



**HIGH COURT OF SOUTH AFRICA
(GAUTENG LOCAL DIVISION, JOHANNESBURG)**

CASE NO: A365/2012

NOT REPORTABLE

NOT OF INTEREST TO OTHER JUDGES

In the matter between:

DESHWIN BARLOW

Appellant

and

THE STATE

Respondent

J U D G M E N T

MAKGOKA, J:

[1] This appeal is against the conviction only. Initially, the appellant faced eight counts in this court. However, the trial culminated in his conviction on four of those counts, namely, murder (count 2); attempted murder (count 4); unlawful possession of a firearm (count 7) and unlawful possession of ammunition (count 8). With the order of concurrency of the sentences, the appellant was sentenced to an effective period of 15 years' imprisonment. The appeal is against the conviction on all four counts, with leave of the trial court (Mabesele J).

N.R

[2] In the indictment, the appellant was alleged to have murdered Mr Mervin Frederick Flagg (the deceased) by shooting him. The attempted murder count was in respect of Ms Myrna Botha (Ms Botha). The allegation was that after the appellant had shot dead the deceased, he took his firearm, which had ammunition in it. This forms the basis of the counts of unlawful possession of a firearm and of ammunition (counts 7 and 8, respectively).

[3] The appellant pleaded not guilty and offered no plea explanation. However, he made certain admissions in terms of s 220 of the Criminal Procedure Act 51 of 1977. These concerned, among others, the so-called chain evidence and the findings of the post mortem medico-legal examination conducted on the deceased's body. The examination revealed the cause of death as gunshot wound on the stomach. The deceased had also suffered two more gunshot wounds to his legs.

[4] The following appear to have been common cause facts during the trial. On 23 October 2009 both the deceased and the appellant attended a school function at the Reiger Park Civic Centre. The function lasted until the early hours of 24 October 2009, at which point deceased left in the company of his cousin, Mr Lawrence Flagg and Ms Myrna Botha. The deceased was the driver of the motor vehicle in which Mr Flagg and Ms Botha were passengers. There was heavy traffic, and exiting the centre was not easy. The deceased, who was having his firearm on his person, got out of his vehicle and pleaded with the other drivers to get moving. At that point, the appellant appeared in the vicinity of the deceased's vehicle.

N.R

[5] A physical altercation ensued between the appellant and the deceased, during which the deceased was fatally wounded with a gunshot to his stomach. That bullet was fired from the deceased's firearm. Another bullet was fired at Ms Botha, and struck her elbow. Thereafter, the appellant fled the scene with the deceased's firearm. He was arrested few days after the incident.

[6] During the trial, the state led the evidence of two witnesses, namely Mr Lawrence Flagg and Ms Botha. Mr Flagg was the deceased's cousin. The appellant testified in his own defence and called Mr Francois Leigh as a witness in his defence. The upshot of the evidence of Mr Flagg and of Ms Botha is, on the one hand, that the shot which fatally wounded the deceased was fired deliberately and intentionally by the appellant at the deceased. On the other hand, the appellant's version is that the deceased had pointed him with the firearm. He grabbed the firearm, and during his wrestling with the deceased for the firearm, the gunshot went off accidentally, fatally wounding the deceased. What follows is a brief exposition of the essence of each witness' evidence.

[7] Mr Flagg testified that he had occupied the front passenger seat of the deceased's vehicle, while Ms Botha sat at the back seat. While the deceased was urging other drivers to move, he suddenly saw the appellant approaching the deceased from behind. He saw a spark and heard a gunshot, and immediately observed that the deceased had been shot from the back – in the direction from which the appellant emerged. The appellant approached the deceased from the back and took the deceased's firearm from the holster on his back.

[8] The deceased was leaning against the door of his vehicle, and pleaded with the appellant not to kill him, as he was a police officer. He uttered those words thrice. At that stage the appellant was standing in front of the deceased. The appellant fired two shots - one into the deceased's stomach, and the other one he did not know where it went to. The deceased fell to the ground. The appellant also fired a shot at the back passenger seat of the deceased's vehicle. He saw Ms Botha covering her head and a bullet hit her right elbow. At that stage the accused had two firearms in his hands. Thereafter the appellant got into his vehicle and drove off the scene. The emergency medical services later arrived and the deceased was certified dead.

[9] Ms Botha testified that upon arriving at the deceased's vehicle, she and Flagg occupied the back passenger seat, and the deceased took the driver's seat. She sat behind the deceased. When the deceased pleaded with other drivers to make way, he was inside the vehicle and simply peeped through the window. One of the people responded that they would not move. The deceased became agitated and got out of the vehicle and had an argument with that individual, during which the unidentified individual pointed the deceased with what appeared to be a firearm.

[10] The deceased turned to his vehicle and retrieved his firearm and approached the unidentified individual, with his firearm in his hand. While the two were facing each other, the appellant approached the deceased from behind and removed the deceased's firearm from the deceased's hand. The appellant moved three steps away from the deceased. The deceased pleaded with the accused not

to shoot him, as he was a police officer. The appellant fired shots at the deceased, using the deceased's firearm. The deceased fell to the ground.

[11] The appellant turned the gun to her. At that stage she was still seated at the back seat of the deceased's vehicle. The appellant fired a shot through the rear window of the deceased's vehicle. She was struck by the bullet on her right elbow as she tried to avoid being struck in the head. She heard two more shots, but could not see in which direction they were fired because by then she was lying down inside the vehicle. People started screaming. They were unable to open the back doors of the vehicle (it is not clear why). As a result, she had to exist from the front passenger seat. When she touched the deceased, there was no pulse. Later she was taken to hospital for medical treatment.

[12] The appellant testified that he left the function with two ladies. As they walked to his vehicle, he unintentionally touched the mirror of the deceased's vehicle. An argument developed between him and the deceased, who was still inside his vehicle. The deceased alighted from the vehicle and pointed a firearm at him. He stepped back, but the deceased kept charging at him. The two ladies in his company fled the scene and went to sit in his vehicle. He managed to grab the firearm with both hands. A struggle ensued between him and the deceased for the firearm, during which shots were accidentally fired. The deceased collapsed to the ground. He took the deceased's firearm and left the scene in his vehicle. He could not explain how Ms Botha was shot. He later arranged with his attorney to hand him over to the police.

[13] On behalf of the appellant, Mr Francois Leigh testified that he witnessed an argument between the deceased and the appellant just before the shooting incident. He saw the deceased pointing a firearm at the appellant. The appellant grabbed the firearm. The deceased and the appellant wrestled for the firearm, during which the appellant fell to the ground. The deceased got on top of the appellant. A lady (which should be Ms Botha) alighted from the deceased's vehicle and tried unsuccessfully to separate the two. At that point, four shots went off. Immediately thereafter, the appellant rose, ran to his vehicle and drove off. He was having a firearm in his hand. That, in brief, is the evidence on which the trial court convicted the appellant.

[14] Before us, the conviction was attacked on the main ground of the insufficiency of the evidence. It was contended that the trial court misdirected itself in the evaluation of the evidence and its conclusion that the state had proven the guilt of the appellant beyond a reasonable doubt. The state supports the conviction.

[15] The appeal is directed at the factual findings of the trial court. Thus, in considering the arguments on behalf of the parties, it is useful to bear in mind the approach a court of appeal should adopt in such cases. The proper approach, which is trite, is found in the collective principles laid down in *R v Dhlumayo* 1948 (2) SA 677 (A) which are as follows. A court of appeal will not disturb the factual finding of a trial court unless the latter had committed misdirection. Where there has been no misdirection on fact, the presumption is that trial court's conclusion is correct. The appeal court will only reverse it where it is convinced that it is wrong. In such a case, if the appeal court is merely left in doubt as to the

correctness of the conclusion, then it will uphold it. See also *DPP v S* 2000 (2) SA 711 (T); *S v Leve* 2011 (1) SACR 87 (ECG); and *Minister of Safety and Security and Others v Graig and Another* NNO 2011 (1) SACR 469 (SCA).

[16] In the present case, it must at the outset, be remarked that the state's case is not without criticism. Mr Flagg's sequence of the shooting is not consistent with that of the other state witness, Ms Botha. Mr Flagg testified that the appellant approached the deceased from behind. He saw a spark and heard a gunshot. This suggests that the appellant first shot the deceased with a firearm different from the deceased's one, and only thereafter, the appellant rushed to the deceased and removed his firearm from the holster at his back. This, apparently, was after the appellant would supposedly have shot the deceased in the back. After the deceased had fallen, the appellant, standing next to the deceased, fired two more shots at the deceased. One of the bullets struck him on the stomach. This means three shots were fired, the first one being with a firearm other than that of the deceased, which struck the deceased from the back. This is not supported by the objective facts.

[17] The post-mortem examination report makes no mention of a bullet entry from the back. The learned judge, correctly, with respect, found Mr Flagg's evidence to be unsatisfactory, especially in respect of the aspects discussed above. There are also contradictions between the evidence of Mr Flagg and that of Ms Botha as to the circumstances leading to the shooting of the deceased.

[18] Such contradictions, however, should not necessarily lead to the rejection of the totality of their evidence. In *S v Oosthuizen* 1982

(3) SA 571 (T) at 576C it was held that where statements by different witnesses are contradictory, the contradictions in themselves prove only that one of the statements is erroneous. It does not prove which one and that it therefore follows that the mere fact of the contradiction does not support any conclusion as to the credibility of either of the witnesses.

[19] The upshot of all these, is that the mere fact that Mr Flagg's evidence had been found to be unsatisfactory in some respects, does not mean the whole of his evidence should be discarded. The court must still evaluate and critically analyse the evidence as a whole. In *S v Van der Meyden* 1999 (2) 79 (W) at 82C-E it was observed that some of the evidence might be found to be false, some of it might be found to be unreliable, and some of it might be found to be only possibly false or unreliable, but none of it, may simply be ignored. That observation was approved in *S v Van Aswegen* 2001 (2) SACR 97 (SCA). See generally, *S v Chabalala* 2003 (1) SACR 134 (SCA) para 15 as to the correct approach in evaluating and weighing the evidence.

[20] Recently, the Supreme Court of Appeal restated the position in *S v Shilakwe* 2012 (1) SACR 16 (SCA) para 11 that it is not impermissible, as an aid to a proper evaluation and understanding of it, to break down the evidence in its component parts, as long as in assessing the evidence, the court in the ultimate analysis considers the totality of the evidence in order to determine whether the guilt of the accused is proved beyond reasonable doubt.

N.R

[21] In present case, the undisputed facts are as follows: the deceased and the appellant had an argument. The deceased had his firearm on his person. The deceased died of a gun shot fired from the deceased's firearm. From the same firearm, Ms Botha was shot at. Shortly after the deceased was shot, the appellant fled from the scene, taking with him the deceased's firearm.

[22] The state witnesses' version is that the appellant deliberately fired shots at the deceased. The appellant says that the fatal shot was fired accidentally during a wrestle for the firearm, after the deceased had intended to shoot him. The trial court had thus to decide the matter on the probabilities. Corroboration of either version also becomes important.

[23] I have already pointed out some contradictions between Flagg and Botha. However, they corroborated each other in material respects. They both testified to have heard the deceased plead with the appellant not to shoot him. This is an important portion of the evidence, which was not challenged. The two state witnesses corroborated each other on this. The significance of this uncontroverted evidence lies in the deceased's observation of the appellant just before he was shot. The plea clearly came about as a result of his observation that the appellant was about to deliberately shoot him. Logically, there would have been no reason for him to utter those words had that not been the case.

[24] Another aspect concerns the shooting of Ms Botha. Both Mr Flagg and Ms Botha testified that she was shot whilst seating in the back passenger seat of the deceased's vehicle. Mr Leigh could not explain how Ms Botha was shot. He tried to place Ms Botha outside

the deceased's vehicle by saying that she had alighted from the vehicle. This was clearly meant to bolster the suggestion that she, too, was shot accidentally during the struggle for the firearm between the deceased and the appellant. The trial court correctly, with respect, found this evidence by Mr Leigh to be contrived, and rejected it.

[25] What is more, the appellant was in the company of two unnamed ladies who witnessed the shooting incident. It is to be borne in mind that during the cross-examination of state witnesses, it was put to them that those ladies would testify to have seen the deceased point the appellant with a firearm. They were not called, and there was no explanation therefor.

[26] In the absence of any explanation, it can safely be assumed that they were available, but their evidence would have been unfavourable to the appellant's version. A negative inference is therefore justified in the circumstances. See by way of analogy, *S v Teixeira* 1980 (3) SA 1098, in which a negative inference was drawn against the state in similar circumstances. In my view, there is nothing on principle, why, in suitable cases, such an inference cannot be drawn against an accused. In my view, this is such a case. This has nothing to do with the onus, which rests on the state throughout. It is simply an observation, flowing from what was promised during cross-examination.

[27] Given the above considerations, I am unable to find any material misdirection in the manner the trial court evaluated the evidence. Its conclusion that the state had proved its case beyond reasonable doubt can therefore not be faulted. It must be borne in

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mind that our law does not require proof beyond any shadow of doubt, only proof beyond a reasonable doubt. See *S v Ntsele* 1998 (2) SACR 178 (SCA).

[28] In the result the appeal against the conviction has to fail.

[29] The following order is made:

1. The appeal against the conviction is dismissed.




TM MAKGOKA
JUDGE OF THE HIGH COURT

I agree



SS MPHAHLELE
JUDGE OF THE HIGH COURT

I agree



JS BALOYI
ACTING JUDGE OF THE HIGH COURT

DATE OF HEARING : 20 AUGUST 2014

JUDGMENT DATE : 30 JANUARY 2015

FOR THE APPELLANT : MR. A. TLAKE

INSTRUCTED BY : *JUSTICE CENTRE, JOHANNESBURG*

FOR THE RESPONDENT : ADV. R.G. MUVHULAWA

INSTRUCTED BY : *DIRECTOR OF PUBLIC
PROSECUTIONS, JOHANNESBURG*

D.B