CONSTITUTIONAL COURT OF SOUTH AFRICA

Tuta v The State

CCT 308/20

Date of Judgment: 31 May 2022

MEDIA SUMMARY

The following explanatory note is provided to assist the media in reporting this case and is not binding on the Constitutional Court or any member of the Court.

On Tuesday, 31 May 2022, the Constitutional Court handed down reasons for the order it issued on Friday, 13 May 2022. The order and reasons for the order were handed down in an application for leave to appeal against the conviction and sentence of the applicant handed down by the High Court, Gauteng Division Pretoria (High Court) and upheld by the Supreme Court of Appeal. The High Court found the applicant guilty of one count of murder and one count of attempted murder. The applicant was sentenced to life imprisonment on the count of murder and fifteen years imprisonment on the count of attempted murder. The primary issue for determination was how the Court ought to treat an ambiguity in a judgment rendered at the conclusion of a criminal trial. In particular, where there are differences between an *extempore* judgment (a judgment handed down immediately after the proceedings) that is not signed by the trial Judge and a revised judgment that has been signed by the trial Judge in criminal proceedings, how must the Court reconcile the ambiguities arising from these different judgments?

On 2 March 2018, at approximately 23h00, the applicant accompanied his friend to his residence in Sunnyside, Pretoria when they noticed they were being followed by an unmarked red polo motor vehicle. The applicant and his friend then started running in different directions. The two occupants of the unmarked motor vehicle were in fact two police officers, Constables Makgafela and Sithole, who were on duty, patrolling in Sunnyside, Pretoria.

Before the High Court, Constable Makgafela, testified that he and Constable Sithole were wearing South African Police Service (SAPS) bullet proof vests over their civilian clothing, bearing the SAPS insignia, on the night of the incident. They suspected the applicant of being in possession of a stolen laptop. When the applicant and his friend

started running, Constable Makgafela gave chase on foot and removed his bullet proof vest so that he could run faster. According to the evidence of Constable Makgafela, he shouted at the applicant, alerting him to the fact that he was being chased by the police. The applicant was apprehended.

The applicant testified that he did not know that his assailants were police officers. Fearing for his safety, he stabbed the police officer who held him down. When the second police officer came to the aid of his colleague, the applicant stabbed him as well and fled the scene. As a result, Constable Makgafela was seriously wounded, and Constable Sithole was killed. The applicant testified that the next day reported the incident to a police station, but the police declined to open a case because the applicant could not identify his attackers. He left his contact details and residential address at the police station and was arrested later that day at his residence.

The applicant alleged that he was acting in putative private defence in that he subjectively thought that he was in danger and that the two "assailants" intended to cause him harm.

The High Court, in the *extempore* judgment, formulated the test for putative private defence as a defence which relates to the accused's state of mind and where the test is *objective*. It held that "[t]he test to be applied in respect of the accused, he generally . . . mistakenly believed that he was acting in lawful self-defence, *or whether his belief was also held on reasonable doubt*." This judgment was not signed by the trial Judge. The revised judgment formulated the test for putative private defence as a *subjective* test, namely what the accused had in mind, *objectively considered*. This judgment was signed by the trial Judge.

The High Court rejected the applicant's submission that he was acting in putative private defence and held that the State had proven its case beyond reasonable doubt and that the applicant's version should be rejected. It found the applicant's version to be improbable to the extent that it could not be found to be reasonably, possibly true. Additionally, although this evidence was not disputed by the respondent, the Court rejected the applicant's testimony that the next day he and his sister went to the police station to report the matter. This evidence was rejected despite the applicant being arrested at his residence and Constable Makgafela testifying that he did not know the identity of the applicant.

The applicant made an application to the High Court for leave to appeal against his conviction. On 13 December 2019, that application was refused. On 30 April 2020, the Supreme Court of Appeal dismissed the applicant's application for leave to appeal on the basis that it had no reasonable prospects of success. On 25 November 2020, the President of the Supreme Court of Appeal dismissed the applicant's application for reconsideration.

Before the Constitutional Court, the applicant advanced the following grounds in his written submissions on which he alleged the Court's jurisdiction was engaged. The first ground complained of an infringement of the applicant's right to a fair trial in terms of section 35(3) of the Constitution. The applicant submitted that during his

cross-examination by the prosecutor, as a result of the trial Judge's intervention, the prosecutor did not put the State's case to the applicant regarding his intention on the night in question. The second ground was that the matter raised an arguable point of law of general public importance which ought to be considered by the Court, namely that the trial court misapplied the test for putative private defence.

In response to the directions issued by this Court, the applicant also made the submission that the High Court erred in its legal approach to the minimum sentencing legislation. The applicant argued that a trial court's determination of a sentence, flowing from the application of the minimum sentencing statute is a value judgment and not a matter of sentencing discretion. Accordingly, an appellate court is entitled to substitute its own evaluation of substantial and compelling circumstances if it finds that the trial court erred in its exercise of this value judgment. This, the applicant contended, raised a constitutional issue as to the nature of the sentencing court's powers.

During oral submissions, the applicant did not argue that the trial court misapplied the test for the putative private defence. Instead, the applicant argued that the trial Judge misunderstood the test. The applicant contended that the trial court failed to articulate the test for putative private defence correctly.

The respondent submitted that it was not in the interests of justice that leave to appeal be granted. In response to the directions issued by this Court, the respondent submitted that the Court's discretion in imposing the prescribed minimum sentence is limited. Thus, the sentence imposed by the High Court was justified.

The first judgment, penned by Unterhalter AJ (Madlanga J, Majiedt J, Mathopo J, Mhlantla J, Theron J and Tshiqi J concurring), found that the alleged irregularity suffered by the applicant as a result of the trial Judge's intervention was not an irregularity of sufficient seriousness to undermine the applicant's right to a fair trial. It dismissed the applicant's appeal on this ground. In respect of the applicant's submission that the High Court applied the test for putative private defence incorrectly, the first judgment held that the incorrect application by the trial court of a well-established legal defence raises neither a constitutional issue, nor an arguable point of law. Therefore, on these two grounds it found that this Court's jurisdiction was not engaged and refused leave to appeal.

In respect of the applicant's submission made during oral submissions, that the trial court had failed to formulate the correct test for putative private defence, the first judgment held that that was an error of law that carried the risk of an unsound conviction and an unfair trial. This ground engaged the Court's jurisdiction. Relying on this Court's decision in *AmaBhungane Centre for Investigative Journalism NPC v Minister of Justice and Correctional Services and Others; Minister of Police v AmaBhungane Centre for Investigative Journalism NPC*, the first judgment held that if an error of law raises a constitutional issue or an arguable point of law of general public importance and the interests of justice require the Court's intervention because of the risk of an unsound conviction, then if the issue can be determined on the papers and no prejudice arises, the

Court should not be precluded from considering the matter. Leave to appeal was consequently granted on this ground.

The first judgment then determined whether the trial Judge did indeed make an error of law in his formulation of the test for putative private defence. It considered the test as formulated in both the *extempore* judgment and the revised judgment.

It found that the *extempore* judgment contained a clear error of law. It formulated the test for putative private defence as objective. This was not in line with the test as formulated in *S v De Oliveira*. There, the Appellate Division held that in putative private defence, the test is whether the State has proved beyond reasonable doubt that the accused *subjectively* had the intent to commit murder. It was not clear whether the reference to an objective test in the *extempore* judgment was simply a transcription error. However, the revised judgment reflected a correction. There, the test for putative private defence was formulated on the basis that the test is *subjective*, "in other words, what the accused had in mind, *objectively considered*."

In resolving this ambiguity, the first judgment noted that in busy criminal courts, the *extempore* judgment is often a necessary part of judicial practice. It held that a patent error or omission may be corrected. However, the substantive reasons for the judgment, handed down in court, must stand. This is because if an *extempore* judgment is given, its reasons are authoritative, and they may not be altered or embellished to give further expression to what the court meant to convey.

The first judgment held that the issue in this matter was how to treat an ambiguity in a judgment, rendered at the conclusion of a criminal trial. Therefore, the normal principles of interpretation, namely text, context and purpose could not find application. According to the first judgment, the question is not simply what did the trial court mean by the ambiguous text. Rather, if the ambiguity is not resolved because it reflects a patent error, the ambiguity must be acknowledged and, if it is material, the ambiguity must redound to the benefit of the accused. That is so because the presumption of innocence requires that the Court may not permit an accused to suffer a conviction which may have resulted from a legal error.

The first judgment found that there was an appreciable risk that the trial Judge, in formulating the test for putative private defence in the revised judgment, imported objective considerations of reasonableness into the test. Given the gravity of the charges with which the applicant was charged, any ambiguity as regards to whether or not the trial court applied the correct legal test, had to be resolved in favour of the applicant. It found that the trial Judge made an error of law going to the heart of the applicant's defence. On 13 May 2022, the Court issued an order upholding the applicant's appeal, setting aside the order of the High Court, acquitting the applicant and ordering his immediate release. Having set aside the applicant's conviction, the first judgment did not consider the submissions made by the parties regarding the High Court's judgment on sentence.

The second judgment (minority), penned by Kollapen J (Mlambo AJ concurring) disagreed with the first judgment that this matter engaged this Court's jurisdiction. In particular, the second judgment differed with the conclusion reached by the first judgment that the High Court incorrectly formulated the test for putative private defence. In respect of sentence, the second judgment found that no constitutional matter or arguable point of law of general public importance was raised, nor could it be said that any alleged error by the High Court in applying the test for substantial and compelling circumstances engaged the jurisdiction of this Court.

Regarding the challenge to the conviction, the second judgment agreed with the position taken in the first judgment that the intervention of the trial Judge in the cross-examination of the applicant did not result in any serious irregularity that impacted on the fairness of the trial. It agreed that this part of the challenge was not sustainable.

The second challenge to the conviction was based on how the High Court dealt with the defence of putative private defence and noted that it was only during oral argument that the applicant argued that the High Court incorrectly formulated the test. Notwithstanding its late introduction and that the error of law contended for was not pleaded, the second judgment agreed with the conclusion reached by the first judgment that this issue was fully ventilated before this Court and that the interests of justice, coupled with the risk of an unsound conviction must mean that this Court should consider the argument, notwithstanding its lateness.

Regarding the test for putative private defence and given the centrality of whether the test was correctly formulated by the High Court, the first judgment referred to *S v De Oliveira* where it found that the test for private defence is objective, while that for putative private defence is subjective. It explained that the latter was concerned with culpability and being an enquiry into the state of mind of the accused. It found that the High Court correctly characterised the defence of the applicant as putative private defence – one where the applicant says that he genuinely but mistakenly believed that his life was in danger. It further explained that given that private putative defence is concerned with the culpability of the accused person, and is characterised as subjective, its application, depending on the charge an accused faces, may require considerations of reasonableness.

The second judgment agreed with the conclusion of the first judgment with regard to the symbolic and legal importance of an *extempore* judgment in an open public court.

While the first judgment suggested a departure from the approach taken in *S v Wells*, and for the adoption of a less permissive holding the second judgment found it difficult to see how the changes or amendments to an *extempore* judgment that do not change its substance imperil the fair trial guarantees of an accused, in particular, when the substance of the judgment remained constant. It explained that the decision of *S v Wells* was clear that the substance of the judgment may not be changed and on that basis, the adoption of a less permissive approach as advocated in the first judgment was neither necessary nor justified.

The second judgment concluded that based on the *extempore* judgment, it could not be said that the High Court erred in formulating the test for putative private defence. It held that the full exposition of the test accords in every respect with the current established test for putative private defence which is subjective.

It explained that the labelling of the test as being "objective", could only have been a patent error if it was a term used at all by the trial Judge. It cautioned that the proper approach was to examine how the test was formulated as opposed to how it was labelled and concluded that it was formulated as a subjective test. It found that this, coupled with the recognition in the first judgment that the words "objectively considered" may have been benignly intended, must reduce the scope for any ambiguity. It reiterated that the phrase "objectively considered" cannot be viewed in isolation.

While the second judgment agreed with the stance taken in the first judgment, this Court's task was to ascertain what the trial Judge conveyed, as opposed to what he meant to convey. It explained that it was clear from the transcription that the Court could not be sure that the trial Judge did use the term "objective", however even if he did, the error was so obvious that it must be capable of revision on the basis of it being a patent error.

In sum, the second judgment found that neither the *extempore* judgment nor the revised judgment provided evidence of an error of law being committed by the trial Judge in how the test for putative private defence was formulated. It found that that there was also no constitutional matter or arguable point of law of general public importance that required determination in order to deal with the appeal. It held that the Court's jurisdiction was not engaged and leave to appeal against conviction must accordingly be refused.

Regarding the sentence imposed by the trial court, and the directions issued by this Court on 28 January 2022, directing the parties to file written submissions, it concluded that the finding of substantial and compelling circumstances constituted a value judgment which would entitle an appellate court to interfere if the judgment was incorrectly exercised. It said that no uncertainty on the issue existed requiring the determination of this Court. The second judgment found that this issue was not a novel one and has come before the courts on numerous occasions and that it was necessary to distinguish between what is regarded as the general sentencing discretion of a court as opposed to the determination of substantial and compelling circumstances. The latter involved a value judgment.

The second judgment then concluded on this basis that the appeal against sentence did not raise a constitutional issue.

Finally, on the issue advanced by the applicant that the High Court erred in finding that there were no substantial and compelling circumstances, the second judgment found that this argument did not engage the jurisdiction of the Court and could not support a basis for the interference with the sentence. For these reasons, the second judgment held that

the application for leave to appeal against sentence must fail. In the result, the second judgment would have refused leave to appeal against conviction and sentence.