

SOUTH AFRICA / JUDGMENT

S v Ntsibande (SS54-2021) [2023] ZAGPJHC 1503 (15 September 2023)

[2023] ZAGPJHC 1503

COURT

South Gauteng High Court, Johannesburg

BEFORE

Mdalana-Mayisela

CASE / FILE NUMBER

SS54-2021

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REPUBLIC

OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

DIVISION, JOHANNESBURG

Case

Number: SS 54/2021

1.

REPORTABLE: NO

2.

OF INTEREST TO OTHER JUDGES: NO

3.

REVISED: YES

15

September 2023

In

the matter between:

THE
STATE
and
NTSIBANDE,
MUSA FRANK

Accused
ORDER

[1]

The accused is found not guilty of the
assault with intent to do grievous bodily harm.

[2]

The accused is found guilty of murder with
criminal intent in the form of dolus
eventualis.

JUDGMENT

Mdalana-Mayisela J

Introduction

[1] The accused has been charged in count 1 with assault with intent to do grievous bodily harm; count 2 with the contravention of the

provisions of section 120(6)(a) read with sections 1, 103, 120(1)(a), section 121 read with schedule 4, and section 151 of the Firearms Control Act,[1] (pointing of a firearm, an antique firearm or airgun); alternative to count 2, with the contravention of the provisions of section

120(6)(b) read with sections 1, 103, 120(1)(a), section 121 read with schedule 4, and section 151 of the Firearms Control Act,[2] (pointing of something likely to lead a person to believe it is a firearm); and count 3 with murder read with section 51(1) and

(2) of the Criminal Law Amendment Act (“the CLAA”),[3] and further read with section 258 of the Criminal Procedure Act (“the CPA”).[4]

[2] At the commencement of the trial the state applied for the amendment of the charge of murder to delete reference to section 51(1) and to read with section 51(2)(a) of the CLAA and it was granted. The provisions of section 51(2)(a) of the CLAA were explained to the accused and he confirmed that he understood same before he pleaded.

[3] In count 1, the state alleged that on or about 11 July 2020 and at or near number 4[...] F[...] Street, T[...], K[...] P[...], in the district of Ekurhuleni North, the accused did unlawfully and intentionally assault Max Martin Thompson with open hands, a firearm and/or similar object, with the intent to cause him grievous bodily harm.

- [4] In count 2, the state alleged that on or about the date and at or near the place mentioned in count 1, the accused did unlawfully and intentionally point a firearm or an air gun, to wit a calibre which is unknown to the state, whether or not it is loaded or capable of being discharged, at another person, to wit Max Martin Thompson without good reason to do so.
- [5] In the alternative to count 2, the state alleged that on or about the date and at or near the place mentioned in count 1, the accused did unlawfully point anything likely to lead a person to believe it is a firearm or an antique firearm or an air gun at Max Martin Thompson without good reason to do so.
- [6] In count 3, the state alleged that on or about 3 August 2020 and at or near 5[...] I[...] Street, B[...] A[...], K[...] P[...], in the district of Ekurhuleni North, the accused did unlawfully and intentionally kill Hlengiwe Msimango, an adult female person.
- [7] The accused pleaded not guilty to all the charges. In count 1, 2 and the alternative count, he denied all the elements of the offences and put the state to the proof thereof. In count 3, he tendered a plea explanation and handed in a statement in terms of section 115(1) of the CPA. Briefly, in his plea explanation he stated that in the early hours of 3 August 2020, at approximately 02h00 he was sleeping with the deceased and their eight months old baby in their bedroom. The other two children were sleeping in two

separate bedrooms. The deceased woke him and said that she had heard noises in the yard as if something had fallen. He ran to his wardrobe and took his firearm, checked the children's bedroom and bathroom and the kitchen and then the driveway. He peered through the dining room window to check the cars and he waited for a moment. The deceased was checking from the bedroom window too. He did not see any movement, so he went back to the bedroom, placed his firearm next to his bedside and they both fell asleep again.

- [8] At approximately 04h00 he heard steps and he said to the deceased in the dark that he heard noises like footsteps. He assumed that she was still in bed next to their baby. He grabbed his licensed firearm, ran towards the bedroom door in the dark, and he saw what looked like movement behind the curtains towards the door. He told the deceased to grab the baby and he quickly fired two shots at the movement which was heading towards the door. He jumped towards his bed realized that the deceased was not there, and then he saw her coming to him in the dark, and he heard her say "baby it's me". He screamed and switched on the lights and realized that he had erroneously shot the deceased.

- [9] By agreement between the parties, the state handed in the following exhibits:

A Admissions made in terms of section 220 of the CPA;

B Post-mortem examination report; and

C Post-mortem photos

[10] In respect of count 3, the accused admitted the identity of the deceased, that the deceased was his fiancé, the date and scene of the incident, that he shot the deceased with his licensed firearm, the date and cause of death, the truth and correctness of the facts and findings of Dr Tinyiko Zondo who conducted a post-mortem, the truth and correctness of the photographs taken by Sergeant Thabo David Masemola at the Germiston Mortuary during the post-mortem examination, that the exhibits (1 x 9mm parabellum calibre CZ model 75 semi automatic pistol, with serial number R[...]; 1 x magazine; 1 x 9mm calibre fired bullet; 2x 9mm parabellum calibre fired cartridge cases; 5 x 9mm parabellum calibre cartridges) were found at the scene on 3 August 2020 properly sealed in evidence bag number PAD001729019 sent to and received by the laboratory in the same condition as found, that the exhibits (7 x 9mm parabellum calibre fired cartridge case) were found inside the vehicle of the accused on 10 August 2020, properly sealed

in evidence bag number PA6002833094 sent to and received by the laboratory in the same condition as found, and that ballistic tests

were performed on the exhibits mentioned herein.

Evidence

(a) Witnesses

[11] To prove its case against the accused the state called the complainant Max Martin Thompson and Warrant Officer Lawrence Mashaotane in counts 1, 2 and the alternative count. In count 3, the state called eleven witnesses, namely Linda Mogale, Nokukhanya Thandi Nkumane, Patrick Hlongwane, Adriaan van der Heever, Sibusiso Mnisi, Moeketsi Mosia, David Thipa, Fraser Hlako, Luvuyo Mlindazwe, Dr Zelda Nkondo and Warrant Officer Mashaotane. The accused testified in his defence and called no witnesses.

(b) Pointing of a firearm, an antique firearm or airgun or pointing of something likely to lead a person to believe it is a firearm (count 2 and the alternative count)

[12] First, I deal with count 2 and the alternative count. Thompson testified that he is a car mechanic. In the afternoon on 11 July 2020, the accused and Willie Madonsela came to his residential place at 4[...] F[...] S[...], K[...] P[...]. He had a prior arrangement with Willie to come to his home for payment for the repairs made to his car and collection of the car. There was an argument between him and Willie in the yard about new parts being used to repair the car instead of the old parts. The accused was armed with a firearm and standing two steps away from them. There were other men sitting by the fire in the yard.

He could remember the names of only three men, namely Lloyd, George and Rasta. Willie produced a firearm and pointed him with it. In his statement made to the police he mentioned that the accused pointed him with a firearm. This was a material contradiction in his evidence.

- [13] After the state closed its case, the accused applied for a discharge in terms of section 174 of the CPA on the ground that there is no sufficient evidence upon which a reasonable court may convict the accused on count 2 and the alternative count. The state conceded that the accused should be discharged on counts 2 and the alternative count because Thompson said Willie pointed him with a firearm and not the accused.
- [14] Having considered the evidence tendered by the state on count 2 and the alternative count, I found that there is no sufficient evidence upon which this court may convict the accused. I discharged the accused in terms of section 174 of the CPA.
- (c) Assault with intent to do grievous bodily harm (count 1)
- [15] Thompson testified in chief that during the argument with Willie, the accused without saying anything, cocked his firearm and hit him on his forehead three times. Then he said: "This is not Malawi I can kill you". He also said "Be careful. You will die my friend". Thereafter, he said to Willie: "Asambe, let us go". At that stage Willie wanted to give Thompson R 3000.00 but he refused to take it. After the incident, the accused and Willie went out of the yard, got into a white Daihatsu motor vehicle and drove away.
- [16] Further, he testified that he sustained a laceration on his forehead as a result of the assault. He produced a photo showing blood coming from his forehead. He took this photo using his phone on the day of the incident at 6h58 pm. He did not print this photo. He sent it to Warrant Officer Mashaotane. He went to the police station to lay a charge against the accused on the same day of the incident. He was given a J88 form to be completed by a medical officer. He did not go to hospital the following day because
- he had some work to do. He decided to treat his injuries by himself. The J88 was not completed and was not handed in.
- [17] The first time he met the accused was on the day of the incident. He did not know the accused's name. The following day he opened Willie's Facebook page and he saw the accused's name. During cross-examination he confirmed that he did not know the name of the accused when he laid a charge on the day of the incident. He also said that he did not mention the accused's name in his statement. He conceded that if the name of the accused was mentioned in his statement taken on the day of the incident his evidence in court would not be the truth. His statement made to Warrant Officer Mashaotane signed on the day of the incident

was shown to him and he confirmed it. He was referred to the name of the accused "Musa" mentioned in his statement. He disputed that he mentioned the name of the accused in his statement. He said he gave the investigating officer the name of the accused the following day. When asked if the investigating officer put the name of the accused in his statement before he signed on the day of the incident, he said no, he was the one that gave the name of the accused to the investigating officer.

[18] Further, during cross-examination he was asked to explain the difference in relation to the assault, between his evidence in chief and the statement he made to the police on the day of the incident. In his evidence in chief, he testified that the accused hit him with a firearm on his forehead three times. In his statement made to the police he said that the accused took out a firearm and pointed it at him, and he then slapped him on his face with open hand three times. In giving the explanation, he denied that

he told the investigating officer that he was slapped three times on his face when making a statement, and said he mentioned that he was hit with the firearm three times.

[19] In his evidence in chief, he testified that he took the photo mentioned above with the phone that he showed us in court. During cross-examination he said he took this photo with another phone and transferred it to the phone he brought to court because the original phone was broken. He also said that he downloaded this photo to the computer and then transferred it to this phone. In his evidence in chief, he said he physically took the photo. During cross examination he said he set the phone on the timer, put it down, it clicked and shot the photo on its own.

[20] Warrant Officer Mashaotane testified that on the 3rd of August 2020 at the murder scene, he reminded the accused about the case that was opened against him, and that he also spoke to him about it on the phone sometime in July 2020 after the charge was laid. The accused acknowledged that he knew about it and that he was remorseful to what he did to the complainant, Max. He arrested the accused for assault and pointing of a firearm on 4 August 2020 at the police cells.

[21] Further, he testified that he did not take the original statement of Thompson that was taken on the day of the incident. He wrote a new statement after the original one was spoiled by oil. He transferred the contents of the original statement to the new one on the 12th of July 2020 in the presence Thompson. He did not add new content in the new statement. Thereafter, Thompson confirmed the contents of the new statement to be true and correct, but the date of signature and oath was backdated to 11 July 2020.

[22] The accused in his testimony disputed that he to Warrant Officer Mashaotane that he was remorseful for what he did to Thompson. He said he confirmed to him that he recalled the case. He testified that sometime in July Warrant Officer Mashaotane phoned him while he was at work. He informed him about a case that was opened against him and Willie. He asked if the accused was aware of the incident that took place at Terenure and he said yes, he was aware. Warrant Officer Mashaotane said “go sort it out with

him”. The accused told him that it was not his car, and that Willie should be doing that, but he said he would speak to Willie

that they go there. Warrant Officer Mashaotane did not ask him to come to the police station to meet him. On the 4th of August 2020 he was charged for assault and pointing of a firearm. After he was released on bail, he asked Willie if he was charged, and he said no. The accused asked Willie to make a statement at the police station, but Willie died before he could make a statement.

- [23] In relation to the assault incident, he denied that he assaulted Thompson or pointed a firearm at him. He said he had no dealings with Thompson, and he had no reason to assault him. He accompanied Willie to Thompson's residential place after he agreed to borrow him R 10 000.00 to pay Thompson for the repairs to his car and to keep the car as a collateral. At Thompson's place there was an argument between Thompson and Willie about the fuel and plugs. He was not involved in that argument. He spoke to Willie and asked him that they should leave because the car was not moving and he could not keep it as a collateral. He argued with Willie because he did not want to leave. He went back to the car and waited for Willie. Eventually, Willie came to his car and they left.
- [24] Thompson was a single witness in relation to the assault with intent to do grievous bodily harm charge. Section 208 of the CPA provides that an accused person may be convicted of any offence on the single evidence of any competent witness. Such evidence should be approached with caution and be substantially satisfactory in all material respects.[5]
- [25] The state submitted that the accused should be convicted as charged on this count. Counsel for the state conceded that there were contradictions in Thompson's evidence and some of them were material. However, she submitted that the photo produced by Thompson in court served as corroboration that he was assaulted. Counsel for the accused submitted that Thompson was not a credible witness and that his evidence should be rejected because he lied under oath and contradicted himself. There is no evidence corroborating his version on the following grounds. He did not consult the medical doctor or nurse for his injuries; the J88 was not handed in to confirm his injuries; the other witnesses that were present during the assault incident were not called to testify; the photo produced by him in court was hearsay because he did not physically take the photo and the phone that was used to take the photo was not produced in court; the copy of the photo used in court was not printed by him; and he gave different versions on how the

photo was transferred from the original phone to the phone that was produced in court (see paragraph 19 above).

- [26] In fairness to Thompson, I am not drawing a negative inference for the failure to call other witnesses because Warrant Officer Mashaotane testified that those witnesses are untraceable. On the remaining grounds stated by counsel for the accused on why Thompson's evidence should be rejected, I agree.
- [27] The other reason for rejecting Thompson's evidence is that the contradiction between his evidence in chief where he said that the accused hit him with a firearm on his forehead three times, and in his statement made to the police where he said that the accused slapped

him on his face with open hand three times is material. It goes to the heart of the charge against the accused because if he was slapped three times it would be assault and if he was hit with a firearm on his forehead three times it would be assault with intent to do grievous bodily harm.

[28] In my view Thompson's evidence is not clear in some material respects, and there is no evidence corroborating his version. I conclude that the state has failed to prove the charge of assault with intent to do grievous bodily harm against the accused beyond a reasonable doubt. I find that the accused's version on this charge is reasonably possibly true.

(d) Murder (count 3)

Witnesses' testimonies

[29] Sibusiso Reginald Mnisi testified that he is the neighbour of the accused. On 3 August 2020 at approximately 05h45 in the morning, he was sleeping at his house. He heard gunshots. He estimated that it was two gunshots, but he was not sure. Thereafter, he heard the accused crying out loud asking for help. He went outside and met him at the gate. He asked the accused what happened. He told him that he shot his wife by mistake. They went inside the bedroom and found the deceased sleeping next to the bed. There was a girl child standing next to the deceased. He took the child to his house. When he returned back to the accused's house, he called the ambulance and the police. He returned back to his house. The girl child informed him that there was another boy child remaining in the accused's house. He went back to the accused's house to fetch him. He took the boy and the baby to his house. He went back to the accused's house. He called the mother of the deceased. He informed her that there was a problem and asked her to come to the accused's house. The ambulance arrived first and the police arrived after. The mother of the deceased came to the accused's house. She asked him where the accused was. He told her that he was inside the police van and she went to him.

[30] Nokukhanya Thandi Nkumane testified that she is an aunt of the deceased. In the Zulu culture she is referred to as her mother because she brought her up after her biological mother died. In the morning of the incident, she received a call from Sibusiso Mnisi asking her to come to the deceased's place. On arrival at the scene, she was told that the accused was inside the van and she went to him. She asked him what happened. The accused told her that he killed his wife. He also said that after the deceased told him that she heard people talking outside, he went to investigate, and he could not see anyone. When he went back into the house, he saw a shadow behind the curtain, and he shot twice at it. The accused apologised to her. On the 10th of August 2020 she found seven cartridges inside the deceased's car. She called Warrant Officer Mashaotane, who instructed her not to touch or take the cartridges. The following day Warrant Officer Mashaotane and the photographer came to her house. The photographer took the pictures of the cartridges. Thereafter, they took them and left. During the cross-examination the accused disputed that he told her that he killed his wife. He also disputed that he said he went outside to investigate. He also

disputed that he said he saw a shadow behind the curtain. Nokukhanya responded that the accused was lying.

- [31] Sergeant Linda Mogale in the morning of the 3rd of August 2020 went to the crime scene. On arrival at the scene, she found the paramedics busy attending to the deceased inside the bedroom. She went outside to fetch the tape to cordon off the scene. She was the officer in charge of the crime scene. On her return, the paramedics had finished with their duties and the deceased had been declared dead. Inside the bedroom she saw the deceased laying on the floor next to the bed facing upwards. The deceased's t-shirt was full of blood. She lifted her t-shirt and saw two bullet holes, one above the breast and another below the breast. She turned her around to check for injuries on her back. She saw 2 holes on her back. She saw a projectile on the floor next to the deceased, two cartridges on the floor and black firearm on top of the bed.
- [32] Thereafter, she went to the dining room to speak to the accused. She introduced herself to him and asked who he was and why he was at the house. He said that he is the deceased's husband. He told her that he shot the deceased by mistake as he thought that she was someone who came to their house. She arrested him. She called officers from other units to do their investigations. The body of the deceased did not sustain any injuries while in her custody and the crime scene was not tampered with.
- [33] Sergeant Gezani Patrick Hlongwane attached to the Local Criminal Record Center in Kempton Park took photographs of the crime scene on 3, 11 and 28 August 2020. He also photographed the cartridge cases inside the car at Nokukhanya's residential place on 11 August 2020. He drafted a sketch plan to depict the location of the exhibits and the outlay of the scene. He conceded that the layout of the scene as depicted in his sketch plan is incorrect.
- [34] He unfolded the duvet on the bed in the main bedroom and saw two holes. He did not temper with the scene. He collected, packaged, properly sealed the exhibits as depicted on photos 157, 148, 125 and 119 and booked them in at their stores.
- [35] Warrant Officer Adriaan Jacobus van der Heever on 4 August 2020 accompanied Lieutenant Colonel Potgieter to the crime scene. On their arrival they found a black male person who gave them permission to search the house for further evidence. In the main bedroom he found live rounds of ammunition and two spent cartridges on top of the table. On the left-hand corner of the ensuite bathroom he found one spent cartridge. He took the exhibits to Norkem Park station where he sealed them in evidence bag number P23500065124. They were booked into SAP 13 with register number 801/2020. He handed the exhibits to Sergeant Hlako.

- [36] Sergeant Kabu Fraser Hlako, the commander of the Community Service Centre at Norkem Park Police Station received a sealed evidence bag number P2B500065124 from Warrant Officer van der Heever which contained 7 live rounds of ammunition and 3 spent cartridges. The exhibits were handed at the SAP 13 stores.
- [37] Forensic Officer Moeketsi Floyd Mosia employed at Germiston Pathology Services received the body of the deceased from Sergeant Mogale at the crime scene on 3 August 2020. He saw 2 bullet wounds on the chest. He placed the body into a body bag. He transported it to Germiston Pathology Services where he tagged and placed it in the fridge. While the body was in his custody it did not sustain any further injuries.
- [38] Forensic officer, David Thipa, employed at Germiston Pathology Services removed the body of the deceased from the fridge and handed it over to Dr Nkondo for post-mortem examination on 6 August 2020. The body did not sustain any further injuries from the time he removed it from the fridge until he handed it over to Dr Nkondo.
- [39] Dr Tinyiko Zelda Nkondo, a specialist in forensic pathology, conducted a post mortem examination on the body of the deceased on 6 August 2020 at Germiston Pathology Services. She recorded her findings in the post-mortem report admitted by the accused in terms of section 220 of the CPA. She determined the cause of death to be “Gunshot wounds into the chest”. She recorded the external examination and findings in her report, inter alia, the round gunshot wound entrance on the right upper back and the direction of the wound is back to front, slightly upwards and to the left; round gunshot entrance wound on the left upper back and the direction of the wound is back to front and slightly upwards; round gunshot entrance wound on the left thigh anteriorly at 70mm from the left knee and the direction of the wound is right to left and downwards. She also recorded the deceased’s clothing as black leggings and white t-shirt soaked in blood and had defects corresponding to wounds on the body.
- [40] She testified that all three gunshot wounds were antemortem injuries, meaning they were inflicted before she died. The wounds differ in terms of antemortem and postmortem. They have different characteristics. With the antemortem wound the person is still alive there is blood circulation, so the blood in the vicinity of the wound is expected. Whereas, with the postmortem wound, it will be yellow or tan because there is no circulation in that wound. The gunshot wound on the deceased’s left thigh had a ring of darkening blood, showing that there was some circulation when it was inflicted. It was on the anterior aspect of the knee. It

was superficial. The major vessel was not injured and only the minor vessels which supply the blood to the muscles were injured.

Therefore, not much bleeding was expected from it. That wound is not visible on the crime scene photos because the deceased was wearing black leggings. It is also not visible from the crime scene photos whether there was bleeding or not because of the colour of the leggings.

- [41] Captain Luvuyo Lundi Mlindazwe, a senior Forensic Analyst employed by South African Police Services based in Pretoria Ballistic section, on 3 August 2020 conducted the forensic investigation at the crime scene and recorded his findings and opinion in his reports, exhibits “Q” and “R”, admitted by the accused in terms of section 220 of the CPA. He tested the accused’s firearm and found it to be a self-loading but not capable of discharging more than one shot with a single depression of the trigger. He also found it to be manufactured and designed to discharge centre-fire ammunition. He found that all the cartridge cases and the bullet mentioned in exhibit “Q” were fired from the accused’s firearm.
- [42] Further, he reconstructed the crime scene after Sergeant Mogale took him through. He investigated the wall, door and the curtains in the main bedroom. He did not see the holes on them. This indicated that the shooter did not direct the shots in that direction. He saw a pool of blood where he was informed the deceased laid. He found 2 bullet holes at the bottom right corner of the bed. The bullets penetrated the mattress on top. He concluded that the holes were bullet holes based on their round shape and blackish colour they left on the mattress. He did not examine the brown blanket underneath the duvet. He was only interested in finding out where the bullet ended. He did not take photographs of the holes on the blue sheet covering the mattress because it would not have been visible on the photographs. He found no spent bullets in the mattress.
- [43] He also found a projectile under the baby creep and two cartridge cases on the left side of the bed under the table. He tested the firearm and found that it ejects the cartridge cases to the right-hand side. He used this finding to determine the position of the shooter when discharging the firearm. He concluded that the shooter was on this side off the table depicted on photo 9 of exhibit “R”. He was facing towards the entrance of the bedroom.
- [44] On 6 August 2020 he attended a postmortem examination conducted by Dr Nkondo at Germiston mortuary. He took photographs of the deceased’s body and injuries. The injuries show that she was struck three times by 3 shots. The entrance wounds to the chest were located on her back. This meant that the deceased was facing away from the shooter when she was struck. The bullets exited through the front of her chest. He determined the entrance and exit wounds on the deceased body by examining the characteristics the wounds had. An entrance wound would have a ring of abrasion and blackening, and the flesh would also be pushed to the inside of the body. On the other hand, exit wound is roughly rectangular and the flesh would be pushed to the outside by the bullet.
- [45] He observed the wounds on the left leg of the deceased. He opined that the bullet entered on top and exited on the left in a downward position. He concluded that the bullet he found under the baby creep could have been from the wounds on her leg because of the direction of the injury and the location of the bullet.

- [46] Warrant Officer Mashaotane collected the cartridge cases which were found inside the deceased's car and delivered them at the Forensic Science Laboratory. He also delivered all the exhibits in this case to the Forensic Science Laboratory. The exhibits were not tempered with while in his possession. That concluded the state case.
- [47] The accused testified in chief that before they went to sleep, the night before the incident, all the main doors of the house and the burglar gate were locked, and the windows were closed. In the early hours at approximately 02h00 he was sleeping with the deceased and their eight months old baby in their bedroom. The other two children were sleeping in two separate bedrooms. The deceased woke him by poking him and said that she heard noises as if something had fallen. She thought there were people in the yard. He ran to the wardrobe and took his firearm. He checked in all the rooms in the house and he did not see anyone. He also looked through the window to check in the area where the cars and bikes were parked and there was no movement. The deceased remained in the bedroom looking outside through the other window. He went back to the main bedroom and told her that he did not see any movement. He placed his firearm on the side table next to his bed and they both fell asleep again.
- [48] In the early hours of the morning he heard the steps as if someone was running "koef koef koef". He woke up and said to the deceased "I heard the steps you are talking about". She did not respond. He took his firearm ran towards the door. He said to her "grab the baby they are already inside". She did not respond again. He shot twice towards the movement that was coming from the curtain edge going towards the bedroom door. Thereafter, he fell towards the bed because he was "expecting the person to retaliate" but only to hear the deceased saying "baby it's me". She was walking towards him in the dark. He immediately screamed for help, grabbed her to the floor and switched on the light. His neighbour came and he said to him "I mistakenly shot my wife or my fiancé". His neighbor's wife arrived and performed CPR to the deceased and there were some movements. He was talking to the deceased asking her not to close her eyes and to stay with them. His neighbour took the kids to his house, called the ambulance, the police and his relatives. He testified that he had no intention to kill the deceased. The deceased was declared dead at the scene. He was arrested by the police and taken to a police van. The mother of the deceased came to him at the police van and asked him what happened. He told her that he thought it was an intruder and he apologised to her.

Evaluation of the evidence

- [49] The state bears the onus to prove the accused's guilt beyond reasonable doubt.[6] In determining whether on the evidence as a whole the state has established the guilt of the appellant beyond reasonable doubt, Heher then AJA in *S v Chabalala*, [7] stated the approach as follows:

"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 strength 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".[8]

[50] The accused is charged with murder with criminal intent in the form of *dolus eventualis*. Murder is the unlawful and intentional killing of another person. In order to prove the guilt of an accused on a charge of murder, the state must therefore establish that the accused committed the act that led to the death of the deceased with the necessary intention to kill. [9]

[51] There is no eyewitness to the charge of murder. The state's case is based on circumstantial evidence. The court in *R v Blom*, [10] set out the cardinal rules of logic that must be observed before the inference can be drawn from the proved facts. These are:

"1. The inference sought to be drawn must be consistent with all the proved facts. If not, the inference cannot be drawn.

2. The proved facts should be such that they exclude every reasonable inference from them save the one sought to be drawn. If they do not exclude other reasonable inferences then there must be a doubt whether the inference sought to be drawn is correct".[11]

[52] The following facts are common cause:

[52.1] That during the early morning of 3 August 2020 the accused shot and killed the deceased with his licensed firearm in their bedroom;

[52.2] The deceased was declared dead by the paramedics at the crime scene; and

[52.3] The cause of death was determined to be gunshot wounds into the chest.

[53] The following facts are in dispute:

[53.1] That the accused shot the deceased on the left leg; and

[53.2] The accused killed the deceased unlawfully and intentionally.

[54] First, I deal with the issue of a gunshot wound on the left leg of the deceased. The accused admitted Dr Nkondo's finding that the deceased sustained a gunshot wound on her left leg. He denied that he shot the deceased on the left leg. The question to be determined by this court is who shot the deceased on the left leg. To determine that question the court has to consider the evidence in totality and draw inferences from the positive proved facts. I have considered the evidence in totality, and I find that the state has proved the following positive facts.

[54.1] The gunshot wound on the left leg of the deceased was sustained before the death

occurred.

[54.2] The accused admitted during his cross-examination that he was the only person that shot the deceased in their bedroom.

[54.3] The third cartridge case was found in their ensuite bathroom on the following day which linked ballistically with the accused's firearm.

[54.4] The deceased was declared dead by the paramedics inside their bedroom before her body was removed and transported to Germiston mortuary.

[54.5] All the state witnesses that were in charge of or in custody of the body of the deceased from the crime scene to the post-mortem examination testified that the body did not sustain any further injuries.

[54.6] Not much bleeding could be expected from the gunshot wound on the left leg because minor vessels were injured.

[54.7] All the witnesses that observed the injuries at the scene of crime did not remove the deceased's black leggings to investigate injuries on her lower body, and that explains why they did not observe the gunshot wound on her left leg.

[55] In my view the proved facts exclude every reasonable inference from them, save that the accused shot the deceased on her left leg inside their bedroom before she was declared dead. This inference is consistent with all the proved facts.

[56] I now turn to deal with the elements of murder with criminal intent in the form of *dolus eventualis*. The accused is disputing the unlawfulness of his conduct. He admitted during his cross-examination that before he fired the shots he was aware that the movement he observed was actually a person. He did not see a weapon in possession of that person. That person was moving fast or running from the edge of the curtain towards the passage leading to the main bedroom door. He was behind that person and that was confirmed by the fact that the entrance wounds were at the back of the deceased. That person turned out to be the deceased. The accused's life and his children were not in danger at the time he shot the deceased. Therefore, the state has proved the element of unlawfulness beyond reasonable doubt.

[57] I now deal with the element of intention in the form of *dolus eventualis*. The question is whether the accused actually foresaw that death might occur when he shot the person moving fast or running towards the passage in his bedroom and reconciled himself with that event. The accused during his evidence in chief said he shot the deceased by mistake as he thought he was shooting the intruder. In other words, he pleaded a putative private defence. During his cross examination

he stated that he acted in private defence because his life was in danger and he was also protecting his family. His defence of private defence fails for the reasons stated in paragraph [56] above.

[58] For him to succeed on the defence of putative private defence he must lay basis for it. He testified that when he spoke to the deceased before he fired the shots she did not respond. He did not think of ascertaining whether she heard him since she was not responding. He did not switch on the light first to check if the deceased and the baby were safe before shooting. He was trained in how to use a firearm, but he did not fire a warning shot before shooting the person. He did not speak to the person before shooting. He fired shots at the upper body of the person.

[59] In his own version his life was not in any form of threat because he did not see a weapon in possession of that person and that person was moving away or running away towards the bedroom door. He testified that he shot the person because he was protecting the kids in other bedrooms, yet after shooting the person he did not go to the other bedrooms he jumped towards the bed and fell on the edge of it. Thereafter, he waited for the person to retaliate, and that person did not retaliate. The person he shot was

2,5 metres away, but he did not see that it was the deceased when shooting because it was dark, yet after shooting, still dark, he saw the deceased turning and walking towards him and saying “baby it’s me” in the dark.

[60] The fact that he did not fire a warning shot constituted a prima facie proof that he did not entertain an honest and genuine belief that he was acting lawfully. Further, the accused lied about firing only two shots. The court is entitled to use the false statements by the accused in drawing inference of his guilt. He was not an impressive witness. Questions had to be repeated to him many times. He contradicted himself in some material respects.

[61] During the cross-examination he conceded that at the time of shooting he knew that a firearm is a deadly weapon, that the person he shot might die, and despite that knowledge he continued to shoot that person. I find that the accused’s defence of putative private defence is not sustainable. He had the intention to kill the human being. The fact that he did not know that he was shooting the deceased and that he thought she was the intruder is irrelevant when determining if he had intention to kill the person.[12]

[62] In conclusion, I am satisfied that the accused in firing the fatal shots must have foreseen that whoever was moving or running towards the bedroom door might die but reconciled himself to that event occurring and gambled with that person’s life. This constituted dolus eventualis on his part and the identity of his victim is irrelevant to his guilt.

[63] For these reasons, I made the above order.

M.M.P. MDALANA-MAYISELA

JUDGE OF THE HIGH COURT

GAUTENG DIVISION, JOHANNESBURG

Delivered:

15 September 2023

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[1] 60 of 2000.

[2] 60 of 2000.

[3] 105 of 1997.

[4] 51 of 1977.

[5] S v Sauls 1981(3) SACR 172 (A).

[6] S v Mbuli 2003

(1) SACR 97 (SCA) at 110D-F.

[7] S v Chabalala 2003

(1) SACR 134 (SCA) at para 15 (“Chabalala”).

[8] See Chabalala (fn

7) at para 15..

[9] Director of Public Prosecutions, Gauteng v Pistorius

[2015] ZASCA 204; 2016 (2) SA 317 (SCA); [2016] 1 All SA 346 (SCA) (“Pistorius”).

[10] R v Blom 1939 AD 188.

[11] Id at 202 – 203.

[12] See Pistorius (fn 9).

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