REPUBLIC OF SOUTH AFRICA

IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

REPORTABLE
Case Number : 318 / 03

In the matter between

RIAAN BOTHA **Appellant**

and

THE STATE **Respondent**

Coram : **HARMS, NUGENT JJA and PONNAN AJA**

Date of hearing : **14 MAY 2004**

Date of delivery : **28 MAY 2004**

SUMMARY

Sentence – role of assessors in alleged irregularity – should be raised by means of a special entry recommendation by judicial officer on parole – undesirable practice.

J U D G M E N T

PONNAN AJA

PONNAN AJA

[1] During the course of the afternoon of 24 March 2001 the appellant was joined, at his invitation, by ten others at his mother's farm Inderheken at Dendron near Pietersburg (now Polokwane). The appellant's guests, who were all members of a rugby club, of which he was the first team captain, were at the farm for the stated purpose of participating in a team building exercise.

[2] Inderheken is a game farm stocked with a variety of herbivores for the purposes of commercial hunting. That afternoon and evening passed uneventfully. The next morning the group set out in the appellant's bakkie on a game viewing excursion. During the trip, alcohol was consumed by members of the group, who were jovial and in high spirits. At the ready were four firearms intended to be utilised by them in bird hunting.

[3] At approximately 6am that very morning Alex Motlokwana, his cousin Melford Motlokwana and their friend Pitsi Tshepo Matloga (the deceased) set out from their homes in Ga-Mokgehle Trust, Dendron. The express purpose of their expedition was to hunt small game on neighbouring farms. As an aid to achieving their objective, they were

accompanied by a pack of ten dogs. During the course of the morning they made their way onto the farm Inderheken.

[4] At approximately 11am, according to Alex Motlokwana, their venture still not having met with any success, they made their way to the boundary of the farm and were about to pass through a fence when they noticed a vehicle and a group of men. The retort of a firearm caused him to quickly dash back into the bushes, his companions and dogs following closely on his heels.

[5] After the shooting had commenced Melford inched forward on his belly until he reached relative safety before fleeing on foot. Alex was less fortunate. After a shot had struck the ground in front of him, he got up and ran towards the fence. Whilst fleeing, he was struck and sustained gun-shot wounds. He fell to the ground and sought cover in the undergrowth where he remained until the next morning.

[6] An explanation for the initial shooting is to be found in the evidence of the appellant. According to the appellant, as the bakkie made its way around the farm, they came upon some of the dogs belonging to the Motlokwane cousins and the deceased. The appellant's response was swift and decisive. Not having observed any people in the company of

the dogs and recognising that they were unlawfully on the farm he fired shots in their general direction.

[7] As he approached the area where the dogs were spotted, so testified the appellant, he was suddenly startled when the deceased emerged from the brush which was knee-high. The deceased was immediately overpowered and subdued by the appellant.

[8] Despite the appellant's protestations to the contrary, the trial court found that immediately after having been subdued, the deceased was already gravely injured. Support for that conclusion is to be found in the evidence of various witnesses that the deceased had to be carried from the point where he had been apprehended to the appellant's bakkie.

[9] At some stage after he had been placed on the vehicle and whilst it was stationary, the deceased was observed lying on the ground alongside the bakkie. Precisely what caused him to fall to the ground was far from clear. What was clear, however, is that once again he had to be carried onto the bakkie. It was not in dispute that the deceased evidenced swelling around his eyes and bleeding from his nose. Various witnesses, it must be added, testified to his moaning and groaning and his arms and legs twitching at different stages of that journey. Thereafter the bakkie, with an obviously injured individual as its

cargo, was driven to different points on the farm, ostensibly in search of more dogs. There was some dispute as to whether or not he was conscious and did in fact respond coherently when questioned by the appellant.

[10] Eventually the deceased was dragged by the appellant into the veld where he was abandoned. The group, first having been urged by the appellant to secrecy, returned to the farmhouse to braai and consume more alcohol.

[11] Given that they were poaching unlawfully on the farm, it is not surprising that Melford did not immediately raise the alarm. The next morning Alex made his way to a neighbouring farm, where he solicited assistance. The police were summoned and medical assistance was secured prior to his making a statement to the police. In consequence of information furnished by him, the police visited Melford at his school.

[12] Shortly after midday, Inspector Ramothwala of the SAPS (Dendron) visited the farm Inderheken in the company of Inspector Matsaung where he discovered the body of the deceased as also the remains of five dogs. Inspector Ramothwala summoned detectives from the murder and robbery unit and handed the crime scene over to them. Later that day he learnt that the body of the deceased had disappeared.

[13] At approximately 9pm that evening, Inspector Sauer of the murder and robbery unit interviewed the appellant. He observed what appeared to him to be blood spots on the clothes of the appellant. The appellant was arrested and various exhibits, including his vehicles, clothes and firearms were seized. In due course the other accused were also arrested.

[14] The day following upon the arrest of the appellant a search for the body of the deceased commenced at the Arabie Dam, which is located some 130 km away from Pietersburg. The body of the deceased was found on 2 April 2001 after an intensive search by police divers. Affixed to the body, which was wrapped in a black plastic sheet, was a metal pipe weighing 17.4 kg.

[15] The cause of death according to Dr Bhootra, the pathologist who conducted the post mortem examination on the deceased, was blunt force trauma to the head. He recorded that there was bruising all over the deceased's head except for his right temple, with an associated sutural fracture of the skull. He also observed bruising on the upper part of the anterior chest wall of the deceased as well as closed fractures of the third to sixth right ribs and the fourth to sixth left ribs.

[16] The appellant and eight others were indicted in the Pretoria High Court before Ngoepe JP (sitting with assessors) on a count of murder, two counts of attempted murder, one count of malicious injury to property and one count of defeating and/or obstructing the course of justice.

[17] At the commencement of the trial, charges were withdrawn against four of the nine accused. After a protracted trial, the appellant was convicted of murder and an attempt to defeat the ends of justice. On the attempt to defeat the ends of justice, the appellant was sentenced to a term of imprisonment for a period of 4 years, which was ordered to run concurrently with the 18 years' imprisonment imposed for the murder. The effective sentence was thus a term of imprisonment for a period of 18 years. In arriving at that conclusion, the learned trial judge stated: "In the light of all of the aforegoing the court unanimously imposes the following sentences on the accused". [Emphasis added]

[18] It is the reference by the learned judge to unanimity that has led to the present appeal. The appellant contends that the reference shows that the sentence was not the product of the learned judge's independent discretion but was the product of a discretion exercised by the judge acting in concert with the two assessors. That, so it was submitted, constituted an irregularity that vitiated the sentence, and we

ought to set aside the sentence and consider the question of sentence anew.

[19] The court *a quo* granted leave to appeal to this court but only on that limited ground. The material portion of the order made by that court reads as follows:

> 'Applicants … are granted leave to appeal against sentence, but only on the ground set out in paragraph 3 of accused 1's notice of application for leave to appeal … and not on any other grounds.' (That paragraph raised the issue of the alleged irregularity to which I have referred.)

An application to this court to broaden the appeal insofar as it related to sentence was unsuccessful and that decision is final (*S v Fourie* 2001 (2) SACR 118 (SCA); *S v Maputle* 2003 (2) SACR 15 (SCA)). Thus the only questions before us are whether the sentence was imposed irregularly and if so what consequences that has.

[20] It is trite that an assessor's function does not extend beyond verdict. (See s 145 (2) of the Criminal Procedure Act 51 of 1977; *S v Sparks and another* 1972 (3) SA 396 (A) at 404 F.) It is not competent for an assessor to thereafter participate in the decision as to what punishment should be imposed. Accordingly, the question of sentence is one for the judge alone and not the assessors. (See *S v Legoa* 2003 (1) SACR 13 par 16.) It is not irregular, however, for a trial judge to consult

with the assessors on the question of an appropriate sentence, but the sentence must remain that of the judge alone. (See *S v Lekaota* 1978 (4) SA 684 (A).) Where, however, a judge and the assessors hold disparate views on sentence, it would be impermissible for the judge to succumb to the will of the assessors in the belief that they constitute the majority of the court.

[21] After conviction, evidence was led in regard to sentence. The assessors were not asked to retire after verdict; nor is this done in practice. Indeed, one's experience is that it is usual for a judge to discuss the sentence with his assessors. (See *S v Sparks* at 403G; Smit and Isakow 'Assessors and Criminal Justice' [1985] *SAJHR* 218.) It follows that a judge may take their advice into account in determining an appropriate sentence. Recording, thereafter, that there was unanimity between the judge and the assessors is but a logical extension of that process.

[22] In giving his reasons for granting leave to appeal the learned judge accepted that the use of the word 'unanimous' lent itself to two possible constructions and granted leave to appeal on those grounds. The question, however, was not what the word might convey, but rather what happened in fact, and it was incumbent upon the learned judge to disclose that. The problem might not have arisen, however, had the

appellant's complaint been raised by a special entry as envisaged in s 317. Section 317, which is aimed at ensuring a fair trial, provides that the special entry should state 'in what respect the proceedings are alleged to be irregular or not according to law' and that 'the terms of the special entry shall be settled by the court which or the judge who grants the application'. Although the facts were well within the cognisance of the judge, his approach was to assume that it is the duty of this Court to decide factually what had happened without any help from him. The facts on which an accused relies and which he alleges constitute an irregularity must be determined by the court which or the judge who makes the special entry. (*R v Matsego and Others* 1956 (3) SA 411 at 415 A.)

[23] Ultimately though, whilst there are other pointers in that direction, the clearest indication of the absence of any irregularity is to be found in the following remarks in the judgment on leave to appeal: 'An irregularity is not something to be lightly inferred and I don't think it should be in this case. While I am quite convinced that no irregularity has occurred, given the fact that this could turn around the interpretation of words in my judgment the question is: is there a reasonable prospect that the appeal court in reading the sentence might find that the word "unanimous"

implies a lot more things, a lot more or perhaps implies some of the things contended for by the applicants'.

[24] In my view, the appellant has failed to establish that there was any irregularity in the proceedings. The proposition that the wrong forum sentenced the appellant inasmuch as the court was improperly constituted at that time, resulting in an irregularity *per se*, is untenable. In the ultimate analysis it has not been shown that the trial judge failed, himself, to impose the sentence.

[25] One final aspect merits mention. The trial judge recommended that the appellant serve at least two thirds of his sentence before being considered for parole. The function of a sentencing court is to determine the term of imprisonment that a person, who has been convicted of an offence, should serve. A court has no control over the minimum period of the sentence that ought to be served by such a person. A recommendation of the kind encountered here is an undesirable incursion into the domain of another arm of State, which is bound to cause tension between the judiciary and the executive. Courts are not entitled to prescribe to the executive branch of government how long a convicted person should be detained, thereby usurping the function of the executive. (See *S v Mhlakaza* 1997 (1) SACR 515 at 521 (f)-(i))

[26] Albeit, just a recommendation, its persuasive force is not to be underestimated. It, no doubt, was intended to be acted upon. In making the recommendation which he did, the trial court may have imposed, by a different route, a punishment which in truth and in fact was more severe than originally intended. Such a practice is not only undesirable but also unfair to both an accused person as well as the correctional services authorities.

[27] In the result, for the reasons given, the appeal must fail and it is accordingly dismissed. The Registrar has been instructed to forward a copy of this judgment to the Department of Correctional Services with a request that the remarks in paragraph 26 be taken account of in relation to the present case.

V M PONNAN AJA
ACTING JUDGE OF APPEAL

CONCURRING:

HARMS JA
NUGENT JA