

CC05/2012-mb
12-06-2012

220

JUDGMENT

IN THE HIGH COURT OF SOUTH AFRICA

(LIMPOPO HIGH COURT)

HELD AT THOHOYANDOU

5

CASE NO: CC05/2012

DATE: 12-06-2012

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In the matter between

THE STATE

15 and

AGOLLE ABDI JAMAALE & OTHERS

Accused

J U D G M E N T

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KGANYAGO J: At the start of this proceedings there were three accused who were charged with one count of murder, the murder of Mohammed Abdulah Ado and one count of attempted murder of Jabriel Ebrahim.

All the three accused have pleaded not guilty to both two counts, one count of murder and one count of attempted murder. Their plea explanation was that of a bare denial.

5 The state called their witness, Ishmael Laliem who testified as follows: He knows the three accused, he also knows the deceased. Accused 1 is having a business and the deceased was also a businessman. Accused 1 and accused 2 are both brothers. He knows
10 accused 3 by face. He also knows Jabriel Ebrahim. He knows about the incident of 17 January 2012.

That day he was in Thohoyandou between 16:00 and 18:00 when he was phoned by accused 1. Accused 1 was swearing at him and tell him that he is
15 the same as the deceased. When he asked him as to what was happening, somebody grabs the phone of accused 1 and told him to fuck off. Thereafter that person dropped the phone. He phoned accused 1 to ask as to what was happening. Accused 1 told him
20 that the deceased has come to his shop and fought with him and that the local people have taken all his property.

He told accused 1 to wait as he will be coming to sort out the problem. After a few minutes he got a
25 call from Jabriel, telling him that the deceased was

dead and he, referring to Jabriel, was injured and also some relatives ascended to Siloam to see what has happened. They found that the deceased was already covered. He was told that the suspect has already
5 been arrested. He then went to the police station. Accused 1 phoned him and told him that he was sorry about what has happened and that he would like to know whether Abdul was dead or not.

The witness was cross-examined and when
10 asked as to how he knew that it was accused 1 who has phoned him, the answer was that he knows accused 1's voice and also that his number was showing on his screen. He denied that when accused 1 was phoning him, accused 1 was telling him that he
15 was robbed. He admitted that accused 1 did not tell him the reason why he said he was sorry.

The second state witness was Jabriel Ebrahim who testified as follows: He knows the deceased, he was working for the deceased. He knows accused 1
20 and accused 2, he do not know accused 3. Accused 1 is having a shop at Siloam, next to deceased's shop. On 17 January 2012 he was at work with the deceased and also with one Adan. At about 18:00 he was at the till and the deceased was sitting on top of a fridge. As
25 they were there he saw a group of six people entering

the shop. He managed to identify three of them.

He was able to identify accused 1, accused 1 and one Kgobe. They were armed with a knife and pangas. Accused 1 was having a knife and accused 2 was having a panga, Kgobe was also having a panga. On entering, all of them went to the deceased who was sitting on top of the fridge. They did not talk to the deceased but started chopping him with pangas. They first hit him on the head and he screamed. After they hit the deceased on the head, blood splashed out. As the deceased was screaming, some of the men came to him and started hitting him with pangas.

He could not identify his attackers, but if he can see them, he will be able to identify them. As he was being attacked, he fell down and blood started coming out. He was bleeding profusely. He was injured on the right hand and left arm. He fainted. He woke up when he was been called by Adan. When he woke up he saw the deceased lying down and the attackers have left. The deceased's business partner also came and they took the deceased to the hospital. When they arrived at the hospital the deceased was already dead. The knife which was presented to court, which was marked Exhibit "1" is the knife that has been held by accused 1.

Accused 2 was having a panga, similar to the one which is marked Exhibit "2". There was no animosity between him, accused 1 and accused 2. the witness was cross-examined and he stated that 5 accused 1 is the one who stabbed the deceased with a knife, which is marked Exhibit "1" and that he saw accused 1 stabbing the deceased. He further stated that accused 2 is one of the people who were having pangas and that he took part in chopping the 10 deceased. When it was put to him that accused 1 and accused 2 were never at the shop, he insisted that he saw them. He denied that he is implicating accused 1 because he was a suspect in a case that accused 1 has opened at Mphephu police station. He denied that 15 he is implicating accused 2 because he is related to accused 1.

Norman Leshiba was called. He testified as follows: He is employed at Siloam as an emergency care practitioner. On 17 January 2012 he was on duty 20 at Siloam. Whilst on duty he was called at the hospital gate and told that he person has been stabbed and that he was dead. By that time it was at about 19:00. He went there and found the person in a pool of blood. It was a male person. When he assessed him he found 25 that he was no longer breathing. He checked the pulse

and found that it was no longer there. There was no heart beat. He took out his ESG machine to check whether he was still alive or not. He found that indeed he was dead. His colleague tried to resuscitate him but could not. He declared him dead. The deceased was having stab wounds and he do not remember how many. The wounds were on his back. He then informed the police who were nearby.

During the trial the formal admissions were made in terms of Section 220 and they were recorded as follows:

The accused admit that the deceased is the person referred to in the indictment namely Mohammed Abdulah Ado.

That the deceased died on 17 January 2012 as a result of injuries received on 17 January 2012 at Siloam store.

That the deceased received no further injuries from Siloam until the autopsy had been held on 18 January 2012.

That doctor Ndinannyi Ernest Nangambi conducted the post-mortem examination on the body of the deceased on 18 January 2012.

That the doctor reported his findings on the form SAP 378 which is attached hereto, marked

EXHIBIT "B".

That the facts and findings set out by doctor Ernest Nangami in Exhibit "B" are correct.

*That the deceased died of head and chest
5 injuries with sharp object, multiple stab wounds.*

*That on 17 January 2012, Sergeant Humbulani Transmile Mulaudzi visited the scene of the crime and
drew a sketch plan attached as EXHIBIT "C", took the
photographs of the scene, body of the deceased,
10 attached as EXHIBIT "D" and drew a key to the plan
and photographs attached as EXHIBIT "E" on 17
January 2012.*

*That the photographs depicts the scene as on
the date of the incident.*

*On count 2 the accused admit that the
15 complainant is the person referred to in the indictment,
namely Jabriel Ebrahim.*

*That the complainant was chopped twice on his
body and that is on the hand and arm.*

*That the complainant was medically attended to
20 by Doctor Ndou at Siloam hospital.*

*That doctor Ndou reported the findings on the
form J88 which is attached hereto marked EXHIBIT "G".*

*That the facts and findings set out by doctor
25 Ndou as in Exhibit "G" are correct.*

Edward Nemamire was then called to testify. He testified as follows: He is a warrant officer at Siloam police station. On 17 January 2012, while busy patrolling with warrant officer Mutsila they got a report
5 that Somalians were fighting at Siloam. They went to the scene and on arrival they were met by one Hamed who was screaming that they have killed his brother.

Whilst at the scene he saw a knife with blood stain. He instructed Inspector Molele to keep the knife
10 as an Exhibit. The knife was picked up three metres from the shop. He proceeded to the hospital as he was told that the injured has been taken to the hospital. When he arrived at the pedestrian gate at the hospital, he found that the deceased had collapsed and died.
15 The deceased was about 100 metres from where he had found the knife. The deceased was having five stab wounds, one on his head and the rest at the back. He was lying in a pool of blood and EMS people have certify him dead. He summon the photographer and
20 pathologist. They then went to prepare a murder case. The knife that was found on the scene was big with sharp edges. The said knife is the one that is marked EXHIBIT "1".

The witness was cross-examined and he
25 admitted that no fingerprints were taken on the knife.

He admitted that he did not ask the person who was screaming as to the names of the murderers.

Adan Abdula Hamed was called to testify. He testified as follows: He is residing at Siloam, he is
5 employed as a shop assistant at the shop that was owned by his brother. His brother was owning that shop together with the deceased. He knows accused 1 and accused 2 very well. Accused 1 is having a shop next to theirs at Siloam. He knows accused 3
10 physically. On 17 January 2012 he was at the shop helping a customer. In the shop he was with the deceased and Jabriel.

Jabriel was operating the till, the deceased was sitting on top of a fridge. It was at about 17:30
15 when he saw a van full of people came and park next to the shop. Six people came out of the van and entered the shop. Those people were holding knives and pangas. He saw that those people were going to do something and he ran out of the shop. Before he ran
20 out of the shop he was able to identify three of them. He was able to identify accused 1, accused 2 and one Kgobe. Accused 1 was holding a long knife while accused 2 and Kgobe were holding pangas. He did not know the other three people.

25 Whilst outside, he could hear the noises and

breaking inside the shop. Later he came back and find
that the deceased and Jabriel were lying down. The
attackers by then has already left. The deceased was
bleeding profusely and breathing heavily. He called
5 Jabriel by his name and he responded. Jabriel then
went outside to phone his relatives. He took the
deceased to the hospital. On arrival at the hospital the
security refused them entry and the security told them
that the doctor will come and attend to them. The
10 doctor and the police came and took over. Jabriel was
also injured and was attended by the doctors. Jabriel
was injured on the hand and was also bleeding. He do
not know who has injured Jabriel.

The witness was cross-examined and he denied
15 that there was bad blood between him and accused 1.
He denied that he had robbed accused 1 at his shop at
Biaba, Louis Trichardt. He denied that he went to
accused 1's shop at Biaba, having a panga and a knife.
He denied ever being at accused 1's shop at Biaba that
20 day. He stated that when the six people entered the
shop he ran to the back of the shop. He further stated
that he was able to identify accused 1 by the cultural
mark he is having on his forehead. At that stage there
was an inspection on the accused's forehead. On
25 inspection of accused 1, it was confirmed that there is

indeed a mark, which even the interpreter confirmed that it was referred to as a religious mark.

COURT: Can we just adjourn for tea time, the court will continue with judgment after tea time.

5 COURT ADJOURNS

COURT RESUMES

JUDGMENT (contd)

The next witness which was called by the state was Redson Siphugu who testified as follows: He is a
10 police officer at Siloam police station. On 17 January 2012 he attended a murder case at Siloam. He was part of the policemen who attended the scene. On arrival at the scene they were met by a young man who was screaming that his elder brother has been killed.

15 He gave them the names of the killers. He mentioned the name of Agolle, Muktar, Sahid and Kgobe. They arrested accused 1 at Biaba, about 17 kilometres from the scene. When they found accused 1, he was already asleep and he was alone. When
20 they explained to him why they were there, he look frightened. He was not involved in the further investigation of the matter. Molele is the one who investigated the matter further.

The witness was cross-examined and he stated
25 that accused 1 was arrested at around 21:00 to 22:00.

He denied that when they found accused 1 he was asleep with his wife who was six months pregnant and also with his two children.

Abdul Sakhir Abdulay Hamed was called as a witness. He testified as follows: He knows the three accused, he was employed by the deceased. Accused 1 and accused 2 are brothers. He do not know how accused 3 is related to accused 1 and accused 2. Accused 1 is having a shop at Siloam. On 17 January 2012 he was sitting outside, next to the deceased's shop. He was sitting about two metres from the shop. The deceased was inside the shop, sitting on top of a fridge. Jabriel was at the counter.

As he was sitting outside, a van came and stopped at the shop. It was driven by accused 1. When accused 1 was getting out of the van he was holding a long knife which was having some marks. Accused 2 and Kgobe were sitting in the front passenger seat with accused 1. Accused 2 and Kgobe were holding pangas. Accused 3 came out of the back of the van and also holding a panga. They all went inside the shop.

When he saw that there was going to be a fight, he ran away and stopped at the garage. Whilst at the garage he saw people standing outside the shop.

Later he saw other people running away from the shop. He was afraid to go back to the shop, he went back to the shop together with other customers. On arrival at the shop he found the deceased and Jabriel lying on the floor. The attackers has already left and one of the attackers has left a panga inside the shop. The deceased died while they were rushing him to hospital. The police came and asked him whether he knew the people who has killed the deceased and he said "yes."

10 He give the police the names of the people who has killed the deceased. Exhibit "1" is the knife which accused 1 was holding. Other people were holding pangas. He is not fabricating a story against the accused.

15 The witness was cross-examined and he denied that he went to accused 1's shop, holding a panga, that is marked Exhibit "2". He did not deny that accused 1 has opened a criminal case against him.

Samuel Molele was called in to testify. He testified that he is a police officer stationed at Siloam police station, he knows the three accused, he is the one who had arrested them. Accused 2 was arrested at Rabali whilst accused 3 was also arrested at Dzhanani magistrate court. Accused 3 was pointed out by one of the witnesses as a suspect. When

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accused 3 was arrested, he was attending court of the other two accused. On 17 January 2012, on arrival at the scene, the witness identified the suspect as Agolle, Muktar, Sahid and Kgobe.

5 Accused 1 is having a shop opposite the deceased's shop. Whilst on the scene he was shown a knife that was used to commit the murder. It was a big knife that cannot be folded. The knife was found five
10 paces from where the deceased was murdered. The deceased died at the gate of the hospital whilst he was been taken to the hospital. He found the panga three days after this incident at the shop. He heard that on the day of the incident a robbery charge was opened against the deceased. Exhibit "1" is the knife that he
15 had found at the scene. Exhibit "2" is the panga that he has found inside the shop after three days.

The witness was cross-examined and he admitted that he did not take the knife for DNA and fingerprint tests. The reason for that was that the
20 suspects were known to him. He denied that when he arrested accused 3, he did so as he was told to arrest any male Somali who will attend the bail application of accused 1 and accused 2. He admitted that no identification parade was held.

25 Doctor Ernest Nangami was called as a

witness. He testified that he is a qualified doctor. He is the one who has completed *the post-mortem* report. The *post-mortem* report was in relation to the deceased. The photos shows the injuries at the back, whilst on the *post-mortem* it is stated that the cause of death was "head and chest injury." Although the injuries were at the back, they penetrated the chest and pierced the lungs – hence they say "chest injuries." For a skull to fracture, it means there was a hard blow. With the injuries that he saw that day, there was no chance of survival. He stand by his conclusions on the *post-mortem* report. The witness was not cross-examined and that concluded the evidence of the state and they closed their case.

At that stage the defence applied for a discharge in terms of Section 174 of the Criminal Procedure Act. Accused 3 was found not guilty on all the counts and discharged in terms of Section 174. Accused 1 and accused 2 were found not guilty on count 2, that of attempted murder and were also discharged in terms of Section 174. With regard to the murder charge, the application was turned down.

Accused 1, Abdi Jamaale Agolle was the first one to testify. He testified that he did not stab the deceased or killed him. He never went to Siloam on

the day in question. That day he was at his shop at Biaba, the whole day. Accused 2 is his blood brother.

On 17 January 2012 he was not with his brother who is accused 2 in this matter. That day he never saw
5 accused 2. That day he was robbed and assaulted by Abdula Shalem at his shop. He had opened a criminal case against Abdula with the SAPS. They are
implicating him because of the case which he has opened with the SAPS. He was robbed by Dadir,
10 Dadir's brother and other people unknown to him. He is having a shop next to the deceased's shop. The people who attacked him were having the same knife and panga as the one which were marked Exhibit "1 and 2". He has been implicated because the people
15 are jealous of him.

The accused was cross-examined and he admitted that he knows Ishmael, who is the first state witness. He admitted that before the incident he used to communicate telephonically with Ishmael. Initially
20 he denied that on the day in question he has communicated with Ishmael, but later admitted having communicated with him. He denied that he has killed the deceased. He admitted that generally he knew Sadhir, Jabriel and others and they know each other.

25 The Muktar Jamaale, accused 2 was called to

testify. He testified that he did not kill the deceased.

On 17 January 2012 he was at his shop at Dzhanani at Tshikota. That day he was not in the company of accused 1. Accused 1 is his blood brother. That day
5 he was alone at his shop, he did not go to the deceased's shop. That day he was not having a panga, that day he did not go to the deceased's shop with a bakkie. He was not aware that his brother was robbed on 17 January 2012. He was arrested at Rabali
10 village on 19 January 2012. He do not know Kgobe. He do not know why these people are fighting him and his family.

Accused 2 was cross-examined. Basically he denied everything, however, he admitted that he used
15 to visit his brother's shop at Siloam and that he knew the deceased's shop and also the deceased. That conclude the evidence of the defence and they closed their case.

Both parties submitted their closing arguments
20 with the state arguing for a conviction whilst the defence arguing for an acquittal. That was the evidence submitted in brief.

The state must prove their case beyond reasonable doubt, that the two accused have unlawfully
25 and intentionally killed Mohammed Abdula Ado. The

two accused have pleaded not guilty and their plea explanation is that of a bare denial, as I have already stated above.

From the evidence presented, there is no doubt
5 that the two accused knew the deceased and his shop. Accused 1's shop is opposite the deceased's shop. Accused 1 has already stated that they generally knew each other and therefore it goes without saying that they knew the deceased together with his employees.
10 They were all Somalians in a foreign land and adjacent to each other and therefore it will be highly unlikely that they will not know each other. Therefore, the evidence by the two accused that they did not know the state witnesses is highly unlikely.

15 The two accused did not rebut the version of the first state witness, Ishmael, who testified that he was phoned by accused 1 who was swearing and screaming at him, telling him that he is the same as the deceased. He was also not challenged when he
20 testified that he told accused 1 to wait for him so that he can come and sort out the problem. He was also not challenged when he testified that after talking to accused 1, some few minutes later he got a call that the deceased was dead. Accused 1, in his evidence in
25 chief, denied that he has communicated with Ishmael

on the day in question.

Under cross-examination initially, he could not remember whether he communicated with Ishmael that day, but later conceded having communicated with Ishmael. This incident did not happen a long time ago and one could not be expected to struggle to remember whether he has communicated with Ishmael or not on the day in question.

Jabriel, who witnessed the stabbing and chopping of the deceased was able to testify in a satisfactory and convincing manner. He was able to tell that he saw accused 1 stabbing the deceased and accused 2 and Kgobe chopping the deceased. If Jabriel wanted to falsely implicate the two accused, he would have went further to say that after chopping and stabbing the deceased, the two accused also attacked him, but he was able exonerate them in relation to the charge against him. He was also able to identify the weapons used in the attack.

Adan Abdula Hamed and Abdul Sakhir Abdulay Hamed were able to identify the two accused and one Kgobe. They were able to identify them when they enter the shop while being armed. The two witnesses did not exaggerate in their testimony. They were honest when they testified that they only saw the

attackers entering the shop, but they did not see the actual stabbing and chopping. If they wanted to falsely implicate the two accused, they could have simply testified that they even saw the actual stabbing and chopping, but they only gave the testimony of what they saw and not what they heard and I do not have any reason to doubt their testimony.

Here there is no issue of mistaken identity. The state witnesses knew the two accused and the two accused knew the state witnesses. The witnesses of the state and accused themselves, both conceded that there was no ill feelings amongst themselves. So if there was no ill feelings or bad blood, why would the state witness falsely accuse the two accused? That now gives credence to the evidence of the first state witness who testified that accused 1 phoned him, being angry and telling him that the deceased has come to his shop and fought with him and that version was never challenged.

20 So when accused 1, 2 and others went to the deceased's shop, that was a revenge attack. The two accused could not offer any explanation as to why they could be falsely indicated, save for their bare denial. It was conceded in the form of admissions in terms of 25 Section 220 of the Criminal Procedure Act that the

deceased died as a result of head and chest injuries which was inflicted by a sharp object and the sharp object which was displayed at this court, which was marked Exhibit "1", it is no dispute that that knife is a sharp object and that knife was also linked to accused 1 and Jabriel was able to say that it was accused 1 who stabbed, he saw accused 1 stabbing the deceased at the back.

Doctor Nangambi also testified that with the type of the injuries which the deceased has sustained, it was highly unlikely that he would have survived. The *post-mortem* confirms that the injuries were penetrated from the back, which now support the version of Jabriel that the stabbing was at the back. Even the photos which were displayed, it shows that the injuries are at the back which confirms the version of Jabriel. From the evidence presented, it is clear that the two accused and others have pre-planned what they wanted to do and they have successfully carried out their mission.

Therefore, after analysing and considering all the evidence and arguments in totality, I am satisfied that the state has discharged their *onus* of prove beyond reasonable doubt and that the two accused have unlawfully and intentionally killed Mohammed

Abdula Ado by stabbing and chopping him with a knife and pangas.

Therefore they are both found GUILTY OF MURDER.

5 MR MAKHERA: As the court pleases.

MR SENGANI: As the court pleases.

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SENTENCE

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SENTENCE

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KGANYAGO J: This is the most difficult part of the trial. I have now to decide your fate. However, the two counsels have made my work very easy. They were a moving library and I would like to thank them.

The mitigating circumstances of the two accused have been presented before me and they evoke sympathy, but however, sympathy on its own is not sufficient. They have been found guilty of a very serious offence of which the minimum sentence, been stated in the legislature is that of life imprisonment.

Both counsel have quoted the Dodo case of which is a Constitutional case and it is very clear in that case that we should not deviate lightly and for flimsy reasons from the minimum sentence be stated in the statute. There was a reason by the legislature to put in the minimum sentence and it is not for us just to deviate for the sake of feeling pity for the accused.

As I have already alluded in my judgment, that in this particular case the murder was pre-planned. The accused should have reconsidered their position immediately when Ishmael said that wait, I will come and sort out the problem. This was a heinous murder. It was like people who were doing this, like they were possessed. They found the deceased in the shop and without even talking to him just attacked him like they are attacking an animal and it was not one blow, with all assortment, acting in common purpose.

However, it is well known that in South Africa you are a youth up to the age of 35. Even though you

are Somalians, we will apply the South African law and you are both below the age of 35 years. Meaning that you will be treated as youth and you are first offenders. Even though I did find that this murder was
5 pre-planned and you were acting in common purpose, because of your youth, because you are still in the age which is below the youth, in the brackets of the youth and you are first offenders, I am persuaded to deviate from the minimum sentence.

10 However, the offence which you have committed, as I have already said, it was a heinous crime which deserve to be punished. I therefore find that there are compelling and substantial circumstances to deviate from the minimum sentence
15 based on your age and that you are first offenders.

You are therefore, both of you, SENTENCED TO (25) TWENTY FIVE YEARS' IMPRISONMENT and it is further ordered that you should serve (20) twenty years before you could be considered for parole. It is
20 further ordered that if ever you would like to apply for the South African firearm, you are DECLARED UNFIT to possess a firearm.