

**IN THE KWAZULU-NATAL HIGH COURT, PIETERMARITZBURG
REPUBLIC OF SOUTH AFRICA**

CASE NO. AR 685/10

In the matter between:

ANDREW DIRK LOUBSER

APPELLANT

and

THE STATE

RESPONDENT

APPEAL JUDGMENT Delivered on 30 August 2011

KRUGER et LOPES J J

[1] The appellant was convicted on a charge of murder and two counts of attempted murder. He was sentenced to ten years' imprisonment in respect of the murder conviction and to five years' imprisonment on each count of attempted murder. The sentences imposed in respect of the attempted murder convictions were ordered to run concurrently. The appellant was accordingly sentenced to an effective term of fifteen years' imprisonment. Leave to appeal having been refused by the trial Court, the appellant now appeals against both conviction and sentence after successfully petitioning the High Court.

[2] The facts, which are largely common cause, can be briefly outlined as follows:

The appellant was employed at the Sneezewood Forest as a

security officer. During the morning of 10 July 2005 the deceased and the two complainants were illegally poaching in the Sneezewood Forest. The deceased and the two complainants were hunting and were armed with two shotguns. They were accompanied by a pack of twenty-two hunting dogs. The appellant was alerted to their presence and as the deceased and the complainants were exiting the forest and walking towards their vehicle the appellant confronted them. During the confrontation the appellant, who was armed with a shotgun, fired three shots at the deceased and the two complainants. The police later arrived at the scene and it was discovered that the deceased as well as the two complainants had been wounded. The deceased later died as a result of the injuries sustained.

[3] The appellant's defence was that upon confronting the deceased and the two complainants they set their hunting dogs on him. Whilst he was defending himself against these hunting dogs, by firing shots at them, he heard a shot being fired and upon looking up saw two of the complainants pointing shotguns at him. He thereafter fired two shots in the direction of the deceased and one of the complainants. Thereafter he returned his attention to the dogs. He later saw one of the complainants once again raising a shotgun in his direction and he fired a third shot in the direction of this complainant.

[4] The State disputed the appellant's evidence and based its case on the fact that the dogs were not set upon the appellant and the complainants did not fire at or raised their firearms and pointed them at the appellant. It is the State's contention that the appellant shot at the complainants for no apparent reason. The Court *a quo*, in convicting the appellant, accepted the evidence of the two

complainants as well as the two independent witnesses. The Court *a quo* accepted that the appellant was not shot at nor was any firearm pointed in his direction, nor was he attacked by the hunting dogs and that he shot the complainants for no apparent reason.

[5] In accepting the evidence of the complainants and the two independent witnesses, the Court *a quo* found that there were contradictions in their evidence. However after examining each of these contradictions concluded that they were not material and accordingly the State witnesses' evidence could not be discredited. Mr. Labuschagne for the appellant has argued that the totality of the evidence and the contradictions, render the State's evidence unreliable.

[6] We turn now to consider the evidence of the State witnesses. Mr. Makhaya Didi, the complainant in Count 3, testified that as they approached the homestead where they had parked their van they met the appellant. He immediately commenced shooting at them and fired three shots. The first shot struck the second complainant, Mr. Bhekwa, the second shot struck the deceased, Mr. Nombambo, and the third shot struck him. He confirmed that at the time he was in possession of a shotgun. After his two companions had been shot he raised his one hand as a sign of submission towards the appellant but was nonetheless shot. He confirmed that the deceased was armed with a shotgun whilst the second complainant was unarmed. As a result of all three of them being shot they all fell to the ground and in particular the second complainant was lying on the ground immediately in front of him. The deceased was lying on the ground behind him. As a result of the shooting he sustained injuries on the side of his nose and on his chest. He confirmed that he had two cartridges in the firearm and three in his pocket.

[7] Under cross-examination however a totally different picture emerged. He was confronted with the statement which he made to the police two days after the incident. In his statement he stated that the appellant ordered him and his companions to sit down, using the words “hlala phanzi” shortly before any shots were fired. In his evidence in chief and under cross-examination he initially denied that anything was said and thereafter stated that he could not recall hearing the said words “hlala phanzi”. In his statement he further mentioned that after the deceased and the second complainant had been shot, he raised his hands surrendering and pleading for mercy. This was in contradiction with his evidence in chief wherein he testified that he raised only one hand as he held his firearm in the other hand. Finally, in his statement he stated that he sustained injuries on his thighs, chest, stomach and face. This was in contradiction to his evidence in chief when he testified that he only sustained injuries on his chest and on his nose. A further contradiction in his evidence emerged with regard to the number of shotgun cartridges in his possession. In his statement to the police he stated that the shotgun was loaded with five cartridges and that he had three in his possession. He testified that he did not fire any shots that day. He could provide no reason for the discrepancies in his evidence.

[8] The complainant in Count 2, Mr. Bhekwa, confirmed that he was in the company of the deceased and the complainant in Count 3. He also confirmed the confrontation with the appellant, but contradicted the evidence of Mr. Didi in that he heard the appellant instructing them to “hlala phanzi”. He however testified that the first person to be shot was the deceased. He immediately turned and ran away. As he was running away, the appellant shot him. This

was also in contradiction to the evidence of Mr. Didi who testified that it was Mr. Bhekwa who was shot first and then the deceased. Didi also did not mention the fact that Mr. Bhekwa ran away but testified that he fell down and was lying in front of him. He also contradicted his police statement in that he did not mention to the police that he was shot whilst running away. He also testified that neither he nor his companions set the dogs upon the appellant, nor did they shoot at him nor did they raise their firearms and point them at the appellant.

[9] Further contradictions emerged when the two so-called independent witnesses testified. Mrs. Priscilla Biyazi contradicted the evidence of Mr. Didi in that she heard the appellant ordering the men to sit down prior to shooting at them. She also contradicted his evidence by testifying that it was the deceased who was shot first and thereafter the complainant in Count 2. She further contradicted Mr. Didi's evidence by stating that he had raised both his hands in the air and was apologising at the time he was shot. Interestingly though in her evidence in chief she only mentioned that two shots were fired prior to the police arriving at the scene. Under cross-examination for the first time she mentioned that the third shot was fired at the complainant in Count 3. She also contradicted the evidence of Mr. Didi and Mr. Bhekwa by testifying that none of the complainants or the deceased were armed. She also did not see any of the complainants or the deceased pointing a firearm or shooting at the appellant.

[10] Mrs. Constance Biyazi who was in the company of Priscilla Biyazi contradicted the evidence of both Mr. Bhekwa and Priscilla Biyazi by testifying that the appellant did not say anything to the complainants prior to shooting them. She also contradicted the

evidence of Mr. Didi by testifying that he had raised both his hands. Notwithstanding the fact that she was closer to the deceased and complainants at the time, she did not see them in possession of any firearms. However, she testified that the appellant was in possession of a large firearm and a “side firearm”. Finally she contradicted the evidence of Mr. Bhekwa that he ran away at the time of the shooting.

[11] As all these contradictions centred around the incidents which occurred immediately prior, during and after the shooting, we do not accept the Court *a quo*’s reasoning that the contradictions were immaterial. It is noted that the Court *a quo* disregarded the contradictions on the basis that the shooting was common cause and that the deceased and complainants were shot at whilst having done nothing to the appellant. The crucial contradiction in our opinion is the fact that the two independent witnesses testified that the deceased and complainants were unarmed. This was in direct contradiction of the evidence of the two complainants who testified that the deceased and the complainant in Count 3 were armed with shotguns.

[12] Perhaps the most unreliable aspect of the State’s evidence was the fact that all the State witnesses denied that the dogs were set upon the appellant and that he fired shots at the dogs in order to ward them off. All the State witnesses confirmed that only three shots were fired, all by the appellant, towards the deceased and the two complainants. The Court *a quo* found, as a fact, that none of the dogs attacked the appellant and also that there was no cross-fire between the deceased and the complainants on the one hand and the appellant on the other. The Court *a quo* failed to consider the undisputed evidence that more than three shotgun shells were found

at the scene. Having accepted that only three shots were fired, the Court *a quo* failed to consider where the other shotgun shells emanated from. Two scenarios arise as a result thereof:

- a) that the appellant was attacked by the dogs and that he fired shots towards the dogs in order to ward them off; or
- b) that the deceased and/or complainants fired shots at the appellant.

Neither of these scenarios is in accordance with the State's evidence against the appellant or the finding of the Court *a quo*. This, in our opinion, renders the State's evidence unreliable and the appellant ought to be given the benefit of the doubt.

[13] A further consideration relates to the existence or non-existence of the ballistic evidence. It is unfortunate that the ballistic evidence in this matter was dealt with in a somewhat haphazard and inadequate way. The basic allegations of the State were that the appellant discharged a shotgun at the deceased and two complainants hitting all three of them. The defence version was that the deceased and the two complainants fired at, or attempted to fire at the appellant, who returned the fire. The weapons used by the appellant, the deceased and the two complainants were alleged to have been shotguns.

[14] In addition to the foregoing it is clear that the appellant himself discharged at least one shot from a "side-arm" and the witness van der Kamp fired a number of rounds from an R5 rifle.

[15] The problem with the ballistic evidence is that no proper attempt was made to deal with that evidence at the trial in such a way as would have established :-

- a) which of the numerous firearms recovered at the scene were fired; and
- b) an accurate count of the number of cartridges recovered at the scene; and
- c) the identification of the firearms which discharged the projectiles which caused the death of the deceased and the injuries to the complainants.

[16] The above confusion is demonstrated by a perusal of the record.

The following appeared :

- a) at page 136 of the record, the witness Mr Didi, the complainant on count 2, is cross-examined and it is put to him by defence counsel:

“I was provided with a ballistics reports which tested those guns and [the report records] six 12 gauge shotgun calibre fired shot shells, test marked ...[inaudible]’, I don’t know what it means but what is important, it says there six shells originating from three 12 gauge calibre shotguns with the following serial numbers, and then it quotes the serial numbers which means that that gun of yours was fired, because they picked up one of the shells which came – well, at least one of the shells which came out of your shotgun.

COURT Sorry before I allow that question to be interpreted, does

that report say that his firearm, particular firearm did fire some shots?

MR KRUGER Yes. There were six shells fired by three shotguns and also indicating the serial numbers of the guns”.

[17] Unfortunately the ballistics report referred to by Mr Kruger in cross-examination does not form any part of the record. There is also a reference in the petition application to the presence of a further ballistics report. That was also not adduced in evidence at the trial. As neither of the ballistic reports were contained in the appeal record, we have not been able to have recourse to them. One is then left with considerable confusion with regard to the firearms used by the various parties, whether or not they were fired at the scene, and which ones caused the injuries attributed to the deceased and complainants.

[18] One of the problems which arises with an analysis of the evidence is that two post-mortem examinations were conducted on the body of the deceased. One was carried out by Dr Y S Bhana the district surgeon of Umzimkulu. He concluded that the cause of death of the deceased was a bullet wound of the abdomen. It appears, however, from his evidence that his examination of the deceased was somewhat cursory, to the extent that he was even unsure which vital organs of the deceased were damaged by the bullet. He testified that it was difficult to trace the bullet and blamed this in part on the lack of facilities and equipment available to him.

[19] It is clear from the evidence of Sergeant Ngubo of the Gowanlea Police Station that Dr Bhana agreed with Inspector Jwajwa that the body of the deceased be transferred to Umtata for a continuation of the post-mortem examination which had been started by Dr Bhana. Sergeant Ngubo maintains that he attended

the second post-mortem examination at Umtata. His evidence records the following :-

“We did a post-mortem on the body. I think it took us about two hours, and at the end we found the bullets and the doctor said that that bullet had caused his death. The bullet which was in the body ... [inaudible].

And did you personally see the bullet? ... I saw it.

Yes? Anything else? ... We took that bullet ... [inaudible]”.

[20] The recordal of the report on the medico-legal post-mortem examination conducted on the body of the deceased appears on four pages from page 27. It refers in no less than four places to ‘bullet wound’. This is the report compiled by Dr Y S Bhana. In a certificate of post-mortem examination report signed by a district surgeon who was not Dr Bhana (presumably recording the continuation of the post-mortem examination which was conducted at Umtata and which document is also signed by Sergeant Ngubo), it refers to the cause of death of the deceased as being “bullet wound of the abdomen”.

[21] It is unfortunate that there is no indication on the record which would enable one to identify the type of projectile which is described as a “bullet” in the post-mortem examination report. This is of importance because the evidence of the witnesses was that the projectiles fired from the shotguns were in the nature of small ball-bearings. This is to some extent confirmed by the medico-legal examination report at page 33 of the record which indicates that the witness Mr Didi sustained what is referred to in that report as “pellet bruises”.

[22] In addition, it is clear that a number of shells were recovered from the scene in a most unsatisfactory and haphazard manner. Sergeant Ngubo in a statement compiled by him records that he

searched the scene of the crime but was unable to find any cartridges. He says that he was given two empty cartridges by Inspector Mafeke which he was told had been received from a witness Vusi Freeman Biyaze. Those were an R5 cartridge and an empty shell of a shotgun. He also records that five other empty shells of shotguns were received from Mzamelais Biyaze who told the police that he had picked up the cartridges from the scene and that there were three red shells and two green shells. In addition his statement records at paragraph 8:

“Two short (*sic*) guns and live round of short (*sic*) gun about fifteen (15) of them also handed to me by Captain Gcaba which he said he recovered them from Captain van der Kamp”.

[23] The importance of ballistic evidence is a trial such as this one cannot be underestimated. The chaotic way in which the evidence was collected by the police and dealt with by the prosecutor, the learned magistrate and defence counsel at the trial has been of little assistance in enabling one to determine the guilt or otherwise of the appellant.

[24] Given the unsatisfactory nature of the ballistic evidence, it is unclear from the record which of the numerous firearms at the scene were in fact discharged at the scene and which one caused the death of the deceased. It is insufficient to merely surmise that because shots were fired by the appellant in the direction of the deceased and the complainants, that the firearm he used was the one from which the projectile which caused the death of the deceased was discharged. This is because of the presence of other firearms which were discharged in what would appear to have been a rather haphazard fashion at the scene of the crime,

and in close proximity to the deceased.

[25] In all the circumstances the ballistic evidence alone does not in any way assist in reaching a conclusion as to the guilt of the appellant.

[26] In conclusion, the following order is made:

The appeal is upheld and the convictions
and
sentences are set aside.

KRUGER J

I agree

LOPES J

Appearances /

Appearances

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Date of Hearing : 18 August 2011

Date of Judgment : 30 August 2011

