



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Case number: A100/2023

(1)	REPORTABLE: YES/NO
(2)	OF INTEREST TO OTHER JUDGES YES/NO
(3)	REVISED YES/NO
	
DATE 15/04/2024	

In the matter between:

MBULELO MATSIKENI

APPELLANT

And

THE STATE

RESPONDENT

JUDGMENT

MOSOPA, J

1. What turns out in this appeal is that, the presiding Magistrate considered aggravating evidence contained in the pre-sentence report by the appellant's erstwhile girlfriend Ms Nontandazelo Robert, who was present at the time of the incident, contradicting the factual basis of the accepted section 112(2) statement by the state, when sentencing the appellant.

2. It was further contended on behalf of the appellant that such version by the appellant's erstwhile girlfriend, remains untested and it was not obtained under oath.
3. The appellant was convicted of murder read with the provisions of section 51(2) of Act 105 of 1997 on the 22 April 2022 and sentenced to 12 years imprisonment on the 24 October 2022 in the Fochville Regional Court. The court *a quo* deviated from imposing a prescribed minimum sentence of 15 years after it found the existence of substantial and compelling circumstances in the case of the appellant.
4. The appellant who was legally represented, pleaded guilty in terms of section 112 of the Act 51 of 1977, which plea was accepted by the state and he was convicted on the strength of his guilty plea.
5. In his plea of guilty, the appellant set out the facts that resulted in the incident that led to his conviction and he admitted to the following;
 - 5.1. That on the evening of the incident he was attending a party with his girlfriend and the deceased was also attending that party.
 - 5.2. He requested his girlfriend to leave with him, but his girlfriend who was intoxicated at that time, refused to leave with him. He then informed his girlfriend that there is a person who wanted to speak to her on the phone that they were jointly using, and he requested her to go outside so that she can answer the phone.
 - 5.3. While they were outside, she started to argue with him as she did not want to leave the place where the party was held. The deceased arrived and he told the appellant to leave his girlfriend at the party as she did not want to go home, and they both argued about that.
 - 5.4. Appellant's girlfriend started swearing at the Appellant and then she went to her sister's house. The deceased then came with a panga

while the appellant was still on the street, and he attacked the appellant with the panga by striking him once on his head and he then sustained a laceration, the deceased attacked him again with a panga and he blocked such an attack with his hands and sustained superficial lacerations on his hands.

- 5.5. He fought with the deceased and eventually he took the panga away from him. At that stage he was angry at the deceased because he interfered in the argument that he had with his girlfriend. He then proceeded to strike the deceased on the head and neck with a panga. He admits that at that stage, the deceased was not posing any danger to him, and he continue to strike him multiple times.

SENTENCE

6. This is an appeal against sentence only.
7. In ***S v Bogaards 2013 (1) SACR 1 (CC)*** at par 41 the Constitutional Court, stated:

“Ordinarily, sentencing is within the discretion of the trial court. An appellate court's power to interfere with sentences imposed by courts below is circumscribed. It can only do so where there has been an irregularity that results in a failure of justice; the court below misdirected itself to such an extent that its decision on sentence is vitiated; or the sentence is so disproportionate or shocking that no reasonable court could have imposed it. A court of appeal can also impose a different sentence when it sets aside a conviction in relation to one charge and convicts the accused of another.”

8. The section 112(2) statement of the appellant was accepted by the state and the court *a quo* waived its authority to put any questions to the appellant in order to clarify any matter raised in the statement (section 112(2) of Act 51 of 1977).

The effect of such acceptance by the state is that the court *a quo* was bound by what was contained in that statement.

9. Section 112(3) of Act 51 of 1977, provides;

“Nothing in this section shall prevent the prosecutor from presenting evidence on any aspect of the charge, or the court from hearing evidence, including evidence or a statement by or on behalf of the accused, with regard to sentence, or from questioning the accused on any aspect of the case for the purposes of determining an appropriate sentence.”

10. Is this sub-section meant to be construed as giving a court a wide discretion to consider contracting evidence to what was accepted in a section 112(2) statement? Section 112(3) may only be used to fill in the detail of the framework and may not be used to contradict the accused's version.

11. In this matter the alleged contradicting evidence contained in a pre-sentence was not led by the state as contemplated in section 112(3) but was at the request of the appellant, the state led no evidence in aggravation of sentence neither did it present any Victim Impact Statement from the family of the deceased. Ms Van Wyk on behalf of the appellant contended that, the appellant does not have an issue with all other evidence contained in the pre-sentence report, but only what was told by the appellant's girlfriend which is contradicting evidence on the merits which was accepted by the state.

12. In ***S v Van der Merwe and Others* 2011 (2) SACR (FB) 509 - 519 at par 30**, the court stated that;

“[30] It has been held that, where an accused pleads guilty and hands in a written statement in terms of s 112(2) of the Criminal Procedure Act 51 of 1977, detailing the facts on which his plea is premised, and the prosecution accepts the plea, the plea so explained and accepted constitutes the essential factual matrix on the strength of which sentence should be considered and imposed — *S v Jansen, supra* at

370g – 371g. Such an essential factual matrix cannot be extended or varied in a manner that adversely impacts on the measure of punishment as regards the offender. The plea, once accepted, defines the *lis* between the prosecution and the defence. Once the parameters of the playing fields are so demarcated, it become foul play to canvass issues beyond. The rules of fair play have to be strictly enforced. In this instance it was not.”

13. The following is what Ms Robert informed the probation officer relating to the incident who compiled the pre-sentence report;

- 13.1. She confirmed attending a party with the appellant and further that when the appellant wanted them to leave, she refused and at that stage was intoxicated.
- 13.2. The appellant then started to assault her on her face with open hands and she ran away and, in the process, she fell down and sustained injuries. When she arrived at her home, she found the door locked and everyone in the house was sleeping and the appellant arrived there and continued to assault her. That is when the deceased saw what was happening and then told the appellant to stop assaulting her. The deceased confronted the appellant, when he continued to assault her, a fight ensued between them.
- 13.3. The family members of Ms Robert opened the door and the appellant apologised to her family and “begged” her to go with him, but she refused. Ms Robert then fainted after being assaulted and she did not see the fight between the deceased and the appellant.
- 13.4. When she woke up the following day, she had bruises all over her body and also an injury on her eye and she only heard that the appellant has killed the deceased.

14. In cross-examination by Ms De Villers who was representing the appellant in the court *a quo*, the probation officer confirmed to have considered what was contained in the plea of guilty statement by the appellant when compiling her report. She was of the view that the appellant was not telling her enough of what actually transpired at the time of the incident that is the reasons that she had to consult with Ms Robert. Ms De Villers' main contention was that the probation officer in her report delved into what was not in dispute between the state and defence, as the guilty plea statement was accepted by the state.

15. The trial court Magistrate when sentencing the appellant stated that;

"Although the deceased is portrayed as the aggressor by the accused, the ex-girlfriend tells another story namely that the deceased reprimanded the accused (appellant) from further assaulting the ex-girlfriend."

16. Ms Van Wyk contended that by stating that the presiding magistrate excluded the fact that it is the deceased who first attacked the appellant and that it is actually the deceased who was the aggressor.

17. This contention by Ms Van Wyk is without merit as the presiding Magistrate continued and stated that;

"The court takes note of the fact that the deceased has attacked the accused with a panga, but the accused disarmed the deceased by taking the panga from him and the accused acted out of anger..."

From this passage, it is clear that the presiding Magistrate appreciated the fact that the deceased was the aggressor, but the appellant ended up disarming the deceased and attacking him with the panga that he initially possessed. Further, it is clear from the pre-sentence report that Ms Robert did not see the fight between the appellant and the deceased, as she fainted and was also informed the following day about the death of the deceased.

18. The presiding magistrate considered the fact that Ms Robert said that the deceased reprimanded the appellant, which is in line with the accepted essential factual matrix by the state and not contradicting.
19. The court in imposing a lesser sentence considered the personal circumstances of the appellant, the fact that he has pleaded guilty and that he has shown remorse by assisting the deceased and transporting him to the hospital and financially contributing to the burial of the deceased.
20. Both the deceased and the appellant were friends and neighbours, they both came from the Eastern Cape to come and work in the mines in Gauteng. The appellant was injured after he was attacked by the deceased but there was no evidence that he received medical treatment as a result of such injuries, which is in our view an indication that he was not seriously injured. The appellant transported the deceased to the hospital after waiting for a long time for the ambulance to arrive, hence there was nothing preventing him from seeking medical assistance if he was seriously injured.
21. At the time of commission of the offence, the appellant was serving a suspended sentence. On the 30 June 2018, the appellant was convicted of assault with intent to do grievous bodily harm and was sentenced to a fine of R3000, 00 or 6 month imprisonment, suspended for a period of 5 years on condition that he is not convicted of assault with intent to do grievous bodily harm committed during the period of the suspended sentence. The appellants previous conviction even though it is not similar, it has a similar element of violence as the current conviction. This shows that the appellant has no respect for the rule of law and he undermines people's rights to freedom and security.
22. The cause of death of the deceased was determined in the Post-Mortem Examination report as "Multiple chop wounds of the head and neck (Unnatural death). On the scalp, there was a diffuse subaponeurotic haemorrhages with associated scalp oedema. On the skull there was a 45mm linear fracture of the left frontal bone, a 170mm long linear fracture involving the left temporal and the left and right occipital bones was observed, there was a severe contusion

and mild laceration of the left temporal and occipital lobes on the brain. On the neck there was an incised wound of the left sternocleid muscle with focal haemorrhage. Subcutaneous haemorrhage was observed on the left lateral aspect of the neck.”

23. The above injuries are consistent with the accepted evidence on the merits by the state, that the appellant struck the deceased multiple times with the panga.

24. Ms Van Wyk contended that the appropriate sentence in this matter is a sentence of 10 years imprisonment, with 5 years of that sentence suspended and for the appellant to be sentenced to an effective imprisonment of 5 years. We disagree with such contention as the presiding Magistrate deviated from imposing a prescribed sentence but imposed a lesser sentence. Despite this incident happening at the place where liquor was consumed, there is no evidence that liquor played a role in this matter. The appellant after realising that the deceased was defenceless after he took the panga away from the deceased and striking him with it, he should have stopped attacking the deceased further with a panga. But without justification, he proceeded to assault the deceased even though he realised that the deceased could not fight back.

25. We cannot find any irregularity committed by the presiding Magistrate, that could amount to failure of justice, as such we need not interfere with the trial court findings with regard to sentence.

ORDER

26. In the consequence, the following order is made;

1. Appeal against sentence is hereby refused.


MJ MOSOPA /
JUDGE OF THE HIGH COURT,

PRETORIA

I Agree,



P PHAHLANE
JUDGE OF THE HIGH COURT,
PRETORIA

APPEARANCES

For the Appellant	:	Advocate L Van Wyk
Instructed by	:	Legal-Aid South Africa
For the Respondent	:	Advocate K Germishuis
Instructed by	:	The Director of Public Prosecutions

Date of Hearing	:	05 March 2024
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Date of Judgment	:	15 April 2024
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