THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case No: 438/2015
Not Reportable

In the matter between:

SITHEMBISO RONALD NGCULU **APPELLANT**

and

THE STATE **RESPONDENT**

Neutral citation: *Ngculu v The State* (438/15) [2015] ZASCA 184 (30 November 2015)

Coram: Bosielo, Zondi, Mathopo JJA and Van der Merwe, Baartman AJJA

Heard: 18 November 2015

Delivered: 30 November 2015

Summary: Criminal appeal against conviction on murder and assault with intent to cause grievous bodily harm – sentenced to life imprisonment in respect of murder and 3 years' imprisonment in respect of assault with intent to cause grievous bodily harm – single witness – adequacy of the evidence – fair trial – sentence of life imprisonment disturbingly inappropriate.

ORDER

On appeal from: Limpopo High Court, Thohoyandou (Makhafola J sitting as court of first instance).

a) The appeal against convictions is dismissed.
b) The appeal against the sentence imposed succeeds partially and to the following extent:
'The sentence of life imprisonment in respect of murder is set aside and replaced with a sentence of 20 years' imprisonment. The sentence of 3 years' imprisonment in respect of the assault with intent to cause grievous bodily harm is confirmed. In terms of s 280 of the Criminal Procedure Act 51 of 1977, the sentence of 3 years' imprisonment is ordered to run concurrently with the sentence of 20 years' imprisonment in respect of murder.'
c) The sentence is antedated to 22 September 2011.

JUDGMENT

Bosielo JA (Zondi, Mathopo JJA and Van der Merwe, Baartman AJJA concurring)

[1] The appellant who was accused 6, stood trial together with six others in the Limpopo High Court, Thohoyandou on a number of counts. He was ultimately convicted on the counts of murder and assault with intent to do grievous bodily harm. He was sentenced to imprisonment for life in respect of murder and 3 years' imprisonment for assault with intent to cause grievous bodily harm. The appellant's application for leave to appeal against his

conviction and sentence was refused by the court below. The appeal before us is with the leave of this Court.

[2] The state called several witnesses. The appellant's conviction is predicated on the medical evidence by Dr NT Mutshembele and the evidence of a complainant who survived the assault, Tshifaro Funanani (Funanani). According to Funanani, he was accosted by the former accused 5 whilst at a bar lounge in the village. He was accused of having stolen some cables at accused 2's mill. He was forcibly taken to accused 2's mill where he was assaulted by accused 1 and 3 with a cable. They were saying 'he, the complainant, knows and he will talk'.

[3] In no time, the deceased was brought in by accused 1, 2, 3, 5, 6 and 7. Accused 3 and 7 started to assault the deceased all over his body with pieces of cables. Accused 3 and 7 then took cables and started to assault the deceased all over his body. Both the deceased and Funanani were then shocked with electric wires by accused 1 and 7. All seven accused continued to assault them. Later, they were hung upside down from the rafters. Funanani testified that as he was escaping he saw the deceased lying on the ground whilst accused 2 was standing next to him. He was later separated from the deceased. He saw the deceased walking with great difficulty whilst being taken to another room. Accused 7 was physically supporting and helping him to walk. According to Funanani all the accused including the appellant assaulted him and the deceased. He later consulted with Dr Mutshembele who treated him for the injuries he had sustained from the assault. According to Funanani, the accused were drinking intoxicating liquor whilst assaulting them.

[4] Dr Mutshembele testified and elaborated on multiple soft tissue injuries which he observed on Funanani during his medical examination. His professional opinion is that 'these injuries were consistent with the injuries that were caused by a blunt object'.

[5] I pause to state that the appellant made formal admissions in terms of s 220 of the Criminal Procedure Act 51 of 1977 (CPA) where he admitted having 'kicked Tshifaro [the deceased] in order to induce him to disclose information pertaining to his involvement in the theft of electric cables around Tshisaulu area'. The appellant did not testify in his defence but testified in mitigation of sentence.

[6] Before us, the appellant's counsel's main attack against the judgment of the court below was that the appellant did not get a fair trial. This was premised on the fact that all seven accused were represented by one counsel. The contention is that their common counsel was conflicted as accused 2 in particular implicated the appellant during his testimony. It was contended further that the appellant was unfairly denied the right to testify due to this conflict of interest. This resulted in the appellant's version not being put before the court below, so the contention went.

[7] On the other hand, the respondent's counsel supported the convictions as being unassailable. He contended that the state's evidence was clear and overwhelming. Furthermore, he submitted that the appellant placed himself at the scene of crime and further admitted participating in the assault on the deceased. Based on this, he contended that the appellant's failure to testify to dispute the state's version was fatal to his case. Regarding the appellant's role, he submitted that by being at the crime scene and participating in the assault,

irrespective the role he played, he associated himself with the entire assault, and thus made himself guilty by common purpose.

[8] As I indicated earlier, the appellant's main contention is that he did not receive a fair trial on the basis that all seven accused were represented by one counsel. The appellant contends that this made it very difficult for the same counsel to effectively cross-examine accused 2 who implicated him. A second string to his bow was the contention that the appellant was ill-advised by his counsel not to testify in his defence. As a result, his version was never put before the court below, resulting in an unfair trial.

[9] The record does not bear out these complaints. It is correct that Mr Mushasha represented all the accused. As he was on a private and not on a Legal Aid Board brief, it follows that he was counsel of choice by the accused. This is in line with s 35(3) (*f*) of the Constitution which states that 'every accused person has a right to a fair trial, which includes the right to choose, and be represented by a legal practitioner.' Once an accused person has chosen his or her legal representative, he or she enters into what is called a lawyer-client relationship. This relationship is unique. It requires the lawyer to receive full and clear instructions from his or her client which include the client telling the lawyer the truth about what his or her case is. Whatever the client discloses to the lawyer is privileged and can only be disclosed with the client's consent. No person, including the court can insist on such lawyer-client confidential discussions being disclosed. This will enable the lawyer to determine and advise the client accordingly.

[10] Ordinarily, in the course of consultation, both the lawyer and the client will discuss and agree on the strategy to be adopted during the trial. Once this has happened, the conduct of the trial is left in the hands of the lawyer, who

presumably will act on the client's mandate. Should the lawyer either ignore or go beyond or even against the client's mandate, the client is free to take remedial actions which he or she may find appropriate, which may include correcting the lawyer or at worst, terminating the lawyer's mandate. Because of the confidentiality of the consultations between the lawyer and the client, a court will not know if and when the lawyer is not acting in accordance with the mandate. It is the accused who will know. A court will only know if an accused brings it to its attention. Even then a court has very limited powers to intervene, save where it is clear that an injustice is happening to the accused. There was absolutely no indication in this case that the appellant was not satisfied with the manner in which Mr Mushasha conducted his trial. In fact all evidence points to the contrary.

[11] In this matter, Mr Mushasha received instructions from the appellant. He executed his mandate. Throughout the trial, the appellant never complained about how he conducted the trial. As part of their strategy they had agreed with him that only accused 2 would testify. Mr Mushasha explained the strategy and the rationale behind it to all the accused including the appellant. They all accepted his advice. It follows that they made an informed decision. Ordinarily, no court can circumvent this and interrogate the accused about the wisdom of his or her choice. I venture to say that a court can do this in exceptional circumstances. Such as where the lawyer is patently incompetent and there is a real indication that the decision is ill-considered and might result in a failure of justice. Fortunately, that is not the case in this matter. In this case, the appellant was satisfied with the manner in which Mr Mushasha conducted the trial. This is demonstrated by the fact that even after he withdrew from the case due to lack of funds, the appellant and the other accused raised money and reinstated him. Why is the appellant complaining now? This is clearly the case where an accused person is satisfied with the strategy adopted by his or her lawyer. Once

the strategy has backfired as it did here, such an accused cannot be allowed to try to avoid the unpleasant results of the trial by imputing the blame to his or her lawyer. This is an age-old trick often adopted by disgruntled accused. Such a stratagem can never be allowed to undermine the administration of justice by setting aside convictions which are proper. It follows that this ground has no merit.

[12] I am fortified in this finding by two important events which occurred during the trial and which undermine the appellant's complaint about his counsel. Firstly, on 15 March 2010, some time before the trial started, Mann AJ asked Mr Mushasha, who appeared for all seven accused if there is no conflict amongst any of the seven accused which may necessitate the obtaining of the services of another counsel to represent some of the accused. He responded and assured the court that there is no such conflict. Notably, none of the accused, including the appellant raised any objection to this. Secondly, during the trial Mr Mushasha withdrew from defending all the accused due to lack of funds. The accused requested the court to grant them a postponement to enable them to raise funds as they preferred to retain Mr Mushasha as their counsel. Suffice to state that after they had resolved their financial difficulties, Mr Mushasha was placed on brief to continue defending all seven of them, including the appellant. Why would they have him reinstated if they were not satisfied with how he conducted their defence? Thirdly, the record shows that at the end of the cross-examination of the state witnesses, Mr Mushasha would, with the court's leave, approach all seven accused to verify if he had covered all relevant aspects of the case in his cross-examination. None of the seven accused, including the appellant ever indicated their dissatisfaction with the manner in which Mr Mushasha cross-examined the state witnesses. The facts of this case show indubitably that the appellant was either satisfied with the manner in which Mr

Mushasha conducted his trial or acquiesced therein. *S v Louw* 1990 (3) SA 116 (AD).

[13] It is worth noting that the appellant is not illiterate or unsophisticated. At the time of the trial, he was busy with his thesis research for his honours degree on microbiology at the University of Venda (Univen). This would qualify him for MSc (Master of Science). It is not the appellant's case that he did not follow the court proceedings. With his level of education, it is unthinkable that he did not appreciate the importance of the decisions which he took regarding his choice of counsel. It is axiomatic that counsel acts on instructions from his or her client and never on his own. Based on this, I accept that whatever Mr Mushasha did, he did it with the informed consent of the appellant. This explains why throughout the trial the appellant never complained to the court regarding any decision which Mr Mushasha took. The truth is that whatever strategy Mr Mushasha opted for was discussed and agreed upon with all the accused, including the appellant. This case is different from what happened in *S v Majola* 1982 (1) SA 125 (A) where the appellant had expressed disagreement with the conduct of his case by his counsel during the trial. Faced with a similar problem, this Court held in *R v Matonsi* 1958 (2) SA 450 (AD) at 457F that 'since the appellant took no steps to withdraw his counsel's mandate and expressed no disagreement with the conduct of his case until after the verdict had been given the trial was regular and the correctness of the verdict cannot be challenged on appeal to this Court'. It suffices to state that by parity of reasoning this appeal must suffer the same fate.

[14] I now turn to deal with the appeal against the sentence. The appellant's counsel submitted that, although the assault was brutal, concerted, prolonged and perpetrated by a group of men, it was not so serious as to call for life imprisonment. However, he conceded correctly in my view that, having taken

all the circumstances into account, a sentence of 20 years' imprisonment in respect of murder would be appropriate as it would punish the appellant appropriately whilst reflecting the gravity and seriousness of the offence, particularly as this amounted to self-help. He did not attack the 3 years' imprisonment imposed for the assault with intent to do grievous bodily harm.

[15] The court below sentenced the appellant in terms of the Criminal Law Amendment Act 105 of 1997. This is notwithstanding the fact that neither in the indictment nor at any stage during the trial, was any mention made of the state's desire to invoke the minimum sentence prescribed in the Act. Such a step is improper and impermissible as the appellant had not been pre-warned of the applicability of the minimum sentence regime. See *S v Ndlovu* (75/2002) [2002] ZASCA 144; 2003 (1) SACR 331 (SCA); *S v Legoa* (33/2002) [2002] ZASCA 122; 2003 (1) SACR 13 (SCA); *S v Makatu* (245/05) [2006] ZASCA 72; 2006 (2) SACR 582 (SCA).

[16] Given the peculiar circumstances of this case, I find a sentence of imprisonment for life imposed on the appellant shockingly inappropriate. However, it cannot be gainsaid that the appellant made himself guilty of a serious offence. Any offence which involves a deliberate infliction of harm to another is serious. It is a violation of his or her right to his or her dignity and physical integrity. What makes it even more serious is that it was perpetrated by a group who assaulted the appellant and the deceased randomly. They used an electric cable which in itself can inflict serious injuries. The assault was prolonged, indiscriminate, brutal and barbaric. The medical report shows that the deceased died of serious injuries to his body, whilst Funanani suffered serious injuries all over his body.

[17] The reason advanced for this wanton assault on the deceased and Funanani is that accused 2 had suffered theft of his cables at his mill. The deceased and Funanani were the suspects. It is clear that accused 2 was aggrieved and angry because of the loss he had suffered. His co-accused including the appellant were merely assisting him to investigate the theft and apprehend the culprits. However, their biggest mistake is that once they found them, they did not take them to the police station to allow the criminal justice system to take its course. They attempted to turn themselves into police officers, prosecutors and a court. In simple terms, they took the law into their own hands. Needless to state that we are living in a constitutional democracy underpinned by the rule of law and the principle of legality. Section 34 of the Constitution guarantees everybody the right of access to justice. Citizens must learn to respect and abide by the law. It is reprehensible for the appellant and his co-accused to have taken the law into their own hands. Our constitutional architecture has no room for self-help. See *Lesapo v North West Agricultural Bank & another* (CCT 23/99) [1999] ZACC 16; 2000 (1) SA 409 (CC); (1999 (12) BCLR 1420).

[18] The offences for which the appellant has been convicted call for a severe sentence. Both counsel for the appellant and the state suggested a sentence of 20 years' imprisonment as being balanced and appropriate. I agree. I think that a sentence of imprisonment for 20 years' although not necessarily destroying the appellant, will punish him effectively and, importantly will cater for society's outrage at such conduct, lest we create the impression, unwittingly that owners whose property has been stolen may take the law into their own hands with impunity. This will be a fertile ground for vigilantism to thrive – a recipe for lawlessness.

[19] On the other hand, I do not think that the sentence of 3 years imprisonment for assault with intent to cause grievous bodily harm on Funanani, is shockingly inappropriate. None of the counsel argued to that effect. However, sight cannot be lost of the fact that essentially the two crimes constitute one continuous act committed at the same place, same time, by the same accused and for the same reason. Although it is correct to punish him separately for the two offences, the cumulative sentence of 23 years' imprisonment induces a sense of shock. Justice requires that it be tempered. I think that the severity of the sentence can be ameliorated by ordering the sentence of 3 years' imprisonment to run concurrently with the 20 years' imprisonment imposed for murder in terms of s 280 of the CPA.

[20] In the result, the following order is made:

a) The appeal against convictions is dismissed.

b) The appeal against the sentence imposed succeeds partially and to the following extent:

'The sentence of life imprisonment in respect of murder is set aside and replaced with a sentence of 20 years' imprisonment. The sentence of 3 years' imprisonment in respect of the assault with intent to cause grievous bodily harm is confirmed. In terms of s 280 of the Criminal Procedure Act 51 of 1977, the sentence of 3 years' imprisonment is ordered to run concurrently with the sentence of 20 years' imprisonment in respect of murder.'

c) The sentence is antedated to 22 September 2011.

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L O Bosielo
Judge of Appeal

APPEARANCES:

For Appellant:	LM Manzini
	Instructed by: Legal Aid South Africa, Polokwane Legal Aid South Africa, Bloemfontein
For Respondent:	A Madzhuta
	Instructed by: Director Public Prosecutions, Thohoyandou Director Public Prosecutions, Bloemfontein