

SOUTH AFRICA / JUDGMENT

S v Barlow (0045/2010) [2012] ZAGPJHC 303 (27 August 2012) [2012] ZAGPJHC 303

COURT

South Gauteng High Court, Johannesburg

BEFORE

Mabesele

CASE / FILE NUMBER

0045/2010

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IN THE HIGH COURT OF SOUTH AFRICA

SOUTH GAUTENG HIGH COURT JOHANNESBURG

CASE NO: 0045/2010

HEARING DATE: 30-03-2011

JUDGMENT

DATE: 27 AUGUST 2012

In the matter between

THE STATE

And

GESHWIN BARLOW.....Accused

JUDGMENT

MABESELE J:

The accused Elands trial on counts of pointing a firearm, murder (read with the provisions of Section 51(1) of Act 105 of 1997), robbery with aggravating circumstances, (read with the provisions of Section 51(2) of Act 105 of 1997), unlawful possession of firearms and unlawful possession of ammunition.

The accused pleaded not guilty to each count. He did not offer a plea explanation. The accused made admissions in terms of Section 220 of Act 51 of 1977 with regard, inter alia, to the correctness of facts and findings of the post-mortem examination in so far as they relate to the cause of death of the deceased as well as the cartridges that were collected from the scene of the crime on 24 October 2009.

It was admitted, also, that the deceased's firearm was found at the accused's place of residence and that cartridges that were collected from the scene were fired from the deceased's firearm as per Exhibit "A". The admissions were read into the record and marked Exhibit "A".

Marlin Abrahams testified in respect of count 1, (pointing a firearm.) The witness and his friends attended a school function which was held at Civic Centre in Relger Park on the night of 24 October 2009. During the function, his friend and the accused had a fight with each other. He intervened and stopped them from fighting. During the early hours of the morning he decided to go home. As he walked out of the hall, proceeding to the main gate of the premises, he noticed the accused coming occupied the driver's seat. Botha sat at the backseat behind Frederick. He occupied the front passenger seat. Because of heavy flow of traffic of vehicles, Frederick was unable to move his vehicle from where it was parked because people did not want to move their vehicles. Frederick got out of the vehicle, lean against the door and asked people to move their vehicles.

The witness said while Frederick was still talking to the people, he suddenly saw someone wearing a T-shirt, approaching Frederick from behind. It was at that stage that he saw a spark and subsequently heard a gunshot. Soon thereafter the person with a T-shirt, whom he clearly recognised as the accused, he said, rushed to Frederick and removed Frederick's firearm from the holster at his back. This, he said, happened while Frederick was in the process of falling on the ground next to the driver's door after the accused had shot him at the back.

The accused then stood close to Frederick on the ground and fired two more shots at him. One of the bullets struck him on the stomach. At that stage the accused had two firearms in his hands. The accused again fired one shot at the back passenger seat which struck Botha on his right elbow. Thereafter the accused left the scene. He then got out of the vehicle to offer help occupied the driver's seat. Botha sat at the backseat behind Frederick. He occupied the front passenger seat. Because of heavy flow of traffic of vehicles, Frederick was unable to move his vehicle from where it was parked because people did not want to move their vehicles. Frederick got out of the vehicle, lean against the door and asked people to move their vehicles.

The witness said while Frederick was still talking to the people, he suddenly saw someone wearing a T-shirt, approaching Frederick from behind, it was at that stage that he saw a spark and subsequently heard a gunshot. Soon thereafter the person with a T-shirt, whom he clearly recognised as the accused, he said, rushed to Frederick and removed Frederick's firearm from the holster at his back. This, he said, happened while Frederick was in the process of falling on the ground next to the driver's door after the accused had shot him at the back.

The accused then stood close to Frederick on the ground and fired two more shots at him. One of the bullets struck him on the stomach. At that stage the accused had two firearms in his hands. The accused again fired one shot at the back passenger seat which struck Botha on her right elbow. Thereafter the accused left the scene. He then got out of the vehicle to offer help to Frederick. While help was offered to Frederick, the ambulance arrived. The medical staff, on arrival, declared Frederick dead. He admitted under cross-examination that he did not mention in his statements marked "G and H", respectively, that the accused removed the deceased's firearm from the deceased.

Myrna Botha testified that during the function she was invited by the deceased and Lawrence to join them at their table. After the deceased and Lawrence undertook to accompany her home after the function, she released her sisters who came with her at the function. At approximately 02:00 (in the early hours) they decided to leave the function. The three of them walked to the deceased's vehicle outside the hall. It was clearly visible outside due to the street lights and the lights from the hall.

The deceased sat in the front driver's seat. She and Lawrence occupied the back seat. She sat behind the deceased. Because of heavy flow of traffic, the deceased was unable to move his vehicle. As a result, the deceased peeped through the window and pleaded with people outside to move their vehicles. One of the people responded that they will not move. The deceased became angry and got out of the vehicle. The person who responded to the deceased's plea approached the deceased at the driver's door. Both of them had an argument. In the process, the person pointed the deceased with something which looked like a firearm.

The deceased turned back to his vehicle to fetch his firearm. Thereafter the deceased approached the person concerned. The deceased had a firearm in his hand at that stage. While the two of them were facing each other next to the driver's door, the accused approached the deceased from behind and removed the deceased's firearm from the deceased's hand. Thereafter the accused moved three steps away from the deceased and started firing shots at the deceased with the deceased's firearm.

The deceased, as he fell on the ground, pleaded with the accused not to shoot him because he was a police officer, said the witness. The accused then turned a firearm on her and shot her through the right back seat window of the vehicle. She raised her right elbow to shield the bullet from hitting her head. The bullet struck her elbow. After the shooting incident she was taken to the hospital.

After the witness had testified, the state closed its case. Thereafter an application was made for the discharge of the accused in terms of Section 174 of Act 51 of 1977. The accused was accordingly discharged on counts 1, 5 and 6 only. On count 1, it was found that a possibility existed that the accused might have pointed a firearm at the crowd of people who wanted to attack him, in self-defence. There was no evidence against the accused on counts 5 and 6. With regard to the rest of the counts, the application was successfully opposed on the grounds that the witnesses saw the accused firing shots at the deceased and Botha with the deceased's firearm.

The firearm was later found In possession of the accused.

The accused took the stand. He testified that after the function came to an end he left the hall with two ladies. The three of them walked to his vehicle that was parked outside the premises. There were many vehicles outside. As they walked passed the deceased's vehicle, he hit his arm against the mirror of the deceased's vehicle. The deceased then asked him why he could not walk properly. This resulted in them arguing with each other. As a result of the argument, the deceased got out of the vehicle with a firearm in his hand. The firearm was then pointed at his face.

He moved three steps backwards to avoid the deceased. The deceased approached him. It was at that stage that the two ladies who were In his company ran away from the scene. He suddenly grabbed the firearm with both hands. As a result of his conduct, the struggle for the firearm between him and the deceased ensued, resulting In shots going off from the same firearm. After shots went off, he got hold of the firearm. This was followed by deceased retreating and fell on the ground. Subsequent thereto, he left the scene with the deceased's firearm. He then got into his vehicle where the two ladies had waited for him and drove off.

The accused said he came to know that the deceased was a Metro Police on the day following the day of the incident. He phoned his attorney to hand him over to the South African Police officers. He does not know how Botha got shot. He testified that, If necessary, he would call the ladies who were In his company to corroborate his evidence in so far as it relates to the deceased pointing a firearm at him. He said the deceased was well build and physically stronger than him.

Frenscols Leigh testified on behalf of the accused. He, too, attended the function on the day of the incident. He witnessed an argument between the deceased and the accused, he said. During argument, said the witness, the deceased pointed a firearm el the accused. The accused grabbed the firearm. This resulted in a struggle between the deceased and the accused over a firearm. During the struggle the accused fell on the ground with the deceased on lop of him. During that process, he said, the lady got out of the deceased's vehicle and tried to pull off the deceased from the accused underneath him, The lady was unsuccessful in her efforts to remove the deceased from the accused.

While the deceased was still on top of the accused, with a lady next to them, four shots went off. He then saw the deceased fell on the ground and the accused stood up at the same time. The accused had a firearm In his hand. After shots went off, the accused ran to his vehicle and drove off. A few days later he went to Boksburg police station to look for the accused and his legal representative. The purpose was to make a statement to the accused's legal representative about what he had observed at the scene, as opposed to the Incorrect Information which he heard from the community and read about In the newspapers, about the accused.

He testified that the statement which he made to the accused's legal representative, the contents of which he confirmed in his evidence-in-chief, was read In court during accused's bail application

It is common cause that both the deceased and Botha got shot with the deceased's firearm. The post mortem examination revealed one wound on the stomach and two wounds on the legs. The deceased died of gunshot wound on the stomach. Botha was shot on the right elbow to secure conviction of the accused, the state has to prove its case beyond reasonable doubt. It follows, therefore, that the case need not be proved beyond any doubt. On the other hand, should the accused's version be reasonably possibly true, the accused should be entitled to acquittal. This means that the version of the accused need not be absolutely true for the accused to be acquitted. With this in mind, I now proceed to analyse the evidence of each witness and the accused.

Lawrence Flagg is a cousin of the deceased. He invited the deceased to the function at which the deceased met his untimely death. For these reasons, I approach his evidence with caution. The witness was unimpressive, in my view. He testified that the accused shot the deceased at the back before the accused quickly removed the deceased's firearm from the holster. Contrary to this evidence, the post mortem examination did not reveal any bullet wound which penetrated the deceased's body through the back.

Secondly, the witness' version that the deceased's firearm was removed from the holster is contradicted by Botha and the accused, who both said that the deceased held a firearm in his hand, according to

Botha and the accused, there was only one firearm at the scene as opposed to Lawrence's evidence that at some stage the accused had the deceased's firearm in one hand and his own firearm in another. From this evidence, I am of the view that the witness was clearly biased against the accused. Despite this, I am not unmindful that the witness' version that the deceased pleaded with the accused not to shoot him because he was a police officer, is corroborated by Botha.

When Lawrence and Myrna heard the deceased plead with the accused, they were seated inside the vehicle as the deceased got shot next to the driver's door which was widely opened. For this reason, and despite shortcomings in the witness' testimony, I am satisfied that the witness (Lawrence) correctly heard the deceased plead with the accused.

Myrna Botha was very impressive, in my view. She was subjected to brilliant cross-examination. Nevertheless, she answered questions eloquently and frankly. Her version that she got shot on the elbow after she had raised up her arm to protect her head from the bullet, was not challenged. Therefore, her version that she raised up her arm to shield her head from the shots that were fired by the accused, is correct. Logic dictates that her version that the accused, after taking the deceased's firearm, fired shots at the deceased before turning a firearm on her, is correct, also. The witness' version that she heard the deceased plead with the accused not to shoot him because he was a police officer, is corroborated by Lawrence Flagg, thereby suggesting that the deceased would not plead with the accused without any threat directed at him. The witness, clearly, saw the accused moving three steps away from the deceased before shooting took place. This version is corroborated by the accused.

The accused said the deceased was well build and physically stronger than him. Therefore, It Is unimaginable that a person, as physically strong as the deceased, as described and demonstrated by the accused In the witness box, can be hit by three bullets during the struggle over a firearm with the accused who Is less physically stronger than the deceased. The fact that the accused had a firearm In his hand after the deceased got shot and fell on the ground strengthens Botha's evidence that the accused was already In possession of a firearm before the deceased was shot.

The accused's conduct of fleeing the scene with the deceased's firearm is clearly inconsistent with his version that shots went off during the struggle over the firearm. He made arrangements with his legal representative to hand him over to the police before knowing that the police were looking for him. From his evidence, the accused was not going to report the shooting Incident which, according to him, occurred by mistake. His clear Intention from his own evidence was to let the police arrest him. His conduct, In my view, demonstrates guilt on his part.

Although he was not bound to do so, his (allure to call the two ladies who, according to him, could be easily reached and were In his company and had witnessed the deceased pointing a firearm at him leads to inference to be drawn that the accused was aware that the ladies would possibly contradict his evidence. He does not have a license to possess a firearm.

The accused was clearly in a fighting mood on the night in question. He first had a fight with Marlin Abrahams' friend inside the hall. Later on, after the function, he was attacked by a mob outside the hall, resulting in him producing a firearm, in self defence. From the facts before me, an inference may be drawn that the mob attacked the accused after the accused had shot the deceased.

Leigh witnessed the fight between the deceased and the accused, he said. He testified that shots went off at the time that the well-bulld and physically strong deceased was on top of the accused who was on the ground, with Myrna Botha next to them. It is unimaginable how would the deceased, In the position In which he was, as described by the witness, be Injured, Instead of the accused being Injured. The deceased sustained a bullet wound on the stomach.

Secondly, It cannot be Imagined how could the accused, who had been overpowered by the deceased, suddenly be in possession of a firearm Immediately after the deceased got shot. Thirdly, the unchallenged and accepted evidence of Botha Is that she got shot Inside the vehicle, not outside, as the witness wants me to believe. His intention of placing Botha outside the vehicle, next to the deceased, was to justify, in my view, how Botha could have possibly got shot while knowing that the incident did not occur as said, by him.

It was argued on behalf of the accused that the accused and his witness corroborated each other, thus justifying the accused's version as being reasonably possibly true. This corroboration is not surprising for the following reasons:

The witness took the trouble of looking for the accused and his legal representative at the police station and finally got hold of them at court where he made a statement to the accused's legal representative with the intention to oppose what he said was incorrect information from the

public and newspapers about the accused. The accused did not even know this witness before the witness approached him in court. According to the defence counsel, the statement was then read into the record during ball application made by the accused (in the presence of the accused who understood both English and Afrikaans.) it stands to reason therefore that the accused knew beforehand what the witness was going to say in his trial.

The evidence of the accused and his witness was carefully planned. As pointed out earlier, failure by the accused to have called the two ladies who were in his company and had witnessed the deceased pointing a firearm at him, as he said, leads to an inference to be drawn that the accused was aware that the ladies would possibly contradict his evidence.

The evidence of the state clearly calls for conviction of the accused on counts 2, 3, 4, 7 and 8. However, accused should be guilty of theft on count 3. The reason is that there is no evidence that the deceased's firearm was taken from him by force. In the result, the accused is GUILTY on counts 2, 3, (theft), 4, 7 and 8

IN THE HIGH COURT OF SOUTH AFRICA (SOUTH GAUTENG HIGH COURT. JOHANNESBURG)

CASE NO: 0045/2010

01-04-2011

and

DESHWIN BARLOW Accused

SENTENCE

MABESELE J;

The accused is guilty of murder of Metro Police officer, Flagg Mervin Frederick, He is also guilty of theft of a firearm of the deceased, attempted murder, unlawful

possession of a firearm and unlawful possession of

The deceased was shot and killed with his own firearm after the accused disarmed him of same. After the deceased was shot, the accused turned a firearm on the deceased's companion and shot her on the elbow. Thereafter the accused left the scene with the deceased's firearm. The incident occurred in the presence of multitudes of people who had attended a party with the deceased and the accused.

Murder of a law enforcement officer calls for a severe punishment. The law is clear that anyone who murders the law enforcement officer who at the time of his or her death was performing his or her functions as such, shall be sentenced to life Imprisonment. This sentence cannot be considered in respect of the accused in that the deceased was not performing his official functions when he was murdered. Despite this, the offenders who commit violent crimes and thus disturb public peace and tranquillity should be removed from the society, by law.

However, the interest of the society should not be over-emphasised at the expense of the personal circumstances of the accused. Moreover, mercy should be exercised in deserving cases. The purpose of punishment, inter alia, is to make the offender realise his or her mistake (instead of destroying him or her,)

The 31 year old accused has a clean record. He has three children. In a spur of a moment, he disarmed the deceased of his firearm at the time that the deceased was threatening to shoot someone in a crowd of people who were about to leave a party in the early hours of the morning after some had consumed alcohol. The deceased's conduct of producing a firearm to a crowd of people who had consumed alcohol was, undoubtedly, provocative. After the shooting incident the accused handed himself over to the police. These factors, taken cumulatively, justify lenient sentences, in my view,

The accused is still a youngster. He can still be persuaded to become a law-abiding citizen. He clearly deserves a second chance in life. In the result, I sentence the accused as follows:

(10) TEN YEARS' IMPRISONMENT on count 2.

(3) THREE YEARS' IMPRISONMENT on count 3 (5) FIVE YEARS' IMPRISONMENT on count 4 (3) THREE YEARS' IMPRISONMENT on counts 7 and 8, taken together.

The sentences on counts 3, 7 and 8, shall run concurrently with the sentence on count 4.

The result is that the accused is sentenced to an effective term of (15) FIFTEEN YEARS IMPRISONMENT

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