THE SUPREME COURT OF APPEAL
REPUBLIC OF SOUTH AFRICA

JUDGMENT

NOT REPORTABLE
Case number : 433/06

In the matter between :

MINNELDHEVI IRIS NAIDOO **APPELLANT**

and

THE STATE **RESPONDENT**

CORAM : **BRAND, LEWIS *et* COMBRINCK JJA**

HEARD : **4 SEPTEMBER 2007**

DELIVERED : **14 SEPTEMBER 2007**

Summary: Criminal Procedure – plea of guilty to attempted murder – Magistrate on the facts correct in not invoking s 113(1) of the Criminal Procedure Act

Neutral citation: This judgment may be referred to as *Naidoo v The State* [2007] SCA 102 (RSA)

COMBRINCK JA/

COMBRINCK JA:

[1] This is an unusual case of a legally represented accused who pleaded guilty to a charge of attempted murder, made a full statement in terms of s 112(2) of the Criminal Procedure Act 51 of 1977 admitting all the essential elements of the offence, was convicted and then appealed against her conviction. The basis of the appeal is that as a consequence of evidence which emerged during the sentencing phase of the trial it should have appeared to the regional magistrate that the appellant may have a valid defence to the charge and she should accordingly have invoked the provisions of s 113(1) of the Act.

[2] The appellant, a 35 year old widow, was charged in the Regional Court sitting at Verulam, Kwa-Zulu Natal with the crime of attempted murder. The charge sheet recorded that she was alleged to have 'incited/instigated/procured a black male, Bonginkosi, to shoot the complainant (Selvin Pillay, also referred to in evidence as Roland Chetty) which would have resulted in his death and with intent to murder him'. I shall refrain from commenting on the drafting of this document.

[3] On arraignment the appellant pleaded guilty and her attorney then read the following statement in terms of s 112(2) of the Act into the record:

'1.

I, the undersigned,

MINNELDHEVI IRIS NAIDOO

Confirm that I know and understand the charge that is being preferred against me as contained in the charge sheet.

2.

I wish to plead Guilty to the charge of Attempted Murder, freely and voluntarily and without any threat or promise being made to me.

3.

The facts upon which I plead guilty are as follows:

3.1 on or about April 2003, I received a telephone call from my youngest sister Visparani Chetty.

3.2 Visparani was extremely upset and told me that she had had an argument with her husband Roland Chetty and that he had assaulted her. She also asked to see me.

3.3 I immediately proceeded to her house. I was worried about her as this was not the first time she had been assaulted by Roland.

3.4 When I arrived at Visparani's house, I calmed her down and we spoke about what had happened. She told me that she did not want Roland in her life anymore because she was tired of his behaviour.

3.5 I then told Visparani that I knew of someone who could help up with this problem and she told me to contact the person.

3.6 I then phoned Bonginkosi who used to come to our area quite often selling various items. I explained to him that Visparani was having problems with her husband and that we needed his assistance to get rid of her husband.

3.7 By getting rid of Roland, I mean that Bonginkosi must kill Roland.

3.8 Bonginkosi agreed to do so for a fee of R10 000.00 which was payable after Roland was killed. No amount would be paid before the killing.

3.9 It was also agreed with Bonginkosi that he would kill Roland by shooting him. This would be done at Roland's house when Roland returned from work sometime between 18h00 and 18h30.

3.10 After my conversation with Bonginkosi I then telephoned Hollard Life. I proceeded to take out a life insurance policy on Roland's life. The beneficiary on the policy was Visparani.

3.11 Approximately two weeks later, I went to Absa Bank, Phoenix Plaza. I deposited a sum of R124.00 into Roland's account so that the debit order for the insurance policy could go off. I confirm that the account details were given to me by Visparani.

3.12 A few days later, I went to Visparani's house with my friend Anand.

3.13 I confirmed with her that I had paid the amount into Roland's account and that I was waiting for Bonginkosi to confirm the date that he would kill Roland.

3.14 I did not receive confirmation of the date from Bonginkosi but a few days later I heard that there had been a shooting incident at Visparani's house and that Roland had been shot – but had not died as a result thereof.

3.15 I later learnt that Roland had sustained an injury to the shoulder where the bullet had grazed him.

3.16 I admit that I was aware at all material times that my actions were wrong and unlawful and that I had no right to try and kill Roland.

3.17 I also admit that due to his treatment of my sister, I intended to kill him by contracting Bonginkosi to shoot him.

3.18 I confirm that I have no defence in law for my actions.

Dated at Verulam on this the 14th day of July 2004.'

[4] The magistrate recorded that she was satisfied that all the essential elements of the charge had been admitted and duly convicted the appellant. The court called for a probation officer's report and after receipt of such report and

hearing evidence in mitigation of sentence, the magistrate sentenced the appellant to five years' imprisonment in terms of s 276(1)(i) of the Act. The appellant appealed to the full bench of the Natal Provincial Division against her conviction and sentence (leave was refused by the magistrate but granted on petition by the Judge President). The appeal was unsuccessful and with leave of the full bench the appellant now appeals to this court.

[5] The basis of the appeal as formulated by counsel for the appellant is the following: The evidence of the probation officer and that of the appellant's sister, Visperani (which appears to be the correct spelling of her name), led in mitigation of sentence disclosed that the appellant may have a defence to the charge she faces. That being so, the magistrate should have invoked the provisions of s 113(1) of the Act and recorded a plea of not guilty and required the State to proceed with its case. The magistrate not having done so, the appellant is entitled to an order from this court referring the matter back in terms of s 312 of the Act with the instruction that s 113(1) be invoked.

[6] The passages in the evidence relied upon for these submissions are the following: First, as far as the probation officer is concerned, the following paragraphs in her report:

'(vii) The accused discussed her plans with one Bonginkosi who was a vendor. She offered him R10 000 to execute the plans in the form of a hijacking. Payment would be made upon receipt of the insurance payout.

(vii) The accused reported that approximately 2 days before the execution of the plans she and her sister decided to dispense with the plans, however, they could not contact Bonginkosi.'

Secondly, in the evidence of the appellant's sister, the following passages:

'MS NAIDOO [the defence attorney] Is it also correct that you knew that she was arranging the hitman? --- Yes, but we did stop it.

Yes, now obviously an attempt was made on your husband's life, so what do you mean when you say you did stop it? --- From the beginning I did agree to it and before the attempt could be carried out I told her to stop it but she said that she couldn't get in touch with them.

So she did try to stop it? --- Ja.'

And:

'And when she suggested to you "let's kill your husband", what was your response? --- I was reluctant at first and over a period of time I adjusted to it. I told her to go ahead but I did stop it as well.

You were reluctant at first, in what manner did you display your reluctance to her? --- I told her no and I told her like no.'

[7] The possible defences arising from these passages, submitted counsel, are twofold. The first is that the possibility exists that Bonginkosi, contrary to the agreement with the appellant, on his own volition went ahead and attempted to shoot and kill the complainant. That he would act in this manner was not subjectively foreseeable by the appellant. This argument was premised on the supposition that it had been agreed between Bonginkosi and the appellant that before the former would go ahead and carry out his part of the bargain, ie, shooting the complainant, the latter had to take out the insurance policy on the complainant's life and then confirm with Bonginkosi that she had done so. Only then would a date for the execution of the complainant be agreed upon. Asked where evidence was to be found for this version of the agreement between the appellant and Bonginkosi, counsel conceded that there was no direct evidence but submitted that it be found as a necessary inference from the facts that this was what was agreed upon.

[8] I am at a loss to understand how the version of the contract put forward by counsel can be gleaned from the facts, even by way of implication. Neither in the s 112(2) statement, nor in the report of the probation officer, is there any suggestion that Bonginkosi was to await confirmation of the fact that the insurance policy had been taken out before proceeding with the plan. Why, one asks rhetorically, after taking out the policy and depositing the money to cover the first premium, did the appellant not telephone Bonginkosi and tell him to go ahead, if that was their agreement? From the time frames revealed in the probation officer's report we know that the appellant only purported to withdraw from the conspiracy two days before the actual shooting took place. She had by then telephonically taken out the policy and paid the premium two weeks later. Everything was therefore in place and yet the appellant didn't phone Bonginkosi

to confirm that he was free to go ahead. The reason is obvious. There was no such agreement.

[9] The second defence which counsel submitted may have been open to the appellant is that on the evidence referred to she withdrew from the common purpose at a stage before her actions became in law an attempt to commit the offence. The full bench found that the appellant's actions before she purported to withdraw, amounted to a completed attempt and her so-called withdrawal was irrelevant. Counsel, with reference to a number of decided cases, attacked this finding. It is unnecessary to enter into the debate of when an attempt in law is complete on a charge of incitement and procurement. I say this because on the evidence relied upon by counsel it cannot be said that there was a withdrawal by appellant from the common purpose. The appellant had set in motion a series of events which would have culminated in the death of the complainant. She had hired Bonginkosi for a fee to shoot and kill her intended victim, she had identified the victim, where he lived and what time he would be at home. She took out the insurance policy and paid the premium to ensure that she would be able to pay the assassin once the deed had been done. All this had taken place before she purported to withdraw. What evidence is there then that she attempted to interrupt the chain of events which she had set in motion? In her very full s 112 (2) statement there is no suggestion that she withdrew or attempted to withdraw from the common purpose. On her sister's evidence it was she, Visperani, who decided not to go ahead. The only evidence that the appellant decided to withdraw is to be found in a quoted paragraph from the probation officer's report. That only records that the appellant and her sister decided not to go ahead with the plan but could not contact Bonginkosi. Apart from the fact that there is a singular lack of detail as to what steps were taken to try and get hold of Bonginkosi, the least one could have expected, if there had been a genuine desire to withdraw, was that the appellant would warn the complainant of the imminent danger. The time and place had been agreed where the shooting was to take place. A timeous warning to the complainant would have averted the subsequent attempt on his life. It may also be noted that the purported attempt to contact Bonginkosi to call off the plan, gives the lie to the first defence raised. If, as was submitted, the execution of the plan by Bonginkosi was conditional, as

outlined above, what was the necessity of attempting to contact Bonginkosi? He was not supposed to go ahead, so it was suggested, until the insurance policy was in place.

[10] In summary, in my view, there is little or no evidence of a withdrawal from the common purpose on the part of the appellant which would have warranted the magistrate invoking the provisions of s 113(1) of the Act.

[11] On the appeal against sentence, counsel submitted that the magistrate had erred and misdirected herself, that this court was accordingly at large to interfere and that an appropriate sentence would be one in terms of s 276(1)(h) of the Act. The first misdirection claimed by counsel was that the magistrate made a finding that the appellant was motivated by greed and when there was no evidence to support this finding. The beneficiary in terms of the policy was Visperani and she alone stood to gain. The magistrate did not find that the appellant was motivated by greed. She said in her judgment on sentence that there was an element of greed present. She got this from the probation officer's report in which it was recorded that there was an element of monetary gain from the complainant's death. I do not see how this can be construed as a misdirection. The second misdirection claimed was that the magistrate failed to take account of the fact that the appellant was not a danger to society. Counsel appears to have overlooked the following passage in the magistrate's judgment:

'The Court must also consider that you have taken responsibility for what you have done and in being first of all coming out clean about this from the outset, and that is an indication that you want to take responsibility, that the prognosis, so to speak, or the chances of you actually rehabilitating are quite strong and that means you don't have to be forced to rehabilitate. It means that you can rehabilitate and that is good for society. It means that you would not be out there and become a risk for the rest of the people who would be concerned in this. The whole community would be at risk if you are not capable of rehabilitation and this is a crime, so naturally society has to be concerned about what the Court does about your sentence today.'

Counsel had to abandon reliance on the alleged third misdirection, namely that the magistrate had not taken into account that the complainant had forgiven the appellant after he was referred to a passage in the judgment where the magistrate clearly did have regard to this fact. Lastly, it was claimed that no weight was attached to the purported withdrawal from the common purpose by

the appellant. As pointed out above, there was little or no evidence of a genuine withdrawal and the magistrate cannot be faulted for not taking this into account. There was, in my view, no misdirection on the part of the magistrate. That being so, it is trite that this court will not interfere.

[12] I agree with the sentiments of the court *a quo* that the magistrate erred on the side of leniency when imposing sentence. The aggravating features far outweigh the mitigating factors. To hire an assassin to kill a family member for reward, surreptitiously take out a policy on his life and pay the first premium and then allow the execution to go ahead, is indeed a horrendous crime. A far more severe sentence was called for.

[13] The appeal, both against conviction and sentence, is dismissed.

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P C COMBRINCK
JUDGE OF APPEAL

Concur:

BRAND JA
LEWIS JA