

IN THE HIGH COURT OF SOUTH AFRICA
(ORANGE FREE STATE PROVINCIAL DIVISION)

Appeal No. : A261/06

In the appeal between:-

SABATA LEFASO

Appellant

and

THE STATE

Respondent

CORAM:

VAN ZYL, J *et* VOGES, AJ

JUDGMENT:

VOGES, AJ

HEARD:

22 OCTOBER 2007

DELIVERED:

25 OCTOBER 2007

- [1] On 15 November 2004 the appellant pleaded guilty to a charge of culpable homicide in the regional court, Ficksburg. As the trial court was of the opinion that the appellant might have had a valid defence to the charge, a plea of not guilty was recorded.

- [2] Thereafter the public prosecutor put a charge of murder to

the accused, to which he pleaded not guilty and raised a defence of self-defence.

[3] The appellant was subsequently convicted of murder and sentenced to 12 years imprisonment.

[4] With leave of the court *a quo* he appeals to this court against both the conviction and the sentence.

[5] It was argued before this court that the appellant could not have been convicted of murder and should have been convicted of culpable homicide and that the regional magistrate erred in:

1. “Questioning” the appellant in respect of the Section 112 statement; and that
2. “It was not necessary for the presiding officer to make an enquiry” as the State accepted the guilty plea on a lesser charge.

This argument is clearly without substance, as section 112(2), Act 51 of 1977, permits

“that the court may in its discretion put any question to the accused in order to clarify any matter raised in the statement.”

No irregularity occurred in this regard.

[6] Based on **S v MOKOENA EN ‘N ANDER** 1981 (1) SA 148

(O) Mr. Skibi, for the appellant, further argued that, after a plea of not guilty was recorded, the trial should have proceeded on the charge of culpable homicide, it being the charge to which the appellant had pleaded.

[7] The record is not clear as to what charge(s) were originally put to the appellant. The charge sheet reflects both murder and culpable homicide and the public prosecutor referred to “charges” prior to the appellant’s plea.

It is also not clear if the charges were put in the alternative or as two separate counts.

From her judgement it seems as if the trial magistrate was under the impression that culpable homicide was an alternative charge to murder.

If that was indeed the position, it was not irregular to allow the prosecution to proceed on the main count as section 113 (2), Act 51 of 1977 stipulates

“If the court records a plea of not guilty under subsection (1) before any evidence has been led, the prosecution shall proceed on the original charge laid against the accused, unless the prosecutor explicitly indicates otherwise.”

(This sub-section was added by section 8 of Act 5 of 1991 and commenced on 23 December 1991).

[8] The prosecutor, however, indicated after the plea of not guilty was recorded, that “the State would like to put **another** charge to the accused”, where after the murder charge was put and the appellant pleaded not guilty.

Although this was somewhat peculiar, it is not irregular as a prosecutor is in terms of section 81 of the Criminal Procedure Act

entitled to join any number of charges at any stage before evidence has been led.

Bound by the record, this court has to accept that the two counts, murder and culpable homicide, were separate counts.

- [9] Properly done, the murder charge should have been the main count and culpable homicide an alternative thereto. The plea of the accused should then have been recorded as “Not guilty to the main count; guilty to the alternative count.”

As pointed out *supra*, the fact that it had not been done in this manner did not result in a failure of justice. The appellant was properly informed of the charges against him and pleaded to both counts.

- [10] AD MERITS:

It is common cause that the deceased was killed on 18 October 1998 at Kommandonek farm in the district of Ficksburg by a shot fired by the appellant.

[11] According to the state witnesses an argument ensued between the appellant and the first state witness after the witness accidentally hit the appellant with the door on entering a garage where a concert was held.

The appellant then invited the witness outside for a fight. The deceased tried to separate the two. The appellant then took out a fire arm, cocked it and fired two or three shots in the direction of the deceased and the witness.

[12] It is the appellant's version that he was accused by an unknown person of not paying his entrance fee to the concert. He was slapped by someone and a group of people approached him, armed with long 'kierie-like' objects. He sensed that he was in danger, pulled out his fire arm, cocked it and fired six shots in the direction of the approaching group.

[13] The trial court accepted the evidence of the two state witnesses as their evidence was found to be convincing and not biased nor contradictory. This finding was not challenged in this court.

[14] The accused was found to be not an impressive witness, he contradicted himself and his version was "not favoured by

the probabilities”.

[15] These findings by the trial court cannot be faulted. It does indeed seem improbable that a crowd would gather and threaten/attack/assault the appellant for not paying his entrance fee.

The version of the two state witnesses was correctly found to be more probable than that of the accused.

[16] The totality of the evidence does not support a finding that the appellant acted in self defence, nor can it be said that he acted negligently. He pulled a fire arm and fired shots towards a group of people with no regard as to who might be hit. He eventually conceded in cross examination that his conduct was “wrong”.

In the statement in terms of section 112, Act 51 of 1977 it was also stated

“I admit further that at the time when I was shooting at the crowd I did foresee the possibility that a person may be hit by a bullet but despite this I proceeded shooting at the crowd.”

[17] It has been proved beyond reasonable doubt that the appellant had the necessary *mens rea*, in the form of *dolus*

eventualis, when firing at and killing the deceased. This court is accordingly not convinced that the appellant should have been convicted of culpable homicide.

[18] The appeal against the conviction of murder can therefore not succeed.

[19] As the appellant was charged with two separate offences, he was entitled to judgement on both. In the circumstances of this case he could not have been convicted of both murder and culpable homicide.

This court has the power in terms of section 309(3), read with section 304(2), Act 51 of 1977 to hand down the judgement that should have been given by the trial court.

[20] AD SENTENCE

The trial court found that substantial and compelling circumstances was proved and sentenced the appellant to a lesser sentence than the prescribed minimum of 15 years imprisonment.

Aggravating and mitigating factors were properly weighed and no misdirections that warrant interference by this court could be found. The sentence of 12 years imprisonment is not shockingly inappropriate in the circumstances of this case.

[21] The following order is made:

1. The appeal is dismissed.
2. The conviction of murder and the imposed sentence are confirmed.
3. The appellant is acquitted on the charge of culpable homicide.

M. VOGES, AJ

I concur.

C. VAN ZYL, J

On behalf of appellant:

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On behalf of respondent:

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MV/sp