

IN THE HIGH COURT OF SOUTH AFRICA



GAUTENG LOCAL DIVISION, JOHANNESBURG

Case number: A334/2010

DELETE WHICHEVER IS NOT APPLICABLE

- (1) REPORTABLE: ~~YES~~ / NO
 (2) OF INTEREST TO OTHER JUDGES: ~~YES~~ / NO
 (3) REVISED.

5/12/14
 DATE

C. Nicholls
 SIGNATURE

In the matter between:

BUCIBO, JONAS BANZA**Appellant**

versus

THE STATE**Respondent**

JUDGMENT

NICHOLLS J:

[1] On 23 April 2003 the appellant was convicted on one count of murder and one count of attempted murder in this court. He was sentenced to 15 years imprisonment for murder and 10 years imprisonment for attempted murder, with half the sentence imposed in respect of attempted murder to run concurrently with the murder charge. He was therefore sentenced to an effective 20 years imprisonment.

[2] On 9 November 2006 the appellant was granted leave to appeal against conviction and sentence. The appeal was previously on the roll on 19 August 2013 but was postponed in order that a complete record of the proceedings be placed before court.

[3] Notwithstanding the above, it is evident that portions of the evidence are still missing, including the cross-examination of the complainant on the attempted murder charge, Mr Botha ("Botha"). That portions of the record are missing does not automatically justify the setting aside of the conviction. The test is whether the missing evidence is material for a proper adjudication of the appeal. This largely depends on the issues raised in the appeal.¹

[4] In this case the missing portion cannot be reconstructed due to the fact that the trial took place over 10 years ago. Moreover, the appellant does not object to the appeal proceeding on the available record. I agree with the State's submission that the judgment, where the evidence was summarised and evaluated, is the best available evidence.

[5] The incident which is the subject matter of this appeal arose when the appellant, who was employed by Secure-A-Guard security company, failed to produce his certificate of registration as a security officer. This led to the appellant being dismissed from the company. On 28 May 2001, the day in question, an altercation ensued between Botha and the appellant regarding the wages still allegedly owed to him by the company.

[6] According to Botha, the appellant refused to leave the premises. When he saw the appellant place his hand on his firearm, Botha requested the receptionist, Ms Anna King ("King"), to phone the police. As she was about to hand him the phone

¹ S v Leslie 2000 (1) SACR 347 (WLD); S v Seleke 1978 (1) SA 993 (T); S v S 1995 (2) SACR 420 (T).

to speak to the police he heard two shots being fired. He saw King's head fall onto the counter and he felt he had been shot in the chest. Botha's wife testified that after hearing the shots she came into the reception area and saw the appellant fire 2 more shots at Botha. She pressed the security gate release button and he ran out.

[7] The appellant's defence in respect of the attempted murder charge is self-defence. He testified that Botha used derogatory language and told him *"I can shoot you now so that everything comes to an end and the court will listen only to me"*. In the reception area he saw Botha lift his khaki top and noticed Botha's firearm, a revolver. The appellant then fired the first shot into Botha's arm. He could not open the door to get away. He saw Botha struggling to pull out his firearm and then fired the second shot at Botha but cannot say what part of his body it hit. The appellant then opened the door and fled from the building. He was insistent that he only fired two shots.

[8] According to the appellant, King was still alive and unharmed at the time he left. He heard another shot being fired when he arrived at the corner of the street, which he assumed must have come from Botha. In essence the appellant's version is that his life was in danger and he acted in self-defence by shooting Botha. He denies that he was responsible for the shooting and killing of King.

[9] The appellant's version that the shot that killed King was fired by Botha, is unsustainable. The evidence shows that Botha was shot before King at a stage when any possible threat posed by Botha had been eliminated. Medical evidence suggests that Botha would have been too weak to discharge a firearm once he had been shot. Secondly, there would have been no reason for Botha to fire a shot once the appellant had left the premises. On the appellant's own version, he had exited the building and was at the corner of the street when he heard the shot that allegedly killed King. It is noteworthy that in the warning statement taken by his erstwhile attorney, the appellant makes no mention of hearing a shot while running away.

[10] The appellant appeared in person. His main point on appeal as I understand it is that the trajectory of the bullet that killed King, and the angle from which it entered King's body, is inconsistent with the shot having come from his firearm. Dr Marule testified that the bullet was fired at close range and in a slightly forward and upward direction. The appellant said he was at the door when he fired. As both he and Botha said that King was sitting at the time that he shot her, his submission is that it was impossible that the bullet from his firearm killed her.

[11] This submission is premised on a misunderstanding of Botha's evidence. Botha said that initially the appellant stood in front of the counter. Botha moved into the area behind the counter next to King to take the phone from her. Shots were fired and the appellant then moved to a point behind the counter. At this stage King was lying down and Botha was trying to shield her body. What cannot be over emphasised is that this was a moving scene and it is improbable that Botha, who was being fired at, can say with any accuracy exactly what direction King was facing throughout the shooting.

[12] Forensic evidence does not support the appellant's submissions. Three spent cartridges, a possible bullet jacket and a damaged bullet point were picked up at the scene. One of these was found later, embedded in the air conditioning unit behind the counter. Another was found on the keyboard and another on top of the counter. The position of the cartridges is corroboration of Botha's version that the appellant was not standing at the door when he fired but was next to the counter.

[13] Significantly, the ballistic expert, Olebile Sereo testified that all 3 cartridge cases were fired from the firearm of the appellant, a 9mm semi-automatic firearm. That the three cartridges and the bullet jacket were from the same weapon is also contained in the ballistic reports, Exhibits E and F. Although the appellant sought to dispute the veracity of the ballistic evidence, the admissions in terms of section 220 of the Criminal Procedure Act record that "*the facts and findings of*" Exhibit F and E "*are correct and accepted.*" In light of these admissions it is difficult to understand on

what basis the appellant argues that the cartridges did not come from his firearm. According to the appellant Botha was armed with a revolver. The incontrovertible evidence establishes that there was only one firearm on the scene.

[14] The appellant has a further difficulty with his version as all the witnesses, apart from the appellant, testified that Botha did not carry a firearm at work and was not armed that day. As pointed out by Mlambo J, as he was then, in the court a quo, even if it is argued that Botha's wife and employees had a reason to lie about this, an independent witness – a doctor who rushed to the scene almost immediately thereafter – found no firearm at the scene. The inescapable conclusion is that the bullet that killed King was fired by the appellant

[15] Although leave to appeal was granted in respect of both counts, the appellant did not present any argument on whether he shot Botha in self-defence and confined his submissions to the killing of King. In any event if regard is had to the evidence, the appellant's evidence at the trial must be rejected. On his own version the appellant shot Botha several times. Even if one were to assume in his favour that the first shot was in self-defence, clearly the other shots were not. I agree with the court a quo that the only conclusion that can be drawn is that the appellant intended to kill Botha by shooting at him in the manner that he did, and the number of times he did.

[16] It was stressed by the appellant that he did not intend to shoot King, only Botha. This does not absolve him of liability for murder. The court a quo correctly held that the appellant is responsible for the death of King. Even if it was not his intention to kill her, he was aware of the proximity of King and must have realised that by shooting at Botha he was also endangering King. Nonetheless he proceeded to shoot at Botha several times thereby reconciling himself with this eventuality. Accordingly he had an indirect intention to kill King and should be found guilty of murder. The appeal on conviction in respect of both counts falls to be dismissed.

[17] The appellant is out on parole and has not vigorously pursued his appeal against sentence. In any event Mojapelo DJP when granting leave to appeal found that there were no prospects of success on sentence if the convictions were not set aside. Insofar as this is an issue the appeal against sentence must also be dismissed.

In the result I would propose that:

The appeal against both convictions and sentence be dismissed.



C. H. NICHOLLS
JUDGE OF THE HIGH COURT
OF SOUTH AFRICA
GAUTENG LOCAL DIVISION
JOHANNESBURG

I agree. It is so ordered.



M. L. MAILULA
JUDGE OF THE HIGH COURT
OF SOUTH AFRICA
GAUTENG LOCAL DIVISION
JOHANNESBURG

I agree.



M. P. TSOKA
JUDGE OF THE HIGH COURT
OF SOUTH AFRICA
GAUTENG LOCAL DIVISION
JOHANNESBURG

Appearances

Counsel for the respondent : Adv. Britz
Date of hearing : 07 November 2014
Date of judgment : 05 December 2014