



**THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT**

Case No: 300/2013

Not reportable

In the matter between:

LEEROY BENSON

Appellant

and

THE STATE

Respondent

Neutral citation: *Benson v the State* (300/13) [2014] ZASCA 26 (28 March 2014)

Coram: Ponnann, Maya and Willis JJA

Heard: 20 March 2014

Delivered: 28 March 2014

Summary: Evidence – murder – confusing and contradictory – conviction not justified.

ORDER

On appeal from: **Western Cape High Court, Cape Town (Griesel J and Dolamo AJ sitting as court of appeal):**

- 1 The appeal is upheld.
 - 2 The order of the high court is set aside and the following is substituted therefor:
‘The conviction and sentence on the charge of murder are set aside.’
-

JUDGMENT

Willis JA (Ponnan and Maya JJA concurring):

[1] The appellant was arraigned before the regional court in Somerset-West on a charge of murder. He was found guilty and sentenced to 12 years’ imprisonment, of which five years were suspended on appropriate conditions, the magistrate having found that there were substantial and compelling circumstances which justified a departure from the prescribed minimum sentence provided for in the Criminal Law Amendment Act 105 of 1997.

[2] The appellant applied to the magistrate for leave to appeal against his conviction only, which leave was granted. Although the Western Cape High Court (Griesel J and Dolamo AJ) dismissed the appeal, it granted the appellant, on application, leave to appeal further to this court. The application for leave to appeal was supported by the State. The appellant has been on bail throughout the proceedings, including the appeals. Bail was originally set

at R500 but on granting the appellant leave to appeal to this court the amount was increased to R1000.

[3] It is common cause that Ricardo Andrews (the deceased) died at Goniew Park, Villiersdorp either late at night on Friday, 6 October 2007 or in the early hours of the morning on Saturday, 7 October 2007 as a result of a head injury caused by the application of a blunt object to his skull with force. It is also common cause that both the deceased and the appellant had attended a dance at the community hall, in the company of others, on the night in question. Alcohol had been liberally consumed by those who attended the event, including the deceased.

[4] Nehemiah Marthinus, a witness for the State, said that fights broke out among 'tjommies' (friends) at this function. There were two of these fights, the second being a follow-up to the first. The first fight took place outside the hall but within the precinct thereof, the second in a street nearby. Mr Marthinus said that the deceased had been involved in both fights and that his death ensued as a result of the second. According to the admitted post mortem report, there was a single injury to the head of the deceased, from which injury he died. Mr Marthinus had already consumed four quarts of beer in the time immediately preceding the fatal incident. Mr Marthinus denied that he had been under the influence of alcohol.

[5] Mr Marthinus described how the appellant had been sitting in a motor vehicle outside the function for some time and had driven off later in the evening with one 'Papskep'. This occurred after the first fight had taken place. At this time Mr Marthinus said that he also left the party on foot. He continued to say in his evidence that while walking along the road he encountered an altercation between the deceased and others and that there were about six or seven persons who participated in this fracas and that the appellant who had, by this time, alighted from his motor vehicle, joined the fray.

[6] Mr Marthinus said that he saw the appellant hit the deceased once on the head with a short, fat object that appeared to be black in colour,

whereupon the deceased fell to the ground. He said the instrument in question appeared to have been made of hard rubber or plastic. This contrasts with the allegation in the charge sheet that a knobkierie had been used. Mr Marthinus, who had last seen the deceased lying on the ground said that he then departed from the scene, together with the appellant, in the motor vehicle. Mr Marthinus said that Mr Lesley Dick drove off in his own vehicle. Mr Lesley Dick, when testifying on behalf of the State, said that he, together with Mr Marthinus and the appellant, drove off in his, Mr Dick's, vehicle. Mr Dick did not see anyone strike the blow to the deceased's head.

[7] Ms Elmarie Jantjies, another State witness, who had also attended the party, testified for the State, said that she had seen the appellant strike the deceased about three times. She described the instrument as a 'stok voorwerp'. She said that she could not describe precisely what type of object it was that the appellant had used. According to Ms Jantjies, two of these blows hit the deceased on his head. She said that she and her friend Hema, (a reference to Mr Marthinus), had tried to intervene to prevent the appellant from hitting the deceased but the appellant had successfully resisted them.

[8] The appellant, when he gave evidence said that Mr Marthinus had struck the deceased on the head with a shifting spanner. The appellant added that Mr Dick had joined in the assault on the deceased by kicking him in the ribs. This version was at no stage in the trial put to Mr Dick.

[9] After the appellant had closed his case, there had been an adjournment. When proceedings resumed, the appellant had obtained the services of a different legal representative. The appellant's new legal representative applied for leave to re-open his case in order to call Ms Louise Louw in his defence. The magistrate acceded to this request. In her evidence-in-chief, Ms Louw said that Mr Marthinus had hit the deceased on the head with what appeared to be a shifting spanner. Under cross-examination, she said that she had seen the appellant hit the deceased. She contradicted herself on this aspect. When she had initially been approached by the police to tell them what she had seen during the incident in which the deceased had

been killed, she had refused to do so. She said then that she had been under the influence of alcohol at the time when the deceased had been assaulted.

[10] There are discrepancies in the versions given by the State witnesses. For example, Mr Marthinus and Mr Dick gave different versions as to how, precisely, the appellant had left the scene after the deceased had received the fatal blow; Mr Marthinus described the instrument used by the appellant to hit the deceased as appearing to have been made of hard rubber or plastic, Ms Jantjies described it as resembling a 'stok voorwerp'. Ms Jantjies, unlike the other State witnesses, made no mention of any stones having been thrown during the fights in question.

[11] The backdrop to the scene where the killing of the deceased took place presents a picture that was tense and fast-moving, exacerbated by occurring during the diminished visibility of the night. It was also an event at which young people had consumed vast amounts of liquor. Counsel for the State conceded that from the record it could not be deduced who did what, to whom and when.

[12] The magistrate unfortunately descended into the arena and even put questions to the appellant about a statement which he had made shortly after his arrest which had not been adduced as evidence during the State's case. The appellant's first legal representative in the early stages of the trial was clearly inexperienced and failed to perform basic duties like putting the version of the appellant to the State's witnesses. When the appellant, for readily understandable reasons, had appointed new counsel and sought an opportunity to cross-examine the State's witnesses, inter alia, for the purpose of testing the appellant's version against this, the magistrate disallowed this. The fact that the appellant was denied a procedurally fair trial might, in itself, have justified the intervention by this court in respect of the conviction. It is fortunately not necessary to make any firm finding in that regard.

[13] The primary difficulty for the State, as counsel on its behalf fairly and correctly conceded in this court, lies in the evidence itself. It was confused

and, on the essential elements of the crime, contradictory. When the evidence is viewed in its totality, there is too much uncertainty surrounding the critically important facts to allow a court safely to convict and, for this reason alone, the conviction cannot stand.

[14] The order of this court is the following:

- 1 The appeal is upheld.
- 2 The order of the high court is set aside and the following is substituted therefor:
‘The conviction and sentence on the charge of murder are set aside.’

N P WILLIS
JUDGE OF APPEAL

APPEARANCES:

For the Appellant:

R Kassel

Instructed by:

Kassel Sklaar Cohen & Co, Cape Town

c/o Symington & De Kock, Bloemfontein

For the Respondent:

S F A Raphaels

Instructed by:

The Director of Public Prosecutions, Cape
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