THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable
Case No: 196/2017

In the matter between:

DIRECTOR OF PUBLIC PROSECUTIONS GAUTENG DIVISION, PRETORIA **APPELLANT**

and

CORNELIUS JOHANNES HEUNIS **RESPONDENT**

Neutral citation: *DPP v Heunis* (196/2017) [2017] ZASCA 136 (29 September 2017)

Coram: Bosielo and Seriti JJA and Molemela, Tsoka and Gorven AJJA

Heard: 29 August 2017

Delivered: 29 September 2017

Summary: Criminal Law and Procedure: appeal by NDPP against conviction in terms of the Criminal Procedure Act 51 of 1977 (CPA): the respondent charged with murder read with s 51(2) of the Criminal Law Amendment Act 105 of 1997: found guilty of culpable homicide based on his statement in terms of s 115 of the CPA: reserved question of law: probative value of a statement made in terms of s 115(2)(*a*) of the CPA.

ORDER

On appeal from: The Circuit Court, Gauteng Division, Pretoria, sitting at Nelspruit (Mabuse J sitting as court of first instance):

1 The appeal is upheld.

2 The conviction of culpable homicide and the sentence of 8 years' imprisonment wholly suspended for 5 years on suitable conditions as imposed by the trial court is set aside and replaced with the following: 'The accused is found guilty of murder'.

3 The matter is remitted to the trial court for the reconsideration of the sentence in the light of the new conviction.

JUDGMENT

Bosielo JA (Seriti JA and Molemela, Tsoka and Gorven AJJA concurring):

[1] This is an appeal by the appellant pursuant to the reservation of questions of law in terms of s 319 of the Criminal Procedure Act 51 of 1977 (CPA). The appeal is with the leave of the court below.

[2] A brief factual background to this case is as follows: the respondent was charged with murder, the state alleging that he unlawfully and intentionally killed one Michelle Curgenven (the deceased) by shooting her with a firearm on 4 July 2013 in Nelspruit. Having pleaded not guilty to the charge, the respondent tendered a comprehensive plea explanation in terms of s 115(2)(*a*)

of the CPA wherein he set out the basis of his defence. Essentially, the respondent admitted that he shot and killed the deceased but averred that it was negligent and not intentional. He also gave an account of how the fatal shooting came about. The admissions contained in this explanation were formally recorded as admissions in terms of s 220 of the CPA. In addition, the respondent made other formal admissions in terms of s 220 of the CPA.

[3] The deceased was shot whilst occupying the driver's seat of her vehicle which was parked in the garage of her home. Her domestic worker was inside the deceased's house, but did not hear a shot. The admissions made by the respondent included that he shot the deceased once and that she died as a result. The respondent is thus the only person who could explain how this took place. He elected not to testify.

[4] The crucial evidence for the state for the purposes of this appeal is that of Captain Christiaan Mangena (Mangena), the police forensic expert. The aspect on which this appeal largely revolves related to his opinion arising from the path of the bullet which killed the deceased. The bullet entered at the base of her left breast on her left side. It exited just below her shoulder blade on her right side. It then made a hole in the driver's door of the vehicle. The trajectory clearly showed that, at the time she was shot, she was facing forward. His unchallenged evidence was that it was not possible for her to have pushed down the firearm held by the respondent in the position described by him in his s 115 statement. This much was conceded in argument before us.

[5] In his evaluation of the evidence, the trial judge correctly characterised the issue in this matter as follows:

'The issue between the parties in [t]his matter is whether the accused shot the deceased as he set it out in his plea explanation or whether he had the necessary intention to kill her as set out in the indictment.'

[6] Having analysed the state's version together with the appellant's s 115 statement, the trial court found as follows:

'In the circumstances, the court will not be justified to find the accused guilty of murder on the facts before it but instead in accordance with section 115 of the CPA the accused should be convicted of culpable homicide as he has pleaded in terms of the said section and that is the conviction of the accused in this matter.'

[7] Based on the above reasoning, the trial court found the appellant guilty of culpable homicide and not murder. It is clear from the reasoning of the trial judge that his conviction of the respondent on culpable homicide and not murder is based solely on the respondent's s 115 statement. The trial judge rejected the evidence of the police forensic expert without giving any reasons. Aggrieved by this finding, the appellant applied for the reservation of questions of law in terms of s 319 of the CPA, which application was duly granted by the court below. Hence this appeal.

[8] The appellant's questions of law that were reserved by the trial court are:

'1. It is respectfully submitted that the trial court misdirected itself in finding that the appellant had a duty to inform the respondent before plea that, the facts contained in the plea explanation in terms of section 115 of Act 51 of 1977, was not sufficient and/or adequate.

2. It is further respectfully submitted that the trial court erred in expecting of the expert witness, Capt. Mangena (ballistic expert) to draw an inference on the guilt of the respondent, and then to lean heavily on this inference in determining the guilt of the appellant.

3. It is also respectfully submitted on behalf of the appellant that the trial court misdirected itself in giving too much probative value to the plea explanation of the appellant (in terms of section 115 of Act 51 of 1977).

4. It is respectfully submitted that the trial court misdirected itself in not drawing any inference from the failure of the appellant to forward a detailed, factual explanation. No such factual, detailed explanation was forwarded in cross-examination, neither did the appellant testify under oath.
5. It is respectfully submitted that the trial court misdirected itself in not drawing an adverse inference from the failure of the respondent to testify; in the face of strong circumstantial evidence.
6. It is respectfully submitted that the trial court misdirected itself in applying the legal principles pertaining to circumstantial evidence.'

[9] As indicated above, this appeal comes before us by way of s 319 of the CPA which provides as follows:

'(1) If any question of law arises on the trial in a superior court of any person for any offence, that court may of its own motion or at the request either of the prosecutor or the accused reserve that question for the consideration of the Appellate Division, and thereupon the first-mentioned court shall state the question reserved and shall direct that it be specially entered in the record and that a copy thereof be transmitted to the registrar of the Appellate Division.
(2) The grounds upon which any objection to an indictment is taken shall, for the purposes of this section, be deemed to be questions of law.'

[10] As it is clear from this section, the appellant's right of appeal is not a general right but is limited to the questions of law reserved. See *Director of Public Prosecutions, Gauteng v Pistorius* [2015] ZASCA 204;2016 (2) SA 317 (SCA) para 24.

[11] On appeal before us, both counsel confined themselves to the approach adopted by the trial court to the respondent's s 115 statement. The vexed question is what weight to accord to the exculpatory parts of a s 115 plea explanation.

[12] The part of the respondent's s 115 statement that is relevant for the purpose of this appeal reads as follows:

'24.1 Ek en die oorledene is toe saam na die voertuig waar dit in die motorhuis geparkeer was. Sy het aan die bestuurskant ingeklim en ek het aan die passasierskant voor langs haar ingeklim en die skootrekenaarsak met die vuurwapen op my skoot gehou.

24.2 Ek het die vuurwapen uit die skootrekenaarsak uitgehaal en vir die oorledene gesê dat ek my eie lewe gaan neem. Die oorledene het vir my gesê om die vuurwapen weg te sit.

24.3 Ek het na haar gedraai en die vuurwapen onder my ken gehou. Ek het my vinger op die sneller van die vuurwapen gehad.

24.4 Die oorledene het by my gepleit om dit nie te doen nie. Ek het die vuurwapen laat sak en vir die oorlede gevra "maar hoekom nie"?

24.5 Die oorledene het toe my hand waarin die vuurwapen was probeer afdruk. Op dié stadium het 'n skoot afgegaan.'

[13] It is clear from paragraphs 24.1 to 24.5 of the respondent's s 115 plea explanation that he had admitted the following essential facts: that he was seated in the front seat of the vehicle; that the deceased was seated in the driver's seat whilst he was seated in the passenger seat; that he had his loaded firearm in his hand; that the firearm went off and a bullet hit the deceased; that the deceased died as a result of the gunshot; that he acted negligently. Crucially, the two reports compiled by Captain Mangena were also admitted.

[14] It is no exaggeration to say that the issue of what weight to accord to the exculpatory aspects of a s 115 plea explanation tendered by an accused, which is not repeated in evidence has long engaged our courts and spawned many judgments.

[15] This Court enunciated the correct approach in *R v Valachia & another* 1945 826 (AD) as follows:

'Naturally, the fact that the statement is not made under oath, and is not subject to cross-examination, detracts very much from the weight to be given to those portions of the statement favourable to its author as compared with the weight which would be given to them if he had made them under oath, but he is entitled to have them taken into consideration, to be accepted or rejected according to the Court's view of their cogency.'

[16] This salutary approach has since been consistently followed and was recently restated in *S v Cloete* 1994 (1) SACR 420 (A) at 428B-C and E-G where this Court cited that matter with approval and elaborated on this approach as follows:

'. . . I can think of no other reason why a court should be entitled to have regard to the incriminating parts of such a statement while ignoring the exculpatory ones.'

and

'It seems to me that . . . the Legislature has, in s 115, provided a procedure whereby material can be placed before the court. It is true that an accused may try to abuse it, but the court should ensure that such an attempt does not succeed by refusing to attach any value to statements which are purely self-serving, and, generally, by determining what weight to accord to the statement as a whole and to its separate parts.'

This approach was further clarified in *S v December* 1995 (1) SACR 438 (A) at 444B-E:

'Statements contained in a confession which are not supported by credible evidence can obviously not be taken for the truth, especially when they are exculpatory in nature . . . . But they may serve to alert a court to a possibility of events or circumstances not otherwise

revealed by the evidence . . . . And if that possibility is a reasonable one having regard to the evidence and the probabilities as a whole the appellant, even if he repudiates the statement, is entitled to have his conduct and state of mind assessed in the light thereof.'

[17] Having considered the evidence as a whole, including the respondent's s 115 statement, I am of the view that the trial court did not apply the law as set out above. The clear and unchallenged evidence of Captain Mangena was to the effect that the crucial part of the respondent's statement as to how the shot came to be fired, could not be true. This left in place the admitted shooting without any credible explanation as to how this came about. The clear evidence is that the respondent shot the deceased while she was facing forward in the vehicle and that no action of hers caused the shot to go off. Taking into account the trajectory of the bullet, the only reasonable inference is that the respondent intended to shoot the deceased. This must, thus, amount to a direct intention to kill, absent any explanation by the respondent.

[18] To my mind, this damning evidence called for an answer from the respondent. No answer came forth from him. Instead, he elected to rely on his unsworn s 115 statement which, as indicated above, was problematic in its essential feature.

[19] On a proper reconsideration of the evidence including the respondent's s 115 statement, I am of the view that although the respondent was exercising his constitutional rights in terms of s 35(3)(*h*) 'to remain silent and not to testify during the proceedings', his failure to do so must be taken into account against him. See *Ex parte The Minister of Justice*: *In Re R v Jacobson & Levy* 1931 AD 466 at 478-479 where this Court held:

'In the absence of further evidence from the other side, the prima facie proof becomes conclusive proof and the party giving it discharges his onus'.

This salutary approach was confirmed in *S v Boesak* 2000 (1) SACR 633 (SCA) where this Court stated that:

'[46] It is trite law that a court is entitled to find that the State has proved a fact beyond reasonable doubt if a *prima facie* case has been established and the accused fails to gainsay it, not necessarily by his own evidence, but by any cogent evidence.

'[47] . . . . Of course, a *prima facie* inference does not necessarily mean that if no rebuttal is forthcoming, the *onus* will have been satisfied. But one of the main and acknowledged instances where it can be said that a *prima facie* case becomes conclusive in the absence of rebuttal, is where it lies exclusively within the power of the other party to show what the true facts were and he or she fails to give an acceptable explanation. In the present case the only person who could have come forward to deny the *prima facie* evidence that he had authorised, written or signed the letter, is the appellant. His failure to do so can legitimately be taken into account.'

[20] Based on *Boesak* (supra) the failure by the respondent to tender evidence under oath has resulted in the state's strong evidence becoming conclusive proof of his guilt beyond reasonable doubt. It follows that the trial court erred in deciding the case solely on the respondent's s 115 statement. The respondent should have been convicted of murder and not culpable homicide.

[21] The question now remains what now? Section 322 of the CPA allows this Court to set aside the conviction, if incorrect, and substitute the correct one. It also gives this Court a discretion concerning sentence. It follows that the conviction of culpable homicide must be set aside and replaced with one of murder in terms of s 322(3) of the CPA.

[22] Regarding sentence, it is only fair that this matter be remitted to the trial court for a reconsideration of an appropriate sentence in the light of the findings of this Court as set out in this judgment.

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

1 The appeal is upheld.

2 The conviction of culpable homicide and the sentence of 8 years' imprisonment wholy suspended for 5 years on suitable conditions as imposed by the trial court is set aside and replaced with the following:
'The accused is found guilty of murder'.

3 The matter is remitted to the trial court for the reconsideration of the sentence in the light of the new conviction.

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L O Bosielo
Judge of Appeal

Appearances

For the Appellant:	JJ Kotzè
	Instructed by:
	Director of Public Prosecutions, Pretoria
	Director of Public Prosecutions, Bloemfontein
For the Respondent:	PF Pistorius
	Instructed by:
	Coert Jordaan Inc., Nelspruit
	Giorgi & Gerber Attorneys, Bloemfontein