IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

Case number: **A197/2020**

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

02 March 2022
DATE

[redacted]
SIGNATURE

In the matter between: -

BHEKUMUZI MNDENI BUTHELEZI **APPELLANT**

And

THE STATE **RESPONDENT**

Coram: Millar J *et* Noncembu AJ

Heard on: 03 February 2022 – This appeal was, by consent between the parties, disposed of without an oral hearing in terms of s 19(a) of the Superior Courts Act 10 of 2013.

Delivered: 02 March 2022 – This judgment was handed down electronically by circulation to the parties' representatives by email, by being uploaded to the *Caselines* system of the GLD and by release to SAFLII. The date and time for hand-down is deemed to be 10H00 on 02 March 2022.

Summary: Criminal law and procedure – conviction – murder and attempted murder.

ORDER

On appeal from: The Benoni Regional Court (sitting as a Court of first instance), the following order is made:

(1) The appellant's appeal against his conviction and is upheld.

(2) The appellant's conviction by the Regional Magistrate, Benoni, be and is hereby set aside and substituted with the following:

Count 1 – the appellant is convicted of culpable homicide

Count 2 – the appellant is convicted of assault with intent to do grievous bodily harm.

(3) The sentence imposed by the Regional Magistrate, Benoni is confirmed.

JUDGMENT

NONCEMBU AJ

Introduction

[1] This is an appeal against conviction by the regional court sitting at Benoni on 01 February 2018. The appellant was charged with two other accused persons for the murder of one Mavuso Bandile (the deceased) and attempted murder of one Regent Sikila Tsotetsi (Mr Tsotetsi). His two co-accused were acquitted and he was convicted on both counts. He was subsequently sentenced to an effective term of 13 years' imprisonment. With the leave of the court *a quo*, he is now appealing against these convictions.

Background facts

[2] The state led the evidence of two witnesses, Mr Tsotetsi who is the complainant in respect of count 2, and Mr Dladla who was an eye-witness to the incident. Their evidence can be briefly summarized as follows: On 21 January 2017 Mr Tsotetsi and the deceased were at a shop in Etwatwa. The deceased left without telling Mr Tsotetsi where he was going. After a while Mr Tsotetsi also left the shop to go home. On the way he met the deceased who informed him that he was nearly knocked down by a vehicle. As they were still talking a Toyota Avanza vehicle approached and stopped next to them. Accused 1 alighted from the vehicle carrying a knobkerrie and approached the deceased. The deceased ran away and went to his home.

[3] He (the deceased) came back carrying an iron rod and a spear. Accused 1 pushed him and tried to assault him with the knobkerrie, but the deceased blocked and stabbed accused 1 on the upper arm with the spear. Accused 1 fell on the ground and the deceased climbed on top of him. Mr Tsotetsi tried to separate them, and whilst busy with that he heard a gunshot which made him to step backwards. A second shot was fired by the appellant which struck the deceased in the abdomen. The deceased fell on the ground. When Mr Tsotetsi tried to lift him up the appellant pointed him with a firearm and asked him why he was interfering. The appellant then shot Mr Tsotetsi on the left hip and Mr Tsotetsi fell on the ground. The appellant tried to fire another shot but the firearm jammed. Mr Tsotetsi got up and ran to his home, where he fell inside the yard. He woke up in hospital where he was admitted for 5 days.

[4] Mr Dladla was watching soccer at his home when he was told by a neighbour that there were people who were fighting on the street. He went outside to check and he saw accused 1 pointing a firearm at the deceased. Accused 1 was reprimanded so he took the firearm to the car and came back with a stick. He tried to hit the deceased with the stick but the deceased blocked the blow. The two grabbed each other and both fell on the ground.

[5] The deceased had a weapon in his hand but Mr Dladla couldn't tell if this was a knife or an iron rod. Accused 3 came from the car with a firearm and fired a warning shot. On hearing the gun shot the deceased stood up and stepped backwards. The appellant took the firearm from accused 3, pointed it at the deceased and fired but the firearm jammed. He cocked the firearm and fired one shot which struck the deceased in the abdomen and the deceased fell on the ground. The appellant also shot Mr Tsotetsi who was trying to separate the two.

[6] At the close of the state's case accused 1 took the stand and testified as follows: On the day in question he went to Barcelona with the appellant and accused 3 to visit the Seebi family. They were travelling in a Toyota Avanza vehicle. At the Seebi family he left the appellant and accused 3 in the vehicle and went inside the house. On his return, the two were gone with the vehicle and he couldn't call them as he

had left his phone inside the vehicle. While still waiting, the appellant came driving the vehicle and informed him that a fight had broken out between accused 3 and some people.

[7] The two drove to the scene where they found the deceased in possession of a steel pipe trying to hit accused 3 with it. Accused 3 grabbed the steel pipe, the two fought over it and accused 3 managed to take it away from the deceased. Accused 1 then told accused 3 to give the steel pipe back to the deceased so that they could leave. At that point he (accused 1) heard footsteps from behind, on turning he saw the deceased trying to stab him with a spear. He retreated and got scratched by the spear at the back. He was also stabbed on the upper arm by the deceased and he fell down and the deceased climbed on top of him. The spear got stuck in his arm and the two fought to gain possession of it. In the process accused 1 was cut on his palm. He screamed that he was being killed. At that point two gun shots were fired, at the second shot he noticed the deceased losing grip of the spear and falling down.

[8] Accused 1 stood up and told the appellant, who was in possession of a firearm to stop shooting at people. The appellant saw Mr Tsotetsi with his hand at the back, he called out to him saying ‘hey you’, then he (the appellant) fired one shot which struck him (Mr Tsotetsi) on the left upper thigh and as a result of which he fell to the ground. Shortly thereafter he got up and ran away. The appellant, accused 1 and 3 got into their vehicle and drove to the police station.

[9] The appellant also gave evidence which can be summarized as follows: Accused 1 had come to separate a fight between accused 3 and the deceased when the deceased started attacking him. A crowd of people had gathered in the area. Accused 3 fired a warning shot but the crowd would not disperse. The firearm in question belonged to accused 1 and the appellant didn’t know how accused 3 had gotten hold of it. The deceased stabbed accused 1 with a spear and the appellant heard him say that ‘this person is killing me’. At that point the deceased was on top of accused 1 and accused 1 was losing strength. The appellant took the firearm from accused 3 and shot the deceased as he did not want the deceased to stab

accused 1, who was also his uncle, again. He then heard Mr Tsotetsi say that they are not afraid of firearms as they have their own. At that point he saw Mr Tsotetsi reaching for his waist at the back pulling out something that looked like a firearm. The appellant then shot him on the hip.

[10] The evidence of accused 3 corroborated that of accused 1, except he went further to say that when the appellant and accused 1 came to the scene, the deceased was fighting with him, asking him what they were doing in that area as Avanzas were not welcome there. The deceased then tried to assault him with a steel pipe which he grabbed. Accused1 told him to go to the vehicle, but then the deceased started attacking accused 1 with a spear. The two fell on the ground and accused 1 was injured on the right upper arm. Whilst accused 1 was on the ground, he saw a firearm on his waist as his shirt had been pulled up. He ran and removed the firearm from him. Mr Tsotetsi approached him saying he must not come there to threaten them with firearms. The fight between accused 1 and the deceased was still continuing and accused 1 was screaming saying 'this person is killing me'.

[11] Accused 3 fired a warning shot in the air to stop the fight and to stop Mr Tsotetsi from approaching him. The fight did not stop as the deceased and accused 1 were still fighting over the spear on the ground. The appellant then grabbed the firearm from accused 3 and shot the deceased who was still on top of accused 1. Accused 3 moved towards the vehicle and saw the deceased fall on the ground. He heard another gun shot and saw Mr Tsotetsi fall to the ground. He did not see the appellant when he shot Mr Tsotetsi. The three accused then drove to the police station.

The issue

[12] The issue for determination by this court is whether the court *a quo* misdirected itself in rejecting the appellant's defence of private defence and convicting him as charged in respect of both counts.

The legal Principles

[13] 'A person acts in private defence, and her act is therefore lawful , if she uses force to repel an unlawful attack which has commenced, or is imminently threatening upon her 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 reasonably proportionate to the attack.'[1]

[14] The question to be answered in the current matter therefore is whether or not the appellant acted in private defence when he shot the deceased and Mr Tsotesi, and if so, whether he did not exceed the bounds of private defence.

Evaluation

[15] No doubt on the versions of both the state and the defence in this matter, despite the discrepancies on the two, there was a threat to the life of accused 1 on the day in question. Much as there are disparities on how exactly the fight started, it is clear that at some point the deceased was an aggressor and posed a threat on the life of accused 1. After the initial fight had stopped, he went home and came back armed with an iron rod and a spear. At that point there was no imminent danger facing him and he thus became the aggressor.

[16] On the version of the defence, when accused 1 tried to intervene in a fight the deceased was having with accused 3, the deceased inflicted harm on him, and thus his attack on accused 1 was unlawful. The question however remains; whether at the time the appellant shot the deceased and Mr Tsotetsi, there was

[1] *Engelbrecht* 2005 2 SACR 41 (W) par 228; *Steyn* 2010 411 (SCA) par 16, quoted in Snyman CR, Criminal Law, *Sixth edition.*

any imminent harm being faced by accused 1 or any of the accused, and whether or not the appellant's actions did not exceed the limits of private defence.

[17] In evaluating the evidence, the court *a quo* rejected the version of the defence on the basis that it had material contradictions. I am of the view that the trial court misdirected itself in this regard in that although they may have been discrepancies on the version of the defence witnesses, these could not be characterized as being of a material nature. In their evidence overall, these witnesses corroborated each other in material respects, and in some respects, their evidence was in line with that of Mr Tsotetsi. The trial court however, overlooked altogether the contradictions in the evidence of the two state witnesses who testified in the matter. In particular, the evidence of Mr Dladla which was totally different to any of the evidence tendered in the proceedings, including that of Mr Tsotetsi.

[18] According to Mr Dladla the deceased was carrying one weapon which he was not sure if it was an iron rod or a knife. Furthermore, on his version accused 1 was the first person to point the deceased with a firearm before he was reprimanded. This is contrary to the evidence of both Mr Tsotetsi and the defence witnesses. Mr Tsotetsi was at the scene when accused 1 arrived in an Avanza motor vehicle. He was therefore best positioned to see if accused 1 had pointed a firearm at the deceased. In fact, his evidence in this regard was that accused 1 alighted from the vehicle with a knobkerrie, at which point the deceased ran home to arm himself with an iron rod and a spear. From this one can only conclude that Mr Dladla was quite economical in his exposition of the facts of the day in question, which makes the reliability of his evidence quite questionable. This then leaves one with the version of Mr Tsotetsi and that of the defence witnesses.

[19] What is common cause between the parties is that there was a fight on the day in question, and whilst there is a dispute as to who may have struck the first blow, it is common cause that the deceased left the scene, thus averting any danger there might have been at the time, and came back armed with two dangerous weapons, thus becoming an aggressor at that point.

[20] On the defence version, accused 1 had been injured and crying that he was being killed when the fatal shot was fired. All the witnesses agree that a warning shot had been fired before the fatal shot that killed the deceased. On Mr Tsotetsi's version the warning shot had put a stop to the fight as even he had stepped back from separating the two at that stage. On the defence version however, the warning shot did not have the desired effect, hence the appellant fired the second shot which struck the deceased in the abdomen.

[21] Whilst a court of appeal is generally reluctant to disturb the findings which depend on credibility it is trite that it will do so where such findings are plainly wrong. This is especially so where the findings are plainly flawed.[2] In evaluating factual disputes in a matter one is enjoined to consider the evidence in its totality, consider the credibility of all the witnesses, their reliability and lastly the probabilities.[3] Given the nature of the evidence in this matter and the circumstances under which the offences in question were committed, one would have to rely heavily on the probabilities.

[22] The appellant's evidence in the matter is that after the warning shot had been fired by accused 3, the deceased continued threatening the life of accused 1 as he remained on top of him thus continuously posing a threat to his life. It is at that point that he took the firearm from accused 3 and shot the deceased. He also testified that Mr Tsotetsi had moved his hand to his waist on the back, he thus believed that he was pulling out a firearm when he shot him.

[23] If one considers the probabilities in this regard, accused 3 who was already in possession of the firearm at the time and had fired the warning shot was in a similar position with the appellant to notice if the warning shot had yielded no positive results, and thus act accordingly, either by firing a second warning shot, pulling the deceased from accused 1, or shooting at the deceased. One can thus only

[2] See *R v Dlhumayo and Another* 1984 (2) SA 677 (A 706; *Santam Beperk v Vincent Biddulph* (Case no. 105/2003) ZASCA 23 March 2004.

[3] *Stellenbosch Farmers' Winery Group Limited and another v Martell et Cie and* others 2003 (1) SA (SCA) para 141-15E.

conclude that the appellant subjectively believed that accused 3 was not doing enough to protect accused1 and that accused 1 was in serious danger if he did not act as he did although objectively viewed that may not have been the case. I find it highly improbable that the deceased would continue as if nothing had happened after the warning shot had been fired. Generally, a gunshot has the effect of bringing everyone to a halt, especially where it is not clear where it is coming from or where it is directed. The version of Mr Tsotetsi seems to be the most favourable one to fit in with the inherent probabilities in this regard.

[24] However, given the fact that there was a group of people in the area who were mainly neighbours of the deceased, it makes sense that the appellant would feel that their lives were in imminent danger if he did not act as he did. His conduct under the circumstances therefore can be said to fall under that which is called putative private defence. That being the case, it would mean that intention to kill would be negated. This is also supported by the fact that he only fired one shot at both the deceased and Mr Tsotetsi who was only shot on the thigh, and on fleeing the scene the appellant and his co-accused went straight to the police station.

[25] The principle of putative private defence was formulated as follows in *S v Olivier*[4]:

"From a juristic point of view the difference between these two defences is significant. A person who acts in private defence acts lawfully, provided his conduct satisfies the requirements laid down for such a defence and does not exceed its limits. The test for private defence is objective – would a reasonable man in the position of the accused have acted in the same way (*S v Ntuli* 1975 (1) SA 429 (A) at 436E). In putative private defence it is not lawfulness that is in issue but culpability ('*skuld*'). If an accused honestly believes his life or property to be in danger, but objectively viewed they are not, the defensive steps he takes cannot constitute private defence. If in those circumstances he kills someone his conduct is unlawful. His erroneous belief that his life or property was in dander may well (depending upon the precise circumstances) exclude *dolus* in which case liability

[4] 1993 (2) SACR (59) A.

for the person' s death based on intention will also be excluded; at worst for him he can then be convicted of culpable homicide."

[26] On the facts of the current matter, the appellant believed that his life and that of accused 1 were in danger, he took the firearm from accused 3 and fired one shot at the deceased and one shot at Mr Tsotetsi to ward off what he believed to be imminent danger. Objectively viewed however, this was not the case. On his version, other than hearing accused 1 screaming that 'this man is killing me', there is nothing to indicate that he indeed ascertained that accused 1 was in imminent danger after the warning shot was fired. On seeing the two still on the ground and the deceased on top of accused 1, he simply fired one shot at the deceased. There is no indication whatsoever in the evidence that he made any attempt to try and pull the deceased away from accused1, which would have been far less evasive than shooting at him with a firearm.

[27] It is common cause that the appellant is not licensed to use a firearm and his version is that he only wanted to shoot the deceased on the thigh. From this fact alone one can easily infer that he had no intention to kill the deceased. Given the fact that he is not licensed and therefore untrained to use a firearm, there is no way he could have been certain that he would not miss and perhaps strike accused 1 instead of the deceased when he fired the fatal shot. He therefore must have foreseen the possibility of missing the deceased and hitting accused 1 (who is his uncle) instead. If we accept that he subjectively reconciled with the possibility that the injury he inflicts on the deceased could be fatal, we must also accept that he reconciled himself with the said possibility ensuing even in respect of accused 1. There is however, nothing on the evidence to indicate that he valued the life of accused 1 any less than any average person would value their lives. On the contrary, the only motivation for his actions on the day in question was to save the life of accused 1. Subjectively therefore, he did not foresee that fatal injuries could result when he fired a shot at the deceased anymore than he foresaw that ensuing

in respect of accused1 had he missed and shot at him instead.[5] This therefore excludes any *dolus* on his conduct on the day in question.

[28] The appellant shot Mr Tsotetsi because he believed that he was going for a firearm on his waist. There is however, nothing in the evidence to indicate that Mr Tsotetsi was carrying a firearm or any weapon on the day in question. It is thus clear that the appellant was mistaken in this regard and therefore his subjective belief that he was acting in private defence was premised on incorrect grounds. This then renders his actions at the time as unlawful.

[29] This notwithstanding, given the circumstances under which the offences were committed, *inter alia,* the fact that this took place at a crowded area where there was a fight going and accused 1 had already been injured, subjectively viewed, the appellant's conduct lacked the requisite *dolus* (intention) to commit the offences of murder and attempted murder. At the most, the issue that arises is not one of *dolus*, but rather of *culpability*. His mistaken belief, albeit wrong at the time, in respect of Mr Tsotetsi's being armed and accused 1 being in imminent danger at the time of the shootings, render his conduct as one which falls within the ambit of putative private defence. Under those circumstances therefore, the convictions of murder and attempted murder cannot stand. At the most, the appellant's actions amounted to negligence.

[30] In the premise therefore, the appeal against conviction must succeed.

[31] Consequent upon this finding, the question that follows therefore is; what then becomes of the sentence imposed by the court *a quo* on the appellant in the matter?

[32] In respect of count 1 (murder), the appellant was sentenced to ten (10) years imprisonment, of which two years were suspended for five (5) years conditionally. In respect of the second count he was sentenced to five years' imprisonment. Effectively therefore, he was sentenced to a term of thirteen (13) years

[5] See *S v Humphreys* 2013 (2) SACR 1 (SCA) paras 13 -16.

imprisonment, and in terms of section 103 (1) of the Firearms Control Act, [6] he was automatically deemed unfit to possess a firearm.

[33] Whilst the two convictions have been set aside and substituted with the lesser ones of culpable homicide and assault with intent to do grievous bodily harm, in determining whether or not the sentences imposed by the trial court are appropriate sentences, one must not lose sight of the manner in which the offences were committed and the impact they had on the victims. The pre-sentence and the victim impact reports give a very clear and gloomy picture of the effect that these offences had on the victims. Needless to say, one person lost his life and no amount of atonement can replace him to his family, and Mr Tsotetsi is still suffering the after-effects of the offence, both physically (the bullet was lodged on his thigh and he still feels pain on cold and rainy days) and emotionally. The trajectory of his life has been altered for good, he has even been criminally charged for a violent offence due to the unmanaged emotional trauma which is an after-effect of the offence by the appellant.

[34] Furthermore, and as an aggravating factor, the appellant used a firearm for which he did not possess a licence lawfully issued to him in committing the offences. The prevalence of offences committed with the use of unlicensed firearms in this country is forever on the rise and despite the hefty penalty provisions of the Firearms Control Act [7], these offences seem to go unabated. Society needs to feel protected from the wanton use of unlawfully possessed firearms, and a stern message must be sent to those who commit such offences. This the courts can do by ensuring that they impose sentences which have both a preventative and retributive effect to those who commit such offences.

[35] The personal circumstances of the appellant were duly and appropriately considered by the trial court. In applying the *Zinn* triad[8] to the facts of the current matter, we are of the view that the seriousness of the offences committed and the

[6] Act 60 of 2000.
[7] Act 60 of 2000.
[8] See *S v Zinn* 1969 (2) SA 537.

interests of society, which include the rights of the victims, far outweigh the personal circumstances of the appellant. That having been said, we hold the view that the sentence imposed by the trial court in the matter is proportionate to the offences committed, the interests of society as well as the personal circumstances of the appellant, and therefore, an appropriate sentence on the circumstances of this matter. This Court therefore finds no reason to interfere with the said sentence.

Ruling

[36] Consequently, the following order is made:

(a) The appeal against conviction on both counts is upheld.

(b) The appellant's conviction by the court *a quo* is hereby set aside and substituted with the following:

Count 1: The appellant is found guilty of culpable homicide;

Count 2: The appellant is found guilty of assault with intent to do grievous bodily harm.

(c) The sentence imposed by the court *a quo* is hereby confirmed.

NONCEMBU AJ

ACTING JUDGE OF THE HIGH COURT

GAUTENG DIVISION, PRETORIA

I agree

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MILLAR J

JUDGE OF THE HIGH COURT

GAUTENG DIVISION, PRETORIA

APPEARANCES

DATE OF HEARRING	: 03 February 2022
DATE OF JUDGMENT	: 02 March 2022
For the Appellant	: Adv M B Moloi

	Pretoria Justice Centre
	Local Office
For the Respondent	: Adv C Pruis
	The Director of Public Prosecutions
	Pretoria