



**IN THE HIGH COURT OF SOUTH AFRICA
(NORTHERN CAPE DIVISION, KIMBERLEY)**

Case No: CA&R 117/14

Heard on: 01-12-2014

Delivered on: 20-03-2015

In the matter:

PETRUS JOHANNES ISAAKS

APPELLANT

And

THE STATE

RESPONDENT

Coram: Tlaletsi AJP et Phatshoane J

JUDGMENT ON APPEAL

Phatshoane J:

1. Mr Petrus Johannes Isaaks aged 76, the appellant, was arraigned before Mr View in the Regional Court for the district of Gordonia, Upington, on a charge of murder read with the provisions of s 51(2) of the Criminal Law Amendment Act, 105 of 1997. The State alleged that on 03 January 2011 he unlawfully and intentionally killed 56 year old Ms Miena Andries at or near Morning-glory, Upington. On 23 February 2012 he was convicted of murder and sentenced to 15 years imprisonment. With leave of the trial Court he is before us on appeal against his sentence only.

2. The appellant pleaded not guilty to the charge. The State led the testimony of two eye witnesses, Ms Maria Andries, the deceased's sister, and Mr Daniel Hermanus Van Rooy. During the course of the trial the appellant confessed to having caused the deceased's death with *dolus eventualis* as the mode of intention.
3. Ms Andries testified that on 03 January 2011 the deceased arrived at their parental home in the afternoon followed by the appellant. The deceased enquired from the appellant: "*Wat loop jy so al agter my aan*". The two went out through the door. Not long thereafter the deceased returned and called on Ms Andries: "*Meisie, Meisie, kom kyk hierdie Oupa steek my*". When she got out of the door she saw the appellant stab the deceased in the chest with a 30 cm butcher knife which he left stuck in the deceased's chest and departed the scene. Another witness, Mr Van Rooy, also saw the appellant pursue the unarmed deceased and stabbing her with the knife in the chest. He also observed the deceased stagger inside the yard and fall at the veranda. It was put to these witnesses that the appellant denied that he stabbed the deceased. The defence suggested that the wounds she sustained were self-inflicted in that she fell on the knife that lodged in her chest.
4. The State also relied on the evidence of Dr George Albertus Isaacs who performed the post-mortem examination. He testified that the wounds that the deceased sustained could not have been self-imposed because at least three of them were located on her back. From the autopsy report the deceased had a total of five stab wounds. Dr Isaacs testified that one wound was 4 x 1.5 cm in front of the chest on the left and was 25 cm deep. This incision entered the chest between the first and second ribs severing the aorta. When the body of the deceased was brought in for the post-mortem examination the knife was still lodged in her chest. He suggested that this wound is typical in cases where the assailant and the victim were facing each other when the injury is inflicted, regard being had to where it is situated and its trajectory. The doctor further testified that the deceased had a 4.5 x 1 cm superficial wound on the right thigh on the front side; two wounds of 4 x 1.5 cm and 2 x 1 cm on her back; and lastly a 3 x 1 cm wound on the back of the left arm. Dr Isaacs concluded that the

cause of death was a stab in the aorta with hypovolemic shock (rapid or excessive blood loss).

5. Belatedly, at the end of Dr Isaacs's testimony, the defence informed the Court that the appellant wished to make certain admissions in terms of s 220 of the Criminal Procedure Act, 51 of 1977 (the CPA), but that he was unable to do so because the State had already closed its case. In view of this, the State brought an application to re-open its case. Thereafter the following admissions in terms of s 220 of the CPA were recorded:

"..(E)k wens die volgende erkennings aan die hof te maak:

Ek erken dat op 03 Januarie 2011 en te of naby Upington, ek in die streekafdeling Noord-Kaap was. Ek erken dat ek al daar vir Miena Andries gedood het deur haar met 'n mes te steek. Ek erken die identiteit van die oorledene as die van Miena Andries.

Ek erken die inhoud van die regsgeneeskundige lyskouingsverslag as korrek. Ek erken dat van dat die oorledene die beserings opgedoen het tot dat die regsgeneeskundige lyskouing op haar uitgevoer was het sy geen verdere beserings opgedoen nie.

Ek het verkeerd opgetree. Ek het geweet dat as 'n mens 'n ander met 'n mes steek dan kan so 'n persoon sterf en nogtans het ek steeds voortgegaan en haar gesteek.

Die onstandighede waaronder die misdryf gepleeg was is as volg: ek en die oorledene was saamleefmaats. Ek en die oorledene en ene Tilla was by 'n sjebien. Die oorledene het gesê "kan 'n blinde oupa nie loop lê nie". Tilla het toe geantwoord "hoekom moet hy dan nou weer loop lê, hy het dan nou net opgestaan". Ek het nie geantwoord nie. Die klomp het toe al van vroegoggend af gedrink. Tilla se ma het toe daar aangekom met 'n groot kan wyn en toe gooi sy vir my 'n glas vol wyn en toe drink ek die wyn uit. Die oorledene maak my toe jaloers en sê vir my 'sien jy hierdie jong man wat hier sit, hy is my nuwe kêrel'. Toe vlieg die jong man op en wou toe vir haar skop. Die jong man sê toe 'hierdie ouma aanvaar jou as vanselfsprekend en sy speel met jou. Ek het toe nie geantwoord nie. Ek stap toe na Maria se huis toe. Ek was baie seergemaak. Die oorledene het my geminag. Die oorledene het ook daar gekom en in die kombuis het ek die mes gevat. Buite die huis het sy gesê ek is nie haar pa nie and haar seun is nie haar ma nie. Ek wou haar toe skrikmaak en dien haar toe die oppervlakkige wonde toe.

Daarna het ek haar gesteek in haar bors en ek het geloop. Ek het geloop want ek was onder die invloed van drank en het nie gedink sy is dood op daardie stadium nie. Ek het steeds geweet wat ek doen. Ek was baie lief vir haar. Ek erken ek het besef dat sy kan sterf as gevolg van die wonde maar ek het steeds geloop. Ek het berou oor my optrede en vra die familie van die oorledene, die agbare hof en die gemeenskap om verskoning. Dit is al wat ek wens te verklaar."

6. Following the admissions mentioned in the preceding paragraph the State and the defence closed their respective cases. The appellant did not testify. It

should be mentioned that the trial Court granted leave to appeal against the sentence on a narrow ambit of whether it properly considered the appellant's personal circumstances. The appellant was 75 years old at the time of the fateful incident. He has no previous conviction; he is a partially blind pensioner and had passed stand 6 (grade 8) at school. The deceased had been his life partner for at least a decade.

7. The grounds of appeal are not only confined to the appellant's personal circumstances but also cover extensive issues on the merits. He states that the Court erred in not finding that there were substantial and compelling circumstances present in his personal circumstances or in the circumstances in which the offences were committed, justifying a departure from the imposition of the prescribed sentence; and that the sentence imposed was shockingly severe and inappropriate.
8. Mr V.Z. Nel, for the appellant, argued that the trial Court over-emphasized the seriousness or the violent nature of the offence by directing his attention to irrelevant considerations which increased the appellant's moral blameworthiness: Firstly, that the Court found that a large knife was used. Counsel is of the view that the fact that a large knife was used is neutral. Secondly, he argued that the trial Court's conclusion to the effect that had the blade not been stuck in the deceased's body the appellant would have continued to stab her was wrong. In any event, he pressed, there was no evidence to support this conclusion. Lastly, that the Court classified the relationship between the appellant and the deceased as characterised by domestic violence when there was no factual basis for this inference, save the inadmissible hearsay evidence adduced through Ms Andries, the deceased's sister.
9. Counsel further contended that the sentence imposed catered for and served retribution and general deterrence to satisfy the public opinion or interest while individual deterrence and rehabilitation were ignored. He submitted that the

appellant showed contrition through his plea of guilty and that this factor is indicative of his good prospects of rehabilitation.

10. It was also argued on the appellant's behalf that the Court erred in finding that he was not provoked because the evidence set out in the s 220 admission disclosed provocation. That any finding to the contrary leads to an improbable inference that the murder was premeditated and executed in a calculated fashion. It was further argued that the Court erred in finding that the only favourable mitigating factor present was the appellant's age and ignored that his health condition, including his age, his stable employment history; that he was a first offender and that alcohol was involved were all weighty extenuating factors.

11. In *S v Kibido* 1998 (2) SACR 213 (SCA) at 216g-j the Court reaffirmed the approach to sentencing by an appellate Court as follows:

"Now, it is trite law that the determination of a sentence in a criminal matter is pre-eminently a matter for the discretion of the trial court. In the exercise of this function the trial court has a wide discretion in (a) deciding which factors should be allowed to influence the court in determining the measure of punishment and (b) in determining the value to attach to each factor taken into account (see *S v Fazzie and Others* 1964 (4) SA 673 (A) at 684A - B; *S v Pillay* 1977 (4) SA 531 (A) at 535A-B). A failure to take certain factors into account or an improper determination of the value of such factors amounts to a misdirection, but only when the dictates of justice carry clear conviction that an error has been committed in this regard (*S v Fazzie and Others* (supra) at 684B - C; *S v Pillay* (supra) at 535E).

Furthermore, a mere misdirection is not by itself sufficient to entitle a Court of appeal to interfere with the sentence; it must be of such a nature, degree, or seriousness that it shows, directly or inferentially, that the court did not exercise its discretion at all or exercised it improperly or unreasonably (see Trollip JA in *S v Pillay* (supra) at 535E - G)."

See also *S v Moswathupa* 2012 (1) SACR 259 (SCA) at 261d-f para 4, *S v Sadler* 2000 (1) SACR 331 (A) at 334h-335a para 8.

12. The crux of the appellant's contention is that the trial Court did not consider that in terms of s 220 admissions his *mens rea* was in the form of *dolus eventualis*. Therefore, he did not premeditate the decision to kill and thereafter set it in motion, the argument went. I must immediately point out that the State did not give any indication that it accepted the plea as tendered by the appellant

through s 220. The Magistrate concluded that the State proved its case beyond a reasonable doubt. The appellant was therefore found guilty of murder on the basis of the evidence tendered by the State and not necessarily on the basis of the admissions he made. In the Magistrate's reasons granting leave to appeal he confirms that he did not find the appellant guilty of murder with intent in the form of *dolus eventualis*. In my view the 25 cm deep stab wound severing the aorta, the multiple stab wounds and their location point to the direct intention to murder.

13. The Court *a quo* rightly rejected, as mitigating factors, the alleged provocation and the submission to the effect that the appellant had been under the influence of alcohol when perpetrating the offence. Save for the admissions in terms of s 220 of the CPA there was no evidence to suggest that the appellant was provoked or that he was under the influence of alcohol. By his own admissions he knew that what he did was wrong and should surely know how to control his temper. In *S v Mjoli and Another* 1981 (3) SA 1233 (A) at 1247G-H the Court pronounced:

"Section 220 of the Act is not applicable to the requirement of confirmation of a confession. This is a statutory requirement in terms of s 209 of the Act. It is not, as contemplated by s 220, a fact proof of which may by an admission be dispensed with."

14. It has been held that an 'admission' must in the nature of the case be an admission of something. The only thing which can be admitted is a claim of the opposite party and not of the party himself. Section 220 of the CPA is concerned with the acceptance of a fact which has been alleged by the opposite party and not by the accused himself. See *S v Dingoos* 1980 (1) SA 595 (O) at 597. In *S v Kuzwayo* 1964 (3) SA 55 (N) the Court held that the equivalent provision, s 284 (1) of the earlier Criminal Procedure Act, 56 of 1955, the precursor of the present s 220, was intended to relieve the State of the necessity of proving an allegation which the accused admits and that it was not intended to be used by the defence as a means of getting on record something which the State does not propose to make part of its case. In my view, it was simply not up to the appellant to make exculpatory averments by means of s 220 and to rely on them as conclusive proof of such statements.

15. What was put to Ms Andries and Mr Van Rooy by the defence, prior to the appellant's admission that he murdered the deceased, is remarkable and went as follows:
 - 15.1 That the wounds were self-inflicted by the deceased when the appellant attempted to retrieve the murder weapon from her;
 - 15.2 That the appellant would say that the deceased went into the kitchen and came out with a knife, enquired from the appellant if he had heard how a certain child insulted her at the place they had earlier visited;
 - 15.3 That the appellant replied that the deceased instigated the clash;
 - 15.4 That the deceased was eager to confront "those people" but the appellant prevented her;
 - 15.5 That the appellant twisted the deceased's arm so that she could release the knife. While the deceased held the knife she inflicted an injury to her leg;
 - 15.6 It was further put to Ms Andries that the deceased was very drunk and may have hurt herself with the knife;
 - 15.7 That at some point the appellant grabbed her, twisted her arm, pushed her away from him and that the deceased probably fell on the knife;
 - 15.8 That when the appellant left the scene he did not even know that the deceased was hurt;
 - 15.9 Ms Andries was also taken to task in cross-examination to cast doubt on whether she in fact saw the appellant stab the deceased.

16. From the contrived version set out in the preceding paragraph it can hardly be said that the appellant was remorseful. When he confessed to the murder it had dawned on him that he had no chance of escaping a conviction and changed his heart by tendering a guilty plea by way of s 220 admissions. The Magistrate cannot be faulted in concluding that there was no contrition on his part because "the writing was on the wall" that the State had an open and shut case against him. In *S v Matyityi* 2011(1) SACR 40 (SCA) at 47 para 13 the Court made the following remarks:

"[13]....There is, moreover, a chasm between regret and remorse. Many accused persons might well regret their conduct, but that does not without more translate to genuine remorse. Remorse is a gnawing pain of conscience for the plight of another. Thus genuine contrition can only come from an appreciation and acknowledgement of

the extent of one's error. Whether the offender is sincerely remorseful, and not simply feeling sorry for himself or herself at having been caught, is a factual question. It is to the surrounding actions of the accused, rather than what he says in court, that one should rather look. In order for the remorse to be a valid consideration, the penitence must be sincere and the accused must take the court fully into his or her confidence. Until and unless that happens, the genuineness of the contrition alleged to exist cannot be determined. After all, before a court can find that an accused person is genuinely remorseful, it needs to have a proper appreciation of, inter alia: what motivated the accused to commit the deed; what has since provoked his or her change of heart; and whether he or she does indeed have a true appreciation of the consequences of those actions..."

17. The Magistrate took into account the *Zinn* triad of factors relevant to the sentence he is enjoined to consider (*S v Zinn* 1969 (2) SA 537 (A) at 540G – H). This includes the appellant's personal circumstances, his mature age, the crime and the interest of the society. The criticism that the appellant's personal and mitigating circumstances were not identified escapes me. The Magistrate painstakingly and fully motivated why he accepted or rejected a particular factor as mitigatory. Clearly, save for his age, the appellant's personal and mitigating circumstances are nothing out of the ordinary and the Magistrate correctly concluded that they do not constitute substantial and compelling circumstances. This should be weighed against the aggravating circumstances which far outweigh the appellant's personal circumstances.
18. The Magistrate appears to have acknowledged that the fact that a large knife was used is a neutral factor because, as he puts it, a knife kills and its size matters not. Much was also made of the inference the Magistrate drew that had the knife not been stuck in the deceased's body the appellant would have continued to inflict further stab wounds because he had already executed 4 other stab wounds. While there was no evidence that the appellant tried and failed to retrieve the stuck knife, it is common cause that it was only removed when the autopsy was conducted. Ms Andries testified that "*hy het hom so gesteeek in die bors in, en toe die mes vas loop sit en toe los hy die mes in die bors in*".
19. Mr Nel further contended that the Magistrate wrongly concluded that the evidence of alleged domestic violence was never challenged. That may well be,

however, the appellant did not take the stand to rebut the allegation that he physically abused the deceased. Ms Andries testified that the deceased came to stay with her three sisters at their parental home around November 2010 because the appellant physically abused her to the extent that she landed at a hospital in Kimberley on one occasion. Under cross-examination Ms Andries expanded on this aspect of her evidence as follows:

“Ja maar hy sê, luister wat hy sê, hy sê sy het dit maar gedoen, dan gaan bly sy daar by julle en dan gaan sy weer terug na hom toe.---Dit is wanneer hy hom so slaan wat sy huis toe kom en dan kom haal hy hom weer met mooi woordjies terug weer. Hy sê dit is nie waar nie. Hy het nooit die vrou mishandle nie---- Oeee, hy het dan in Kimberley Hospitaal geloop draai al soos hy hom breek en slaan”.
 “....Dit is met die baklei wat sy huis toe gekom het, maar sy het nie vir hom gesê hy kom terug huis toe nie, sy het vir ons gesê sy kom bly nou by die huis, hy gaan nie meer vir hom so laat slaan nie.”

20. In *S v Waldeck* 2006 (2) SACR 120 (NC) this Court extensively dealt with the admissibility or otherwise of hearsay evidence in circumstances almost similar to the present. The following dictum appears at 126 para 13 of that judgment:

“[13] It is a settled principle or rule of our law of evidence that an accused person may adduce hearsay evidence for his/her own purposes, by giving such evidence him-/herself or calling a witness to give such evidence, as appellant attempted to do with the discarded evidence of Ms Damoense (referred to above), *or an accused person may elicit hearsay evidence by way of cross-examination, as the defence has done in this instance (as will be demonstrated hereinafter). Evidence adduced in this manner is admissible, and an adducer thereof cannot try to wriggle out of it when the shoe pinches. See R v Bosch* 1949 (1) SA 548 (A) at 553 - 4; *S v Mthembu* 1988 (1) SA 145 (A) at 150; *S v Mokoena* 1978 (1) SA 229 (O); *S v Olifant* 1982 (4) SA 52 (NC); *S v Minnie* 1986 (4) SA 30 (E); and, generally, Law of Evidence by C W H Schmidt and R Rademeyer (loose-leaf) at ch 13-20 - 13-21”.

21. There was clearly no direct evidence that the deceased was physically abused by the appellant. However, it is not correct that what was said by Ms Andries is entirely hearsay evidence as counsel sought to argue. It merely serves to proof what was reported to her by the deceased and not the veracity of the incidents of domestic violence. This is precisely what the magistrate noted in his sentence and it cannot be discerned how this would have increased the appellant's moral blameworthiness:

“Nie op een stadium het jy ontken enigsins of instruksies aan adv Victor, wat sy gegee dat daar nie so was nie. Daar was weer 'n stadium, adv. Victor wat sy gesê het daar was nie aanrandings gepleeg nie. Sy het vir ons getuig, dit is wat die vrou vir ons gesê het en nie wat ek gesien het nie, meneer. En dit was die getuienis wat voor die

hof geplaas is. So dit bly my te wees, Mnr Isaaks, dat daar was ook geweldsprobleme, hetsy dit nou van jou af gekom het alleen of hetsy dit van jou vrou af gekom het, in julle huwelik of julle saamleefverhouding, geweld het plaasgevind tussen julle twee.”

22. On the whole, I am satisfied that the Magistrate did not commit any material misdirection in imposing the 15 years minimum sentence. Equally true is that the sentence imposed is not shockingly inappropriate in that there is no striking disparity between what the Magistrate imposed and the sentence that this appellate Court would have imposed. In my view, the sentence meets the gravity of the offence; has deterrent effect; it takes care of the interest of the society and caters for some prospects of rehabilitation for the appellant. Therefore, it should not be upset. This appeal should fail.

Order:

1. The appeal is dismissed and the sentence of 15 years imprisonment is confirmed.

Phatshoane J

I concur:

Tlaletsi AJP

On behalf of the Appellant	Adv V.Z. Nel
Instructed by	Kimberley Justice Centre
On behalf of the Respondent	Adv K. F. Ilanga
Instructed by	Director of Public Prosecutions