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167/88

CASE NO 494/87  
/CCC

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between

JOHN MOTAMBEDZO

APPELLANT

and

THE STATE

RESPONDENT

CORAM: JOUBERT, SMALBERGER JJA et NICHOLAS AJA

DATE HEARD: 24 November 1988

DATE DELIVERED: 30 NOVEMBER 1988

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J U D G M E N T

NICHOLAS, AJA:

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The appellant is John Motamedzo ("Motamedzo"), who was convicted of murder in the Witwatersrand Local Division of the Supreme Court. The trial court (HARMS J and two assessors) found extenuating circumstances, and he was sentenced to 7 years' imprisonment. HARMS J granted leave to appeal to this court.

(In regard to leave to appeal, two observations need to be made.

Motamedzo applied for leave to appeal in a document forwarded to the registrar of the Witwatersrand Local Division by the head of the Johannesburg Prison. It does not appear that there was a hearing in court or that the Attorney General was given notice of the application. After the event, the registrar sent to the Attorney General a copy, for his information, of

the order granting leave. It is not good practice that leave to appeal should be granted in this informal manner, without the Attorney General being given the opportunity to be heard on the application.

The second observation is that there was nothing in the record which suggested that this was a case which deserved the attention of the Appellate Division: this was a run-of-the-mill case in which no law point was raised, and the issues were issues of fact.)

It was not in dispute at the trial that on 11 December 1986 Motamedzo stabbed the deceased, Fanuel Hlokosi ("Hlokosi"), who died shortly afterwards from the injury he sustained. On post mortem examination by Dr Moar it was observed that:

"There is a four centimetre vertical penetrating incised cut wound over the supero-medial border of

the left scapula. Track of the wound passes downwards and inwards passing through the body of the 1st thoracic vertebra, entering the left pleural cavity and terminating within the lower lobe of the left lung."

The cause of death was stated to be "Penetration wound of the left lung."

Under cross-examination by the defence Dr Moar said that the track of the wound was not at all consistent with a person stabbing the deceased from in front. "This is a wound that has been inflicted over the back of the body."

Motamedzo pleaded self-defence. This was adumbrated at the proceedings held under s.115 of the Criminal Procedure Act, 51 of 1977, at which he pleaded not guilty. He admitted that on 11 December 1986, at Parkmore, Randburg, he stabbed Hlokosi once with a knife in the shoulder. He said that he defended himself, stating -

"Die rede hoekom ek onskuldig pleit is dat hierdie bakleiery waarin ek betrokke was, dit was so, as ek

nie gewen het nie, sou die ander man gewen het."

Witnesses for the State were Detective Constable Manamela (the investigating officer) and Elizabeth Mohlami.

When Manamela arrived on the scene, Hlokosi was still on the pavement where he had fallen after being stabbed. On the basis of information received, he went to where Motambedzo lived. He found him there and found, in a sheath attached to his belt, a knife described as "a typical dagger". Spots of blood were observed on the knife. He asked Motambedzo why he had killed Hlokosi. The reply was that Hlokosi had been bothering him and Motambedzo bought the knife for R15 in order to defend himself against Hlokosi - he felt that his life was in danger. Every time Hlokosi saw him, he chased Motambedzo with a screwdriver. Motambedzo had not reported the matter to the police because he had thought it better to solve the problem by killing Hlokosi.

Motambedzo was arrested and lodged in the cells at Sandton Police Station.

On the following day Manamela took from Motambedzo what was referred to as a "waarskuwingsverklaring".

(Exhibit "E"). In this statement Motambedzo said:

"On 11.12.86 at about 16h00 I went to Parkmore Shopping Centre where I bought a knife for R15,00 in cash. I bought the knife special for the deceased because he is after me every weekend, was chasing me with a screw-driver. I don't know why. After I bought the knife I then went to Sandton to collect money and I came back at about 16h45 to the Shopping Centre and found the deceased standing next to bottle store and was facing east and I was from north direction where there was many people. I then took out the knife which I bought for him and stabbed him once at his back and he fell down and I ran away to my place of residential, c/o Lilian and 13th Street, Parkmore. While still there, there came the police who arrested me and they found the knife in my possession."

Elizabeth Mohlami said that at about 5 o'clock on the afternoon of 11 December 1986, she went to Parkmore Shopping Centre in order to make some purchases at Pick and Pay. She saw Hlokosi, with whom she was acquainted,

on the pavement outside the bottle store. They greeted each other and chatted, facing each other. While they were doing so, Motamedzo (whom she also knew) approached Hlokosi from behind and stabbed him. Hlokosi, who was unaware of Motamedzo's approach, fell to the ground. Motamedzo walked on without saying anything. She did not try to assist Hlokosi - she was frightened, and went to Pick and Pay to make her purchases. On her return, there was a crowd collected around Hlokosi's body, but she did not go up to it.

Giving evidence in his own defence, Motamedzo said that on the Sunday before Thursday 11 December, trouble had arisen between him and Hlokosi, who accused him of having an association with his wife. Hlokosi started hitting him with his fists. Hlokosi then pulled out a screwdriver, and Motamedzo fled. On the day before the 11th Hlokosi assaulted him again at the shopping centre. Motamedzo then decided he should acquire a knife which he

would keep with him. He bought it at Parkmore Shopping Centre on 11 December and went to Sandton in order to get some money. On his way back, when he was near the bottle store at the Parkmore Shopping Centre, he heard footsteps behind him. He looked round and saw Hlokosi, and started running away. Hlokosi gained on him from behind, and grabbed him by his T-shirt, and pulled it over his head. Motamedzo drew his knife with his right hand and passed it to his left hand. He said:

"In that instant the deceased tried to turn in order to face me. That is when I got a chance to stab him. That is when I raised my hand that was holding the knife and stabbed him."

When he was cross-examined, Exhibit "E" was put to him. He was asked if he had said:

"He was facing east and I was from the north direction where there were many people."

and replied:

"Dit is wat Manamela geskryf het, want ek is daaroor geslaan omdat ek aangesê was dat daardie persoon



gestaan het toe ek hom daar kry.

HOF: Het hy u geslaan by die polisiestasie ook? -- By die eerste geleentheid het hy my aangerand toe hy my arresteer en tweedens was ons by die polisiestasie gewees toe hy hierdie verklaring kom neem. Het hy u toe weer aangerand? -- Ja, omdat ek ontken het dat ek by die oorledene gekom het terwyl hy daar staan."

In the judgment, HARMS J said that that part of Motamedzo's evidence which related to his difficulties with Hlokosi could reasonably possibly be true, and the trial court accepted it in his favour. The learned judge continued:

"As ons by die handelinge om die dood van die oorledene kom, is die prentjie egter ietwat anders. Die Staatsaak is gebaseer op die getuienis van Elizabeth Mohlami. Sy sê dat sy en h groepie was besig om met die oorledene te gesels toe die beskuldigde van agter die oorledene aangestap gekom het en hom in die rug gesteek het.

Hierdie weergawe van Elizabeth Mohlami stem ooreen met die mediese getuienis en pas ook in met die beskuldigde se verklaring aan speurder-konstabel Manamela. Daarteen staan die beskuldigde se getuienis. Hy vertel hoe die oorledene van agter gekom het, sy hemp oor sy kop getrek het en toe die oorledene gedraai het, het hy die oorledene gesteek. Die beskuldigde het gepoog om te wys hoe dit gebeur het, maar tensy hy en die oorledene sirkus-artiestes

was, kon die gebeure net nie plaasgevind het soos hy gesê het nie.

Sy getuienis het ook van klem verander. Belangrike aspekte het hy vir die eerste maal tot verrassing van die Staat, en glo ek, van sy advokaat, op n laat stadium geopper, soos byvoorbeeld dat die speurder-konstabel hom sou aangerand het met die neem van die verklarings en dat die getuie, Elizabeth Mohlami, nie teenwoordig was nie.

Ons is tevrede dat sy relaas gevolglik nie redelikerwys moontlik waar kan wees nie en dit moet verwerp word ..."

The first point argued on appeal was one not taken at the trial, namely, that both Motamedzo's statements were confessions made to a peace officer, other than a magistrate or justice, and were consequently inadmissible in evidence in terms of s.217 of the Criminal Procedure Act. It was also argued that the trial court erred in relying on the evidence of Elizabeth, and that it should have found that the State had failed to rebut the defence of self defence.

A confession is, in the words of DE VILLIERS ACJ in the leading case of R vs Becker 1929 A D 167 at 171, "an unequivocal acknowledgment of guilt, the

equivalent of a plea of guilty before a court of law." It is an extracurial admission of all the ingredients of the crime, and is inconsistent with a defence of innocence (for example self-defence or provocation). See S vs Grove-Mitchell 1975(3) S A 417(A) at 419 G - H. In adjudicating the question whether a statement is a confession for the purposes of s.217, the approach is primarily an objective one. If the statement amounts to an unequivocal admission of all the elements of the offence, it does not matter that subjectively the accused did not intend to confess. See S vs Yende, 1987(3) S A 367(A) at 374 C - D.

I deal first with the oral statement made on 11 December. In that statement Motamedzo did, in answering the question why he had killed Hlokosi, admit that he had done so. But that was not an unequivocal admission of guilt in relation to the offence of murder. Motamedzo said nothing about the circumstances of the stabbing and it was open to him on that statement to raise a

defence of self-defence - indeed, that was the tenor of the statement regarded as a whole. In my opinion, therefore, that statement was not a confession for the purposes of s.217.

In Exhibit "E" Motamedzo unequivocally admitted that he stabbed Hlokosi while the latter was standing near the bottle store and that he used the knife "which I bought for him". Thus, he admitted assaulting Hlokosi by stabbing him in the back, and doing so with intent, if not to murder him, at least to do him grievous bodily harm. In regard to the actual assault, there is no suggestion that Motamedzo was acting in self-defence. This was, the words suggest, a pre-emptive strike. There was not, it is true, an acknowledgment of all the elements of the crime of murder - apart from intention to kill there was no admission that he caused the death of Hlokosi. Nevertheless, this was a confession for the purposes of s.217, ie "any confession made by any person in relation to the commission of any offence". Assault, with intent to do grievous bodily harm is a competent

verdict on a charge of murder (See s.258(b) of the Criminal Procedure Act), and an acknowledgment of guilt on the latter charge is not any less a confession because the charge as formulated by the prosecution is one of murder.

In my opinion therefore Exhibit "E" was a confession and its admission in evidence constituted an irregularity. Moreover it was a further irregularity for the State to cross-examine Motambedzo on the contents of the inadmissible confession. See R vs Gibixegu & Another 1959(4) S A 266 (E).

In terms of s.309(3) of the Criminal Procedure Act,

"no conviction or sentence shall be reversed or altered by reason of any irregularity or defect in the record or proceedings unless it appears ... that a failure of justice has in fact resulted from such irregularity or defect."

There is a failure of justice when the irregularity has caused actual and substantial prejudice to the accused. See Rex vs

Rose, 1937 AD 467 at 477. The test is "whether the court hearing the appeal considers, on the evidence (and credibility findings, if any) unaffected by the irregularity or defect, that there is proof of guilt beyond a reasonable doubt. If it does so consider there was no resultant failure of justice."

In my opinion there was such proof in the present case. Elizabeth was essentially an independent witness. She was acquainted with both Motamedzo and Hlokosi. No reason is apparent from the record why she should wish to implicate Motamedzo falsely, and none was suggested to her. No adverse findings on credibility were made against her by the trial court, and there is nothing in a reading of her evidence to suggest that she was an untruthful witness. Nor is there any reason to doubt the reliability of her observations - the assault took place immediately in front of her in broad daylight. The medical evidence supports to the hilt her version of how the deceased was stabbed. From the

evidence of Dr Moar, and the photograph of the deceased's body (Exhibit "C"), it appears clearly that he was stabbed in the back a short distance below the base of his neck. The track of the wound was downwards and inwards. This is fully consistent with Elizabeth's evidence of his being stabbed from behind by Motambedzo. She explained her conduct after the stabbing by saying that she took fright on account of what happened. That was an understandable reaction. While the trial court should not have relied on the fact that her evidence fitted in with Exhibit "E", that does not mean that her evidence would otherwise not have been acceptable. In my view she was a credible witness.

The same cannot be said for Motambedzo. His version of what happened does not coincide with what the cross-examination of Dr Moar suggested that it would be. It would seem from his evidence that Hlokosi came from behind him, and passed him on his right. While doing so Hlokosi

pulled Motamedzo's T-shirt over his head, using his right hand, and held it like that as he moved to in front of Motamedzo. This caused Hlokosi to be slightly off balance. Motamedzo's vision was obscured by the T-shirt that was partly over his face. While being so held Motamedzo drew his knife with his right hand, transferred it to his left hand and stabbed at Hlokosi who at the time was in the process of turning to face Motamedzo. It is not quite clear from Motamedzo's evidence whether in turning Hlokosi was pivoting to the right or to the left. It is difficult to visualize how all this happened. It does not seem to fit in with the position and track of the wound found on the deceased's back, and this version was never put to the district surgeon to enable him to comment thereon.

The trial court observed Motamedzo's demonstration of how the stabbing allegedly occurred. This caused it to comment in its judgment that "(d)ie beskuldigde



het gepoog om te wys hoe dit gebeur het, maar tensy hy en die oorledene sirkus-artiestes was, kon die gebeure net nie plaasgevind het soos hy gesê het nie". From a reading of the trial court's judgment this would appear to have been the main reason for rejecting Motamedzo's evidence. In doing so, it did not rely on the terms of Exhibit "E". Significantly it was only towards the end of the cross-examination of Motamedzo that brief reference was made to Exhibit "E", and that could have had little or no influence on the trial court when it made its credibility finding. One cannot ignore the distinct advantage which the trial court had of witnessing Motamedzo's demonstration, and assessing the cogency of his evidence in the light thereof.

The other important aspect of Motamedzo's evidence relates to his denial under cross-examination (for the first time) that Elizabeth had been on the scene at all. Elizabeth had earlier testified to the arrival of Motamedzo

on the scene, and how she had greeted him before the stabbing took place. Her evidence that she was present when the stabbing occurred was never challenged. She was cross-examined in regard to what Motamedzo would say happened. It is difficult to accept that his counsel would not have taken proper instructions from him regarding Elizabeth's evidence, and that had that always been his case it would not have been put to her that she was never at the scene. His untruthful denial, for such it must be, of Elizabeth's presence at the scene, seriously detracts from his credibility.

I am satisfied that, notwithstanding the irregularities, the trial court's conclusion that Elizabeth's evidence was true and that of Motamedzo's false, and that his guilt was proved beyond all reasonable doubt, is unassailable.

As far as the sentence is concerned, there is no basis on which interference with it would be justified. The trial judge did not misdirect himself in any respect, the

sentence is not shockingly inappropriate having regard to all the relevant circumstances, and it is not affected by the irregularities which occurred.

The appeal is dismissed.

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NICHOLAS, AJA

JOUBERT JA )  
                  ) CONCUR  
SMALBERGER JA)