IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL DIVISION:

PIETERMARITZBURG CASE NO: AR212/2017

In the matter between:

Mthobisi Mtho Mgidi Appellant

and

The State Respondent

Judgment

Lopes J

[1] On the 14th of September 2015, and in the Umlazi Regional Court, the appellant, Mthobisi Mtho Mgidi, was convicted of one count of robbery with aggravating circumstances and one count of murder. On the 15th September 2015 he was sentenced to undergo 15 years' imprisonment on the count of robbery, and life imprisonment on the murder count.

[2] The matter comes before us by way of leave to appeal having been granted against the robbery count, and Mr Mgidi's inherent right to appeal against the sentence of life imprisonment for murder. Two points in *limine* were raised in the heads of argument of Mr *Dlamini*, who appeared for Mr Mgidi. In argument, he abandoned them, and I shall not deal with them. In my view the points raised have no merit in any event.

[3] With regard to the conviction of Mr Mgidi, it is necessary, firstly, to examine facts surrounding the incident leading to the death of the late Blessing Nkosinathi Siyabonga Khanyile. They may be summarised as follows:

(a) At about 3:00am on the 20th of September 2014 Mr Mgidi and his friend Andile Sikhakhane were proceeding along the road to Mata's Tavern. They had been drinking from earlier the previous day at another tavern which is located at a local carwash. That tavern had closed and Mr Mgidi and Mr Sikhakhane could no longer drink there.

(b) Along the road they met the late Mr Khanyile. At this stage it was clear that all three of them were intoxicated, and manifestly so.

(c) Having been told that Mata's Tavern was also closed, Mr Sikhakhane went ahead of Mr Mgidi in order to see for himself whether the tavern was in fact closed. He then heard someone calling him and he looked back and saw Mr Mgidi stabbing the late Mr Khanyile with a knife. He saw Mr Mgidi stab him more than once, and at that stage Mr Khanyile was lying on his back, and Mr Mgidi was bent over him stabbing him in the chest region.

(d) Mr Sikhakhane then went up to Mr Mgidi and pushed him away from Mr Khanyile.

(e) After pushing Mr Mgidi away, Mr Sikhakhane then proceeded along the road. When doing so, he again met Mr Mgidi who was covered in blood, and carrying a belt and either shoes or takkies which Mr Sikhakhane stated belonged to the late Mr Khanyile.

(f) Early the next morning Mr Sikhakhane reported the incident to the late Mr Khanyile's family.

(g) Mr Sikhakhane also testified that the knife used was a kitchen knife, and he was of the view that Mr Mgidi had obtained it from persons who were selling chicken at the shops at the carwash, where the first tavern was situated. He had seen Mr Mgidi helping them carry their goods as

they were heading home. Mr Sikhakhane had no knowledge of the circumstances under which Mr Mgidi obtained possession of the knife.

(h) Mr Sikhakhane did not enquire from Mr Mgidi why he was stabbing Mr Khanyile. He did, however, confirm in cross-examination that Mr Mgidi was so drunk that he was not behaving normally, and in his evidence he referred to him staggering, and not speaking normally.

(i) Mrs Zanele Mgidi testified that she was the mother of Mr Mgidi, and that she had seen him on the morning of the 20th of September 2014 at approximately 7:00am standing outside their home. His trousers, which were on the ground, were full of blood. She also saw a blood-stained knife. She then telephoned the South African Police Services but Mr Mgidi had already fled. She confirmed that he had been drunk because she saw him staggering and crying.

[4] Against the evidence set out above Mr Mgidi testified that he could not recall what had happened on the day in question. He remembered his mother seeing him with blood on his t-shirt and she was shouting at him. He could remember her calling the police, but he ran away. He did so because he had heard from other persons who came to his house, that the police officers were looking for him.

[5] Mr Mgidi denied that he sustained any abrasions or bruises on the night in question. He could neither confirm nor deny that he was the person who stabbed Mr Khanyile, because he could not remember. He could remember quarrelling with Mr Sikhakhane, parting company and sleeping at the homestead of one Botsotso.

[6] At the outset of the appeal, Mr *Dlamini* submitted that the defence of Mr Mgidi should be classified as temporary non-pathological criminal incapacity. Mr *Dlamini* submitted that, as this was raised at the outset of the trial, the State bore the onus of proving criminal capacity and has failed to discharge that onus. In those circumstances Mr Mgidi should not have been convicted of any crime.

[7] Mr *Dlamini* referred to the decision in *The Director of Public Prosecutions, KwaZulu-Natal v Ramdass* 2019 JDR 0679 (SCA), where, in the court *a quo*, Ploos van Amstel J acquitted the accused of both robbery and murder because he found that the State had not proved that he had the necessary criminal capacity. The decision in the court *a quo* was upheld by the Supreme Court of Appeal.

[8] Ms *Dube*, who appeared on behalf of the State before us, submitted that *Ramdass* was distinguishable from the facts of this case because:

(a) *Ramdass* pertinently raised the defences, whereas in the present matter Mr Mgidi pleaded not-guilty, because he could not recall having committed the offences. Unlike *Ramdass*, Mr Mgidi was not sent for observation in terms of the Criminal Procedure Act, 1977

(b) In *Ramdass,* expert evidence was led from Professor Mkhize to speak to Mr Ramdass's ability to understand the proceedings so as to make a proper defence and whether he was criminally responsible for the offences. That was not requested or done in this matter.

(c) The memory of Mr Mgidi was selective, because he remembered things which had taken place shortly before and after the incident.

[9] In the judgment in *Ramdass* a quo, *S v Ramdass* 2017 (1) SACR 30 (KZD), the learned judge referred to the statement by Rumpff CJ in *S v Chretien* 1981 (1) SA 1097 (A) at 1108C, that the fact that a person cannot remember what they did, does not mean that they were not criminally responsible. Ploos van Amstel J also pointed out that amnesia itself is not a defence, but may be relevant in determining whether automatism or lack of criminal capacity has been established (See: *S v Piccione* 1967 (2) SA 334 (N) at 335 C-D). He also referred to *S v Eadie* 2002 (1) SACR 663 (SCA) para 2 that in assessing temporary non-pathological criminal incapacity, a court must consider:

(a) The State is assisted in discharging the onus by the natural inference that, save in exceptional circumstances, a sane person who commits a criminal act does so voluntarily and consciously.

(b) The accused must lay a foundation for the defence, sufficient to raise a reasonable doubt as to his capacity

(c) The evidence must be carefully scrutinised.

(d) The court must have regard to the expert evidence and all the facts, including the nature of the accused's conduct during the relevant period.

With regard to the above, the plea was not precisely made, and no suggestion was made that the accused should have been sent for mental observation. In addition, no expert evidence was led. Although the evidence of the State witnesses clearly established that alcohol played a role in the unfolding events, it is clear that Mr Mgidi was of sound enough mind to procure the knife with which he assaulted Mr Khanyile. I agree with the submission of Ms *Dube* that Mr Mgidi was selective in his evidence about what he remembered, and what he did not. He remembered his interaction with his mother after arriving at home, and his actions in crying and then fleeing, indicate that he must have known what he did. In all the circumstances the defence of temporary non-pathological criminal incapacity must fail.

[10] It is now necessary to deal with the merits of the offences. In his work Jonathan Burchell *Principles of Criminal Law*' 5ed (2016) at 721, the learned author records that:

> 'Robbery consists in the theft of property by intentionally using violence or threat of violence to induce a person to submit to the taking of the property'.

In the circumstances of the present case there is no evidence that the violence occasioned to Mr Khanyile by Mr Mgidi was instigated with the intention of depriving him of his property. The essence of robbery is that the violence must be intended to induce submission to the taking of the property. The only witness to the stabbing, Mr Sikhakhane, did not testify as to anything in the initial exchanges between Mr Mgidi

and the late Mr Khanyile which could have led to the inference that Mr Mgidi intended to rob Mr Khanyile. The fact that he may have taken items belonging to Mr Khanyile after he had assaulted him, and he was apparently dead, does not lead to the inference that the initial assault was intended to induce submission to the taking of the property.

[11] In this regard I refer to *Mokoena v S* (A242/2013) [2014] ZAFSHC 72 (22 May 2014) para 27 (referred to in Burchell *Principles of Criminal Law*, at 723) where Motloung AJ stated:

> 'Relying on the evidence above, the trial court convicted the appellant of robbery with aggravating circumstances. In my view the trial court erred. The magistrate said the only reasonable inference is that the appellant robbed the deceased of his wallet with aggravating circumstances. There is more than one inference that can be drawn. . . . .' In this particular instance there is no evidence that at the time of taking the deceased's wallet, he was still alive or dead. In the result robbery as defined above, cannot succeed as there is no evidence of violence being used to induce the deceased to submit to his belongings being taken. The property must be obtained by appellant as a result of violence or threat of violence. The premise is that the violence must precede the taking and that robbery is not committed if the violence is used to retain a thing already stolen or to facilitate escape. If this happens, appellant commits theft and assault. The converse is also true. If appellant assaulted the deceased, after the assault discovers that the deceased had by chance dropped some of his property and then only for the first time forms an intension of taking the property, he does not commit robbery if he picks up the property and appropriates it, he may however be charged with, and convicted of assault and theft'.

Motloung AJ relied upon *S v Moerane* 1962 (4) SA 105 (T) at 106 D; *S v Jabulani* 1980 (1) SA 331 (N); *S v Matjeke* 1980 (4) SA 267 (B); and CR Snyman *Criminal Law* 5ed at 518.

[12] As in *Mokoena's* case, there is no evidence in the present matter to suggest that Mr Mgidi intended to rob Mr Khanyile. In those circumstances Mr Mgidi should have only been convicted of the murder of Mr Khanyile and the theft of a belt and a

pair of takkies. In my view the learned magistrate, as in the *Mokoena* case, erred in concluding that the only inference which could be drawn was that Mr Mgidi intended to rob Mr Khanyile. There is in my view no basis for finding that Mr Mgidi intended to rob Mr Khanyile, far less – as the learned magistrate stated – that with regard to his attack upon Mr Khanyile, 'clearly it was brought on by the accused's intention to rob the deceased.'

[13] The conclusion at which I have arrived also affects the conviction of murder. I say this because the minimum sentencing provisions are only applicable in the circumstances set out in (a) to (f) of Schedule 2 part I, to the Criminal Law Amendment Act, 1997. In my view none of those circumstances are applicable. The fact that Mr Mgidi was in possession of a knife, even if he had appropriated it to himself unlawfully, does not in any way indicate that he intended to use it to rob or murder anyone at the time he acquired the weapon. In my view there can be no suggestion that the murder was planned or premeditated and, for the reasons set forth above, it was not committed in an incident of robbery. Accordingly none of the provisions in Schedule 2, part I are applicable to the sentencing of Mr Mgidi. With regard to the murder count, however, part II of Schedule 2 renders Mr Mgidi liable to undergo 15 years' imprisonment in respect of the murder charge. This was conceded by Ms *Dube,* correctly so in my view.

[14] Given that the learned magistrate accepted that Mr Mgidi had shown remorse for his actions, coupled with the fact that it is common cause that liquor played a considerable role in what happened, and the fact that Mr Mgidi was in prison from the time of his arrest on the 25th of September 2014 until his conviction on the 14th of September 2015, substantial and compelling circumstances existed which would have entitled the learned magistrate to impose a sentence of less than 15 years' imprisonment for the murder. In my view a sentence of twelve years' imprisonment for the murder and two years' imprisonment for the theft would accord with the tenets of justice. I have taken into consideration in this regard, the appellant's previous convictions for theft.

[15] I would accordingly make the following order:

(a) The appeal against conviction on the count of robbery is upheld, the conviction is set aside, and replaced with a conviction on one count of theft. The appellant is sentenced to undergo two years' imprisonment on the conviction of theft.

(b) The appeal against conviction on the murder charge is dismissed.

(c) The appeal against sentence on the murder charge succeeds; the sentence of life imprisonment is set aside, and is replaced with a sentence of twelve years' imprisonment.

(d) Both the sentences are to run concurrently, and are antedated to the 15th of September 2015.

(e) The matter of the implementation of the suspended sentences in the appellant's previous convictions is referred to the National Prosecuting Authority for consideration and implementation of any steps deemed appropriate.

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Lopes J

I agree.

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Radebe J

Date of hearing: 17th May 2019

Date of Judgment: 31st May 2019

Counsel for the Appellant:	Mr N B *Dlamini* (instructed by: Shazi and Associates)
Counsel for the Respondent:	Ms N *Dube* (instructed by: State Attorney)