

IN THE COURT OF APPEAL OF SEYCHELLES

Reportable/ Not Reportable / Redact

[2020] SCCA 18 December 2020

SCA CR 20/2019

(Appeal from CO 66/2018)

DAVID MICHEAL AGNES

(rep. by Mr. Clifford Andre)

Appellant

and

THE REPUBLIC

(rep. by Mr. Hemanth Kumar)

Respondent

Neutral Citation: *Agnes v R* (SCA CR 20/2019) [2020] SCCA - (18 December 2020).

Before: Fernando, President, Robinson JA, Dingake JA

Summary: Murder – appeal against conviction and sentence – appeal dismissed and conviction and sentence confirmed.

Heard: 1 December 2020

Delivered: 18 December 2020

ORDER

Appeal is dismissed and the conviction and sentence of the court below confirmed.

JUDGMENT

DINGAKE JA

Introduction

[1] This is an appeal against the decision of the Supreme Court convicting the Appellant of the offence of murder and sentencing him to life imprisonment.

- [2] The Appellant was charged and convicted on a charge of murder contrary to section 193 of the Penal Code by the verdict of the jury on the 12th of July 2019. The jury was split, with seven jurors upholding a guilty verdict and two jurors finding the accused not guilty.
- [3] The Appellant has raised seven grounds against conviction and one against sentence. The Appellant's grounds of appeal are similar and overlap in many respects. Purely for convenience I have grouped them together, as may be convenient, where they overlap, and considered them together.
- [4] Most of the grounds relate either to the manner in which the trial judge conducted the trial or they relate to specific evidence, particularly that of Michel Souffe, the minor son of the deceased.
- [5] Based on the seven grounds raised, the Appellant prays the court to quash the conviction and that he be acquitted. Alternatively, he prays that in the event the court maintains the conviction, it should not be for murder but for manslaughter.
- [6] It is convenient to start with Ground 2 and 3 that relate to the manner in which the trial judge summed up the evidence. The grounds are as follows:

Ground 2: The learned judge was wrong in law and fact in addressing the jury in his summing up when he clearly was guiding them into which verdict they should come to but in reality he should have just stated that this was the evidence given before the court and not to tell them what their verdict should be.

Ground 3: The learned Judge erred in both law and fact in not guiding the jury in considering fully the statement of the accused in that he stated that he had gone to the beach with the victim and was not present and he had left the said place and that when he left the victim was alive.

[7] The above grounds implicate the role of a presiding judge in a trial by the jury. First, it has long been accepted, including by this court that the jury is a trier of facts and not of law. Lord Justice General in **Hamilton v HM Advocate (1938) JC 134** stated the following regarding the role of the presiding judge:

“The primary duty of the presiding judge is to direct the jury upon the law applicable to the case. In doing so it is usually necessary for him to refer to the facts on which questions of law depend. He may also have to refer to evidence in order to correct any mistakes that may have occurred in the addresses to the jury, and he may have occasion to refer to the evidence where controversy has arisen as to its bearing on a question of fact which the jury has to decide. But it is a matter very much in his discretion whether he can help the jury by reviewing the evidence on any particular aspect of the case.”(emphasis mine)

[8] The law requires a judge to exercise restraint in expressing his own views on questions of fact to avoid influencing the jury. At the same time, the judge must direct the jury to key factual questions of fact that have a bearing on legal questions. Occasionally this requires referring to the evidence given to ensure that the jury considers certain evidence. If the Court of Appeal finds that the presiding judge unduly influenced the jury or imposed his views on the jury, the Court has to quash the conviction. Quashing the conviction will occur even if the judge attempts to cure the influence through placing emphasis at the end of the trial that the factual questions are primarily the role of the jury (see **Judge v The United Kingdom Application No. 35863/10 of 2010**, para 18.

[9] In **Sim v HMA [2016] HCJAC 1947 JC 109** the court had an occasion to deal with the approach a court would adopt to determine whether a judge in directing the jury may have fallen into error in the following terms:

*“The words should not be scrutinised in isolation or as if they were part of a conveyancing document or a provision in a penal statute (**Beck v HM Advocate [[2013] HCJAC 51...**) Minor deviances from standard formulae will not normally be*

regarded as productive of miscarriages of justice, if the directions on a particular topic are, when the charge is read as a whole, clear and correct”.

[10] It follows from the above that directions by the trial judge must therefore be looked at holistically in the context of the evidence given. When a judge decides to summarise evidence, he or she must do so in a balanced manner, without showing any undue favour to the State’s case (see **Snowden v HMA [2014] HCJAC 100**).

[11] In **Akbar v R [1998] SCCA 37** this court stated:

“An appellate court does not rehear the case on record. It accepts findings of facts that are supported by the evidence believed by the trial court unless the trial Judge’s findings of credibility are perverse.”

[12] In this case the trial judge advised the jury that the assessment of the evidence was wholly a matter for them. He then made such reference to the State case as was necessary to put his directions in law into context, specifically reminding the jury that assessment of the evidence was for them. In my view, his reference to evidence did not amount to any misdirection. He summed up both the Prosecutor’s case and the Defence’s case, highlighting issues that the jury had to take into account. There is therefore no merit in the argument that the trial judge in directing the jury misdirected himself.

Evidence of a Michel Souffe

[13] Ground 1 and ground 4 relate to the evidence of Michel Souffe. It is convenient to deal with these grounds together.

Ground 1: The learned judge erred in law and fact in guiding the jury to accept the evidence of Michel Souffe when it was clear that when the visit was done he was unable to explain how the candle was sighted and the position of the table was not in the position he said it was.

Ground 4: The learned judge erred in both law and fact in not guiding the jury on the fact that the said Michel Souffe had not told the truth on many occasion

when his abetment was compared with what he said in court. The said evidence of Michel Souffe was contradicted by his own brother later.

- [14] Regarding the evidence of Michel, the twelve year old son of the deceased, the judge asked a series of questions to establish whether the witness understood the nature of the proceedings and what was required of him. He explained his role; the role of both counsels in the matter; and that the jury could also ask him questions. There is nothing to demonstrate that the witness did not understand what was before him. Even the subsequent questions to the witness by the prosecution demonstrated that he fully understood the questions that were being put to him.
- [15] It is true that the evidence of Michel had inconsistencies. It was the Defence's case that Michel was mistaken as to the identity of the person who attacked his mother. They relied on the poor lighting condition in the house and argued that it was not possible for Michel to have identified the attacker. However, it is not in dispute that the Accused and Michel spoke; he had known the Accused and was familiar with his voice. In other words, the identification of the Accused was further confirmed by the voice recognition. As correctly noted by the trial court, this was a traumatic case on the 12 year old witness and some inconsistencies are possible. When viewed and analysed together, the inconsistencies were minor and his evidence was not in any way discredited.
- [16] The evidence of Michel that the Accused strangled his mother was also consistent with the findings of the Medical report (the autopsy report). According to the report, there were signs of violence (hematomas produced by the fingerprints on both sides of the neck; superficial and surface contusion).
- [17] The medical report concluded that the cause of death was Mechanical Asphyxia, Force constriction of the neck and Strangulation.
- [18] The question on whether the candlelight in Michel's room was capable of assisting the witness to see his mother's bedroom, taken in isolation, might raise doubt on whether he

saw the Accused strangling his mother as he put it. His version that he woke up after hearing his mother and Mike fighting; went to his mother's room; found the door closed but not locked; opened the door and saw Mike strangling his mother; was told to mind his own business and he went back to sleep, was not discredited. Later on he woke up after hearing his mother screaming and shouting the words stop; went to the room; this time the door was closed and locked; he went back to sleep.

[19] In my view, the inconsistencies in the testimony of Michel must not be viewed in isolation, but must be assessed in the context against all the evidence given. In addition, it must be noted that the witness was a 12 year old. Courts must also consider issues of anxiety and stress that child victims and child witnesses suffer when entering the criminal justice system, especially while testifying (see for example *Director of Public Prosecutions, Transvaal v Minister for Justice and Constitutional Development and Others 2009 (4) SA 222 (CC), para 1*). These two grounds are without merit and must fail.

[20] Ground 5 is based on the right of the Appellant to remain silent. The ground states as follows:

Ground 5: The learned Judge erred in both law and fact in contradicting himself when he said that the fact that the accused did not give evidence was something of consideration and that if he had given evidence he would have been cross examined. This is in contravention with the constitutional rights of the accused which was also stated by the judge.

[21] The trial judge explained the rights of the Accused to remain silent to the jury from page 454, volume II. The learned trial judge explained that under our criminal justice system, an accused person can remain silent and no adverse inference can be drawn from such silence. He also explained that the choice to remain silent in the face of evidence suggestive of complicity may in an appropriate case lead to an inference of guilt. Despite the explanation, the trial judge did not say to the jury this was an appropriate case to draw the inference. He merely explained the applicable legal position. No violation of the rights of the Appellant was committed.

Intoxication and criminal capacity

[22] Grounds 6 and 7 challenge the state of mind of the accused:

6. The learned judge erred both in law and fact in not properly explaining the mental element of the offence and that if it was not present the accused could not have been found guilty for the crime of murder. The issue of strangulation was only evidenced in court by only one person and this is a one to one issue which the court could not and should not guide the jury to take into consideration.

7. The learned judge erred in both law and fact in properly guiding the jury on the act that intoxication is a ground that could allow them to consider manslaughter. The evidence adduced indicated that the victim and the accused person was consuming alcohol and that the content of the stomach of the victim indicated that there was alcohol in her body.

[23] The relevant section of the Penal Code provides as follows in relation to intoxication:

Intoxication

14. (1) Save as provided in this section, intoxication shall not constitute a defence to any criminal charge.

(2) Intoxication shall be a defence to any criminal charge if by reason thereof the person charged at the time of the act or omission complained of did not know that such act or omission was wrong or did not know what he was doing and-

(a) the state of intoxication was caused without his consent by the malicious or negligent act of another person; or

(b) the person charged was by reason of intoxication insane, temporarily or otherwise, at the time of such act or omission.

(3) Where the defence under subsection (2) is established, then in a case falling under paragraph (a) thereof the accused person shall be discharged, and in a case falling under paragraph (b) the provisions of section 13 shall apply.

(4) Intoxication shall be taken into account for the purpose of determining whether the person charged had formed any intention, specific or otherwise, in the absence of which he would not be guilty of the offence.

(5) For the purposes of this section “intoxication” shall be deemed to include a state produced by narcotics or drugs.

[24] In terms of this section, the starting point is that intoxication is not a defence. There are few exceptions to the general rule listed under subsection 2. It was neither raised as a defence that by virtue of his intoxication, the Appellant may have had a diminished capacity. Importantly, the version that the Appellant was intoxicated was put forward by the trial judge based on the Appellant’s statement. It was never established factually that the Appellant was intoxicated. To the contrary, a reading of the Appellant’s statement demonstrates a vivid narration of the events from the time he arrived on Mahe from Praslin to the time he left the deceased room.

[25] The statements by the trial judge at para 122, and how he cautioned the jury that the Accused was under the influence of drugs must not be read in isolation to the whole judgment. In fact, it appears to me that such a statement favoured the Accused. Despite this, I am unable to come to the same conclusion that the Accused was under the influence of drugs or to say “he was heavily under the influence of drugs that night...” as the judge points out at paragraph 121. Despite admitting that he had smoked that day and during that evening, there is no evidence to suggest that he was intoxicated or heavily intoxicated. Quite to the contrary, his vivid, detailed recall of events that occurred that night suggests that he was fully aware of what happened that night. It is trite learning that a detailed recollection of events militates against a claim of loss of control over one’s actions.

[26] In **S v M (CC122/2016) [2017] ZAGPPHC 869; 2018 (1) SACR 357 (GP) (5 December 2017)**, the court had an occasion to deal with a defence of automatism and pointed out the following:

*Having discussed numerous cases relating to sane automatism, the Supreme Court of Appeal made it clear that **one has to carefully consider the accused's actions before, during and after the event. Account must be taken of whether there was planned, goal-directed and focused behaviour. Also, a detailed recollection of events militates against a claim of loss of control over one's actions. (own emphasis)***

[27] In **Nicholas Brian Julie v R (Criminal Appeal SCA21/2017) [2018] SCCA 18 (31 August 2018)**, the Court of Appeal referred to several cases on the onus of the state to prove its case against the Accused, beyond any reasonable doubt. In particular, the state must prove that Accused had the criminal capacity at the time. The court must consider all evidence holistically (see **S v Chabalala 2003 (1) SACR 134 (SCA)**). The question for the court is whether in light of the all the evidence, the State has proved the guilt of the accused beyond any reasonable doubt (see also **Nicholas Brian Julie v R (Criminal Appeal SCA21/2017) [2018] SCCA 18 (31 August 2018)**).

[28] In this case, one must also look at the explanations that the judge made from paragraphs 33 – 51 of his judgment in which he meticulously explained the law to the jury. From the crime of murder to manslaughter, the judge explained the legal position, occasionally cautioning the jury on what aspects it ought to ignore and to consider. In particular, paragraphs 43- 51, the trial judge explained the role of intention in the commission of the crime; and how manslaughter comes into the picture if this intention is not proven. In all instances, the trial judge raised or flagged questions of fact that the jury ought to consider in its assessment of the case.

[29] In my respectful view, having regard to the totality of the entire evidence there is no basis to suggest that the Appellant was intoxicated. On the contrary, he had such a vivid, detailed recollection of events suggesting that he was fully aware of all the events. Without any

other supporting evidence, the statements by the trial judge to the effect that the Appellant was heavily intoxicated is without any basis. Accordingly, the jury also rejected the statement and were of the view that the charge of murder was proven by the evidence adduced and not manslaughter.

[30] The proper approach to be adopted by a court of appeal when dealing with the factual findings of a trial court is found in the collective principles laid down in **R v Dhlumayo 1948 (2) SA 677 (A)**. A court of appeal must not disturb the factual finding of a trial court unless the latter had committed misdirection.

[31] Lastly, as stated in **Booyesen v S (A875/12) [2013] ZAGPPHC 104 (18 April 2013)**, “[a] court does not base its conclusion, whether it be to convict or to acquit, on only part of the evidence. The conclusion which it arrives at must account for all the evidence...”

[32] In my considered opinion, having regard to the totality of the evidence, the prosecution succeeded to prove its case beyond reasonable doubt and the court correctly returned a verdict of guilty as charged. The inconsistencies that may be there are neither serious nor material to affect the evidence proving the Appellant’s guilt beyond reasonable doubt (see on this point *Zialor v R SCA 10/2016*).

[33] In the result the appeal against conviction is without merit and it is dismissed.

Sentence

[34] I turn now to consider the sentence imposed, which the appellant complains is harsh.

The Penal Code

[35] The Penal Code, at section 194 provides for punishment for murder as follows:

Punishment of murder

194. Any person convicted of murder shall be sentenced to imprisonment for life.

[36] Section 26 of the Penal Code provides that a person *liable* to imprisonment for life or any other period may be sentenced for any shorter term. This section does not apply to the crime of murder since the wording of section 194 which uses ‘*shall*’ is imperative and takes away any discretion from the sentencing judge.

[37] In all the circumstances of this case, there is no merit in the Appellant’s complaint that the sentence imposed by the court below was harsh. The trial court was entitled to impose the mandatory sentence as prescribed by law and no misdirection was committed. The sentence imposed by the court below is accordingly confirmed.

[38] In the result the appeal is dismissed and the conviction and sentenced imposed by the trial court is accordingly confirmed.

Signed, dated and delivered at Palais de Justice, Ile du Port on 18 December 2020

Dingake JA

I concur

Fernando, President

I concur

Robinson JA