THE SUPREME COURT OF APPEAL
REPUBLIC OF SOUTH AFRICA

JUDGMENT

Case No: 403/09

Bruce-Lee Lutchman Naidoo Appellant

and

The State Respondent

Neutral citation: *Bruce-Lee Naidoo v The State* (403/09) [2010] ZASCA 40 (30 March 2010)

Coram: **HEHER, MALAN JJA and SERITI AJA**

Heard: **25 February 2010**

Delivered: **30 March 2010**

Summary: Criminal law – self –defence – whether appellant acted in self defence – whether appellant erroneously believed his life was in danger – putative self defence – sentence of 15 years' imprisonment reduced to 12 years' imprisonment.

ORDER

On appeal from: North Gauteng High Court Pretoria (Murphy, Molopa JJ sitting as court of appeal)

(a) The appeal against conviction is dismissed.

(b) The appeal against sentence succeeds. The sentence imposed by the trial court is set aside and for it is substituted a sentence of 12 (twelve) years imprisonment.

JUDGMENT

Seriti AJA (HEHER AND MALAN JJA concurring):

[1] The appellant appeared before the regional court, facing one count of murder. After evidence was led he was convicted as charged and sentenced to fifteen years' imprisonment. His appeal to the North Gauteng High Court against both conviction and sentence was unsuccessful. He was granted leave to appeal to this court by Murphy J.

[2] The appeal revolves around two issues, namely whether the appellant acted in self defence when he shot and caused the death of the deceased, Mr Robert Miller, and whether, when imposing the sentence, the trial court was correct when it found that there were no substantial and compelling circumstances which justified the imposition of a sentence lesser than the sentence prescribed by section 51(2) of the Criminal Law Amendment Act 105 of 1997.

[3] It is common cause that on the day in question the deceased and

Messers Vernon Watson ('Watson'), Marcus Ruiters ('Ruiters') and Barend Barnard ('Barnard') drank alcohol at a certain place. In the evening, the deceased drove them in a Toyota Corolla, to a barbershop and parked their motor vehicle in a parking bay parallel with the pavement. In front of the motor vehicle there was a bakkie belonging to the appellant parked with its nose facing the nose of the Corolla.

[4] The deceased and his friends (but as the trial court correctly found, not Watson who was left in the car) went to the pool tables adjoining the barbershop where they encountered the appellant and other people. An argument ensued between the appellant and the deceased leading to a fight. The friends of the deceased joined in and assisted the deceased. The appellant's friends also took part in helping him. In the process the appellant was assaulted and he sustained bodily injuries.

[5] The owner of the business premises, Mr Abdul Rocker came on the scene and chased the deceased and his friends out. They went to their motor vehicle. The deceased sat on the driver's seat and Mr. Barnard on the passenger's front seat together with two young children and Watson on the left back seat and Ruiters on the right.

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[6] The appellant was also chased from the premises. He went to his bakkie and, whilst standing in front of it, fired five bullets at the motor vehicle in which the deceased and his friends were sitting. At that stage the appellant was about three metres away from the deceased's motor vehicle. The gun shots hit that vehicle on the bonnet, front windscreen and radiator. The deceased was struck by one of the bullets and later died.

[7] The state witnesses Watson, Ruiters and Barnard testified that when the appellant fired their vehicle was stationary, idling and not in gear. Rocker said that when he went out of the barbershop, just after the shooting, he found

the deceased's Corolla idling.

[8] The appellant testified that when he left the barbershop the deceased and his friends were standing on the sidewalk. They swore at him and threatened to run him over. His mother and young brother came on the scene, and his brother ran to him and held him by his leg. At that time, the four men were inside their motor vehicle. The driver of motor vehicle was revving it and it was jerking forward. He drew his firearm which was in a holster at his side. He fired a shot at the motor vehicle's engine. The motor vehicle continued coming towards him and he fired a second shot. There was no positive response from the driver. The Corolla continued coming towards him. He then fired three more shots one after the other and the motor vehicle stopped.

[9] The trial court accepted the evidence of the state witnesses on how the shooting occurred and rejected the version of the appellant. It accepted that there was no attempt to run over the appellant with a motor vehicle. The trial court further found that when the appellant fired he had the intention to kill the driver.

[10] The full court which heard the appeal, after analysing the facts of the case, agreed with the trial court that the evidence of Messers Watson, Ruiters and Barnard was by and large credible and reliable and that the probabilities supported their version. The trial court was aware of their intoxication and approached their testimony with caution. It noted contradictions in the version of the state witnesses but found them not to be material. It rejected the appellant's version and his defence on the grounds that it was highly improbable.

[11] The appellant's counsel submitted that the trial court should not have accepted the evidence of Messers Watson, Ruiters and Barnard when they said that their motor vehicle was stationary when shot at. The submission was

that the state witnesses had a motive to tender false evidence against the appellant as their friends was killed and they assaulted the appellant. There is no merits in this. In *S v Morgan and others*[1]*; S v Tshoko*[2] *en 'n ander; R v Dhlumayo*[3] the court reiterated the principle that an appeal court is generally reluctant to upset a trial court's findings of fact and its assessment of the credibility of witnesses. I am unable to find any reason why the trial court should not have accepted the state witnesses' evidence. There was no objective evidence to suggest that they had a motive to give false evidence against the appellant.

[12] The appellant's counsel further submitted that the deceased could (involuntarily) have put the gears of the motor vehicle into neutral after being shot at. This submission is not based on reliable evidence and amounts to speculation.

[13] The appellant testified that when the motor vehicle jerked towards him he could not take evasive action because the pavement next to him was full of people and the road to his left was busy with traffic. Later he changed his evidence and stated that he did not think about taking any evasive action to avoid being knocked down by the motor vehicle. His evidence was correctly rejected by the trial court.

[14] Appellant's counsel further submitted that if it is found, objectively viewed, that the appellant's life was not under threat, the appellant erroneously believed that it was in danger and that he therefore acted in putative self defence. The submission was further made that the erroneous belief of the appellant excluded dolus and he should have been convicted of culpable homicide only.

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[1] 1993 (2) SACR 134 (A) at p153 a-c.
[2] 1988 (1) SA 139 (AA) at 142I-143A.
[3] 1948 (2) SA 677 (AD) at 689.

[15] The submission by the appellant's counsel is without merits. The trial court found, and I agree, that the deceased's motor vehicle was stationary when the appellant fired at it. The appellant could not have reasonably believed that his life was in danger – See *S v Joshua*[4] and *S v De Oliveira*[5]. The appellant fired directly at the front windscreen knowing that there was a driver behind the steering wheel. His life was not threatened. It follows that the appeal against his conviction should be dismissed.

[16] As far as sentence is concerned section 51(2) of the Act read in conjunction with Part II of Schedule 2 provides that if an accused is convicted of murder, the court shall impose a minimum sentence of 15 years. Subsection (3) stipulates that the court may depart from the prescribed sentence and impose a sentence less than the prescribed sentence if there are substantial and compelling circumstances justifying the imposition of such a sentence.

[17] When considering sentence, the trial court took into account the personal circumstances of the appellant and the fact that the appellant was a first offender. It also took into account nature and seriousness of the offence and the interests of society. The trial court further said that although the appellant was clearly a victim of assault, it could not find sufficient factors justifying the imposition of a lesser sentence.

[18] As a general rule, a court of appeal will not interfere with the sentence imposed by the trial court unless the trial court has failed to exercise its discretion properly. This will be the case if there was a misdirection on the part of the trial court – see *S v Shapiro* [6]; *S v Sadler* [7]and *S v Michele.* [8]

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[4] 2003 (1) SACR 1(SCA) at para 29.
[5]1993 (2) SACR 59 (A) at 63i-64a.
[6] 1994 (1) SACR112 (A) at 124d-e.
[7] 2000 (1) SACR 331 (SCA) at 334d-g.
[8] 2010 (1) SACR 131 (SCA) at para H.

[19] In passing sentence the magistrate accepted that the appellant had been assaulted by the deceased and his friends. He, however, did not consider that to be a substantial and compelling circumstance justifying the imposition of a lesser sentence. He said that, despite the assault on him, the appellant had the choice of withdrawing but instead went ahead and stood in front of the Corolla in order to provoke a further confrontation. The full court associated itself with this view. To my mind, however, it is precisely circumstances such as the assault, the injuries he sustained and the anger which possessed him that palliate the horror of the appellant's crime and his moral culpability. Neither court apparently attached weight to the combined effect of these factors. That was, as I see it, a material misdirection which entitles us to consider the sentence afresh.

[20] The personal circumstances of the appellant, the fact that he was assaulted prior to he shooting and sustained physical injuries and that he was angry at the time of the shooting cumulatively justifies the imposition of a sentence less than the prescribed sentence. In my view, after taking into account all the relevant factors into account, a sentence of twelve years' imprisonment is appropriate.

[21] (a) The appeal against conviction is dismissed.

(b) The appeal against sentence succeeds. The sentence is set aside and for it is substituted a sentence of 12 years' imprisonment.

W L SERITI

Acting Judge of Appeal

APPEARANCES:

FOR APPELLANT:	M van Wyngaard
Instructed by	Matwadia Attorneys, Springs Mpobole & Ismail Attorneys, Bloemfontein
FOR RESPONDENT:	J J Kotzé
Instructed by	The Director of Public Prosecutions, Pretoria