

SOUTH AFRICA / JUDGMENT

Horn v S - Appeal (A51/2023) [2023] ZAWCHC 235 (5 September 2023)

[2023] ZAWCHC 235

COURT

Western Cape High Court, Cape Town

BEFORE

Le Grange, Cloete, Savage

CASE / FILE NUMBER

A51/2023

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FLYNOTES: CRIMINAL – Murder – Self-defence – Officer shooting dead under-cover policeman and his suspect – Convicted of two counts of murder – Witness testimony found untrustworthy and containing serious contradictions – Policeman had been carrying gun and was involved in brawl with suspect at time – Appellant saying that under-cover policeman pointed firearm – Version that he acted in

self-defence is reasonably possibly true – The two shots fired was also not a disproportionate response to neutralise the imminent threat – Conviction and sentence on both counts set aside.

Republic of South Africa

IN THE HIGH COURT OF SOUTH AFRICA

[WESTERN CAPE DIVISION, CAPE TOWN]

Coram: LE GRANGE, ADJP, CLOETE et SAVAGE JJ

Case no: A51/ 2023

In the matter between:

Morne Horn

Appellant

And

The State

Respondent

Judgment: 05 September 2023

LE GRANGE, ADJP

Introduction:

- [1] This is an appeal against conviction with leave of the Supreme Court of Appeal. The Appellant was convicted on 18 November 2021 by the court a quo, on two counts of murder, and sentenced to a term of ten years imprisonment on the first count and on the second count to a term of seven years imprisonment. The sentences were ordered to run concurrently.

Grounds of Appeal:

- [2] At the heart of this appeal is whether the appellant acted in self-defence, alternatively putative self-defence, when he fired two shots at the deceased in count 1, of which one, also hit and fatally wounded the deceased in count 2. According to the appellant, the court a quo, erred in not accepting his evidence as reasonably possibly true that the deceased in count 1 had a firearm in his hand which was pointed at him when he was shot. The appellant contended that the eye witnesses who testified to the contrary on that point were unreliable and untrustworthy. According to the appellant their version of events was materially contradicted by an audio recording of the incident.

Factual matrix:

- [3] The factual matrix underpinning the convictions can be summarised as follows: The appellant was employed by the City of Cape Town as a law enforcement officer at the time of the incident. His partner, Officer Lubabalo Blom, ("Blom") was on duty with him in the central business district of the City. It is common cause the Appellant fired two shots with his service pistol at the deceased in count 1, Constable Thandimfundo Sigcu ("Sigcu") which killed both Sigcu and the deceased in count 2, Bongani Jack ("Jack") also known as Tyson.
- [4] It is not in dispute that Sigcu was a policeman doing under-cover work. On the night of the incident he was dressed in civilian clothes and in the process of arresting Jack for allegedly dealing in drugs, when the appellant fired the two shots that fatally wounded him and Jack.
- [5] The appellant pleaded not guilty to both counts of murder and filed a plea explanation in terms of section 115 of the Criminal Procedure Act[1], wherein he set out in detail the basis of his defence. The following facts were inter alia recorded in

paragraphs 4 - 7.

"4. I aver:

4.1 That on 7 January 2020, I was on duty together with my partner, Officer Lababalo Blom ("Officer Blom"). We were in full uniform and using an Isuzu bakkie.

4.2 I was in possession of an official law enforcement 9 mm Glock 19, semi-automatic pistol with 15 rounds in the magazine and an extra magazine also containing 15 rounds of ammunition. Officer Blom was unarmed.

4.3 Officer Blom and I were returning to Cape Town from Manenberg police station where we had attended to a call for assistance. We were on our way to City Hall to book in the firearm and ammunition in my possession, as we would go off duty at 22h00 when our shift ended.

4.4 While driving in Strand Street, Inspector Fortuin of the Rail Enforcement Unit radioed for assistance with a robbery which was taking place in Hertzog Boulevard. We responded to her call and made our way to that scene. Several other law enforcement officers also responded to the call. By the time we arrived at the scene, the suspect had been apprehended and the stolen property returned to the victim.

4.5 Officer Blom and I then left the scene and proceeded towards the armoury at City Hall in Darling Street to book in the firearm and ammunition.

4.6 Whilst driving into Adderley Street, Officer Blom informed me that he had seen a male person assaulting another male person and that there were a few other male persons, whom we thought were street people, watching the incident take place. I made a u-turn further down Adderley Street and parked on the corner of Old Marine Drive and Adderley Street. There was, however, no one at the scene where Officer Blom had seen the assault taking place. We nevertheless alighted from our vehicle and were approached by a man in his late thirties. He told us that "they went that way" and pointed east down Heerengracht Street. He also informed us that the one person had a firearm.

4.7 I immediately handed my radio to Officer Blom to radio for assistance. Officer Blom informed our control room that we were in pursuit of an armed suspect, that we required backup and he informed the control room of our location.

4.8 We returned to our vehicle and drove in the direction indicated to us by the man.

4.9 As we drove, I saw two male persons on the sidewalk on the corner of Heerengracht Street and Hertzog Boulevard outside the Standard Bank building. The one man, whom I now know was Sigcu, was assaulting the other man whom I now know was Jack.

4.10 Officer Blom and I exited our vehicle and ran towards the two persons. My intention was to stop the assault.

4.11 As we approached the two persons, Officer Blom shouted at Sigcu to put his hands in the air. Sigcu stopped the assault and began to draw a pistol from his left hip. Officer Blom immediately shouted at Sigcu to put the firearm down. I also shouted at him to put the firearm down. He did not adhere to the warnings and pointed the firearm directly at us. I believed that he was on the point to shoot us and fired two shots at him.

4.12 Sigcu fell to the ground. He still had the firearm in his left hand and I ran towards him and kicked the firearm out of his hand.

4.13 Sigcu was dressed in plain clothes and we had no idea that he was a police officer.

4.14 I aver that I fired the two shots at Sigcu in self-defence. There was no doubt in my mind when he pointed the firearm at Officer Blom and myself that our lives were in danger.

5. I submit that there was no other means for me to avoid the danger but to shoot the assaulter. I consequently submit that I did not act unlawfully.

6. With regard to the gunshot suffered by Jack, I submit that I did not have the intention to shoot Jack, I fired the two shots at Sigcu. My attention was fixed on the assaulter and the firearm in his hand.

7. Should it be found that, objectively viewed, I did not act in self-defence and thus unlawfully, I respectfully submit that I was at all times relevant hereto under the firm impression that I was allowed to shoot Sigcu in self-defence and that I accordingly lack mens rea in the form of knowledge of unlawfulness with regard to both the killing of Sigcu and Jack."

[6] In order to discharge its onus, the State relied on the evidence of three eye witnesses namely, Mr James August ("Mr August"), his wife, Ms Ashlene August ("Mrs August") and Mr Mogamat Rafiek Rinquest ("Mr Rinquest"). The State also used close circuit television (CCTV) footage as well as a transcript of an audio recording as evidential material. The State further called Captain Manuel who arrived on the scene 20 minutes after the incident who questioned the appellant about what had transpired. According to Manuel, the appellant told him how he saw Sigcu hitting Jack with a gun. It is common cause the two way radio carried by Blom was switched on. The voice of Blom and what he said as well as the sounds of two gunshots that were fired were recorded.

[7] The recording of the CCTV video footage is in two parts. The first part shows Sigcu and Jack in a struggle with Jack on the ground, who then got up and moved away from Sigcu. In the second part of video the footage is partly obscured by a cross-beam, Sigcu can be seen kicking Jack's legs from underneath him who then fell to the ground. Sigcu bends down and makes moves with his right arm as if he is hitting Jack. He then stands up straight, turns slightly to his left and makes a movement with his left arm as if he lifts his left arm where after he falls to the ground. The CCTV footage is not of a good quality and does not include an audio recording.

[8] On the audio recording of the radio control centre Blom can be heard shouting frantically. At time stamp 20:34:17 the following was recorded: "Hey, put it down, put it down, down, down, down, down, down, down. Shoot him, shoot him." At 20:34:31, 17 seconds later, shots were fired in quick succession. Blom was shouting "shoot him" before the first and second shot was fired. At 20:34:34 Blom shouted "Put the firearm down". At 20:34:39 Blom reported to radio control "Shot the guy. We shot the guy. We shot the guy". At 20:34:42 Blom can be heard saying "... drawn firearm".

- [9] At 20:36:23 Blom reported to radio control: "Can I talk to control? We need assistance here. EMS. The guy is down. We had to shoot him. Shoot the guy".
- [10] Less than 3 minutes after the shots were fired, at 20:36:59, Blom reported the following: "The suspect is down control. There is two suspects. The guy was busy stabbing the other guy and then he withdraw his firearm while we were coming so that they were taken down. Then the suspect is down control. The other guy is down as well."

The court a quo

- [11] The court a quo's finding that the State proved beyond a reasonable doubt that Sigcu did not have a firearm in his hand when he was shot by the appellant was primarily based on the evidence of the eye witnesses. The Court a quo further found that the appellant was not confronted with an immediate threat to justify the force that the appellant exercised and rejected the appellant's testimony that he fired the shots at Sigcu in self-defence. Accordingly it was found that the appellant did not act in self-defence, that he had the direct intention to kill Constable Sigcu. In respect of count 2, it was found that the appellant foresaw that he could kill Jack when he fired the shots at Sigcu and acted recklessly in firing the shots. Accordingly, the appellant was also convicted on count 2, of murder.

Argument:

- [12] The nub of the argument of Appellant's counsel was that the eye-witnesses' evidence was untrustworthy, unreliable and not adequately evaluated. Furthermore, the court a quo failed to give sufficient weight to the serious contradictions by the eye-witnesses on material issues in dispute. It was also contended that the CCTV footage and the audio recording, objectively viewed, support the appellant's version that he acted in self-defence.
- [13] Although counsel for the State had the contrary view, she accepted the proposition that if Sigcu had a firearm in his hand and pointed it to the appellant, he acted in self-defence when he fired the two shots.

The Law:

- [14] It is trite that a person acts lawfully when he/she uses force to repel an unlawful attack, which has commenced, or is imminently threatening, upon her or somebody else's life, bodily, integrity, property, or other interests, which deserves to be protected, provided the defensive act is necessary to protect the interest threatened, is directed against the attacker, and is reasonably proportionate to the attack."^[2]
- [15] Although the test for self-defence is an objective one,^[3] our higher courts have repeatedly stated that judicial officers should not judge the events like an armchair critic but should place themselves in the shoes of the attacked person at the critical moment, and keep in mind that the attacked person probably only had a few seconds in which to make a decision, which was of vital importance to him.^[4] In *S v Ntuli*^[5] Holmes J A stated the following in that regard:

"In applying these formulations to the flesh-and-blood facts, the Courts adopt a robust approach, not seeking to measure with nice intellectual callipers, the precise balance of legitimate self-defence or the foreseeability or foresight of resultant death." [6]

[16] It is trite that in our law putative self-defence [7] applies when a person honestly believes, although mistakenly, that their actions were necessary to protect themselves or others from imminent harm or danger. The author, Snyman has explained the concept of putative private defence at the hand of an example, as follows:

"Y leaves his home in the evening to attend a function. When he returns home late at night, he discovers that he has lost his front door key. He decides to climb into the house through an open window. X, his wife, is woken by a sound at the window. In the darkness she sees a figure climbing through the window. She thinks it's a burglar, the person who has recently raped a number of women in the neighbourhood. She shoots and kills the person, only to discover that it is her own husband whom she has killed. She has acted unlawfully, because she cannot rely on private defence; the test in respect of private defence is, in principle, objective and in a case such as this, her state of mind is not taken into account in order to determine whether she has acted in private defence. Although she intended to cause the death of another human being, she will not be guilty of murder, for her intention did not extend to include the unlawfulness of her act. She thought

she was acting in private defence. This is a case of what is known as putative private defence."

[17] In view of the abovementioned principles, the evidence of the three eye-witnesses needs closure scrutiny as it is the primary source upon which the court a quo based its findings and guilt of the Appellant.

[18] Mr August, testified that on the day in question he was pushing his wife in a trolley near Food Lovers Market on their way to the place where they normally sleep. He suddenly observed two men running past them which later was identified as Sigcu and Jack. The witness soon thereafter heard a bakkie 'pulling up very fast'. The next moment, when he turned his back, two shots went off and he saw one of the men falling to the ground. He tried to push the

trolley closer to the scene. Another law enforcement vehicle arrived and the enforcement officers in a rude manner chased them away from the scene.

[19] In explaining what happened before the shots went off, Mr August testified that Sigcu managed to catch-up with Jack to whom he referred as "Tyson" and tripped him. Afterwards, Jack was lying on the ground. According to August that is the time when the wrestling or the struggle ensued, when Sigcu attempted to handcuff him. Mr August's version according to the typed record was the following: "A struggle or wrestling ensued as his endeavours to handcuff him (sic)" ... "because everything happened behind the pillar – so it was not easy to see everything that was happening behind the pillar. Ja, and I just saw the bakkie come and then this gentleman" –jumped out and just started firing".

- [20] Mr August, further testified how he noticed two police officers in full uniform who jumped out of their vehicle. The one had a firearm in his hand and immediately started shooting. Later in his evidence he said "I just saw them running and shooting, that's all I see (sic)". According to Mr August, the fire-arm of Sigcu was on his waist and not in his hand when the shots were fired. However under cross-examination Mr August conceded that he could not see what was happening as Sigcu and Jack were behind a pillar and that he only heard the shots being fired. Furthermore, when the shots were fired, the appellant's partner was standing at the passenger side of the bakkie. When the appellant's version was put to Mr August, he was adamant that the appellant said nothing, including Blom. The witness was then confronted with an affidavit he made on 10 September 2020, some 8 months after the incident to Colonel Hendricks, wherein he recorded the following: "I heard the law enforcement officer ask the undercover police officer to drop his firearm". In trying to explain the different versions, Mr August merely stated "I was still confused at that time".
- [21] The contradictions in Mr August's evidence cannot be regarded as minor differences that are ordinarily observed in matters of this nature. The contradictions go to the very heart of the issues in dispute between the defence and the State. It is unmistakably clear that August's observation of events that night was obscured by a pillar and could not give a proper and credible account whether Sigcu had a firearm that was pointed at the Appellant. His evidence when he said "because everything happened behind the pillar – so it was not easy to see everything that was happening behind the pillar" – supports the argument that his evidence cannot be regarded as reliable and trustworthy. Moreover, his evidence that "I heard the law enforcement officer ask the undercover police officer to drop his firearm" differs materially with his earlier version that both the appellant, including Blom, before the shooting said nothing. In fact, the latter rather supports the Appellant's version that Sigcu had a firearm that was pointed at him. His observations of the incident raise some serious doubt about his credibility as a witness. His evidence was therefore untrustworthy and unreliable.
- [22] Ms August's evidence was equally untrustworthy. Her version of events was also recorded some 8 months after the incident. According to her, Sigcu and Jack were on the ground in front of Standard Bank wrestling with each other when she noticed the Law Enforcement bakkie making a u-turn and its occupant started to shoot at them. She did not hear any conversation between the appellant and the deceased and did not see Sigcu with a firearm.
- [23] Ms August's evidence in court differed materially with what she had stated. In court she testified that Sigcu and Jack were in a standing position, wrestling with each other, when the appellant approached and fired the shots at them. During cross-examination, she explained the obvious contradiction as a mistake by saying that "I was talking too fast". She further testified that Sigcu had a firearm on his waistband and that she noticed it when he and Jack ran past them. When she was confronted about her earlier version that Sigcu had no firearm with him, she simply refused to give an answer. She was also questioned how Sigcu's firearm ended up on the ground if it was tucked into his waistband. Her answer was the appellant

used his foot to push the gun away and then kicked it to the side. Ms August had great difficulty in explaining the contradictions in her version of events.

- [24] Mr Rinquest testified that Sigcu bent down and handcuffed Jack. Thereafter he was sitting on him and straddling him with both his knees on the ground. Sigcu then took out his wallet to show his identification to the appellant. However, the appellant fired four shots at him. Mr Rinquest's version is simply untenable and unreliable. It is common cause only two shots were fired and that Jack was never handcuffed by Sigcu.
- [25] The appellant repeated his version of events as recorded in his plea explanation. Despite extensive cross-examination by the prosecution, the appellant did not materially deviate from his version of events. It is correct that, he initially exaggerated the nature of the assault on Jack by stating that Sigcu was using his gun to do so. However, the appellant without hesitation corrected that version of his own accord and the latter version was supported by the CCTV footage. The Appellant further testified that he kicked the firearm away from Sigcu when he approached him after he had been shot. It is also common cause that Sigcu's firearm was found on the scene, a few meters away from his body
- [26] The question whether the State has established beyond a reasonable doubt that, the appellant did not act in self-defence is mainly a factual question that needs be answered having regard to the totality of the evidence.
- [27] On a conspectus of all the evidence, there can be no doubt that, Sigcu and Jack was involved in a brawl when the appellant and Blom arrived on the scene. On the State's own version at 20:34:17 Blom shouted frantically at the scene of the crime: "Hey, put it down, put it down, down, down, down, down, down, down. Shoot him, shoot him". Barely 14 seconds later, at 20:34:31, shots were fired in quick succession. At the time Blom was still shouting "shoot him" before the first shot was fired and again after the second shot was fired. At 20:34:34 Blom was still shouting "Put the firearm down". Blom immediately reported to radio control about the shooting and the urgent need for medical help at the scene.
- [28] The evidence of Mr August and Mr Rinquest that Sigcu never had a firearm in his hand is irreconcilable with their later version that the appellant told Sigcu to drop his firearm. It is also irreconcilable with the frantic shouts of Blom that Sigcu should put his firearm down. Having regard to the frantic tone of Blom's voice on the audio recording, the inescapable conclusion is that Sigcu must have possessed something so dangerous that at the time it posed a serious threat to the lives of the appellant and Blom. In fact the court a quo in its judgment stated that: "Sigcu must have been carrying something which possibly posed a danger, and that is why Blom said 'Put it down', and then 'Shoot him" [8].
- [29] Where I however part ways with the court a quo, is regarding the findings that "I am not certain that this is the only or, indeed, the most probable inference that can be drawn, namely that Sigcu was carrying a gun pointed at them.",[9] and where the following was said: "Indeed, my impression is that all the witnesses offered a truthful version in relation to whether or not Sigcu had a gun in his hand".[10] In my view, on the totality of the evidence,

there are no serious anomalies and or inaccuracies with the audio recording against the appellant's version. In fact the opposite is more probable. Blom's frantic voice supports appellant's version that Sigcu pointed a firearm at both him and Blom, which posed a real and immediate danger to their lives, because no other item or dangerous weapon other than Sigcu's firearm was found that could have caused Blom to react in the manner he did.

[30] Moreover, it is not in dispute that Sigcu carried a firearm on his body, whether in a holster or tucked into his waistband, when he wrestled with Jack, and after the shooting it was found lying on the ground. The CCTV footage also shows Sigcu standing slightly to his left and making a movement with his left arm. The latter was confirmed by Warrant Officer Engelbrecht, the digital forensic investigator called by the State, when he viewed the footage. In my view, on the evidence as a whole, there is no other reasonable inference to draw but that Sigcu has pointed the firearm at the appellant and Blom in a threatening manner.

[31] For all the above mentioned reasons the appellant's version that he acted in self-defence is reasonably possibly true. The two shots fired was also not a disproportionate response to neutralise the imminent threat that Sigcu posed at the time. The state simply failed to discharge its onus on both counts and the convictions cannot stand.

[32] It follows that the appeal against conviction must succeed.

[33] In the result the following order is made.

1. The appeal against the conviction and sentence on counts 1 and 2 is upheld.
2. The conviction and sentence on both counts is set aside and the Appellant is found not guilty and acquitted on counts 1 and 2.

Le Grange, ADJP

I agree

Cloete, J

Savage, J

[1] Act 51 of 1977

[2] Mugwene and Another v Minister of Safety and Security 2006(4) SA 150 (SCA) at paras 21-22: S v Makwanyana and Another 1995 SA (3) 391 (CC) at 448-449; C R Snyman: Criminal Law (6th Ed) at page 102.

[3] Snyman, op cit at pages 112 to 113

[4] Snyman, op cit at page 113

[5] 1975(1) SA 429 (AD)

[6] At paragraph 437 E; See also *Snyders v Louw* 2009(2) SACR 463 (C) at paragraph [29], page 476

[7] See *S v De Oliveira* 1993(2) SACR 59 (A) at 63h to 64a: Snyman, page 198 and further.

[8]

Judgment

volume 4 p 358 lines 6-9.

[9]

Judgement

volume 4 p 358 lines 11-13.

[10] Judgment, Volume 4, p 357, lines 11-13

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