

SOUTH AFRICA / JUDGMENT

Nene v S (AR65/2017) [2018] ZAKZPHC 46 (4 May 2018)

[2018] ZAKZPHC 46

COURT

Kwazulu-Natal High Court, Pietermaritzburg

BEFORE

Henriques, Chetty

CASE / FILE NUMBER

AR65/2017

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IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL DIVISION, PIETERMARITZBURG

CASE NO. AR 65/2017

In the matter between:

MTHETHELENI PARDON NENE APPELLANT

and

THE STATE RESPONDENT

J U D G M E N T

HENRIQUES J (CHETTY J CONCURRING)

Introduction

[1] This appeal lies against the convictions by the court a quo on 14 October 2016 in the Regional Court sitting at Ezakheni, KwaZulu-Natal. The appellant was charged as follows:

- (a) Count 1 - murder read with the provisions of s 51(2) of the Criminal Law Amendment Act 105 of 1997 (CLAA);
- (b) Count 2 – attempted murder and, as an alternative to count 2, reckless endangerment to person or property.

- [2] The appellant was convicted on one count of murder and the alternative count of reckless endangerment to person or property. In respect of the murder count he was sentenced to 10 years' imprisonment. In respect of the conviction on reckless endangerment to person or property, he was sentenced to two years' imprisonment. The sentences were ordered to run concurrently, resulting in an effective 10 years' imprisonment.
- [3] This appeal lies against the convictions alone. Having regard to the heads of argument, the respondent appears to oppose the appeal on count 1 only.
- [4] It is common cause that the convictions on both counts were secured on the evidence of two eye witnesses who testified, being Philani Ishmael Sithole and Sandile Frank Mposara. The appellant testified that he acted in self-defence; however, this defence was rejected by the court a quo.
- [5] The appellant submits that the evidence of Mposara must be rejected as false as his evidence that he saw the appellant shoot the deceased in the back whilst he was running away and that the deceased was holding his back is blatantly false and not supported by the objective facts.
- [6] In addition the appellant submits that the evidence of Sithole is equally unreliable as 'he wants the Court to believe that the deceased was shot by the Appellant for no reason at all and that the Appellant tried to kill him too by firing shots whilst he was running away, bullets striking the motor vehicle close to him'.^[1]
- [7] The appellant further submits that there is no evidence by the police officers who attended the scene, nor is there any forensic, photographic or ballistic evidence to support the evidence of Sithole and consequently his evidence is false and falls to be rejected.

Accordingly the appellant submits that his version as to what transpired must be accepted.

The legal position

- [8] The appellant's defence in the court a quo was that of putative self-defence. CR Snyman Criminal Law 6 ed (2014) at 102 defines private defence as follows:

'A person acts in private defence, and her act is therefore lawful, if 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 interest 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.'

- [9] Snyman draws a distinction insofar as the requirements of private defence are concerned and deals firstly with the requirements of the attack with which a person who acts in private defence must comply, and secondly the requirements with which the defence must comply.

[10] Insofar as the requirements of the attack are concerned, the attack must be unlawful, the attack must be directed at an interest which legally deserves to be protected and the attack must be imminent but not yet completed.

[11] The requirements for the defence of private defence are the following:

- (a) It must be directed against the attacker.
- (b) The defensive act must be necessary. Here one considers whether there is a duty to flee and the defensive act must be the only way in which the attacked party can avert the threat to his/her rights or interest.
- (c) There must be a reasonable relationship between the attack and the defensive act. Here it is not necessary that there be a

proportional relationship between the nature of the interest threatened and the nature of the interest impaired.

- (d) The attacked person must be aware of the fact that he/she is acting in private defence.

[12] The test is an objective one and our courts have emphasised that one should not judge the events like an armchair critic, but rather place oneself in the shoes of the attacked person at the critical moment and bear in mind that at such point in time the attacked person only has a few seconds in which to make a decision.

[13] The court should then ask whether a reasonable person would have acted in the same way in those circumstances. A person who suffers a sudden attack cannot always be expected to weigh up all the advantages and disadvantages of his/her defensive act and to act calmly.

[14] In *S v Ntuli*[2] the court noted the following:

‘In applying these formulations to the flesh and blood facts, the Court adopts a robust approach, not seeking to measure with nice intellectual calipers the precise bounds of legitimate self-defence or the foreseeability or foresight of resultant death.’

The evidence

[15] Sipho Stanley Malinga, a member of the South African Police Services confirmed that on 30 October 2015 he attended at the scene of a shooting at the Ezakheni Plaza. On his arrival he found the deceased lying face down and observed a gunshot wound to his chest. Four cartridges were found, two near the pistol which was in front of the deceased, and two cartridges near the vendors’ table inside the plaza. The accused approached him and informed him that he was the one who had shot the deceased and handed him his firearm which contained eleven live rounds. The firearm was a black CZ with serial number L962J and a magazine with eleven rounds. This was subsequently entered into the SAP 13 register with reference 554/2015. Malinga confirmed at the time that he did not see any persons who were in the company of the deceased.

- [16] Philani Ishmael Sithole testified that he and the deceased were friends and on the day in question he had accompanied the deceased to sell cakes at a stall. Early in the evening, at 17h00, they had an argument with the security guards, one of whom was the appellant, about selling cakes inside the Ezakheni Plaza as opposed to the vendors' table outside. The appellant grabbed the deceased but after a brief discussion and after they had apologised, he and the deceased considered the matter to be resolved. Later that evening at approximately 19h00, Sithole and the deceased went to deposit money at the money market at Shoprite Checkers. Whilst walking toward Shoprite Checkers they were advised by the security guards to see them on their way out. Sithole and the deceased said they would do so.
- [17] After depositing the money and whilst they were walking out of the plaza they came across the security guards, including the appellant. He informed them that he took offence at the fact that they had reprimanded him earlier. A further argument ensued between the deceased and the appellant and the appellant confronted the deceased about selling cakes. Whilst the altercation was taking place between the deceased, Sithole and the appellant, Sithole noticed that the appellant held the right side of his waist. He told the deceased that the matter was not coming to an end and that they should leave. As they were about to leave the appellant asked him why they had come back to the plaza. He responded to the appellant and said to him 'you are the ones that called us over'.^[3]
- [18] As they were leaving, the appellant said they must be shot at. The security officer in the company of the appellant then separated from them and the appellant took out a firearm, pointed it at the deceased and shot him. After the appellant shot the deceased, Sithole ran away. He heard the appellant shoot at him three times although he was not struck by any of the bullets as he stood quite a distance away in the dark. He observed the appellant standing next to where the deceased was lying and shooting at him twice. He testified that when the deceased was first shot at, he was still inside the plaza near the vendors' table. When he later found the deceased, the deceased was outside the plaza near the traffic circle. After the deceased was first shot at, he hid behind a Quantum taxi and was approximately a metre or two away.
- [19] He testified that as he was running towards the road leading towards his home the appellant fired a second shot in his direction and the bullet went past him and hit a vehicle. He was running away and did not see where the appellant fired the third or fourth shot. He confirmed that the appellant was the one shooting at him and that the appellant was wearing a light green shirt. When the shooting stopped he was approximately 100 metres away from the plaza.

Submission of the parties

- [20] Mr Venter who appeared for the appellant, submitted that this court can on appeal interfere with the factual findings of the court a quo,^[4] as the evidence of the State witnesses can safely be rejected given the disparity in the evidence of the State witnesses.

[21] Should the appeal court decide the matter on the basis of the appellant's version, then at best the appellant ought to be acquitted on count 1, at worst he ought to be found guilty of culpable homicide applying the guidelines set out in *S v Steyn*.^[5]

[22] Ms Ratanjee for the respondent, submitted in her heads of argument, that the contradictions in the evidence of the State witnesses were not

material, and in determining whether the guilt of the appellant had been established beyond reasonable doubt, individual aspects of the evidence must not be viewed in isolation, but must be evaluated with all other available evidence, that is, to 'consider the mosaic as a whole'.^[6] In doing so, this court too would conclude the appellant exceeded the bounds of self-defence and dismiss the appeal in respect of the conviction.

Applicable legal principles

[23] As stated by Brand AJA in *S v Schackell* and quoted with approval in *S v Heslop*:^[7]

'It is a trite principle that in criminal proceedings the prosecution must prove its case beyond a reasonable doubt and that a mere preponderance of probabilities is not enough. Equally trite is the observation that in view of this standard of proof in a criminal case, a court does not have to be convinced that every detail of an accused's version is true. If the Accused's version is reasonably true in substance the court must decide the matter on the acceptance of that version. Of course it is permissible to test the accused's version against the inherent probability but it cannot be rejected merely because it is improbable; it can only be rejected on the basis of inherent probabilities. But if it can be said to be so improbable that it cannot reasonably possibly be true. On my reading of the judgment of the Court a quo its reasoning lacks this final and crucial step.'

[24] Proof of the guilt of the appellant beyond reasonable doubt and the question of whether the appellant's version is reasonably possibly true are not separate and independent tests. As was held by Nugent J in *S v Van der Meyden*:^[8]

'These are not separate and independent tests, but the expression of the same test when viewed from the opposite perspectives. In order to convict, the evidence must establish the guilt of the accused beyond reasonable doubt, which will be so only if there is at the same time no reasonable possibility that an innocent explanation which has been put forward might be true. The two are inseparable, each being the logical corollary of the other. In whichever form the test is expressed, it must be satisfied upon a consideration of all the evidence. A court does not look at the evidence implicating the accused in isolation in order to determine whether there is proof beyond a reasonable doubt, and so too does it not look at the exculpatory evidence in isolation in order to determine whether it is reasonably possible that it is reasonably possible that it might be true.'

[25] The case of *Van Der Meyden* received the unanimous approval of five Judges in the Supreme Court of Appeal case of *S v Van Aswegen*.^[9]

[26] It is trite law that the court does not have to believe the first appellant's version nor does it need to reject the State's case in order to acquit him, instead a court is bound to acquit the appellant if there exists a reasonable possibility that his evidence may be true.[10] A holistic approach to all the evidence is required as opposed to a fragmented and compartmentalised approach to the evidence.

[27] It is well established that a court of appeal will be very reluctant to disturb the credibility findings of the trial court since the trial court observed the demeanour of the witnesses in their performance in the witness box, and will reverse such findings in exceptional cases, where it is convinced that it is wrong.

[28] This was crisply set out by Holmes JA in *S v Robinson & others*[11] where the following was stated:

'A Court of appeal, not having had the advantage of seeing and hearing the witnesses, is of necessity largely influenced by the trial Court's impressions of them. Having regard to the re-hearing aspects of an appeal, this Court can interfere with a trial Judge's appraisal of oral testimony, but only in exceptional cases as apply summarized in a Privy Council decision quoted in *Parkes*

v. *Parkes*, 1921 A.D. 69 at p. 77:

"Of course it may be that in deciding between witnesses, he has clearly failed on some point to take account of particular circumstances or probabilities material to an estimate of the evidence or has given credence to testimony, perhaps plausibly put forward, which turns out on more careful analysis to be substantially inconsistent with itself, or with indisputable fact; but except in rare cases of that character, cases which are susceptible of being dealt with wholly by argument, a Court of Appeal will hesitate long before it disturbs the findings of a trial Judge based on verbal testimony."

[29] Murder is defined as the unlawful and intentional causing of the death of another human being, whereas culpable homicide is the unlawful negligent causing of the death of another human being.[12] The difference in the two offences lies in the form of culpability, negligence being required for culpable homicide and intention for murder.[13] Self-defence or private defence is where a person uses force to repel an unlawful attack which has commenced or is imminently threatening

upon their life, bodily integrity, property or other interest which deserves to be protected, provided that the act is necessary to protect the person or interest from the attacker and is reasonably proportionate to the attack.[14] Putative private defence implies rational but mistaken thought – it relates to the mental state of an accused person.[15]

[30] The leading authority which sets out the test to distinguish between private defence and putative private defence is the decision in *S v De Oliveira*[16] in which Smalberger JA deals with the difference as follows:

‘From a juristic point of view the difference between these two defences is significant. A person who acts in private defence acts lawfully, provided his conduct satisfies the requirements laid down for such a defence and does not exceed its limits. The test for private defence is objective – would a reasonable man in the position of the accused have acted in the same way (S v Ntuli 1975

- (1) SA 429 (A) at 436E). In putative private defence it is not lawfulness that is in issue but culpability (‘skuld’). If an accused honestly believes his life or property to be in danger, but objectively viewed they are not, the defensive steps he takes cannot constitute private defence. If in those circumstances he kills someone his conduct is unlawful. His erroneous belief that his life

or property was in danger may well (depending upon the precise circumstances) exclude dolus in which case liability for the person’s death based on intention will also be excluded; at worst for him he can then be convicted of culpable homicide.’

Analysis

[31] The court a quo in its judgment carefully analysed the evidence of the State witnesses and that of the appellant. The court a quo correctly pointed out that the appellant’s version can only be rejected if it is found to be false beyond a reasonable doubt. The court a quo clearly preferred the evidence of the State witnesses and rejected the appellant’s version that he acted in self-defence.

[32] The post mortem report and the photographs reveal that the entry wound of the bullet was slightly above the right nipple and exited on the left side of the deceased’s chest. This confirms that the deceased was not facing the appellant at the time the fatal shot was fired.

[33] In response to questions put by the court, the appellant stated as follows:

‘He then turned around to his friend who was in his company he told him and said “my friend just now let’s kill these people” is when I fired the shot.

So when you fired he was talking to his friend? ---- Yes

The friend was right next to him? --- Not very close because when we were arguing with Mr Dlamini, the other one was also having the noise on the other side.

So he moved away, the other person? --- No, the deceased had just turned around his face looking to his friend who was arguing with Dlamini, he told him “let’s shoot these people”.

That’s when you shot him? --- That is when I drew out the firearm and shot at him.’[17]

[34] On the appellant’s own version, at the time the fatal shot was fired, the deceased was engaged in a conversation with Dlamini and in no way posed any threat or danger to the appellant in order to justify the conduct of the appellant in drawing his firearm and shooting the deceased.

- [35] The deceased did not produce any firearm or dangerous weapon that posed a threat or danger to the safety and wellbeing of the appellant in order to justify his conduct in shooting the deceased. The deceased was not facing the appellant but was facing sideways (which seems to be common cause) at the time the fatal shot was fired.
- [36] I agree with the learned magistrate that it is highly unlikely that the deceased would have wanted to seek any altercation or confrontation with the appellant knowing that the appellant was armed and in the company of another security officer.
- [37] I am satisfied that on a careful analysis of all the evidence, including the appellant's version of what transpired on the day in question, that the court a quo correctly concluded that the appellant did not act in self-defence at the time he fatally shot the deceased. There was accordingly no misdirection by the court a quo in the conclusions it arrived at.
- [38] On an assessment of the objection evidence the appellant could not have reasonably believed that his life or property was in imminent danger that required him to draw his firearm and shoot the deceased. A reasonable man in the position of the appellant, being a trained security guard, would not have drawn a firearm and shot the deceased in the circumstances illustrated above.
- [39] The appellant clearly foresaw that by drawing his firearm and firing the fatal shot at the deceased, his action would result in the death of the deceased and accordingly the elements of *dolus eventualis*[18] have been satisfied.
- [40] I am also satisfied that the court a quo correctly convicted the appellant on the alternative to count 2 namely, endangerment to person or property. The appellant clearly fired shots at the witness, Sithole as he was fleeing and thereby endangered his person or property.

Order

[41] In the result, the following order do issue:

The appeal is dismissed and the convictions and sentence confirmed.

HENRIQUES J

CASE INFORMATION

DATE OF HEARING: 20 October 2017

DATE OF JUDGMENT: 04 May 2018

APPEARANCES

For the appellant: Adv. Jan Venter

Instructed by: Hellberg Thöle Inc.

For the respondent: Adv. R.T Ratanjee

Instructed by: The Director of Public Prosecutions, KZN

- [1] Appellant's heads of argument para 5.
 - [2] *S v Ntuli* 1975 (1) SA 429 (A) at 437E.
 - [3] Appeal record page 32 lines 2-3.
 - [4] *S v Monyane & others* 2008 (1) SACR 543 (SCA) para 15; *S v Pistorius* 2014 (2) SACR 314 (SCA) para 30.
 - [5] *S v Steyn* 2010 (1) SACR 411 (SCA) para 19.
 - [6] *S v Hadebe & others* 1997 (2) SACR 641 (SCA) at 645i-646b.
 - [7] *S v Schackell* 2001 (4) SA 1 (SCA) para 30; *S v Heslop* 2007 (4) SA 38 (SCA) para 10.
 - [8] *S v Van der Meyden* 1999 (1) SACR 447 (W) at 488f-i.
 - [9] *S v Van Aswegen* 2001 (2) SACR 97 (SCA) at 101a-e.
 - [10] *S v Kubeka* 1982 (1) SA 534 (W) at 537F-G; *R v Dhlumayo & another* 1948 (2) SA 677 (A) at 701; *S v Robinson & others* 1968 (1) SA 666 (A) at 675G-H; *S v Heslop* 2007 (4) SA 38 (SCA) at 47C; *S v Scott-Crossley* 2008 (1) SACR 223 (SCA) para 10.
 - [11] 1968 (1) SA 666 (A) at 675G-H.
 - [12] *Snyman Criminal Law* 6 ed (2014) at 437 and 442.
 - [13] *Snyman Criminal Law* at 442.
 - [14] *Snyman Criminal Law* at 102.
 - [15] See Director of Public Prosecutions, *Gauteng v Pistorius* 2016 (2) SA 317 (SCA). See further S Maharaj 'Fight back and you might be found guilty: Putative self-defence' August 2015 *De Rebus* 138.
 - [15] See Director of Public Prosecutions, *Gauteng v Pistorius* 2016 (2) SA 317 (SCA).
- See further S Maharaj 'Fight back and you might be found guilty: Putative self-defence' August 2015 *De Rebus* 138.
- [16] *S v De Oliveira* 1993 (2) SACR 59 (A) at 63h-64a.
 - [17] See appeal record page 94 line 25 to 95 line 11.

[18] Director of Public Prosecutions, Gauteng v Pistorius 2016 (2) SA 317 (SCA) paras 25-27.

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