



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case no: 739/2021

In the matter between:

RASIMATE SAMUEL BALOYI

APPELLANT

and

THE STATE

RESPONDENT

Neutral citation: *Rasimate Samuel Baloyi v The State* (739/2021) [2022] ZASCA 35 (01 April 2022)

Coram: MOCUMIE, HUGHES JJA AND MAKAULA, SMITH AND WEINER AJJA

Heard: 18 February 2022

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by email. It has been published on the Supreme Court of Appeal website and released to SAFLII. The date and time for hand-down is deemed to be handed down on 01 April 2022.

Summary: Criminal Law and Procedure – whether the murder was premeditated – life sentence – appropriateness of sentence.

ORDER

On appeal from: Limpopo Division of the High Court of South Africa, (Ledwaba AJ and Phatudi J, sitting as court of appeal):

The appeal is dismissed.

JUDGMENT

Makaula AJA (Mocumie and Hughes JJA and Makaula, Smith and Weiner AJJA concurring):

[1] This is an appeal against the judgment and order of the Limpopo Division of the High Court, Polokwane (Ledwaba AJ and Phatudi J sitting as full bench), with leave of this Court granted on the following limited ground:

'The sentence imposed and whether the state established that the murder was premeditated.

The appeal was dealt with in terms of s 19(a) of the Superior Courts Act 10 of 2013 as (amended). The parties agreed to the adjudication of the appeal by this Court without hearing oral argument as provided for under the practice rules of this Court during the National State of Disaster Regulations of 2020 which are still in operation'.

[2] The appellant and his erstwhile accused (accused 2) were charged and convicted of murder by the Regional Court (the trial court). The trial court found no substantial and compelling circumstances and sentenced both to life imprisonment. The appellant appealed against the conviction and sentence to the full bench of the high court, which dismissed his appeal. Leave to appeal was granted to this Court on petition.

[3] The appellant's charge before the trial court was murder, read with the provisions of s 51(1) of the Criminal Law Amendment Act 105 of 1997 (CLAA), which prescribed the imposition of life imprisonment. The appellant was appraised of the applicability of the CLAA as the murder was planned and premeditated or committed in the execution of a common purpose. The trial court warned the appellant accordingly.

[4] I briefly set out the following material facts. On 4 March 2012, at about 20h30, Mr Thabo Letsoalo (Mr Letsoalo) and Mr Nicholas Molepo (Mr Molepo) were with the deceased at a tavern sitting under a tree drinking liquor. The appellant arrived in the company of accused 2. The appellant approached the deceased from behind and hacked him with a panga on his head. He hit him more than once, and the deceased fell to the ground. Accused 2 joined the assault by hitting the deceased with a weapon that looked like a steel bar (or a pick-handle) while the deceased was lying on the ground. They also kicked him. After assaulting the deceased, the appellant and accused 2 left the scene. An ambulance and the police were called in vain. Mr Thabo Alfred Sithole (Mr Sithole), the tavern owner, was called to the scene. He found the deceased lying in a pool of blood. He conveyed the deceased to Mankweng hospital, where the latter died a few minutes after arrival.

[5] The appellant's evidence is different from that of both eyewitnesses. The Appellant denied that he assaulted the deceased, let alone with a panga. He stated that in the late afternoon he was involved in a scuffle with the deceased when the latter fell against a fence, injuring his forearm. He testified that he never saw accused 2 on that day. He only learnt the following day that the deceased had died.

[6] The appellant said that he was at the tavern on the same date, at about 16h00 to 17h00. He sat there for about 35 minutes before other local young men joined him, and later the deceased. The deceased took an empty crate of beers and went to join other patrons. The appellant stood up and purchased a 'long tom of Hansa' and a cigarette. When he returned, the chair he was sitting on was not there. He was told that it was taken by the deceased. He saw the chair, fetched it, and took

it to where he had been sitting. After a while, he again went to buy a cigarette. When he returned, he found the deceased standing next to where he had sat. The deceased confronted him about the chair. He told the deceased that he (the appellant) was the first to use it. They then quarrelled over the use of the chair. The appellant said they were both drunk at that stage. He said that the deceased pushed him, and they ended up pushing each other. He testified thus:

'We put our arms around each other grabbing each other and I tripped him he fell onto the fence.'

People who were present separated them. He thereafter bought a cigarette and snacks and left the tavern. He did not return to the tavern that day.

[7] During cross-examination regarding whether the deceased was injured during this alleged scuffle, he said:

'The injuries I saw on him I think they would have been caused by the fence and the witness is indicating to his left forearm'.

[8] The appellant and accused number 2's evidence was rejected by the trial court because their 'evidence was unconvincing and simply did not have the ring of truth about it. Their version can safely be rejected as false'. The trial court further found that 'accused's untruthfulness is a guarantee of the truthfulness of the state witness'. In my view, the trial court correctly analysed the evidence and cannot be faulted for finding the appellant guilty of murder. However, it did not say whether the murder was planned or premeditated in its judgment on conviction. It is only in sentencing the appellant that the trial court mentioned premeditation for the first time. It said:

'This is (sic) a premeditated murder. You came to this tavern armed with a panga and an iron rod or bar. Your purpose was to kill the deceased and that is just what you have done. You had ample opportunity to restrain yourself. This poor deceased had no chance whatsoever.'

[9] The full court dismissed the appeal. It agreed with the finding by the trial court in its judgment on sentence that the murder was premeditated. The full court reasoned that because the appellant went to the tavern armed with a panga, with

which he killed the deceased, he had formed the intention to kill the deceased before going to the tavern.

[10] The evidence of Mr Letsoalo and Mr Molepo was found to be acceptable and credible by the trial court. From that, it is ineluctable that the trial court was correct in convicting the appellant and accused 2 as charged. Although this Court has not had the benefit of a post-mortem report, the judgment of the full court reflected on the injuries as follows:

'The injuries sustained included (sic) 6 x lacerations, a fracture to the coronal suture, fractures of the left mandibular bone over the front of the middle aspect.'

These are serious injuries which were inflicted on the head and are indicative of the force used. The cause of death was recorded as 'blunt force head injuries'.

[11] The issue before this Court is whether the state established that the murder was premeditated. It is clear that nowhere in the trial court's judgment prior to the imposition of the sentence was any reference made to planning or premeditation of the murder by the appellant. The full court did not make any pronouncement on the issue as well, save to use the trial court's words that the murder was premeditated. Therefore, it behoves this Court to reflect on the issue and determine whether the murder was indeed planned or premeditated, as well as the legal significance of the fact that the issue was not decided by the trial court prior to sentencing. These issues must be considered by looking at the evidence presented by the two eyewitnesses in conjunction with the appellant's version.

[12] On the accepted evidence of the two reliable eyewitnesses, the appellant hacked the deceased from behind with a panga and continued to assault the deceased while he was lying on the ground. This to me, was a sequel to their prior fight three or so hours earlier. There is no evidence that he was armed with a panga earlier during the fight. He left for a few hours and came back armed with a panga and attacked the deceased with it. The appellant thus had time to think about the attack. The attack did not occur on the spur of the moment.

[13] It is necessary to point out that not in every instance, that an accused is armed with a weapon, will it be an indication of premeditation. The Appellant relied on *S v Makatu*¹ in its submission that there was no premeditation on the part of the Appellant. In *Makatu*, the appellant went to the deceased's office armed with a firearm for which he had no licence. Paragraph 12 of the judgment captures precisely what occurred and reads:

'When the appellant went into the deceased's office she immediately told him that she was not interested in him and that he should move out of the house that he was busy renovating for them. This triggered bad memories of what she had done and said in the past. "It was then at that spur of the moment that I felt hurt and started shooting at her." After firing shots at her the appellant had turned the gun on himself, apparently shooting himself through the chin, the bullet exiting through his forehead.'

[14] In accepting the appellant's version in *Makatu*, the court reasoned as follows: '... the evidence does not support a finding that the appellant had taken the firearm with the intention of shooting his wife, nor that he was motivated by the fear of losing her share in the joint estate. It cannot be said that the State established that his version was not reasonably true.'²

[15] The appellant's evidence must be evaluated together with the acceptable evidence of the two eyewitnesses, who undoubtedly knew both him and accused 2. His evidence that he fought with the deceased earlier that day speaks to the reason why he came back in the evening and assaulted the deceased without saying a word. The appellants attack was thus a continuation of the fight that had occurred earlier.

[16] It is trite that a court can accept certain portions of the evidence of a witness as the truth and reject others. This Court in *Rex v Gumede* held that:³

'There may be motives inducing a witness at one stage to tell falsehoods and subsequently to confess the truth, and it would be arbitrary rashness to hold that the later evidence must necessarily be rejected.'

¹ *S v Makatu* 2006 (2) SALR 582 (SCA).

² *Ibid* at 588.

³ *Rex v Gumede* 1949 (3) SA 749 (A) at 755.

[17] Having outlined the above, it is essential to state that a finding of premeditation requires inferential reasoning. The trier of facts (a presiding officer) has to interrogate the facts of each case and then deduce from them whether the commission of the offence was premeditated or not. That is partly due to the legislature not having defined 'planned' or 'premeditated' in the CLAA.

[18] Intrinsic in the question this Court posed, when it granted leave to appeal, is the issue that seems to continue to perplex presiding officers in criminal trials where planning or premeditation is alleged by the State. The question arises: must a trial court determine whether the murder was planned or premeditated at conviction? The answer lies in what this Court said in *Michael Legoa v State*⁴ when it determined whether at the trial of an accused charged with dealing in dagga, 'the State is entitled to prove the value in question after conviction but before sentencing, so as to invoke the minimum sentences'. Cameron JA said that the court acquires the jurisdiction in respect of the minimum sentences legislation 'only if the evidence regarding all the elements of the form of the scheduled offence is led before verdict on guilt or innocence, and the trial court finds that all the elements specified in the Schedule are present'. Our courts have consistently followed this approach. However, the ultimate question remains 'whether the accused had a fair trial under the substantive fairness protections afforded by the Constitution'.⁵

[19] A similar question arose in *S v Taunyane*.⁶ As in this case, the trial court failed to mention at the conviction stage that the accused was guilty of planned or pre-meditated murder. It was only at the sentencing stage that mention was made. The full court found that such omission constituted a misdirection.

[20] Similarly, I find that the trial court in this matter, misdirected itself in pronouncing that the murder was premeditated only at the sentencing stage. What remains to be determined is whether the appellant was prejudiced by such misdirection. In *Legoa* this Court found that the Appellant received an unfair trial as a result of the misdirection by the trial court.

⁴ *Michael Legoa v State* [2002] 4 All SA 373; 2003 (1) SACR 13 (SCA) para 1.

⁵ *Ibid* para 18.

⁶ *S v Taunyane* 2018 (1) SACR 163 (GJ).

[21] The question of whether an accused is prejudiced by the failure of a trial court to refer to an offence in Part 1 of Schedule 2 varies from case to case. This Court held in *Legoa* that such failure would not, in every case, result in an accused being prejudiced. Whether an accused has been denied a fair trial, as a result, depends on the facts of each case, as I shall demonstrate below.

[22] Failure to make a pronouncement at the verdict stage as to which of the provisions of Part 1 of Schedule 2 of Act 51(1) of the CLAA are applicable to the accused's conviction constitutes a misdirection in every case it occurs. However, such failure will not always prejudicially affect the accused to an extent that the accused will avoid being sentenced to the minimum sentence of life imprisonment. If that were to be the case, it would result in a miscarriage of justice.

[23] There will undoubtedly be cases where the proved facts compellingly and ineluctably point to premeditation. In such a case there cannot be any conceivable prejudice to an accused person if the minimum sentence is imposed despite the fact that a finding regarding premeditation had not been made prior to conviction. In my view, this is such a case. The accused was duly warned of the applicability of the minimum sentencing legislation on the basis of premeditation and, as I have said previously, the proved facts incontrovertibly established that the murder was premeditated. Accordingly, there can be no conceivable basis on which he can complain about the fairness of the trial.

[24] To conclude on this aspect, a court of appeal cannot overlook that, despite the misdirection of a trial court, in failing to make a finding at the verdict stage, that the murder was planned or premeditated. Justice should not only be done or seen to be done to the accused, it has to be meted out to the victims and those affected by the actions of an accused, as well. The court of appeal should rather focus on the appropriateness of the sentence imposed. It cannot be that an inappropriate sentence should be imposed simply because of a misdirection on the part of the sentencing court, particularly when the accused is not prejudiced

[25] A minimum sentence imposed will stand only if the accused had been properly apprised in the charge sheet and informed by the court of the relevant provisions of the CLAA before the trial begins. Furthermore, the state will not be relieved of the duty to prove planning or premeditation before the verdict. In that event, the accused will be made aware of which evidence will be led and the kind of sentence likely to be imposed. That will allow the accused to prepare his defence and cross-examination of the state witnesses accordingly. This is exactly what happened in this case. It is accordingly not unjust for the appellant to be sentenced in terms of s 51(1) of the CLAA.

[26] I have accepted that the appellant returned to the deceased with a clear intention to kill him. Unlike in *Makatu*, I have found that the motive behind the appellant's action was to continue with the fight that had occurred in the late afternoon. Clearly, under those circumstances, the appellant had premeditated the attack on the deceased.

[27] Though superfluous in the light of the finding regarding premeditation, I am satisfied that on the proved evidence, the appellant had also acted in execution of a common purpose with accused 2.

[28] Having established that the murder was premeditated, I have to determine whether the trial court erred in respect of the sentence it imposed. The trial court correctly took into account and balanced the appellant's personal circumstances, the seriousness of the offence and the interest of society. The full court found that the trial court did not err. I agree with that finding.

[29] It is trite that the issue of sentence is predominantly in the discretion of the trial court. The powers of the appeal court are circumscribed to this extent, and the crux of the appeal against a sentence is not whether the sentence was right or wrong.⁷ An appeal court will thus not interfere with that discretion unless there is a clear misdirection or the sentence is manifestly disproportionate to the extent that no reasonable court would have imposed it. In my view, the aggravating circumstances

⁷ See *S v Pillay* [1977] 4 All SA 713 (A); 1977 (4) SA 531 (A) at 535 (E).

far outweigh the appellant's personal circumstances, which are not out of the ordinary. In the circumstances of this matter, the sentence of life imprisonment is appropriate.

[30] Consequently, I make the following order.

The appeal is dismissed.

M MAKAULA
ACTING JUDGE OF APPEAL

APPEARANCES:

For appellant:

L M Manzini

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