

SOUTH AFRICA / JUDGMENT

# Gudu v S (A124/07) [2010] ZAGPPHC 538 (30 April 2010)

[2010] ZAGPPHC 538

## COURT

North Gauteng High Court, Pretoria

## BEFORE

NB Tuchten, PM Mabuse, MF Legodi

## CASE / FILE NUMBER

A124/07

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IN

THE NORTH GAUTENG HIGH COURT, PRETORIA

(REPUBLIC OF

SOUTH AFRICA)

CASE NO: A124/07

DATE: 30 APRIL

2010

In the matter

between:

GCINLEHANI

WITBOOI

GUDU.....Appellant

and

THE

STATE.....

Respondent

## JUDGMENT

1. This is an appeal, with the leave of the learned judge, against a judgment of Preller J, sitting in the circuit court at Witbank. The appellant, a 52 year old man at the time of his trial, was convicted of the murder of Ntsatsi Philemon Mogohloane, to whom I shall refer as the deceased and sentenced to imprisonment for 10 years. There is no appeal against the sentence.

2. It is not in dispute that on 31 October 2003, on the grass dividing island between the two carriageways of the N4 highway near Witbank, the appellant fired one shot at the deceased from a 9mm pistol licensed to the appellant, with the intention of killing the deceased.
3. The events that day must be seen against a taxi war which was raging in that area. The appellant and the deceased were members of different factions in that conflict, shown on the evidence to be bitterly hostile to each other.
4. Earlier during the morning of 31 October 2003, the appellant, accompanied by one Masina, had been confronted by a crowd of supporters of a hostile faction. There is a reasonable possibility that the deceased was one of the members of that crowd. The crowd began to attack Masina with sticks and metal objects and the appellant fled. Masina was only saved from death or very serious injury by the intervention of a bystander, Mr Khumalo, who appears from the record to have been a man of courage and humanity.
5. Mr Khumalo, who gave evidence for the appellant, said that shortly before 08h00 on 31 October 2003, at a stage during or immediately before the crowd began to beat Masina, a man (whom the witness identified as the deceased) fired three shots from a firearm in the direction of the fleeing appellant. Mr Khumalo's evidence in this regard was broadly corroborated by the appellant.
6. Masina laid a charge arising from the assault upon him and on 22 January 2004, the investigating officer, Inspector de Witt, took a statement from the appellant. In that statement, the appellant made no mention that anybody had fired shots at him.
7. The learned judge concluded, without dealing with the credibility of Mr Khumalo, that the version of the appellant that he had been fired upon by the deceased earlier on the morning of 31 October 2003 was fabricated. He accordingly found that no shots had been fired at the appellant.
8. While the appellant was an extremely bad witness and his account of the attack on Masina and him was riddled with contradictions and improbabilities, I think that the learned judge erred in ignoring the evidence of Mr Khumalo. I have described the unrest that seethed within the taxi owning and driving community as a war. I was not exaggerating. Passions ran extremely high and, on the evidence, many of those involved in the unrest carried firearms. Indeed, at the time of the assault upon Masina, the appellant himself was armed with the pistol with which he later shot the deceased. I am therefore prepared to find that the appellant was shot at by the deceased during the morning of 31 October 2003, before the fatal shooting.
9. I turn to the events of the fatal shooting itself. Although the precise time of day of the shooting was not canvassed in the evidence, it appeared from the statement of the police witness, Inspector Kruger, that the deceased was shot and killed at about 08h30 that morning. I accept that the appellant was still emotionally affected by the attack on him by the deceased some moments before.

10. The grass dividing island in the highway on which the fatal shooting took place was about 13 to 15 metres wide. At that time there stood, in the highway adjacent to the island, a red minibus taxi belonging to a member of the deceased's faction. This minibus had been put out of action in the conflict and abandoned. The deceased and three others drove up in a blue Toyota Corolla to retrieve the red minibus. Inspectors Ainslie and Kruger and many other police officers were on the scene. A crowd of members or supporters of the appellant's faction, and the appellant himself, were on the scene.
11. The deceased, who was the driver of the blue Corolla, got out, apparently to make preparations to tow away the red minibus. The crowd became restive and Kruger feared violence might erupt. He instructed the deceased to get back into the Corolla and drive away from the scene. The deceased obeyed and started the engine of the Corolla. At that moment, the appellant emerged from the crowd and, right next to Kruger, fired a shot through the open driver's window of the Corolla, striking the deceased in the neck. The bullet travelled through the body of the deceased and struck a passenger in the rear of the Corolla in the knee.
12. Kruger, with the assistance of Ainslie, tried to arrest the appellant. Kruger took the appellant's pistol from him, without resistance from the appellant and put the pistol in his, Kruger's, pocket. The crowd closed in. According to Kruger, one of the persons in the crowd thrust an object under Kruger's bullet proof jacket and warned him, on pain of death, to release the appellant. It is common cause that the appellant was not arrested on the scene.
13. The Corolla began to move and, after a few metres came to a halt when it collided with a white minibus on the island.
14. Kruger opened the driver's door and the deceased fell out, only his feet remaining in the Corolla. The deceased probably died on the scene.
15. The accused handed himself over to the police some few days later.
16. At the trial before the learned judge, the appellant admitted shooting the deceased. The evidence shows that the deceased intended to kill the deceased. The learned judge made a finding to that effect. This finding has not been challenged on appeal.
17. The appellant's defence, disclosed for the first time at his trial, was that he had acted in self-defence or in putative self-defence. The factual basis for this defence was an allegation by the appellant that as he approached the Corolla, he saw the deceased reach under his seat and bring out a pistol which the deceased then held on his lap, by the barrel, with the barrel of the pistol pointing upwards. The appellant then, so he said in effect, realised that his life was in danger and that it was a case of kill or be killed. So the appellant drew his own pistol and killed the deceased.

18. The learned judge found that this defence was a concoction and not reasonably possibly true. The learned judge accepted the evidence of the police witnesses in all respects. There was ample justification for these findings. I list a number of reasons why this, in my judgment, is so:

18.1 The appellant said that he approached the deceased to tell him to leave the scene. But the police had already told the deceased to do so and the deceased had re-entered the Corolla and started the engine, obviously in preparation for leaving the scene. The appellant's version in this regard is most improbable. It is much more likely that the appellant approached the deceased because he had recognised the deceased and had decided to murder him, in revenge for the attack on the appellant a short time earlier.

18.2 Kruger and his colleagues thoroughly searched the scene and the Corolla. They found two of the three passengers in possession of firearms, which they seized. These firearms were licensed to the passengers in question and were later returned to them. The deceased was searched. No firearm was found upon him. The rear seat passenger who was wounded was searched. No firearm was found on him. No firearm was found in the Corolla itself but the police found in the Corolla a spent round which was proved ballistically to have been fired from the appellant's pistol.

18.3 It was urged upon us on behalf of the appellant that the deceased might have borrowed one of the passengers' weapons to shoot the appellant and that the passenger might have retrieved the weapon after the fatal shooting. I regard this suggestion as so speculative and so improbable that it cannot reasonably possibly be true.

18.4 Kruger was within a few metres of the appellant when he fired the fatal shot. He went almost immediately to the Corolla after the shooting. There simply was not enough time for any of the passengers to retrieve the alleged weapon from the deceased, let alone any discernable motive for doing so.

18.5 The defence of self defence was disclosed at an extremely late stage. The appellant testified in his bail application and denied being on the scene at all. He explained that he had lied in his evidence at the bail application because his attorney had advised him to do so. This shows that the appellant is a person who is prepared to lie under oath if he thinks he can get away with it.

18.6 In my view, the appellant invented the absurd story that the deceased had held the weapon by the barrel on his lap in an attempt to meet the prosecution case that none of the police officers on the scene had seen any such weapon.

18.7 I find that the true reason, established beyond any reasonable doubt, for the killing was that the appellant, recognising the deceased as the man who had shot at him a short while earlier, decided on the spur of the moment to revenge himself and impulsively stepped forward and shot and murdered the deceased.

19 For these reasons, I would dismiss the appeal and confirm the conviction and sentence.

NB Tuchten

Acting judge of the

High Court

16 April 2010

I agree.

PM Mabuse

Acting judge of the High Court

I agree; it is so ordered.

MF Legodi

Judge of the High Court

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