

SOUTH AFRICA / JUDGMENT

S v Ebrahim (55124/2021) [2023] ZAGPJHC 281 (22 March 2023)

[2023] ZAGPJHC 281

COURT

South Gauteng High Court, Johannesburg

BEFORE

Ally

CASE / FILE NUMBER

55124/2021

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IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

DIVISION, JOHANNESBURG

CASE

NO: 55124/2021

NOT

REPORTABLE

NOT

OF INTEREST TO OTHER JUDGES

REVISED

In

the matter between:

THE
STATE
and

EBRAHIM:

MUHAMMED
ACCUSED

JUDGEMENT

ALLY AJ

INTRODUCTION

[1] The Accused Muhammed Ebrahim has been arraigned before this Court on three counts of murder read together with Section 51(1) of the Criminal Law Amendment 105 of 1997 as amended

[2] The State was represented by Adv. M.M. Rampyapedi and the Defence by Mr M. Vally assisted by Adv. M.Y. Razak.

[3] The Accused understood the charges as read out fully by the Prosecutor and pleaded not guilty to all charges. There was confusion

in terms of whether the Accused was submitting a Section 115 plea explanation, but the Court was informed that it would become clear from the Section 220 Admissions which were handed up as Exhibit "A". The Accused raised a defence of private or self-defence, in paragraph 10 of the said Exhibit "A".

[4] Mr Rampyapedi indicated in broad summary that the case of the State is that the Accused exceeded the bounds of private or self-defence.

[5] In respect of the abovementioned Section 220 admissions, the Accused admitted the day, time and place of the murders, the names of the deceased and the causes of death of all the deceased. The Accused admitted the chain of evidence in respect of the preservation of the bodies from the scene to the mortuary until the post mortem examinations.

[6] The Accused also admitted the photographs taken of the scene as well as the Sketch plan which sketch plan, chain statements and photographs were handed in as Exhibit "E".

[7] Mr Vally, for the Accused, clarified the Section 220 Admissions by stating that the truth of the contents of Exhibit "G" and Exhibit "H" were not admitted. Exhibit "G" and "H" were ballistic reports compiled by Warrant Officers Mangena and Yashnee Paul.

[8] Mr Rampyapedi moved for the amendment of the indictment to reflect the date of 4 July 2013 in Count 1 and the amendment was granted without objection.

SUMMARY OF THE EVIDENCE

[9] The State proceeded to call Glory Ramadimetja Gafane, hereinafter referred to as Ms Gafane, to testify.

- [10] Ms Gafane testified that on 4 July 2013, around about midday, she was on foot patrol which she described as community patrol in Sector 1, Central. She indicated that she was stationed in Fordsburg next to Braamfontein train Station. She indicated that she was in the company of Lwando.
- [11] Ms Gafane testified that whilst patrolling she observed a black Mercedes Benz pass her and it was followed by a grey Golf GTI motor vehicle. The Mercedes Benz was a private motor vehicle.
- [12] The Mercedes Benz stopped and the Golf GTI also stopped at the stop sign. Ms Gafane testified that she had forgotten the names of the streets.
- [13] Ms Gafane testified that a man alighted from the front passenger seat of the GTI and he was wearing a blue work suit. She states that as this man with the blue suit was walking towards the Mercedes Benz, he was shot by the driver of the Mercedes Benz.
- [14] In respect of the occupants of the motor vehicles, Ms Gafane testified that there were two in the Mercedes Benz and 3 in the Golf GTI. Two occupants were left in the Golf GTI.
- [15] She recalls that the two occupants of the Mercedes Benz alighted from the motor vehicle and shot the 2 occupants in the Golf GTI. Ms Gafane testified that these two occupants consisted of the driver of the Golf GTI and the passenger behind the driver. She testified that they shot the driver and the passenger and pulled them out of the Golf GTI. One seemed alive and they were shot further whilst on the ground.
- [16] Ms Gafane testified that she did not see the passenger in the blue work suit that alighted from the Golf GTI fire any gunshots at all. His hands were by his sides. She testified further that the driver and the passenger in the Golf GTI did not fire any gunshots; they were just seated in the Golf GTI. At this time, Ms Gafane estimated that she was approximately 6 metres away. The visibility was good, it was bright and during the day.
- [17] Ms Gafane was then asked to identify certain photographs contained in Exhibit "E" and comment thereon. She identified the stop sign in photograph 5, the man lying in front of the Mercedes Benz in photograph 6. She observed that she could not see a firearm. She identified the two other two occupants of the Golf GTI in photograph 9 and observed that she did not see firearms and that both were lying on the ground on the driver's side of the Golf GTI.
- [18] Ms Gafane was then referred to photograph 153 and she testified that she could see two firearms but recalled that she did not see them on the day.
- [19] Ms Gafane was referred to photograph 24 and whether she saw any markings on the rear window to which she replied in the negative.
- [20] Ms Gafane testified that she had seen the driver of the Mercedes Benz go around the Golf GTI to the back and shoot from the back of the Golf GTI.

[21] She recalls that she was at the scene when the police arrived. She identified the Accused as one of the occupants of the Mercedes Benz but was not certain if he alighted from the right or the left side.

[22] The State then called Warrant Officer Ngwanagologa Priscillah Maboko, hereinafter referred to as Warrant Officer Maboko, who was a Constable at the time of the incident. She confirmed that she worked at the Criminal Records Centre and that she is a crime scene investigator and has been working as such for 13 years.

[23] She testified that the scene was pointed out to her by Warrant Officer Msibi. Warrant Officer Maboko confirmed that she had compiled Exhibit "E".

[24] With reference to A19(4) of Exhibit "E" Warrant Officer Maboko testified that Exhibit "M", was a PR evidence

collection kit collected from suspect number one with a certain serial number and that Exhibit "N" was a PR evidence

collection kit collected from suspect number two with its own serial number.

[25] Warrant Officer Maboko explained that PR stood for Primer Residue which in turn means gunpowder that is emitted after firing a firearm.

[26] She ended her evidence in-chief by stating that separate kits were compiled for separate people and were then sent for analysis. She did not tamper with the scene and did not know the suspects.

[27] The State then called Sergeant Patience Mbatha, hereinafter referred to as Sergeant Mbatha. She testified that she worked at Johannesburg Central and was part of the Murder Group Detectives. She has been employed by the South African Police Services for 15 years.

[28] Sergeant Mbatha in answer to a question from the prosecution indicated that a certain Mazibuko was a police officer.

[29] She was on duty on 4 July 2013 and at about 15H00 she was called and told that something was happening in Fordsburg at Central Avenue and Gillies Street.

She proceeded to the scene and arrived there at approximately 15H10.

[30] On her arrival at the scene, Sergeant Mbatha observed a Golf GTI and a Mercedes Benz ML. She observed that there were people who were shot and lying next to the Golf 5.

[31] Sergeant Mbatha testified that the scene had been cordoned off on her arrival and that Captain Shingange had shown her the scene. Captain Shingange was the first SAPS member on the scene.

[32] In describing the scene, Sergeant Mbatha stated that two people were lying next to the Golf and one was near the Mercedes Benz. She states that Captain Shingange indicated that two Indians had occupied the Mercedes Benz. She spoke to the two Indians who explained to her

that a Golf was following them. Sergeant Mbatha pointed out the Accused as one of the Indians. She states that they said they made a U-turn and came into Gillies Street. In Gillies Street, the Golf came in front of them a little. Sergeant Mbatha could not recall who of the Indians did the talking.

- [33] She recalls she was told that one black guy alighted from the Golf and when he alighted, he was armed and was wearing a balaclava. She testified that she was told that they had already alighted when they saw the black man approaching. The black man was approaching and they were retreating and gunshots were fired. The Accused and the Accused that was absent, who will be called Mr Essay, told her that the person from the Golf fired the gunshots. They stated that initially there were three occupants of the Golf and the two left in the Golf were shot or shot at.
- [34] Sergeant Mbatha recalls that the Accused and Mr Essay stated that after the shots were fired, they took the firearms and placed them on the side pavement. When she asked them why they did that, they replied that there were a lot of people and it was for safekeeping. She testified that there were two firearms. She could not recall where exactly the firearms were placed but was able to identify them on photographs 153 and 154 of Exhibit "E".
- [35] Sergeant Mbatha testified that she called the photographer to photograph the crime scene and collect evidence. She further recalls that the deceased were declared dead by the Ambulance personnel.
- [36] When asked whether the Golf and the Mercedes Benz were inspected Sergeant Mbatha answered no. She stated that the Golf 5 was taken to the compound to check it the next morning.
- [37] She recalls that she was at the crime scene till late, between 20H00 and 21H00. She recalls having arrived at the police station at approximately 21H00.
- [38] She testified that the Mercedes Benz was returned to the owner and not taken to the compound. She had noticed that the Mercedes Benz had no bullet markings or holes. She recalls not having taken the Mercedes Benz to the compound because her Seniors had remarked that there was no damage to it.
- [39] Sergeant Mbatha testified that the Accused and Mr Essay had two firearms, namely, Glocks which were given to them. The firearms were booked so that they could be taken for ballistics.
- [40] With regards to the Golf, Sergeant Mbatha recalls that the photographer was called to take photographs at the police station. A bag was found in the boot of the Golf which contained a firearm. She could not remember the name of the firearm but it was filed off. She described the bag as a sports bag that had clothes and the firearm was inside the bag.
- [41] Sergeant Mbatha testified that they did not check the boot at the crime scene because there were many Seniors and Commanders and they did not want people to tamper with the

scene.

- [42] Sergeant Mbatha recalls that the photographer took photographs at the scene. She could not recall why there was no photograph of the firearm in the boot. She had been assigned the case that morning of 5 July 2013. She recalls that the gun was taken by the photographer but could not remember the photographer's name.
- [43] Sergeant Mbatha testified that she knocked off work on 4 July 2013 and returned the next morning. She stated that the Golf remained at the police station. She explained if the processing of a vehicle is not finished then the motor vehicle is taken to the Local Criminal Record Centre, hereinafter referred to as the LCRC. She recalls that they placed the Golf in the basement at the police station.
- [44] Sergeant Mbatha testified that the Golf was opened in the presence of the photographer. She recalled that when she had parked the car at the LCRC she had taken the key and left it at the police station and on returning in the morning, retrieved the key.
- [45] Sergeant Mbatha then testified regarding the circumstances of taking Ms Gafane's statement. She recalls that she telephoned Ms Gafane to come to the police station as she learned that Ms Gafane was an eye witness and she was the investigating officer. She identified Exhibit "J" as Ms Gafane's statement and stated that she had written the statement down. She identified the handwriting as hers and could not explain why Ms Gafane stated that she had written the statement.
- [46] The State then called Captain Langwani Lucky Shingange, hereinafter referred to as Captain Shingange, to testify. Captain Shingange
- testified regarding his observations at the crime scene on 4 July
2013. He had been patrolling around Fordsburg when he was stopped by people saying there was a shooting in the next street.
- [47] Captain Shingange recalls having spoken to Mr Essay who stated that he had been involved in the shooting and that he was the driver of the Mercedes Benz ML. Mr Essay had approached him from a nearby building. Mr Essay volunteered the information.
- [48] He testified that other policemen then arrived on the scene and Warrant Officer Msibi said he could leave. Captain Shingange recalled that there were no people at the scene.
- [49] He recalled having seen the Accused at the scene on 4 July 2013 and the Accused had volunteered certain information.
- [50] The State then called Lwando Mrobongwana, hereinafter referred to as Mr Mrobongwana.
- [51] Mr Mrobongwana testified that at the time of the incident he was doing voluntary work in the Community Policing Forum. He patrolled

the streets of Fordsburg.

- [52] He recalls that at the time he was teamed up with Ms Gafane. He testified that around 14H00 he and Ms Gafane were patrolling going down Mint Road towards Central Avenue and back to Mint Road.
- [53] He recalled that a black Mercedes Benz passed towards Central Avenue. He testified that it was a usual car they see in the street and had seen it before. He recalls that the Mercedes Benz parked and as it parked, a Golf came pass as if it was following the Mercedes Benz.
- [54] He testified that in the past, the occupants of the Mercedes Benz usually went to Sniper, a shop that sold guns.
- [55] Mr Mrobongwana testified that as the Mercedes Benz parked around the stop sign, the Golf stopped next to it. He observed a male alighting and he was wearing a blue work suit. He states that he was curious about the male alighting and he saw this male with the blue work suit, pulling something from his belt but was unable to see it. He then states that immediately he saw the male with the blue work suit trying to pull something from his belt, he heard gunshots. After the gunshots, this male person with the blue work suit, fell down.
- [56] Mr Mrobongwana testified that the gunshots were coming from the driver side of the Mercedes Benz. He further testified that after the male with the blue work suit fell. the passenger of the Mercedes Benz alighted. This passenger moved to the back of the Golf and started firing gunshots from the back of the Golf. Mr Mrobongwana stated that this passenger was firing in the direction of the Golf and at this time, the driver of the Mercedes Benz was also shooting.
- [57] Mr Mrobongwana then testified that the passenger and the driver of the Mercedes Benz went to the driver's side of the Golf and pulled the driver out. He testified that the passenger and the driver of the Mercedes Benz fired gunshots at the driver of the Golf, whilst he was on the floor. They then stopped.
- [58] Mr Mrobongwana testified that he thought that there was a passenger in the back of the Golf. He states that he was in shock and ran to a shop to call the police. He recalls that he did not see the passenger and driver of the Mercedes Benz pull out the passenger of the Golf.
- [59] He testified that the policeman he called was Sergeant Mazibuko, a Sector Manager. He testified that Sergeant Mazibuko came to the scene with more than two policemen.
- [60] Mr Mrobongwana was then shown Exhibit "E" and testified that he was on the right-hand side of the road between the white and grey cars depicted on photograph 33 of Exhibit "E". He estimated the distance between him and the Golf and Mercedes Benz to be approximately 20 metres.
- [61] At the end of his evidence in-chief, Mr Mrobongwana testified that he recognised the Accused as the person that he used to see at Sniper and the person that was the passenger of the Mercedes Benz on the day of the incident who was shooting from the back of the Golf.

[62] The State then called Dr Boitumelo Ramorobi, hereinafter referred to as Dr Ramorobi, to testify. She had 12 years' experience and was going to testify in respect of the post-mortem reports of:

62.1. Vusi Gerald Phiri, Exhibit "B";

62.2. George Zakhele More, Exhibit "C"; and

6.2.3. Tshepiso Ferdinand Mohale, Exhibit "D".

[63] Dr Ramorobi confirmed the post-mortem reports as having been compiled by her and made one addition, that is, that a mistake was made in paragraph 4.2. of Exhibit "B". She testified that there had been in fact powder tattooing 40 cm from the skin. She described the error as being human error.

[64] The State then called Warrant Officer Frank Kgamanyane to testify. He had 17 years' experience and was not the original investigating

officer. He was called to testify regarding the whereabouts of Warrant Officer Mangena and Warrant Officer Yashnee Paul, ballistic

experts who had compiled ballistic expert reports in this case.

[65] Warrant Officer Kgamanyane testified that he was unable to locate the abovementioned ballistic experts and that they had resigned.

[66] The State then closed its case.

[67] Mr Vally then indicated that he would be applying for the discharge of the Accused on all the charges in terms of Section 174 of the Criminal Procedure Act[1].

[68] Both the State and Defence submitted written Heads of Argument for which the Court was grateful.

[69] The Court granted the application for the discharge of the Accused in relation to Count 1, the murder of Vusi Gerald Phiri and refused the application in respect of Counts 2 and 3.

[70] I indicated that the reasons for the abovementioned decision will form part of this judgement.

[71] Mr Vally then called the Accused to testify in his own defence.

[72] The Accused testified that he was 49 years of age, 41 at the time of the incident. He was married with four children who had all been born at the time of the incident.

[73] The Accused testified that on 4 July 2013, he was at Newtown Cash n Carry and Mr Essay, his cousin, came to pick him up to buy hunting equipment at Sniper. He knew the owner of Sniper.

- [74] The Accused testified that Mr Essay was the driver of the black Mercedes Benz ML 350. On the way to Sniper, they turned right into Mint Road and then right into Gillies Street. He estimated the time to be about 14H00.
- [75] The Accused testified that Mr Essay parked the motor vehicle and he alighted but as he alighted, he heard a loud sound like an exhaust. He turned around to see where it was coming from and he saw a Golf coming to a screeching halt. The Golf stopped in front of the Mercedes Benz. He then saw a man in a blue overall emerge from the Golf with a gun in his hand. This man emerged from the front left-hand side of the Golf and he had a balaclava on.
- [76] The man with the blue overall pointed the firearm in the direction of Mr Essay, he cocked his firearm. He recalled that in his mind he knew there was going to be a hijacking. The Accused then states that he retreated and took cover at the rear end of the Mercedes Benz.
- [77] The Accused then testified that he heard gunshots. He did not know where the man in the blue overall was. He states that when he heard the gunfire, he drew his firearm as he was armed at the time. He then states that whilst the gunfire had continued, he peered from the back of the Mercedes Benz and saw Mr Essay back- peddling. Mr Essay kept on saying "shoot shoot".
- [78] The Accused then testified that when he stood up, he saw a muzzle flash coming from inside the Golf and he fired in the direction of the Golf with his firearm. Mr Essay was also firing at the time he was back-peddling.
- [79] The Accused testified that at the time of the shooting, he feared for his life and he just wanted to get away. He ran across the road, as he put it, to the next point of cover. At this point of cover there was a car there. He saw the door of the right-hand passenger side of the Golf opening and saw a leg emerge. He then started firing in the direction of the Golf. At this time gunshots were still being exchanged. He then retreated to what he called his 3rd point of cover behind another car.
- [80] He testified that he still saw movement and he kept on firing and he retreated further down the street near Mint Road. At this point he realised that he was out of ammunition and he changed his firearm magazine. He testified that the magazine of his firearm took 15 bullets maximum and he could not recall whether he fired 14 or 15 bullets.
- [81] At this time he was at his 4th point of cover and he testified that his attention was focussed on Mr Essay. He asked Mr Essay if he was okay. The Accused testified that at this stage the gunshots had stopped and they waited for a minute or two.
- [82] The Accused then noticed people emerging from Central Avenue. He states that he felt relieved and he walked towards Central Avenue; he felt safer.
- [83] He testified that as he was walking towards Sniper a gentleman was nudging one of the deceased with his legs. He remembers people asking him if he got shot and he was ushered into the shop on the corner.

- [84] The Accused recalls having seen the male with the blue overall lying on the ground. He could not recall where Mr Essay was when he walked down the street towards Central Avenue.
- [85] In the shop, someone brought him water. He testified that the incident on that day was a traumatising experience. He recalls that a gentleman, whom he thinks was Msibi spoke to him and Mr Essay. He states that Msibi spoke to Mr Essay. He recalls explaining to Msibi what transpired but states that he never really gave a statement at the scene. He states that Msibi took his firearm which he described as a Glock 22 with serial number RAM 775 40 calibre.
- [86] The Accused then confirmed that Exhibit "L" was his statement and recognised his signature. Exhibit "L" was then formally handed in as an exhibit after reading it into the record.
- [87] The Accused identified Exhibit "M" as a further statement which was not written by him nor did he sign the statement. The Accused testified that he stood by the contents of Exhibit "M" and the statement was formally handed in as an exhibit after reading same into the record.
- [90] The Accused was then referred to Exhibit "E" containing the photographs and Sketch plan. The Accused then testified how he ran for cover, pointing out the various points as well as shell casings which he stated came from his firearm.
- [91] The Accused testified that as he was running for cover and taking cover at various points, he never encountered any person including Ms Gafane.
- [92] The Accused testified that he received counselling in respect of the incident and that he also received support from his family.
- [93] The Accused testified that the firearm in photograph 21 of Exhibit "E" and marked "K" belonged to the male in the blue overall. He further testified that when he was ushered into the shop, he did not see the firearms lying on the pavement as shown in photograph 21. He did not know who moved the firearms "K" and "L" as shown in photograph 21.
- [94] The Accused repeated that he had to shoot to save his life and accepted that somebody would be killed or injured.
- [95] The Accused estimated that from the time he was firing at his first point of cover to his 4th point of cover it took about a minute. In his words, "it was so fast".
- [96] The Accused denied pulling out anybody from the Golf and testified that he did not know the eye witnesses nor did he see patrollers at the scene. He testified that he did not know how the bodies of the deceased came to be lying the way they were depicted in photograph 40 of Exhibit "E".

EVALUATION OF THE EVIDENCE

[97) The State has relied on eye witness testimony in respect of the shooting incident as well as forensic evidence to prove its case.

[98) Ms Gafane's evidence in-chief was simple enough and gave the Court, at the outset of this trial, a broad perspective as to what occurred on 4 July 2013. However, it was during cross-examination when her testimony was tested against certain objective facts and previous statements she had made that the simplicity of her evidence turned out to be not so simple.

[99) It will be recalled that Ms Gafane pointed out to the Court that she was standing at a point marked "X" which shows that it was just above the points "F19" and "F18" on the Sketch Plan A19(5) in Exhibit "E". It was pointed out to Ms Gafane during cross-examination that she could not have been standing there as that was probably where gunshots had been fired from and she would have been in the line of fire. She categorically dismissed this and stated that she was not in the line of fire. The point of being in the line of fire became clearer later in this trial. Her testimony was that she was in close proximity to the shooting.

[100] Ms Gafane's evidence during cross-examination enlightened the Court about the crime scene. Ms Gafane indicated to the Court that the crime scene was secured by Sergeant Mazibuko 15 minutes after the gunfire had stopped. She had testified that she had clothing on which showed to all and sundry that she was a patroller and had a CPF logo.

[101] Ms Gafane's testimony, as stated above, relating to where she was standing when the shooting took place remains remarkable if one takes into account that her testimony was to the effect that she stood rooted to her place without ducking whilst gunshots were being fired. It should also be remembered that the Accused testified that he was firing near the point marked "X" that Ms Gafane had identified as the place where she was standing.

[102] Ms Gafane's testimony that the passenger of the Golf and the driver thereof were pulled out of the Golf and were on the ground when the Accused and Mr Essay fired shots at them does not correlate with the testimony by Dr Ramorobi that the deceased could not have been shot execution style.

Whilst she could not confirm whether the gunshots were fired into the bodies of the passenger and the driver her testimony left the Court with no other conclusion to draw but that the gunshots were fired into the bodies of the driver and the passenger. Now this evidence must be seen in the context of Dr Ramorobi's evidence.

Whilst Mr Rampyapedi insisted that Dr Ramorobi was not a ballistics expert the Court cannot ignore the fact that she studied forensic pathology which she described as estimates based on a scientific body of knowledge, relating to gunshot wounds, how they are formed, the tract that the bullets follow through one's body.

Dr Ramorobi also testified that the bullet wounds of Mr Vusi Gerald Phiri were formed whilst he was probably bending; the bending over was probably a more consistent posture, she testified.

- [103] Dr Ramorobi explained to the Court during questioning by Mr Vally that if the passenger and the driver had been shot in the manner described by Ms Gafane, then the directionality of the bullet wounds of Mr George Zakhele More and Mr Tshepiso Ferdinand Mohale would have been different. Furthermore she would have expected flame burns and muzzle imprints if these two deceased were shot in a manner that resembled an execution.
- [104] This evidence of Dr Ramorobi, in my view, puts into question the testimony of Ms Gafane and Mr Mrobongwana. However, it should be noted that Mr Mrobongwana only testified in respect of the driver of the Golf and not the passenger in the back. The question to ask, is why would the witnesses testify about the execution style shooting in the manner that they did? If they are not to be believed in respect of the shooting of the driver and the passenger in the back, what reliance can one place on their other evidence. I will revert to this, later in this judgement.
- [105] Mr Vally pointed out that the Court should also take into account Ms Gafane's previous statements when evaluating her evidence. Ms Gafane confirmed that Exhibits "J" and "K" were statements made by her. She, however, denied that she had not written Exhibit "J". The testimony of Ms Gafane, relating to her statements, when tested against the totality of the evidence of the State, begs introspection. Warrant Officer Mbatha confirmed that Exhibit "J" was taken down by her and that she wrote the statement. In cross-examination by Mr Vally, Ms Gafane stated that even with the first statement she asked somebody to write and then immediately changed her testimony to say there was typing and she wrote the statement herself. She also testified in cross-examination that the statement was not taken down at the Police Station.
- [106] I must state that the testimony regarding the statements by Ms Gafane is perplexing and ties into the questionability of her evidence and credibility. Furthermore, as stated hereinbefore, why would this witness insist that the shooting incident occurred as she testified when the objective evidence, in my view showed otherwise? Mr Vally preferred an answer and stated that Ms Gafane was not present at the scene. Now this Court would rather not venture into why the witness testified in the manner she did but rather to identify improbabilities in her evidence.
- [107] Whilst Mr Mrobongwana was a better witness, his testimony in relation to the shooting of the driver must be questioned in the face of the evidence of Dr Ramorobi. Furthermore, the two eye witnesses, Ms Gafane and Mr Mrobongwana contradicted each other in their testimony. Mr Rampyapedi submitted that the fact of the contradictions was not important but that the Court should look at the materiality thereof. Now it is true that there may be many reasons for witnesses contradicting each other as to what they saw. One could be their positioning at any point in time. In this regard the following excerpt is enlightening:

"It is trite law that not every error made by a witness will affect his or her credibility. It is the duty of the trier of fact to weigh and assess all contradictions, discrepancies and other defects in the evidence, and in the end, to decide whether on the totality of the evidence the state has proved

the guilt of the accused beyond reasonable doubt. The trier of fact also has to take into account the circumstances under which the observations were made and the different vantage points of the witnesses, the reasons for the contradictions and the effect of the contradictions with regard to the reliability and credibility of the witnesses.'[2]1

[108] However, it is my view that the contradictions in respect of the testimony of the two eye witnesses, Ms Gafane and Mr Mrobongwana, are material. If it is true that the two of them never flinched or ducked during the firing of the gunshots, then in my view, it is inconceivable, how they would see different things happening at the very time they state that they saw them happening; such as, the driver and the passenger in the back being pulled out of the Golf and shot. Ms Gafane states categorically that the driver of the Golf and the passenger in the back were pulled

out by both the driver of the Mercedes Benz as well as the Accused whereas Mr Mrobongwana stated that only the driver of the Golf was pulled out of the Golf.

[109] At this point it is appropriate to return to the Section 174 application. At the close of the State case, this Court had to adjudicate as to whether prima facie evidence existed in respect of all counts which pointed to the guilt of the Accused.

Section 174[3] provides as follows:

"If, at the close of the case for the prosecution at any trial, the court is of the opinion that there is no evidence that the accused committed the offence referred to in the charge or any offence of which he may be convicted on the charge, it may return a verdict of not guilty."

[110] At this point of the proceedings, a Court is endowed with a judicial discretion and a careful assessment of the case at that point must be given due consideration.

[111] The Supreme Court of Appeal[4] stated and expanded on the principle as follows:

"[18] I have no doubt that an accused person (whether or not he is represented) is entitled to be discharged at the close of the case for the prosecution if there is no possibility of a conviction other than if he enters the witness box and incriminates himself. The failure to discharge an accused in those circumstances, if necessary *mero motu*, is in my view a breach of the rights that are guaranteed by the Constitution and will ordinarily vitiate a conviction based exclusively upon his self-incriminatory evidence.

[19] The right to be discharged at that stage of the trial does not necessarily arise, in my view, from considerations relating to the

burden of proof (or its concomitant, the presumption of innocence) or the right of silence or the right not to testify, but arguably from a consideration that is of more general application. Clearly a person ought not to be prosecuted in the absence of a minimum of evidence upon which he might be convicted, merely in the expectation that at some stage he might incriminate himself. That is recognised by the common law principle that there should be "reasonable and probable" cause to believe that the accused is guilty of an offence before a prosecution is initiated

(Beckenstrater v Rottcher and Theunissen 1955(1) SA 129 (A) at 135C-E), and the constitutional protection afforded to dignity and personal freedom (s 10 and s 12) seems to reinforce it. It ought to follow that if a prosecution is not to be commenced without that minimum of evidence, so too should it cease when the evidence finally falls below that threshold. That will pre-eminently be so where the prosecution has exhausted the evidence and a conviction is no longer possible except by self-incrimination. A fair trial, in my view, would at that stage be stopped, for it threatens thereafter to infringe other constitutional rights protected by s 10 and s 12."

[112] The State case, in my view, at the time of closure, did not reach the standard as pointed out in the Lubaxa case. The evidence at the time was that the deceased, Mr Vusi Phiri, was the person with a blue overall or working suit. The evidence was that one of the occupants of the Mercedes Benz had fired gunshots at the person with the blue overall but this occupant of the Mercedes Benz could not be identified by Ms Gafane but Mr Mrobongwane in his evidence in-chief stated that the driver shot at the male in the blue work suit. Captain Shingange, however, testified that Mr Essay had identified himself as the driver. It was clear to the Court at that time that the person identified as the shooter of Mr Phiri, was Mr Essay.

[113] It was my view, that the State had failed to prove a prima facie case against the Accused in respect of Mr Phiri and therefore the evidence in respect of the death of Mr Phiri was not sufficient to put the Accused on his defence.

[114] It was further my view that in respect of the other deceased, the State had made out a prima facie case and that the Accused at that stage was not entitled to a discharge in respect of them taking into account that he put to the witnesses that he had fired shots in the direction of the Golf in self-defence.

It was further my view that at the closure of the State case, it was not prudent nor appropriate to delve into the credibility of the eye witnesses. Thus, my reasons for discharging the Accused on Count 1 and refusing the application in respect of Counts 2 and 3.

[115] Returning to the remainder of the State's case against the Accused, it must be remembered that it is trite law that the State bears the onus of proving its case beyond

reasonable doubt. The Accused bears no onus to prove his innocence. If his version is reasonably possibly true then he must be acquitted.[5]

[116] In evaluating the evidence above, I have taken heed of the following principles laid down in criminal cases:

"...the correct approach is to weigh up all the elements which point towards the guilt of the accused against all those which are indicative of his innocence, taking proper account of inherent strengths and weaknesses, probabilities and improbabilities on both sides and, having done so, to decide whether the balance weighs so heavily in favour of the State as to exclude any reasonable doubt about the accused's guilt."[6]

[117] The Accused was clear and unambiguous in his testimony. The Court was able to get a picture of the circumstances, he and Mr Essay found themselves in. He remained steadfast in his testimony during cross-examination by the State and whilst he at times showed emotion by breaking down during his testimony, this Court accepts that he had gone through a traumatic experience during the incident. His demeanour in the witness box, in my view could not be faulted.

[118] I am of the view that his testimony that he and Mr Essay found themselves in a hijacking situation must be true because why would a gunfight ensue shortly after the Golf stopped and the man in the blue overall alighted? Furthermore, during the cross-examination of Captain Shingange it was revealed that the Golf was linked to a Langlaagte case wherein the owner of the Golf was robbed of his Golf. The Golf was linked to the Langlaagte case through its chassis number which correlated with the Golf that was found on the scene on 4 July

2013. It is my view that no other inference could be drawn from these facts but that the persons in the Golf were coming to hijack the Accused and Mr Essay.

[119] Now whilst the Accused might have been facing a hijacking, the State submitted that he and Mr Essay exceeded the bounds of self-defence when they fired gunshots at the deceased.

[120] Now I am mindful that a judge should take care not to judge the events in situations such as the present case, like an armchair critic. I accept that one needs to place oneself in the shoes of the person being attacked and be mindful what he is experiencing[7].

[121] I align myself with the statement in *S v Ntuli*[8]:

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

[122] CR Snyman[9] has opined and I align myself therewith, that:

"A person acts in private defence, and his act is therefore lawful, if he uses force to repel an unlawful attack which has commenced, or is imminently threatening, upon his body 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 not more harmful than necessary to ward off the attack"

[123] It should be noted that this defence is available to the person in defence of himself/herself as well as in defence of others.[10]

[124] As stated above, the testimony of the eye witnesses called by the State is unreliable for the reasons stated above and that their evidence does not accord with the objective facts as testified to by Dr Ramorobi as to how the deceased had died especially in relation to Counts 2 and 3.

- [123] The Accused impressed me as a witness. As stated hereinbefore, he was forthright in his testimony and his testimony correlates with objective evidence collected by the State and contained in Exhibit "E". I can find no reason not to accept the evidence of the Accused where same contradicts the evidence of the eye witnesses. The Accused did not waiver during his cross-examination by Mr Rampyapedi, for the State.
- [124] I accept that the Accused and Mr Essay found themselves faced with a hijacking and had to defend themselves. When one considers that the scene was a volatile and fluid one, I accept that the Accused felt a continued and consistent threat to his life and that of his cousin, Mr Essay. I find that the number of shots fired by the Accused was commensurate with the threat that he experienced and that he was justified in warding off the attack.
- [125] At this point it should be noted that the crime scene, at the stage when the police arrived, had been unsecured for a period of at least 15 minutes. I accept the evidence of the Accused that there were many people on the scene when the gunshots had stopped.
- [126] The evidence in respect of the crime scene, in my view, was shoddy and left much to be desired. The reason given for not searching the boot of the Golf at the scene, in my view, was flimsy. Photographs taken of the contents of the Golf at the LCRC went missing. Sergeant Mbatha accepted that no continuity could be shown between the inspection of the crime scene and Golf on 4 July 2013 and the inspection of the Golf on 5 July 2013 at the LCRC.
- [127] To repeat, the State bears the onus to prove its case against the Accused beyond reasonable doubt.
- [128] I have evaluated the evidence of the State and the Accused and, in my view, it cannot be said that the State's evidence is of such a standard that proof beyond reasonable doubt has been shown. I have indicated that the testimony of the eye witnesses was unimpressive contradictory and had discrepancies to such an extent that their evidence cannot be relied upon unless supported by the evidence of the Accused or objective forensic evidence. The evidence in its totality does not point to the guilt of the Accused.

CONCLUSION

- [129] Having outlined that I accept the version of the Accused as being reasonably possibly true and that he has fulfilled the requirements of private or self-defence, it is my view further that in conclusion, the State has failed to prove its case against the Accused in respect of Counts 2 and 3 beyond a reasonable doubt and the Accused is thus entitled to an acquittal on Counts 2 and 3.
- [130] Accordingly, the Court having discharged the Accused on Count 1 at the closure of the State's case, finds the Accused found not guilty on Counts 2 and 3 and is therefore acquitted of all charges.

ALLY

ACTING JUDGE OF THE HIGH COURT

GAUTENG DIVISION OF THE HIGH COURT, JOHANNESBURG

Appearances:

For the State Adv. M.M. Rampyapedi DPP Johannesburg For the Accused Mr M Vally [assisted by Adv. M.Y. Razak] MVIP Attorneys

[1] 51 of 1977, as amended

[2] Sithole v S 2006 SCA 126 at para 4

[3] Act 51 of 1977

[4] S v Lubaxa 2001 SCA 100

[5] S v Shackell 2001 (4) SACR 1 (SCA) at para 30

[6] S v Chabalala 2003 (1) SACR 134 (SCA) at para 15

[7] R v Patel 1959 (3) SA 121 (A) at 123C-D; Union Government v Buur 1914 AD 273 at 286

[8] 1975 (1) SA 429 A

[9] Criminal Law: 6th Edition

(2104) at 102

[10] R v Patel supra

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Prepared on 9 October 2026 · Esheria