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THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case no: 471/2010

In the matter between

RUDOLPH JACOBUS COMBRINK **APPELLANT**

and

THE STATE **RESPONDENT**

Neutral citation: Combrink v The State (471/10) [2011] ZASCA 116 (23 June 2011)

Corum: **BRAND, PONNAN and SHONGWE JJA**

Heard: **25 May 2011**

Delivered: **23 June 2011**

Summary: Criminal law – whether the appellant's guilt proved beyond reasonable doubt – appellant's defence not put to state's eye witness – effect thereof – Sentence – appeal court's power to increase sentence.

ORDER

On appeal from: North Gauteng High Court (Pretoria) (Preller, Poswa and Ledwaba JJ sitting as court of appeal):

In the result the following order is made:

1. The appeal against both conviction and sentence is dismissed.
2. The sentence imposed by the court below is set aside and substituted with the following:

'The appellant is sentenced to 15 years' imprisonment.'

JUDGMENT

SHONGWE JA (BRAND and PONNAN JJA concurring)

[1] The appellant (Combrink) appeared before Coetzee J, sitting in the circuit court of the North Gauteng High Court (Pretoria) in Middelburg. He was charged with murder, attempting to defeat or obstruct the cause of justice and the contravention of section 3 of the Arms and Ammunition Act 75 of 1969 (unlawful possession of a firearm).

[2] At the close of the state's case he was acquitted on the second and third charges in terms of section 174 of the Criminal Procedure Act 51 of 1977. At the end of the trial he was, however, convicted of murder and sentenced to 15 years' imprisonment, five years of which was suspended for five years on the usual conditions. He was granted leave to appeal to the full

court of the North Gauteng High Court against both conviction and sentence.

[3] The majority of the full court (Poswa & Ledwaba JJ) dismissed the appeal against conviction and upheld the appeal against sentence. The sentence imposed by the trial court was set aside and substituted with a sentence of ten years' imprisonment. Preller J disagreed and concluded that the appeal against both conviction and sentence should succeed to the extent that both conviction and sentence must be set aside. The appeal against the majority judgment of the full court is with leave of this court

[4] Both the trial court and the majority of the court a quo found that Combrink intentionally shot and killed Mr Benjamin Ngwenya (the deceased). On the other hand Preller J found that the cause of the 'tragic death of the deceased was nothing more than a freak accident'. He further found that Combrink was not negligent and could not even be convicted of culpable homicide.

[5] Combrink contends that the interpretation of the state's evidence by the trial court and the majority of the court a quo was unfair and incorrect. He contends further that the evidence of Mr Du Plessis (a ballistics expert for the defence) was considered in isolation.

[6] The facts are that on 17 October 2000, and at about 17h30, Combrink fatally shot and killed the deceased. It is common cause that a shot fired from

Combrink's rifle struck the deceased on his back just below the left shoulder. It is not disputed that his death was caused by the tamponade effect of blood accumulating in the heart sac after the bullet had ruptured the aorta.

[7] It is also common cause that the deceased was walking on the mealie land, on the said afternoon, which is on a farm where he was employed and where Combrink farmed with his father. Combrink was driving his vehicle (a bakkie) on one of the farm roads on his way to fetch some of his workers. He saw a person, whom, according to his evidence, he could not identify at that time. He called him to draw his attention. The person did not respond. He just continued walking. Combrink called him repeatedly but in vain. He then fired a shot from his .308 calibre Parker Hale hunting rifle, apparently with the purpose to warn or intimidate the person. He thereafter called him again and when the person did not respond he fired the second shot. The person turned slightly towards Combrink and fell face down. According to Combrink he noticed when the person turned and fell down that it was the deceased, one of his employees.

[8] The state led the evidence of Mr Masilela who was an eyewitness and one of the employees on the farm. He testified that he was in the vicinity when he saw Combrink driving his vehicle. He passed him. Combrink saw a person, whom Masilela was able to identify as the deceased. Combrink stopped the vehicle and called him. He confirmed that Combrink called repeatedly but that the deceased did not stop. Masilela was unable to estimate the distance between Combrink and himself when the shots were

fired. But he pointed out a distance in court which was estimated by the trial court as 120 metres. He must have been within a hearing distance because he heard Combrink say: 'Hey kom hier'. Combrink's evidence was also that: 'Ja ek is seker hy kon my hoor'.

[9] He testified further that he then saw Combrink crouching in the bakkie and that he came up with a rifle.

'Hy het toe een skoot geskiet teen die grond en toe was daar stof … Hy het geskiet na die rigting van die persoon … die werker … die stof was langs die persoon, die werknemer'.

Thereafter Combrink called him again. He testified further that:

'Hy het toe die tweede keer geskiet. Die tweede een het toe hierdie persoon getref en hierdie persoon het toe geval. Hy is raak geskiet na die tweede skoot'.

Thereafter Combrink drove away. When asked how far from the deceased he saw the dust rise after the first short, Masilela said:

'Naby aan hom, naby aan hom, dit was naby aan hom.'

[10] It is significant to note at this stage that Masilela's version was not challenged or disputed. The only pertinent and material question in cross-examination was that, the appellant would testify that:

'… nadat hy die tweede skoot geskiet het, het die man omgedraai, … en hy het toe gesien dat dit die man is, die oorledene.'

[11] The state also led the evidence of Madigage, also an employee of Combrink. His evidence is basically that he was on the back of the vehicle

driven by Combrink at the time when the shooting took place. His version under cross – examination appeared to differ drastically and materially from the statement he made to the police. His evidence was also contradicted by the evidence of Masilela and Combrink that he was never on the vehicle when the shooting took place. In light of this his whole version was rejected, rightly, in my view, by the trial court. Inspector Van der Berg arrived on the scene and he showed Superintendent Neethling where the deceased was found and Inspector Wolmarans took the photos of the area and the deceased. Their evidence did not take the case any further.

[12] It is common cause that after Combrink shot the deceased he proceeded to fetch some of the farm workers who were working some distance from where the incident occurred. It was only on his way back that he went to investigate, in the company of one Majola, what happened to the deceased. He discovered that he was already dead. Combrink's evidence is that he saw a shotgun under the body of the deceased as he lay face down on the ground. At the trial there was no proper enquiry into how it came about that the shotgun was found under the deceased. Hence, Combrink was acquitted on counts 2 and 3 which related to the shotgun. The state tendered the evidence of Mr Frederik Nel who was the commanding officer of the local commando at the time. According to his testimony, Combrink telephoned him at about 18h00 on the afternoon in question to inform him that there was a shooting incident on his farm involving a suspicious person. This I find irreconcilable with Combrink's version. On his version one would have expected him to tell Nel that there was a terrible accident which led to the

death of one of his workers. Combrink's version continued that he proceeded to his home where he informed his father about the accident. He could not say who called the police, but he was certain that it was not him.

[13] According to Combrink he fired the first shot into the ground about 80 metres away from the deceased. This important piece of evidence is contrary to what Masilela said, which was that the first shot landed near the deceased's feet. What is significant is that Combrink's version was not put to Masilela for his comment. Instead, Combrink introduced the evidence of Du Plessis, who attended to the body of the deceased and the scene of the shooting on the farm some six days after the event. Du Plessis was briefed to reconstruct the scene of the shooting in the presence of Combrink only. He came up with a theory that when Combrink fired the second shot, the bullet first struck a wire fence surrounding the mealie land which caused the bullet to ricochet towards the deceased. Had it not been deflected, so the theory goes, it would have caused a round entry wound. But because it was deflected and unstable the projectile caused an oval entry wound. The trial court as well as the court a quo rejected this theory and found it unconvincing, tenuous and not reasonably possibly true.

[14] Counsel for Combrink submitted that the fact that he repeatedly called the deceased is indicative of lack of intention to shoot and kill. However, he was bound to concede that using a .308 hunting rifle under the circumstances was entirely inappropriate. The situation did not call for the use of any firearm, let alone one as powerful as a hunting rifle. The deceased was walking

innocently and relaxed on the property of his employer, he did not pose any danger to Combrink or to anyone else. The state argued that Combrink could have driven towards him to stop him, or could have used the hooter of the vehicle. If he wanted to draw his attention, there were numerous other ways of doing so.

[15] It is trite that the state must prove its case beyond reasonable doubt and that no onus rests on an accused person to prove his innocence. The standard of proof on the state and the approach of a trier of fact to the explanation proffered by an accused person has been discussed in various decisions of this court and of the high courts (see *R v Difford* 1937 AD 370 at 373; *S v Van der Meyden* 1999 (1) SACR 447 (W) at 448f-i). It suffices for present purposes to state that it is well settled that the evidence must be looked at holistically.

[16] Masilela's evidence was accepted by the court a quo. Counsel for Combrink conceded, as much, that Masilela was an honest witness. In my view, not only was Masilela an honest witness, his evidence is reliable, and sufficient to sustain a conviction. This I say having considered all the evidence and the necessary caution required when dealing with the evidence of a single witness (see *R v Mokoena* 1932 OPD 79 at 80; *S v Webber* 1971 (3) SA 754 (A); *S v Sauls* 1981 (3) SA 172 (A) at 180E-G). It is significant to note that Du Plessis's theory is irreconcilable with Masilela's evidence. On his own version Combrink is an experienced hunter and a very good marksman. He said he aimed the second shot at the same place as the first. It is my view that

when doing so, he foresaw the possibility that a bullet might strike the deceased. His version is that he did not see the wire in front of him. That matters not. For, on the undisputed evidence he plainly shot at the deceased. And in resorting to his firearm in those circumstances and in the manner that he did he must subjectively have foreseen the possibility (a real one I must add) that the bullet could ricochet after striking a stone or some other object and in the process strike the deceased. Regardless of that foreseeable possibility he went on to shoot.

[17] Holmes JA in *S v De Bruyn* 1968 (4) SA 498 (A) at 506H-507A referred with approval to *S v Sigwahla* 1967 (4) SA 566 (A) at 570B-E where the following was said:

‘1. The expression ‘‘intention to kill’’ does not, in law, necessarily require that the accused should have applied his will to compassing the death of the deceased. It is sufficient if the accused subjectively foresaw the possibility of his act causing death and was reckless of such result. This form of intention is known as *dolus eventualis,* as distinct from *dolus directus.*

2. The fact that objectively the accused ought reasonably to have foreseen such possibility is not sufficient. The distinction must be observed between what actually went on in the mind of the accused and what would have gone on in the mind of a *bonus paterfamilias* in the position of the accused. In other words, the distinctive between subjective foresight and objective foreseeability must not become blurred. The *factum probandum* is *dolus,* not *culpa.* These two different concepts never coincide.

3. Subjective foresight, like any other factual issue, may be proved by inference. To constitute proof beyond reasonable doubt the inference must be the only one which

can reasonably be drawn. It cannot be so drawn if there is a reasonable possibility that subjectively the accused did not foresee, even if he ought reasonably to have done so, and even if he probably did do so.'

As already stated, in the present case Combrink fired the second shot knowing that the bullet might fatally strike the deceased. In my view he is guilty of murder, the intention being dolus eventualis.

[18] What remains unexplained on Combrink's version is that, after shooting for the second time, he simply drove off without establishing what happened to the deceased. He was bent on stopping him because he thought he posed a danger. Now that he had stopped him, he simply left him, after having realised that he was one of his employees. He fetched his other employees and only later did he return to the scene of the shooting and discovered that the deceased was dead. Strange enough, Combrink telephoned Nel to inform him of the shooting incident. What he then told Nel was not that there was a terrible accident. He said he shot a 'suspicious' person. Which, as I said, I find irreconcilable with his version.

[19] The trial court made certain credibility findings. This court is not at liberty to interfere with such findings. (See *R v Dhlumayo* 1948 (2) SA 677 (AD) at 705-706; *President of the Republic of South Africa v South African Rugby Football Union* 2000 (1) SA 1 (CC) paras 78 and 79.) In this case we do not have a single reason to do so. Combrink's conviction must stand.

[20] I now turn to the question of sentence. It is common cause that the

provisions of section 51 of the Criminal Law Amendment Act 105 of 1997 are applicable in this case. The trial court found substantial and compelling circumstances. However, it did not place those circumstances on the record as required by the Act.

It is trite that sentencing or punishment is pre-eminently a matter of discretion of the trial court. (*S v Rabie* 1975 (4) SA 855 (A) at 857D-E.) Therefore an appeal court should be slow to interfere with the trial court's discretion. An appeal court may interfere provided the discretion has not been judicially and properly exercised and the sentence is vitiated by irregularity, misdirection or is disturbingly inappropriate.

[21] The court a quo found that the trial court misdirected itself, and I agree. The minimum sentence in the circumstances is 15 years' imprisonment. But for the finding of substantial and compelling circumstances, that is the sentence the trial court was bound to impose. As to what this yardstick means, Marais JA said the following in *S v Malgas* 2001 (2) SA 1222 (SCA) para 25:

'A. Section 51 has limited but not eliminated the courts' discretion in imposing sentence in respect of offences referred to in Part 1 of Schedule 2 (or imprisonment for other specified periods for offences listed in other parts of Schedule 2).

B. Courts are required to approach the imposition of sentence conscious that the Legislature has ordained life imprisonment (or the particular prescribed period of imprisonment) as the sentence that should *ordinarily* and in the absence of weighty justification be imposed for the listed crimes in the specified circumstances.

C. Unless there are, and can be seen to be, truly convincing reasons for a different response, the crimes in question are therefore required to elicit a severe, standardised and consistent response from the courts.

D. The specified sentences are not to be departed from lightly and for flimsy reasons. Speculative hypotheses favourable to the offender, undue sympathy, aversion to imprisoning first offenders, personal doubts as to the efficacy of the policy underlying the legislation and marginal differences in personal circumstances or degrees of participation between co-offenders are to be excluded.

E. …

F. All factors (other than those set out in D above) traditionally taken into account in sentencing (whether or not they diminish moral guilt) thus continue to play a role; none is excluded at the outset from consideration in the sentencing process.

G. The ultimate impact of all the circumstances relevant to sentencing must be measured against the composite yardstick (''substantial and compelling'') and must be such as cumulatively justify a departure from the standardised response that the legislature has ordained.'

[22] In light of this I am of the view that the trial court focused exclusively on the mitigating factors instead of balancing them with the aggravating factors. Firstly Combrink's personal circumstances were overstated while the personal circumstances of the deceased and the gravity of the offence were virtually ignored. The court required direct evidence as to the effect of the deceased's death on his family. I do not think it is necessary to lead such evidence. It stands to reason that the loss of life will self-evidently have a negative impact. (See *S v Matyityi* 2011 (1) SACR 40 (SCA.) Moreover, life was the most valuable asset of the deceased which had been taken away from him.

The fact that Combrink had a military background does not in itself, in my view, impact on mitigating factors.

The trial court appreciated the fact that murder is a very serious offence, and

that the resort by Combrink to his firearm and the killing of the deceased was gratuitous. One would have thought that the minimum sentence was being contemplated.

[23] The only aggravating circumstance mentioned by the trial court was that Combrink failed to, immediately, assist the deceased, after realizing that he had shot him. The court also concluded that Combrink failed to show remorse, that he steadfastly denied that he committed the offence. In my view, it was the most callous behaviour of Combrink to have used a .308 hunting rifle just to deal with a 'suspicious' person who was just walking on the mealie land without posing any danger to anybody. The late Mahomed CJ said in *S v Salzwedel* 2000 (1) SA 786 (SCA) para 12:

'[12] My main difficulty with the approach of the trial Judge is that he over-emphasised the personal circumstances of the respondents without balancing these considerations properly against the very serious nature of the crime committed, the many very aggravating circumstances which accompanied its commission, its actual and potentially serious consequences for others, and the interests and legitimate expectations of the South African community at a very crucial time in its transition from a manifestly and sadly racist past to a constitutional democracy premised on a commitment to a constitutionally protected and expressly articulated culture of human rights.'

In that case the respondents had been charged with murder; assault with intent to do grievous bodily harm and malicious damage to property. They were all convicted of murder and malicious damage to property. On the murder charge they were each sentenced to ten years' imprisonment but the whole sentence was suspended for five years on certain conditions which

included three years' correctional supervision. The respondents, who were young white men and women, had assaulted the complainants who were all black men and damaged the vehicle belonging to one of them. They had been part of a group of young persons who were bent on attacking black persons indiscriminately. The state took the view that the sentence imposed in respect of the murder charge was glaringly inadequate and obtained leave to appeal. The sentence for the murder charge was set aside and then substituted with 12 years' imprisonment, two years of which was suspended on certain conditions.

[24] A sentence of ten years' for murder is very light and inadequate, so argued counsel for the state before us. I am not suggesting by any means that the murder committed in this case was racially motivated; however, I am saying that courts must be conscious and sensitive to cases which on the facts appear to have a racial or discriminatory connotation, especially when dealing with the question of sentence. We all know that the public is incensed with sentences that appear to favour a particular group in society. The public interest is one of the essential considerations in determining an appropriate sentence. That the trial court appeared to ignore.

[25] Courts have in the past dealt with cases with a racial connotation. (See *S v Van Wyk* 1992 (1) SACR 147 (Nm); *S v De Kock* 1997 (2) SACR 171 (T); *S v Matela* 1994 (1) SACR 236 (A). I therefore agree with Poswa J when he said in para 88 of his judgment that:

'What the court a quo did not mention, which, in my view, merits mentioning, is the fact that the appellant's conduct was adding to a series of disturbing events in which

a number of African people, some of them employees of the accused persons, are shot by a number of ‘‘white farmers’’ which episode definitely has a negative impact on race relations in a country with a painful history of relations between ‘‘white’’ and ‘‘black’’ citizens.’

Counsel for Combrink argued that Poswa J was politicizing the case. I don’t think so. The public interest and discrimination is not necessarily between black and white but rather between people in general who perceive others, with prejudice, to be different or inferior to them. It is this perception that the judiciary should address. As a result of avoiding the issue of racial tension some people think that:

‘Judges and magistrates will not necessarily be aware that the effect of hate crimes goes far beyond the victims and serve to traumatise whole communities and damage South African society. Without the decision makers in the criminal justice system being attuned to these issues it will not be possible to properly combat hate crimes’ (see Kerry Williams, Legalbrief on Hate Crimes in South Africa (assisted by Tshego Phala and Benjamin Cronin) (27 May 2010) para 7.3.4).

[26] In short, when weighing up all the mitigating circumstances against the aggravating factors, I believe that the trial court had erred in finding that the yardstick of substantial and compelling circumstances had been met. Because of this view I held on a prima facie basis, Combrink’s legal representatives were notified of the possibility of the sentence being increased in the event the conviction is confirmed. Despite the arguments to the contrary presented by Combrink’s counsel I have not been persuaded to

the contrary. In terms of section 322 (6) of the Criminal Procedure Act 51 of 1977 this court is empowered to increase the sentence imposed by the court a quo. On the authority of *Malgas* (supra) the legislature decreed that in the absence of substantial and compelling circumstances, the prescribed minimum sentence must be imposed. Section 51 (2) (a) (i) of the Criminal Law Amendment Act stipulates that in the case of a first offender convicted of an offence referred to in Part II of Schedule 2 the court must impose a sentence of not less than 15 years' imprisonment.

[27] In the result the following order is made,

1. The appeal against both conviction and sentence is dismissed.
2. The sentence imposed by the court below is set aside and substituted with the following:

'The appellant is sentenced to 15 years' imprisonment.'

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J B Z SHONGWE

JUDGE OF APPEAL

APPEARANCES:

FOR APPELLANT:	B C Bredenkamp SC
Instructed by:	Coert Jordaan Inc Attorneys, Nelspruit;
	Giorgi & Gerber Attorneys, Bloemfontein.
FOR RESPONDENT:	J J Kotzé
Instructed by:	Director of Public Prosecutions, Pretoria;
	Director of Public Prosecutions, Bloemfontein.