

SOUTH AFRICA / JUDGMENT

Murphy v S (CA& R 68/2011) [2011] ZAECHGC 83 (22 December 2011)

[2011] ZAECHGC 83

COURT

Eastern Cape High Court, Grahamstown

BEFORE

J W Eksteen, I Schoeman

CASE / FILE NUMBER

CA& R 68/2011

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IN

THE HIGH COURT OF SOUTH AFRICA NOT REPORTABLE

EASTERN

CAPE, GRAHAMSTOWN

C.A.

& R.: 68/2011

Date

Heard: 14 December 2011

Date

Delivered: 22 December 2011

In

the matter between:

ALWYN

MURPHY

.....Appellant

and

THE STATE

.....Respondent

JUDGMENT

EKSTEEN J:

- [1] The appellant herein was convicted on one count of murder, three counts of attempted murder and one count of the unlawful possession of a firearm. He was sentenced to an effective 17 years imprisonment. He now appeals against his conviction and sentence.
- [2] The State called four eye witnesses. They, together with the deceased on the count of murder, one Rhoode en one Fleur had gone to the house of the appellant in Lodewyk Street in Bethelsdorp on 22 November 2008. It was approximately 20h00 and it was already dark. The visit was in connection with a jacket of one Gavin Salters (herein referred to as “Salters”) which had allegedly been stolen approximately a week earlier. Upon their arrival at the home of the appellant some of the group entered the property where they met one Derek Murphy, also known as Buys (herein referred to “Buys”). A discussion ensued whilst they stood outside the house, but within the property. Whilst this persisted a number of persons, estimated to be approximately ten to twelve, emerged from the back of the property. Clearly the discussion became heated and in time spread to the pavement and into the road in the front of the yard. There a number of shots were fired and the deceased, who had remained seated in the vehicle at all times, was shot in the chest and died. When the shots were fired, Salters, Dalpat and Rhoode all fled for safety and boarded the motor vehicle in which the deceased was seated. Shots continued to be fired whilst they were in the vehicle.
- [3] It is not an exaggeration to say that the evidence adduced on behalf of the State is riddled with contradiction, inconsistency and improbability. This the presiding magistrate recognised. He held, however, as follows:

“In hierdie saak gaan dit nie oor die vraag of die persoon wat geskiet het inderdaad moord of poging tot moord gepleeg het nie. Die

geskilpunt in hierdie saak gaan oor die identiteit van die persoon wat so geskiet het. Dit is die staat se saak dat dit die beskuldigde

was wat so geskiet het. ...”

- [4] The magistrate never considered the possibility that there may have been more than one person armed with a firearm and shooting at the scene. The entire judgment is predicated upon the foundational assumption that there was only one person shooting. I do not think that the evidence justifies this conclusion. The witnesses Du Plessis and Adams both testified that they saw the appellant shooting whilst he was standing directly in front of the vehicle approximately three to four paces back from the centre of the front bumper. Du Plessis also testified that he saw the appellant shooting whilst on the pavement. I shall revert to this evidence in due course. Evidence of Dalpat in respect of the identity of the shooter was correctly rejected by the magistrate. Dalpat gave

elaborate evidence of the identity of the shooter which was directly in conflict with his police statement. The evidence of Salters,

however, was that prior to the shooting a crowd of people had assembled in the street and there were approximately fifty people

present. He says that the shot which he saw came from within the crowd. The following passage of evidence appears:

“And at that stage you heard a shot. --- Die tyd wat ek voor die kar staan ja.

And you said you turned around to see where the shots were coming from, correct? --- Ek het voor die kar gestaan in die rigting van die skieter.

HOF: So het u gekyk in die rigting van die skietery, vanwaar die skiet gekom het? --- Waar die skiet vandaan kom ja.

MR CHETTY: Okay. And once again, you couldn't make out the shooter because there are ten or twelve of them. --- Dis korrek.”

[5] Later the following exchange occurred:

‘HOF: Wat sou u sê wat is die hoofrede hoekom u nie kon geweet het wie geskiet het nie? --- Van die skietery na die kar toe u Edele?

Ja, wat is die hoofrede hoekom u nie weet wie geskiet het nie? --- Want die straat was vol mense en basies almal was om die skietery ook gewees.

MR CHETTY: That was going to be my next point also. How many people would you say besides this ten to twelve people that followed you were outside in the street? --- Plus minus, “jo”, hy was vol, dit was ‘n ontelbare “total” wat ek kan gee.

Okay. So if I tell you there were more than fifty people?

INTERPRETER: More than fifty? --- It can be.’

[6] The evidence of Du Plessis, which the magistrate accepted, is that he heard at least ten to twelve shots being discharged. I think that this consideration together with the positive evidence given by Salters, which the magistrate never considered, and the damage to the vehicle, to which I shall revert, gives rise to a reasonable possibility that there may have been more than one shooter.

[7] I have set out above the circumstances which gave rise to the altercation. The State witnesses and their group arrived unannounced at the home of the appellant. It does not seem to me in these circumstances that any common design on the part of the appellant and others present could have existed. There is no suggestion of a common purpose amongst those persons who emerged from behind the appellant's property. In these circumstances the question which falls to be addressed is who shot the deceased.

- [8] It clearly emerges from the evidence that upon the occurrence of the shooting Dalpat, who was the driver of the vehicle, sped away from the scene. The deceased, Rhooode and Salters were in the vehicle with him. Adams and Du Plessis fled on foot and the evidence does not clarify what happened to Fleur. It is however common cause that the police were summoned to the scene immediately after the shooting. It is admitted that one Constable Joubert was amongst the policemen who attended the crime scene and that he gathered two empty cartridge cases and one projectile in Lodewyk Street. These exhibits were properly sealed and sent to the ballistic unit for analysis and a report was compiled. In addition at the execution of the post-mortem, of which the report is admitted, Doctor Kalev removed one bullet jacket from the body of the deceased. An affidavit was handed in terms of section 212 of the Criminal Procedure Act, 51 of 1977 in which Inspector Olivier attests to his examination of the two cartridge cases found on the scene by Joubert and the bullet and jacket which were respectively found in Lodewyk Street and removed from the body of the deceased. Inspector Olivier found that the two cartridge cases had been fired from the same weapon. He also found that the bullet and the jacket had been fired from the same firearm. He did not, however, find that the bullet and the jacket had been discharged from the same firearm as the two cartridge cases. Although the police attended the scene shortly after the shooting no firearm was found in the possession of the appellant.

There is no evidence whatsoever which connects the ballistic exhibits to which I have referred to the appellant. There is no direct

evidence from any witness from which it can be inferred which shots struck the deceased.

- [9] The deceased had been seated in the centre of the rear seat of the motor vehicle. He was struck by a single bullet through the chest. Although Salters and Rhooode appeared to have been seated on either side of him at the time that Dalpat sped away from the scene it was only after the motor vehicle was brought to a stop in Scholtz Street, some distance away, that the occupants noticed that the deceased had been shot.
- [10] The only evidence in respect of any shooting directed at the motor vehicle in which the deceased was seated was that of Du Plessis, Adams, and Dalpat. Although Dalpat's evidence of identification was rightly rejected he testifies that the person who discharged and fired the shots was standing immediately in front of his vehicle slightly to the left hand side of the centre.

Adams and Du Plessis both testify that he was standing immediately in front of the centre of the motor vehicle and that he discharged shots repeatedly at the motor vehicle. It is common cause that the motor vehicle was struck three times (possibly four). The first was a shot which penetrated the front left hand fender on the side of the vehicle. Dalpat testified that when he sped away the left hand front tyre of the vehicle was flat as a result of a gunshot. Whether that was caused by a separate shot or whether the damage was inflicted by the bullet after penetrating the left hand front fender is not immediately clear, hence the possibility postulated of a fourth shot. A bullet mark was also visible on the extreme left hand side of the vehicle on the pillar

supporting the front windscreen and joining the body of the vehicle to the roof. Finally there was a bullet hole which penetrated the windscreen on the extreme left towards the top of the windscreen. It seems to me that if the latter two markings had been caused by the weapon fired by the appellant standing in the centre of the vehicle and in front of the vehicle then those shots were directed markedly to the right of the shooter and could never have struck the deceased, absent some ricochet, of which there is no evidence. The bullet hole on the left fender could clearly not have been inflicted from the position attributed to the appellant.

- [11] In the circumstances I consider that the magistrate misdirected himself in assuming, as a point of departure, without evaluating the evidence in that regard, that there was only one person shooting. I do not think that the evidence establishes beyond reasonable doubt that the deceased was killed by a bullet fired by the appellant. I have already set out above that I do not think that the doctrine of common purpose arises on the facts of this matter. In the circumstances I think that the magistrate erred in his verdict on count one.
- [12] The three counts of attempted murder relate to counts 2, 5 and 6 brought against the appellant. In count 2 the appellant is charged with attempted murder in that he “did unlawfully and intentionally attempt to kill Rodney Delport, a male person, by firing shots at him”. (It emerges plainly from the evidence that the reference to Delport is in fact intended to be a reference to Dalpat.) In count 5 and 6 the appellant was similarly alleged to have intentionally attempted to kill Mano Rhoode and Gavin Salters, respectively, “by firing shots (at them)”. The magistrate accepted the evidence that Dalpat, Rhoode and Salters were inside the vehicle at the time that the shooting occurred. He concluded as follows:

“Ten opsigte van die ander persone, klaers op aanklag 2, 5 en 6 is ek oortuig dat die beskuldigde op ‘n roekelose wyse in hulle

algemene rigting geskiet het sonder om, om te gee of hulle getref word. Om tot hierdie gevolgtrekking te kom besef ek dat die klaer

Mano Rhoode, die klaer op aanklag 5 nie getuig het nie maar hy was duidelik deel van die persone op wie daar op so ‘n roekelose wyse geskiet is.”

- [13] It is abundantly clear that the only basis upon which the magistrate convicted the appellant in respect of these charges was *dolus eventualis* in firing shots in the general direction of the occupants of the vehicle.
- [14] The only evidence on record of the appellant shooting at the motor vehicle is that to which I have referred above. The evidence establishes that at the time of the shooting Rhoode, the deceased and Salters were seated in the rear seat. Dalpat was in the driver’s seat. The front passenger seat was vacant. Accepting, for purposes of this argument, that the bullet which penetrated the windscreen and that which struck the support pillar of the windscreen did emanate from the firearm of the appellant then it seems to me that the appellant deliberately discharged the shots well to his right hand side and away from the occupants of

the vehicle. In respect of such further shots allegedly fired by the appellant it is inconceivable that he would not have struck the vehicle at a distance of three to four metres if indeed he intended to shoot at the occupants. This too the magistrate did not consider. It follows that I am of the view that the magistrate has misdirected himself in respect of the facts in his conviction on the counts of attempted murder.

- [15] I do not lose sight of the fact that Du Plessis testified of a shooting directly at Salters whilst on the pavement. Du Plessis says that after the appellant had emerged from the property onto the pavement he smacked both Adams and Salters, for no identifiable reason, pulled out a firearm and shot one shot into the ground whilst uttering some expletives. This Du Plessis says was followed by a second shot straight at Salters and which struck Salters in the leg. He gave a graphic description of precisely the stance taken up by the appellant – holding his arm out in front of him parallel to the ground in discharging the weapon - and says that he was just two to three metres away when the shot was fired. There he says, he stood together with Adams. Adams, however, emphatically denies this event and denies that any shot was fired into the ground. Adams's evidence is that when the appellant emerged from the property he moved directly to the front of the motor vehicle where he drew his firearm and shot, the first shot

being directed at the motor vehicle.

- [16] The second shot Du Plessis says was straight at Salters and he heard Salters exclaim that he had been struck. Salters, however, denies that he ever said that he had been struck. In fact, Salters says that he simply fled and only after they had driven away and stopped at a petrol station in Scholtz Street did he first realise that he had been injured. The J88 form in respect of Salters's injury, which is admitted, shows that Salters had two injuries, one to the ankle and one to the leg. Both entry wounds are directly from behind. Of all of this, which after all is the shooting of Salters, there is no mention in Du Plessis's statement to

the police.

- [17] In his police statement Du Plessis states:

'I further saw "Koelie" come out of the Buys yard and he pushed Luan. He "Koelie" further clapped Gavin. He "Koelie" then drew a firearm and fired shots at us. He was standing in front of Rodney's car.' ("Koelie"

is the nickname of appellant.)

- [18] Du Plessis's statement is suggestive that the very first time that the appellant discharged his firearm he was already standing in front of the motor vehicle. This accords with Adams's evidence. When this was drawn to Du Plessis's attention in cross-examination he could offer no answer. Both Salters and Adams testified that the first shot discharged was fired in the direction of the motor vehicle and not into the ground. I have already referred to Salters's evidence as to the source of the shot which he saw.

- [19] In all the circumstances the magistrate's finding that there were no serious shortcomings in the evidence of Du Plessis is not supported by the record. The magistrate appears to have accepted Du Plessis's evidence and simply ignored evidence from other State witnesses which contradicts it. This he cannot do (see e.g. *S v Van der Meyden* 1999
- (1) SACR 447 (W) at 450A-C). The magistrate's further finding that where other witnesses contradict the evidence of Du Plessis these contradictions do not detract from the reliability of the evidence of Du Plessis can also not be supported. The enquiry, after all, is whether it is reasonably possible that the appellant did not shoot Salters or the deceased. Where there is direct evidence from witnesses tendered by the State which supports that conclusion their evidence ought to be carefully considered.
- [20] By way of example Du Plessis says that when the second shot was fired Salters exclaimed that he had been hit. Salters testifies that he was entirely oblivious of his injury until after he had fled the scene. I do not think that there can be any basis for rejecting the evidence of Salters on this aspect and the magistrate does not deal with it at all. If, however, the evidence of Salters is true then Du Plessis's evidence of these events cannot be correct. Adams too expressly denies the version of Du Plessis in respect of the shot being fired into the ground or any shots being directed at Salters. This must be weighed together with the complete absence of any reference to this occurrence in the police statement made by Du Plessis himself.
- [21] In all the circumstances I do not think that the conviction of the appellant in respect of the attempted murder on Salters can be sustained on this evidence of Du Plessis.
- [22] Finally the appellant was convicted of the unlawful possession of a firearm. The judgment does not reflect any reasoning at all for this conclusion and it appears to be advanced on the basis of the assumption that the appellant was correctly identified as an attacker and that he was only person who discharged a firearm. I have already concluded that this assumption constitutes a misdirection. The ballistic exhibits collected from the scene has, as referred to above, not been connected to the appellant by any objective evidence. In these circumstances, even if the evidence of Du Plessis and Adams is accepted there is nothing on record to suggest that what the appellant had in his possession was a "firearm" as defined in the Firearms Control Act, 60 of 2000. I consider that this conviction too falls to be set aside. In the result the appeal succeeds and I would make the following order:
- [23] The conviction and sentence is set aside.

J W EKSTEEN

JUDGE OF THE HIGH COURT

SCHOEMAN J:

I agree. It is so ordered.

I SCHOEMAN

Appearances:

For Appellant: Mr K Chetty instructed by Netteltons Attorneys, Grahamstown

For Respondent: Adv H Obermeyer instructed by the National Director of Public Prosecution,
Grahamstown

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