

SOUTH AFRICA / JUDGMENT

S v Slender (CC59/2019) [2020] ZAGPPHC 30 (11 February 2020)

[2020] ZAGPPHC 30

COURT

North Gauteng High Court, Pretoria

BEFORE

Johnson

CASE / FILE NUMBER

CC59/2019

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(Inlexso Innovative Legal Services) / mr

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

REPORTABLE: NO. OF INTEREST TO OTHER JUDGES: NO REVISED

CASE NO: CC59/2019

DATE: 2020.01.31

In the matter between

THE STATE

and

JOHN SLENDER

Accused

J U D G M E N T

JOHNSON, AJ: The accused is an adult male and charged with 4 counts. In the indictment, it is alleged that he unlawfully and intentionally killed Andries Monareng by shooting him with a firearm (Count 1), that he attempted to kill Wiseman Qwabe by shooting him with a firearm (count 2) , that he contravened section 120 (6) (A) of the Firearms control Act by pointing a firearm at the persons mentioned in the first two counts (count 3) and that he contravened section 120 (3) (B) of the same act by discharging or handling a firearm in a manner likely to injure or endanger the safety of the persons mentioned in counts 1 and 2 (Count 4).

He is represented by adv. Khumalo and he pleaded not guilty to all 4 counts. Admissions in terms of section 220 of the CPA were made during the trial which are contained in EXHIBIT D. The relevant admissions as far as findings in my judgement is concerned, are the following: he admitted that the deceased is the person mentioned in the indictment, that he died on 23 August 2019 as a result of a gunshot wound to the head, that the Post mortem report that was done on his body, is correctly reflected in EXHIBIT E; that the bullet that was found in the head of the deceased was sealed in an official bag with serial number FSB1050336 which was handed in at the Ballistic Section of the Forensic Science Laboratory, as well as the rifle (serial number 331043) that the accused used on the day of the incident; and the correctness of Colonel Botha's statement (EXHIBIT. G) in term of sections 212 (4)(a) and (8)(a) of the Criminal Procedure Act 51/1977.

Pule Ramashale testified that he was across the gate, outside the Tshwane University of Technology on 23 August 2018, selling bunny chows.

At about 17:45 6 – 7 police vehicles entered the campus. The students closed the gate and barricaded it. After a few minutes the police wanted to exit. He heard 2 gunshots from inside the campus, and the students dispersed. One police officer took up a position on the left side of the gate, and the accused the right. Both were armed with rifles. The accused faced the students and fired a shot which apparently ricocheted off a bus or container, because he saw sparks. He was approximately 6 – 7 meters from the accused. The students ran. There were no students in his immediate vicinity. He took a few steps, aimed at the students down the road and fired another shot. No-one else fired any shots.

Wiseman Qwabe, a student at the university, was on his way there to study during the incident, when students came running towards him. Near the entrance he heard a gunshot from inside the campus, and ran away. He looked over his shoulder and saw a policeman whom he will not be able to recognize coming from the gate. He heard a gunshot and felt heat on his right buttocks. The deceased fell down in front of him. He realized that he was shot and he received medical treatment. The shot entered his right buttocks and exited his front right thigh.

After the incident on 3 September 2019, he assisted the police to reconstruct the scene.

Lucky Masoma is a constable in the SAPS stationed at Soshanguve. He was in the company of the accused during the incident and fired warning shots on instructions of Capt. Rapoo. While he was removing rocks at the gate, the accused gave him cover by firing further shots.

Joseph Rapoo is a Capt. In the SAPS stationed at Soshanguve. A rifle with serial number 331043 was issued to the accused on the day of the incident. He went to the university where an election was held, where he was informed that a presiding officer was assaulted. They rescued him where after the students got violent. He called for back-up and the accused and his crew, as well as other police vehicles, arrived. When they wanted to leave the campus, the gate was barricaded. He instructed the accused and Constable Masoma to fire warning shots to enable them to remove stones which barricaded the gate. The situation was very volatile. They would have been killed if no warning shots were fired.

EXHIBIT G which the correctness of was admitted, states that the bullet that was found in the head of the deceased, (Sealed in bag with no FSB 1950336), was fired from the rifle with serial no 331043, which was issued to the accused on the day in question. (See paragraphs 3.1, 3.2 and 6 of EXHIBIT. G).

Col Botha, who authored EXHIBIT G, compiled a second report EXHIBIT. H, wherein he reconstructed the scene with the assistance of the complainant mentioned in count 2, on 3 September 2018. According to his reconstruction, the bullet hit the complainant in count 2 first, and then the deceased as indicated on page 13 of EXHIBIT. H. The body of the deceased after the shot, laid at an angle of 90 degrees in relation to the campus gate. A warning shot from inside the gate would not have hit him. The bullet that he saw in the head of the deceased during the post mortem examination (EXHIBIT. H pages 5 and 6), which he attended on 24 August 2018, was not a ricochet bullet as there are no marks on it to indicate that.

After an unsuccessful application in terms of section 174 of Act 51/1977, the accused testified that he was under the command of Capt. Rapoo on the day of the incident. He was armed with a rifle. There was a riot at the Tshwane University. When they wanted to leave the campus, the gate was barricaded and they were thrown with stones. Capt. Rapoo instructed him and Const Masoma to fire warning shots. He fired warning shots into the soft ground to prevent harm. The students then ran away. They opened the gate and drove off. He never pointed a gun at anyone and shot no-one. He only fired inside the gate in the direction of a soft spot on the ground towards the wall. Except for the warning shots, he fired no other shots. He could not explain how a bullet from his rifle hit the deceased.

The State does not seek a conviction on counts 3 and 4 are concerned.

As far as counts 1 and 2 are concerned, it is common cause that there was an uprising at The Tshwane University of Technology on 23 August 2018 during a Student Representative Council election when the presiding officer was assaulted and abducted. The police were summoned to quell the violence. The accused, Const. Masoma and Const Mathabatha who were in police uniform and in a marked police vehicle, was also summoned to the scene. It is further common cause that the students closed and barricaded the exit gate when the police wanted to leave the campus with the injured presiding officer, and that they also threw stones at the police. On the instructions of Capt. Rapoo, their commander, the accused and Masoma fired warning shots to scare off the students to enable them to remove the barricades and opened the gate. It is also common cause that the deceased and the complainant mentioned in count 2 sustained gunshot wounds – the deceased to his head and the complainant to his buttocks, and that the deceased died as a result of the bullet wound. A bullet was retrieved from the head of the deceased and it was sent for ballistic tests, together with the two firearms of the accused and Masoma. The only issue is whether the accused shot the deceased and the second

complainant or not, and if the court should find that he did, whether the shooting was justified or not, and whether he had the intention to kill or not.

I have carefully considered the evidence of the 1st SW Mr. Ramashale. He is not a student, was not part of the student uprising, and sold food from his shop opposite the campus gate on Aubrey Matlala Rd. He apparently did not know the deceased or the second SW and had no interest in this matter. He is an independent witness. I observed him in the witness stand. He was self-assured and did not contradict himself. It was suggested to him that he had a motive to tell lies because the students were his customers, which he denied. This proposition was clearly mere speculation and not based on any facts or evidence at all. There is no doubt in my mind that he did not have a motive to falsely implicate the accused. His evidence was clear and satisfactory in all material respects and I am satisfied that he was a credible witness.

His evidence that the accused held his rifle in a horizontal shooting position and that he fired in the direction of the fleeing students, is corroborated by the complainant mentioned in count 2. Although he could not identify the shooter, he testified that the policeman with the rifle pointed the rifle in his direction when he was shot. I am also satisfied that Mr. Qwabe was a credible witness. If he wanted to give false evidence, he could have said that the accused was the shooter, but he refrained from that.

Const. Masoma testified that after the initial warning shots and while he removed rocks from the entrance, the accused fired further shots, but he could not see in what direction he fired. This witness was as deeply involved in quelling the violent behaviour of the students as the accused was, and they were colleagues. It is inconceivable that he would have any motive to falsely implicate the accused, and no motive for him to want to do so, was put to him. His evidence in this regard was furthermore not challenged in cross-examination, and points to the fact that the accused did fire further shots outside the gate of the campus. This also corroborates the evidence of the first state witness.

The most compelling factual evidence which cannot merely be argued away, is the forensic finding. Colonel Botha is a forensic expert and clearly has no interest in the outcome of this matter. He clearly had no motive to influence the outcome of this matter and no motive for him to want to do so, was put to him. His evidence, which traced the bullet that was found in the head of the deceased to the rifle that was used by the accused on the day of the incident, was not challenged and I have no doubt to accept it. His evidence as to the fact that it was not a ricochet bullet because it had no marks on it to indicate such, is also clear and acceptable. This points to the fact that the bullet which he concluded hit the complainant mentioned in count 2 first and then the deceased, came from the second shot that the 1st SW saw him fire. It could not be the first shot because the first one ricochet from the container.

Prima facie it seems therefore, that the accused did fire shots at the fleeing students, of which one hit the complainant in count 2 which injured him, and thereafter the deceased which killed him.

This conclusion does not lead to an automatic conviction. The court also has a duty to consider the evidence of the accused. If what he says is reasonable, possibly true, he is entitled to the benefit of the doubt in which case he is entitled to an acquittal.

The overwhelming evidence that the fired bullet came from his rifle, left the accused with no answer. He merely said that he did not fire the shot and could give no explanation as to how a bullet from his rifle ended up in the head of the deceased. His evidence that he shot at no-one, can therefore not reasonably possibly be true. From all accounts the warning shots had scared the students off and there was no justification at that stage to fire at them. It is also impossible that any bullet that he fired inside the gate into a soft surface, would have hit anyone down the road. They were at a 90 degrees angle from the direction he shot in, inside the gate from where the warning shots were fired. I think a court can take judicial notice of the fact that bullets don't travel around corners. The shot could only have been fired from outside the gate, down the road in the direction of the students, like the first SW had testified.

His evidence is therefore rejected where it conflicts with that of the state. In the absence of anything to the contrary, the prime facie evidence becomes conclusive proof of the allegations against him.

The firing of the shots at the students after they had retreated, was unjustified as they posed no danger at that stage. The killing of the deceased and the injury of the complainant mentioned in count 2 was unlawful.

Mr Khumalo argued that the accused did not have any intention to kill anyone. The court is not privy to what the accused thought when he discharged his rifle at the students.

As far as his intention is concerned, the court is not satisfied that state proved that the accused had the direct intention to kill the deceased. It was dark during the incident and the students had retreated a distance away. The question is whether he had intention in the form of *dolus eventualis*. This form of intention is present where an accused did not intend to kill, but foresaw the possibility of death ensuing, he was reckless as regard to the consequence and nevertheless proceeded with his conduct. The test for intention in the form of *dolus eventualis* is a subjective one. The question is therefore whether the accused subjectively foresaw that death might ensue. It is of course impossible for a court to look into the mind of an accused person to see whether he had subjective foresight or not. The only way that this can be determined, is by inferential reasoning. In *S v Sigwahla* 1967 (4) SA 566 (A) at 570 the court said as follows:

"Subjective foresight, like any other factual issue, may be proved by inference. To constitute proof beyond reasonable doubt the inference must be the only one which can reasonably be drawn. It cannot be so drawn if there is a reasonable possibility that subjectively the accused did not foresee, even if he ought reasonably to have done so, and even if he probably did so."

The accused discharged his rifle twice in the direction of the retreating students. When he fired warning shots into the ground earlier, he did so specifically with the aim not to cause harm. He was thus aware of the lethal consequence of firearms. He is a police officer and no doubt trained in the consequence of firing a firearm in the direction of people. The only inference is that he foresaw that the shot that he fired in the direction of the students, would kill or seriously injure someone. He was reckless as to the consequence and proceeded to shoot. I am therefore satisfied that he had the intention in the form of *dolus eventualis* to kill the deceased and the complainant

mentioned in count 2.

He is found guilty on counts 1 and 2 as charged.

He is acquitted on counts 3 and 4.

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JOHNSON, AJ

ACTING JUDGE OF THE HIGH COURT

DATE: 2020 02 11

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