer to those accused as the “CPF” members. The CPF members who were tried were acquitted.

[4] In his heads of argument, and subsequently at the outset of the oral argument in this appeal, counsel for the appellant conceded that the conviction of murder could not be sustained, and that the appellant ought to have been convicted of assault with intent to do grievous bodily harm. The reason for that concession is best dealt with after an account of the facts.

[5] The two material witnesses for the State were Mr S H Mkhonza and Mr D E Thomo. Neither the appellant nor any of the CPF members gave evidence. The appellant and the CPF members were separately represented during the trial.

[6] The appellant is a farmer in the greater Vryheid area. Shortly before 18 February 2010 the appellant found himself the victim of stock theft. The belief seems to have been that after they had been stolen the cattle in question were slaughtered and eaten.

[7] On 18 February 2010 the appellant telephoned Mr Thomo who was the chairperson of the CPF. He advised Mr Thomo that assistance was required and that the theft of the cattle had been reported to the police. Subsequently on 20 February 2010 the appellant and Mr Thomo met and Mr Thomo was advised by the appellant that the latter had obtained a list of names of people involved in the slaughter of his cattle and that he required the assistance of the CPF in that regard. The deceased was one of those persons. Ignoring unnecessary detail, what happened, according to Mr Thomo, was that the deceased was picked up by Mr Thomo and one of the CPF members, as was Mr Mkhonza at the request of the deceased, after which that party was joined by the remaining CPF members. All these people then met the appellant and

boarded his bakkie with a view to being transported to a police station. Instead of driving to the police station the appellant took the road to his own farm where, after the passengers had alighted, he directed that all of them should enter a small building situated next to the farm house, which was done.

[8] Mr Thomo says that there were two boys and a woman he did not know in the yard of the farm when they arrived. When everyone was inside the building to which they had been directed the appellant instructed the boys to bring a rope, which was done. He produced a sjambok in the presence of Mr Thomo and also instructed the boys to go and fetch a stick that had been left by thieves in a kraal. According to Mr Thomo he then decided that he had better telephone the police. He left the room in which the others were with the deceased, and moved away so that the others could not see that he was making a phone call. He telephoned the Emondlo police and was told that no police van was available as the station was busy. He then telephoned a Mr Mazibuko who he understood to be the investigating officer with regard to the complaint of stock theft made by the appellant. Mr Mazibuko arrived on the scene, but very much later.

[9] From outside the building Mr Thomo then heard the cries and screams of the deceased and what appears to have been general noise. He called out two of the CPF members from the building and told them that what was happening was wrong. But that did not stop proceedings. He heard the deceased protest his innocence, saying that he did however know the people who had slaughtered the appellant's stock. He heard the appellant saying to the deceased that the latter should reveal the names of the persons who stole the stock. Eventually the noise died down.

[10] The account of the events of the night of 20 February 2010 thus far is derived from the evidence of Mr Thomo, and must be interrupted in order to consider the evidence of Mr Mkhonza. According to Mr Mkhonza he was in the building or room in which the assault took place from when it commenced to when it ended. On his evidence the deceased was tied up with a rope and the appellant wielded the sjambok striking the deceased many times. Sticks

were also used. The whole group (the appellant together with the CPF members) participated in the assault. The deceased, he says, protested his innocence throughout. The assault only stopped, according to Mr Mkhonza, when the deceased died. In his judgment the learned magistrate made no particular comment about Mr Mkhonza's evidence. In giving his brief account of the events of that night the magistrate did not indicate clearly whose evidence he was drawing on, but it does appear that he found the evidence of both the chief State witnesses to be credible and reliable.

[11] However there were some contradictions between the evidence of Mr Mkhonza and that of Mr Thomo. One of them is plainly material. According to Mr Thomo whilst the assault was underway Mr Mkhonza was not inside the room but on the verandah of the building. Mr Thomo was absolutely clear on that point, and Mr Mkhonza was equally adamant that he was inside. However both witnesses say that the door leading into the building and the room in which the assault took place was open throughout. It is not impossible that Mr Mkhonza did not distinguish between the verandah and the room itself; nor was that he saw what going on from the verandah. Be that as it may, Mr Mkhonza confessed more than once during the course of his evidence that he regarded himself as mentally unstable. This was apparently the result of some difficulties he had experienced in the past. In my view it would be unsafe to rely on Mr Mkhonza's evidence save where it is corroborated by that of Mr Thomo, assuming that the latter's evidence is acceptable, a subject to which I will revert. (As will be seen, this approach is consistent with the State's concession that assault with intent to do grievous bodily harm as opposed to murder was the proper verdict.)

[12] Reverting to an account of the events of the night, when the noise had subsided, according to Mr Thomo the appellant emerged from the building and said that he had got a few names and that these persons should be collected. Mr Thomo refused to go along with this and instead requested the appellant to take Mr Mkhonza back to town, which is what the appellant agreed to do. After Mr Mkhonza had been dropped off they (the appellant, Mr

Thomo and one of the CPF members who had gone with them) returned to the farm.

[13] On their return Mr Thomo found four of the CPF members standing around outside the building in which the assault had taken place. It is only at that stage that Mr Mazibuko arrived. Mr Thomo reported to him as to why he had telephoned him, but then Mr Mazibuko and the appellant moved a distance away and spoke privately. After that conversation Mr Mazibuko reverted to the appellant telling him that he (Mazibuko) had received a call which required him to rush back, and that Mr Thomo should continue to do his job of helping the police. This led the magistrate to state in his judgment that Mr Mazibuko's conduct on the evening in question should be reported to the National Commissioner of Police.

[14] According to Mr Thomo he did not then know that the deceased had died. He went into the room and saw him lying on his back with his leg and hands tied with a rope which had been fetched earlier. He noticed the wounds which the deceased had sustained. He soon realised that the deceased was dead, either because of his own observations; or because the appellant gave instructions that the body should be removed from the farm; whilst a woman who was present suggested that the body should be burnt. Mr Thomo thought it better to go along with the appellant's suggestion, and assisted in loading the body of the deceased onto the appellant's bakkie which then transported the body with the CPF members and the appellant on board to a residential area apparently on the outskirts of Emondlo, where the body was dumped. The appellant then left that scene on his own.

[15] Mr Thomo again phoned the police and was told that he would have to wait. He eventually suggested to the CPF members that they should leave and he himself waited until about 4 o'clock in the morning when, because of rain and cold, he felt that he should leave also. He was later contacted by the police to give his account of events of the night.

[16] Before Mr Thomo commenced his evidence the prosecutor requested the magistrate to administer a warning in terms of s204 of the Criminal Procedure Act. It is not clear why that was done. Perhaps it was in the nature of a precautionary measure given that Mr Thomo was indeed involved in the events of the night in question. However on Mr Thomo's evidence, he got caught up in events which were directed by the appellant throughout, and he tried at all material times to secure the assistance of the police in order to put a stop to what was going on once he realised what the appellant's intentions were. There is nothing on the record before us to show that the prosecution was in any way dissatisfied with what Mr Thomo had to say.

[17] In considering Mr Thomo's evidence it is impossible to overlook that the cross-examination of him by the lawyer representing the appellant was for the most part a form of verbal assault. It was rude, demeaning and intended to intimidate the witness. It was unjustifiable and should not have been allowed. In the result, on my assessment of the record, that approach by the appellant's lawyer did his client more harm than good, as Mr Thomo emerged from the ordeal unscathed. In the course of this evidence which might have been challenged, because it was material to the proposition that the appellant was innocent, was left unchallenged. Putting aside Mr Mkhonza's evidence, Mr Thomo's evidence that the appellant called for the rope, that the deceased was tied up with that rope, that the appellant was on the scene with a sjambok, and that he was present and clearly directing the assault (whoever from time to time wielded the weapons used in the assault), was not specifically challenged. It was only at the end of Mr Thomo's cross-examination that some element of a defence case was revealed when it was put that it was Mr Thomo, and not the appellant, who had a list of names of persons who had slaughtered the cattle; that wherever the appellant drove his bakkie it was on the instructions of Mr Thomo; that it was Mr Thomo who assaulted the deceased at the farm and indeed also put a plastic bag on his face; and that the appellant, in the course of this, had told Mr Thomo to desist from the assault because the person was doing to die. All these propositions were put baldly in the course of a few sentences, without any detail being provided; with the result that Mr Thomo could do nothing but make equally

bald denials. Of course, as already mentioned, the appellant did not enter the witness stand in order to make this case. Mr Mkhonza was not challenged on his evidence that Mr Thomo did not participate in the assault. It was not put to Mr Mkhonza that Mr Thomo had directed matters.

[18] In my view the decision of the magistrate to accept the evidence of the State witnesses was proper and is unassailable, save to the extent that it is implicit in the magistrate's finding that the appellant was guilty of murder, that he accepted the evidence of Mr Mkhonza that the deceased was dead before he (Mr Mkhonza) was taken by the appellant in the appellant's bakkie back to town.

[19] The State's concession in this appeal is that it failed to prove that the beating which preceded the appellant's emergence from the building, and his continuing absence from it while Mr Mkhonza was taken back to town, caused the death of the deceased. It may be improbable, but it is nevertheless reasonably possible, that the assault upon the deceased continued at the hands of the CPF members who remained behind, which resulted in the death of the deceased.

[20] The conclusion I reach is that the State proved that the appellant was the leader, director and participant in vigilante action, including an assault on the deceased, directed at obtaining information from him. He accordingly ought to have been convicted of assault with intent to do grievous bodily harm.

[21] Turning to the question of sentence, as mentioned earlier the magistrate imposed a sentence of 12 years imprisonment on a conviction of murder. Given that the appeal against that conviction must be upheld, and replaced with a finding that the appellant is guilty of assault with intent to do grievous bodily harm, the question of sentence must be revisited. But I think that whilst assault is a lesser crime than murder, on the facts of this case the level of moral blameworthiness which attaches to the one is not that much less than the level of blameworthiness attaching to the other. But having said

that, it was mentioned in argument, correctly I think, that it would have been arguable that the correct verdict was culpable homicide if the State had managed to prove the causal link between the assaults perpetrated by and under the immediate direction of the appellant, and the death of the deceased.

[22] In sentencing the appellant the magistrate had before him a report of a probation officer as well as a report from the Department of Correctional Services. The former recommended a sentence of imprisonment and the latter found the appellant a suitable candidate for correctional supervision. The authors of the reports gave evidence. Neither of the social workers found any sign of remorse on the part of the appellant. He did allege, when interviewed, that he had made what might be called an *ex gratia* payment (*ex gratia* because he continued to deny his responsibility for the death of the deceased) to the deceased's mother. But when she was interviewed to gauge victim impact, she denied that there had been any such approach or payment. It appears that the deceased ran a small tuckshop in order to support his mother and four children (aged between 5 and 10 years). In short the deceased was a man who lived in humble circumstances in a large rural area.

[23] There is some conflict between the reports to which I have referred concerning the personal circumstances of the appellant, and indeed some conflict between statements made from the bar on behalf of the appellant during the sentencing proceedings, and those reports. Looking past these issues, which are not of great import, the position is broadly as follows. The accused was 49 years of age at the time when sentence was first imposed. He appears to have fathered 18 children, five of whom were majors at the time when sentence was passed. He has two wives and is responsible for his parents and his maternal family. Until he was sentenced he was a self-employed man who owned two shops, two taverns and two farms which, according to the appellant, would generate a profit of about R20 000,00 per month. Measured by the standards of the community, and certainly by the standards of those no more fortunate than the deceased, the appellant presents as a wealthy and prominent citizen. He had no previous convictions.

[24] Turning to the crime, it must be noted immediately that the beating to which the deceased was subjected was dreadful. The appellant was the director of it, but not the sole active participant in it. The assault amounted to vigilante action undertaken at the behest and for the benefit of the appellant. It is conduct of the type which strikes fear into the hearts of members of the community less fortunate than the appellant, who are generally ultimately dependent on people like the appellant for employment opportunities and the like. Whether the deceased was guilty or not of stock of theft (or of having joined in the eating of the slaughtered stock, if that be the case) is neither here nor there. He was deprived of the benefit of a fair trial which was given to the appellant. Society cannot afford to have our courts treat cases like the present one with excessive leniency. An approach which generates a sense of despair in the community about the realisation of the right to protection of the law, particularly when the vulnerable must inevitably live to some extent dependent upon, and in the shadow of the wealthy and powerful, has the potential to cause serious harm to societal structures.

[25] Nevertheless all components of the traditional triad must be brought to account and, as pointed out by the learned magistrate in his judgment on sentence, a measure of mercy should not be overlooked as a component of the enquiry.

[26] A substantial sentence (bearing in mind that we are now dealing with a conviction of assault with intent to do grievous bodily harm), a part of which is suspended, would be appropriate.

The following order is made.

[1] The appeal against the conviction of murder is upheld.

[2] The conviction of murder is set aside and in its place the appellant is convicted of assault with intent to do grievous bodily harm.

[3] The appeal against the sentence of 12 years imprisonment is upheld.

[4] The sentence of 12 years imprisonment is set aside and replaced with a sentence of 8 years imprisonment, three years of which are suspended on condition that the appellant is not convicted of a crime involving assault committed during the period of suspension. The sentence is ante-dated to 17 March 2015.

OLSEN J

XOLO AJ

Date of Hearing: THURSDAY, 05 MAY 2016

Date of Judgment: TUESDAY, 17 MAY 2016

For the Appellant: Mr RM Ntshangase

Instructed by: Mthethwa Attorneys
Appellant's Attorneys
5 Lower Level,
Edwards Building
10 Union Street
Empangeni...KZN
(Ref....)
(Tel No.: 035 – 772 7411 / 035 772 5588)

For the Respondent: Mr DC MacDonald

Instructed by: Director of Public Prosecutions
Respondent's Attorneys
6th Floor, Southern Life Building
88 Joe Slovo Street
Durban
(Ref. Mr DC MacDonald)
(Tel.: 031 – 3345114 / 033 – 845 4400)