

SOUTH AFRICA / JUDGMENT

Mthiyana v S (AR216/22) [2024] ZAKZPHC 98 (22 March 2024)

[2024] ZAKZPHC 98**COURT**

Kwazulu-Natal High Court, Pietermaritzburg

BEFORE

S Singh, Balton

CASE / FILE NUMBER

AR216/22

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**IN THE HIGH COURT OF
SOUTH AFRICA
KWAZULUNAT AL
DIVISION, PIETERMARITZBURG
Case No: AR 216/22**

In the matter between:

SIPHO
MUNTUKAYISE MTHIYANE
APPELLANT
and
THE
STATE
RESPONDENT
ORDER

The following order is

made:

(a)
The appeal against conviction and sentence
succeeds.
(b)
The conviction and sentence on count 1 are

set aside and replaced as follows:

- (i)
The appellant is convicted of culpable homicide.
- (ii)
The appellant is sentenced to a term of 8 (eight) years imprisonment, 2 (two) years of which is suspended on condition that the appellant is not convicted of an offence of culpable homicide committed during the period of suspension.
- (c)
The sentence is antedated to the date of the appellant's arrest in terms of s 282 of the Criminal Procedure Act 51 of 1977.
- (d)
The appellant's bail is revoked and he is ordered to surrender himself to the clerk of the Mtubatuba Regional Court where the trial was heard within 5 (five) days of service of this order on him to commence serving his sentence.

JUDGMENT

S Singh AJ {Sitting with Balton J}

Introduction

- [1] The appellant was charged of count 1 (murder) and count 2 (attempted murder) and appeared before Ms C Zungu, the trial magistrate in the court a quo. He pleaded not guilty to all the charges and raised a defence of putative private defence in respect of count
- 1. He was convicted on count 1 and acquitted on count 2. The sentence on count 1 was subject to s 51(1) read with schedule 2 of the Criminal Law Amendment Act 105 of 1977 in terms of which law a life sentence was applicable, which the court a quo reduced to a sentence of 18 years' imprisonment.
- [2] With the leave of the court a quo this appeal proceeds against the conviction and sentence.
- [3] On count 1 the State alleged that on 30 April 2018 at Khula Village, KwaZulu-Natal the appellant unlawfully and intentionally caused the death of the deceased by shooting him with a firearm which murder was pre-mediated and pre-planned by the appellant.

Common cause and undisputed facts

- [4] The common cause or undisputed facts are as follows:
 - (a) The identity of the appellant and the deceased is not in dispute.

- (b) The first State witness N Ncube ('Ncube'). and the sons of the appellant were at the local tavern late at night in Khula Village, KwaZulu-Natal. Arguments and a physical altercation ensued between the appellant's sons, the deceased and others which ended up outside on the road.
- (c) The appellant's wife received telephonic information that one of their sons was injured. The appellant armed himself with his own firearm and a stick, left home with his wife and walked to the place where his son was allegedly injured. At some stage the appellant met some males on the road, two of whom were armed with a knife and a sharp object respectively, who chased him and tried to attack him. The appellant went to the scene and fired a shot at the deceased in his stomach who was hospitalised for treatment where he died as a result of his gunshot wounds.
- (d) The appellant was subsequently arrested, charged, detained in prison and appeared in the court a quo.

Grounds of appeal

- [5] The appellant alleged that the State failed to prove its case of murder beyond a reasonable doubt against him; relied on the evidence of a single unreliable witness against him and that his version is reasonably, possibly true.
- [6] The appellant alleged that the sentence imposed by the court a quo is grossly inappropriate, induces a sense of shock and there was no consideration for his age, education, work activities, ill-health, minor dependent children or the time he had spent detained in prison before sentence was imposed.

The

facts

- [7] The material trial facts as set out in the records of the court a quo and interpreted in the judgment are set out herein.
- [8] The court a quo convicted the appellant of murder (count 1) on the basis that the appellant had unlawfully and intentionally shot and killed the deceased which was also planned and pre-mediated by the appellant. The State led the evidence of Ncube, a single State witness. His factually similar evidence on both counts was discredited by the court a quo as unreliable when acquitting the

appellant on count 2. The version of this single State witness was also not corroborated by the medical doctor who was not led in evidence in the court a quo in respect of count 1. In his evidence-in-chief Ncube said the following:

- (a) neither he nor the deceased were armed with weapons or fighting;

- (b) he was drunk during the crime incidents during which he had witnessed the appellant committing and which was not in self-defence; and
- (c) he said that he saw the appellant fire a shot at the deceased which killed him. Under cross-examination he said the following in contradiction to his evidence in chief:
 - (a) the deceased was also drunk and fought back with Nkosi, the son of the appellant;
 - (b) he initially denied that the deceased and other boys were armed and wanted to stab the appellant, which version he later changed. He denied any knowledge of the two boys being armed with a knife and sharp object whom the appellant said has come towards him; and
 - (c) he also denied that he had any knowledge of the appellant taking his firearm from his pocket, cocking it and firing the shot.
- [9] The appellant and his wife testified in his defence in the court a quo. The appellant did not dispute that he fired a gunshot at the deceased, which he said he aimed at the legs of the deceased and had no intention to murder the deceased, who was armed also and was accompanied by other armed boys who had all chased and tried to attack him more than once earlier and approached him again. He also said that he did not use his stick first and had verbally shouted at his alleged attackers, to protect himself, then later he fired the said gunshot to protect himself which hit the deceased in his stomach. He denied that he had any intention to murder the deceased whom he assisted thereafter to get medical attention before leaving the scene. He also said that he knew that the incident had already been reported to the police, so he did not make a report to the police.
- [10] The wife of the appellant confirmed and corroborated the appellant's evidence in respect of the fact that she saw the deceased was armed and accompanied by armed boys, who chased the appellant who was under attack at some stage and the appellant used his stick and verbally shouted at them to protect himself initially, before firing a gunshot at the deceased to prevent further attacks. She also corroborated the fact that her son was also slightly injured.

Legal principles

- [11] The appellant had relied on his defence of putative private defence. It is trite, since *S v De Oliveira* [1993] ZASCA 62; 1993 (2) SACR 59 (A) at 63I-64B, that the test for putative private-defence is that
 - (a) an accused who kills another in the belief that his / her life is in danger when objectively it is not, acts unlawfully. But if he / she kills another in the mistaken but genuine belief that his / her life is in danger, the accused lacks the intention to act unlawfully and is accordingly not guilty of murder;
 - (b) the accused may be guilty of culpable homicide which depends on whether such a belief that his / her life might be in danger was reasonable or not; and

(c) putative private defence is therefore concerned with the issue of culpability on a charge of murder and is judged accordingly to what the accused believed, and culpability on a charge of culpable homicide is determined on the basis of the reasonableness of that belief.

[12] The court a quo rejected the version of the appellant as a fabricated version which differed when put Ncube and when the appellant testified. The court a quo also stated that appellant's

conduct in not using his stick to ward off the attacks by the boys who possessed a knife and a sharp object, as alleged by him is questionable because the appellant was in a better position to ward off his attackers with the knife by using the stick.

[13] The court a quo also stated that the appellant performed badly under cross-examination and failed to explain why no warning shot was fired first, and the appellant had no valid reason to shoot the deceased. The court also rejected the evidence of the appellant's wife as being different to the appellant's version that he was surrounded by the boys which evidence she disputed.

[14] The trial evidence proved to the court a quo that beyond any reasonable doubt, the appellant acted unlawfully and intentionally in shooting and killing the deceased, and also, he did not care what was going to happen to the deceased nor did he report the incident to the police.

[15] On count 2 after discrediting the single State witness the court a quo was satisfied that the single State witness was a credible witness who testified in a clear, straight forward manner in all material respects which is trite.

[16] The court a quo stated that Ncube was honest and gave the same material version in both of his police statements and in his evidence in the court a quo. The court stated further that that the deceased and others were not a danger to the appellant, but the appellant was the aggressor who fired shots at the deceased which killed him and which fact was consistent with the fact that the appellant and his family members were not injured at all.

[17] The court a quo convicted the appellant of murder on the basis that he had the mens rea in the form of dolus directus when he shot and killed the deceased intentionally and unlawfully, which was pre-mediated and pre-planned by the appellant. The court did not give any consideration to the appellant's defence version.

[18] It is necessary to determine and consider whether:

(a) the appellant satisfied the legal requirements for his defence of putative private defence stated in paragraph 11 above; or

(b) the appellant had the necessary mens rea in the form of dolus eventualis, the test for which is well established and which was stated and quoted in the unreported judgment of Balton Jin Kuben Naidoo v State Case no: AR605/17 (13 December 2018), together with evidence assessment as follows:

[10] The Appellate Division in *S v Sigwahla* set out the test as follows: "... the following propositions are well settled in this country:

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 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 distinction 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."

[14] In assessing the evidence, and making findings thereon, I am mindful of the following statement in *S v Van Der Meyden*:

"The proper test is that an accused is bound to be convicted if the evidence establishes his guilt beyond reasonable doubt, and the logical corollary is that he must be acquitted if it is reasonably possible that he might be innocent. The process of reasoning which is appropriate to the application of that test in any particular case will depend on the nature of the evidence which the court has before it. What must be borne in mind, however, is that the conclusion which is reached (whether it be to convict or to acquit) must account for all the evidence. Some of the evidence might be found to be false; some of it might be found to be unreliable; and some of it might be found to be only possibly false or unreliable; but none of it may simply be ignored."

[17] In assessing the appellant's state of mind it is important to bear in mind the following statement by the Appellate Division in *S v Dlodlo*:

"The subjective state of mind of an accused person at the time of the infliction of a fatal injury is not ordinarily capable of direct proof, and can normally only be inferred from all the circumstances leading up to and surrounding the infliction of that injury. Where, however, the accused person's subjective state of mind at the relevant time is sought to be proved by inference, the inference sought to be drawn must be consistent with all the proved facts, and the proved facts should be such that they exclude every other reasonable inference save the one sought to be drawn. If they do not exclude every other reasonable inference, then there must be a reasonable doubt whether the inference sought to be drawn is the correct one. (See *R v Blom*, 1939 AD 188 at pp. 202 - 3)." (Footnotes omitted.)

[19] A court of appeal does not interfere with the factual findings of the trial court unless such findings are misdirected, and clearly incorrect. It is trite that the guilt of the appellant must be proved beyond a reasonable doubt for a conviction by the trial court.

Conclusion

[20] Having assessed the evidence, it is clear to me that the court a quo did not assess the evidence in totality, misdirected itself in its assessment of the material facts herein before stated, did not consider the appellant's defence of self-defence and made an incorrect finding of murder in terms of *dolus directus* which was not proved factually against the appellant.

[21] I am accordingly satisfied on the facts that:

- (a) the test for self-defence is aligned with his evidence that he shot the deceased which proved the mistaken but genuine belief that his life was in danger.
- (b) he consequently lacked the intention to act unlawfully, and was not guilty of murder but because he had so acted under a reasonable belief that his life was in danger, he was guilty of culpable homicide which attracts a lesser sentence;
- (c) his state of mind at the time of his act of shooting the deceased, when he aimed at the deceased's legs, determined the applicable criminal liability as set out above.

He lacked the necessary *mens rea* for commission of a murder; and

- (d) the conviction and sentence for murder must be set aside, and the appellant must be convicted and sentenced for culpable homicide for his unlawful action in shooting the deceased, without the intention to murder him.

Order

[22] I propose the following order:

1. The appeal against conviction and sentence succeeds.
2. The conviction and sentence on count 1 are set aside and replaced as follows:
 - (i) The appellant is convicted of culpable homicide.
 - (ii) The appellant is sentenced to a term of 8 (eight) years' imprisonment, 2 (two) years of which is suspended on condition that the appellant is not convicted of an offence of culpable homicide or a competent verdict thereof committed during the period of suspension.
3. The sentence is antedated to the date of the appellant's arrest in terms of s 282 of the Criminal Procedure Act 51 of 1977.

4. The appellant's bail is revoked and he is ordered to surrender himself to the clerk of the Mlubatuba Regional Court where the trial was heard within 5 (five) days of service of this order on him to commence serving his sentence.

S Singh AJ

I have read the judgment of Singh AJ and agree with the result.

Balton J

Appearances:

Date of hearing: 3 November 2023

Date of judgment: 22 March 2024

For the Appellant: T. P. Pillay

Instructed by: Legal Aid South Africa, Durban Local Office

For the Respondent: K. Singh

Instructed by: Director of Public Prosecutions, Pietermaritzburg

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