REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: A 65/2018

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO

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BADENHORST AJ

6/12/2018
DATE

In the matter between:

MGIDI, PERTUS ZWELAKHE **Appellant**

and

The State **Respondent**

JUDGMENT

Windell J

Badenhorst AJ

[1] The Appellant was charged in the Regional Court sitting in Voloorus on one count of arson and one count of attempted murder.

[2] He was convicted as charged on 31 July 2017.

[3] On 7 August 2017 the Appellant was sentenced to 12 years imprisonment on count 1 (arson) and 8 years imprisonment on count 2 (attempted murder). The court a quo directed that the sentence on count 2 should run concurrently with the sentence on count 1. Leave to appeal was refused by the Court a quo. Leave to appeal was subsequently granted by this Court on both the conviction and sentence.

[4] It is common cause that in the early hours of 8 October 2016 the dwelling occupied by the appellant and his wife, Irene Miya Duduzile (Ms Duduzile), caught fire and was severely damaged before help arrived. Ms Duduzile is the complainant. Both of them were trapped inside the house and faced in certain death if their saviours did not manage to break down a locked burglar door and pulled them to safety. Two of the rescuers, Stanley Magwaza and Kagiso Mopedi, gave evidence at the trial.

[5] Ms Duduzile was called first. She testified that she was woken by the appellant's patting on her shoulder, saying "*amen*". When she proposed that they go to sleep, the appellant was heard "*clapping his hands hard ...* (and) *saying amen with a loud voice*". When Ms Duduzile was about to enquire from the appellant what caused him to shout at her, she "*saw a huge light emanating from the*

children's bedroom". She soon discovered that the house was on fire. Alarmed by her discovery, she summoned the appellant's help to find the key to the locked door so that they could exit and make efforts to extinguish the fire.

[6] She testified that he, ominously, refused saying:

"*I want us to die here me and you.*"

[7] Pressed for a reason, he answered:

"*it is because of your bitchiness*".

[8] When help eventually arrived in front of the locked door, Ms Duduzile told the rescue party that she did not have the key and that the appellant (who was standing behind her) did not want to give her the key and, she added, he wanted both of them to die inside the house.

[9] After they were rescued, Ms Duduzile saw the appellant making a call on his tablet.

[10] She reported the matter to the police who arrived on the scene.

[11] Stanley Magwaza, the next witness for the State, was one of those who rushed to the scene of the burning house. He and others joined in efforts to extinguish the fire. Once the two occupants were rescued, the witness and his

friends asked Ms Duduzile what had happened. She identified the appellant as the culprit. They then asked him what the problem was and he then:

"*asked as to why did we take them out we should have let them burn inside the house*".

Upon further inquiry, the appellant said:

"*yes indeed I burned it*".

[12] According to Mr Magwaza, the appellant then proceeded to break a window of the house and retrieved his "*tablet cell phone*". He was overheard talking over the telephone explaining what happened.

[13] Kagiso Mopedi was the third, and last, State witness. He was also one of the rescuers. When he arrived at the scene, the burglar door was still locked, trapping the two occupants inside the burning house. He said that he saw the appellant:

"*grabbing (Ms Duduzile) from behind as if (he) was pulling her inside the house*".

Later he also saw the appellant, pacing up and down, talking over the phone. He confirmed that Ms Duduzile pointed out the appellant as the arsonist and when the angry onlookers confronted the appellant, he said:

"*I wanted us to burn inside the house*".

[14] The appellant testified in his defence. His version is that he had been watching television and fell asleep. He was woken by the sound of windows breaking. He confirmed that the burglar door trapped them inside the burning house and that Ms Duduzile screamed for help. He stated that he could not fetch the keys, which he knew to be in the bedroom; but that it had been dark and the house filled with smoke. He denies touching Ms Duduzile, or saying the ominous things the state witnesses attributed to him and said that he "*could not remember talking to anyone on the scene*". Later he emphatically denied talking to anyone. He also denied being dragged out of the house, as described by the state witness, claiming he managed to escape without assistance from anyone. When asked, during cross examination, what he did to try and help the situation, he replied:

> *"I stood with her (Ms Duduzile) at the door because I was scared to go back*".

[15] Counsel for the appellant made the following submissions:

15.1. That the State's evidence was unreliable, particularly concerning what is referred to as "*the confession or admission*" allegedly made by the appellant that he is the one who set the house alight.

15.2. That it is improbable that the appellant set the house alight, as there is no plausible reason furnished for this on record. The real cause of the fire was not established.

[16] With regard to counsel's first submission, there is of course a material difference in law between a "confession" and "an admission". A confession is defined as an admission of all the elements of the offence charged, a full acknowledgment of guilt, see R v Becker 1929 AD 167.

[17] In S v Molimi 2008 (3) SA 608 (CC) par [28] the Court made the point that:

"*There is no definition of 'confession' in the statute (the Law of Evidence Amendment Act). However, courts define 'confession' narrowly as 'an unequivocal acknowledgment of guilt, the equivalent of a plea of guilty before a court of law'. Du Toit et al [Service Issue 38, 2007 at 24-74] describe an admission 'as a statement or conduct adverse to the person from whom it emanates'. Such admissions are made out of court and tendered in evidence against their maker. If made to a magistrate and reduced to writing, they are admissible upon their mere production provided the legal requirements are met.*"

[18] Section 219A of the Criminal Procedure Act [CPA] 51 of 1977 provides, in relevant part, as follows for the admissibility of any admission:

"**219A.** ***Admissibility of admission by accused.***—*(1) Evidence of any admission made extra-judicially by any person in relation to the commission of an*

offence shall, if such admission does not constitute a confession of that offence and is proved to have been voluntarily made by that person, be admissible in evidence against him at criminal proceedings relating to that offence:...".

[19] In this case, the appellant's statements constitute admissions. We are satisfied that these extra judicial admissions by the accused, if proved, satisfy the requirements of Section 219A of the CPA and would be admissible.

[20] We find that the admissions were proved beyond a reasonable doubt and are entirely inconsistent with the appellant's belated protestations of innocence. The appellant was also unable to explain why the two state witnesses, who testified about his admissions, falsely implicated him to be the arsonist.

[21] We do not agree that the "real cause" of the fire was not established. Based on the overwhelming circumstantial evidence, the fire was started by the appellant with the intention of killing Ms Duduzile and himself. This inference is, in our view, consistent with the proved facts (R v Blom 1939 AD 188 at 202 - 3), and even if it is not the only inference, we are satisfied that on the probabilities it is certainly the more plausible or acceptable inference (Ocean Accident and Guarantee Corporation Ltd v Koch 1963 (4) SA 147 (A) at 159B - D, and AA Onderlinge Assuransie Assosiasie Bpk v De Beer 1982 (2) SA 603 (A) at 614E - H).

[22] We are accordingly in agreement with the Judgement of the Court below. Ms Duduzile's evidence was corroborated by two independent eye witnesses who

had no reason whatsoever to lie to the Court. The magistrate assessed the State's witnesses to be credible and we have no reason to deviate from that assessment. The appellant's version, on the other hand, was held to be highly improbable. We agree. If he was innocent, why was he not actively involved in the ongoing rescue effort. On his version, he was a passive observer throughout the crisis: standing behind Ms Duduzile at the locked burglar door without engaging with the rescuers or lifting a finger to assist in any meaningful way. His lack of action is entirely consistent with his admitted desire to burn inside that house with Ms Duduzile. It comes as no surprise that he did not make a good impression on the Court *a quo* and that his (continually shifting) version was rejected by the magistrate as improbable and false beyond a reasonable doubt.

[23] In the result, the appeal against conviction falls to be rejected.

[24] The appellant was sentenced, effectively, to 12 years imprisonment. We note, in particular, the consideration given by the Court below to the crimes involving domestic violence which the magistrate said had "*reached astronomical proportions*" particularly in the area of Vosloorus. The Court a quo was correct to apply the *dictum* in paragraph [6] of Mudau v State (547/13) [2014] ZASCA43 (31 March 2014). The full text thereof reads as follows:

"[6] *Domestic violence has become a scourge in our society and should not be treated lightly, but deplored and also severely punished. Hardly a day passes without a report in the media of a woman or child being beaten, raped or even killed in this country. Many women and children live in constant fear. This is in some respects a negation of many of their fundamental rights such as equality,*

human dignity and bodily integrity. This was well articulated in S v Chapman 1997 (3) SA 341 (SCA) at 345A-B when this Court said the following:

'Women in this country have a legitimate claim to walk peacefully on the streets to enjoy their shopping and their entertainment, to go and come from work, and to enjoy the peace and tranquillity of their homes without the fear, the apprehension and the insecurity which constantly diminishes the quality and enjoyment of their lives.'

See also S v Baloyi 2000 (1) SACR 81(CC) at para 11."

[25] We do not find the sentence to be shockingly inappropriate, considering the seriousness of the crimes and the appellant's total lack of any signs of remorse.

[26] The appeal is dismissed.

L. WINDELL J
Judge of the High Court of South Africa,
Gauteng Local Division

C. H. J. BADENHORST AJ
Acting Judge of the High Court of South Africa,
Gauteng Local Division

For the appellant: Ms M Leoto
For the respondent: Adv R Ndou
Date of hearing: 6 December 2018
Date of Judgment: 6 December 2018