THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case No: 065/11

In the matter between:

SHANE GILBERT **Appellant**

and

THE STATE **Respondent**

Neutral citation: *Shane Gilbert v The State* (065/11) [2011] ZASCA185 (30 September 2011)

Coram: HEHER, MAYA, CACHALIA, LEACH JJA and PETSE AJA

Heard: 16 August 2011

Delivered: 30 September 2011

Summary: Evidence – assessment and evaluation thereof – proper approach to adopt.

ORDER

On appeal from: KwaZulu-Natal High Court, Pietermaritzburg (Ntshangase, Gorven JJ sitting as court of appeal):

The appeal succeeds. The appellant's conviction and sentence are set aside.

JUDGMENT

PETSE AJA (HEHER, MAYA, CACHALIA and LEACH JJA CONCURRING):

[1] In May 2002, the appellant was charged in the regional court, Durban with the murder of Mr Sivalingum Govender (the deceased). Despite his plea of not guilty, he was subsequently convicted as charged and sentenced to ten years' imprisonment.

[2] His appeal against both conviction and sentence to the KwaZulu-Natal High Court, Pietermaritzburg, was unsuccessful. The further appeal before this court is with the leave of the court below.

[3] It was common cause at the trial that the deceased was the owner of and a passenger in the taxi in which the appellant was travelling at the material time. In his statement in terms of s 115 of the Criminal Procedure Act 51 of 1977 (the Act) the appellant, who was also a passenger in the taxi, denied that he unlawfully and intentionally killed the deceased. He further disclosed that he relied on a defence of private defence.

[4] To substantiate his defence the appellant tendered as evidence at the trial, with the concurrence of the state, a letter dated 26 September 2009 (together with hospital records) from Addington Hospital in Durban which, inter alia, recorded that the appellant was examined on 18 December 2000 after an alleged assault and the following injuries were noted: numerous lacerations on scalp (± 6) over occipital, parietal and frontal areas; two lacerations of right ear; contusion over right mandible causing a fracture of the bone; and a 6cm stabwound of right gluteal region i.e. buttock. It was thus common cause at the trial that the appellant was injured on the day in question in the manner more fully set forth in his hospital records.

[5] The appellant also made certain admissions in terms of s 220 of the Act. The most relevant admissions for present purposes are the following: that the deceased was stabbed . . . on 18 December 2000; that the deceased died as a result of 'Penetrating incised wounds of the neck and chest'; and that the postmortem examination report correctly 'ascertains' the cause of death.

[6] The report on a medico-legal postmortem examination of the deceased records the following under sub-heading 'The Chief Postmortem Findings':

'1. Penetrating incised wounds of the neck and chest. 2. Incised wound of the aorta, with mediastinal haematoma.'

Under the sub-heading 'Injuries' the following is recorded:

'A 57 X 25mm penetrating incised wound of the anterior chest wall was present, 1355mm above the heel and lying directly over the midline . . . A 59 X 27mm penetrating incised wound was present over the lateral left neck, 1595mm above the heel . . . An 82 X 30mm incised wound present over the flexor aspect of the right forearm.'

[7] Before considering the issues argued before us, it is useful in my view to set out briefly the evidential background. Two witnesses were called to testify on behalf of the state, being Mr Thulisani Happy Mnguni (Mnguni) and Mr Logan Moodley (Moodley).

The appellant also testified in his defence. Mnguni testified that he was employed by the deceased as a taxi conductor. He was travelling in the deceased's taxi on 18 December 2000 which, at the time, was driven by Moodley and in which the deceased and the appellant were passengers. When he collected fares from the passengers, the appellant refused to pay his fare despite the fact that the deceased had asked him to do so. The appellant, instead, swore at the deceased and also punched him with a clenched fist. Mnguni then called out to Moodley to stop the taxi.

[8] When the taxi stopped Moodley opened the rear door and the deceased alighted and stood next to the taxi. The appellant also alighted, drew a knife from his pocket and stabbed the deceased three times in the left arm, left side of the neck and chest. The deceased collapsed and died. Mnguni then took a sjambok from the dashboard of the taxi and struck the appellant once with it. The appellant turned to him and he fled, fearing for his life. He enlisted the assistance of other taxi drivers in the immediate vicinity who chased the appellant, caught him and assaulted him. The police arrived and removed the body of the deceased to the mortuary. Mnguni denied under cross-examination that Moodley and the deceased had at any stage assaulted the appellant or pulled the appellant out of the taxi. But he conceded that he did not see the assault of the appellant by the taxi drivers.

[9] Moodley was the second witness called by the state. He testified that at the time of the incident he was the driver of the deceased's taxi which was travelling from Bonella to the market in Durban. En-route to the market he heard one of the passengers swearing. Upon his arrival at a drop-off point he opened the rear door of the taxi for the deceased to alight. As the deceased was about to do so the appellant who was seated on the back row of seats in the taxi pulled him back. After the deceased had eventually alighted from the taxi he went around to the sliding door on the side. When the sliding door was opened he and the deceased pulled the appellant out of the taxi. The appellant drew a knife and at that stage Mnguni struck him with a sjambok. The appellant then turned to Mnguni who ran away with the appellant in pursuit. All the while the deceased was standing next to the taxi.

[10] When the appellant abandoned his pursuit of Mnguni he returned to Moodley, brandishing his knife and chased him across the taxi rank. He too outran the appellant who then turned his attention to the deceased. A scuffle ensued between the deceased and the appellant during which the appellant stabbed the deceased. Thereafter the appellant ran away but was prevented from fleeing the scene by members of the public responding to Moodley's screams.

[11] They stoned the appellant, who at that stage, was in the taxi in which he had sought refuge. Police and paramedics were summoned to the scene and on their arrival the paramedics informed Moodley that the deceased had died. Under cross-examination he said that the appellant was asked to alight from the taxi but refused to do so. He and the deceased then pulled the appellant out of the taxi. When he came out of the taxi, the appellant, without uttering a word, pulled out a knife. He further said that no one had requested him to stop the taxi before it arrived at the market where he was to offload passengers. He reiterated that he and the deceased did not at any stage assault the appellant.

[12] The appellant testified in his defence. He told the trial court that he left his place of work at 17h00 and proceeded to West Street Durban where he had arranged to meet his ex-fiancée Ms Nicolette Houtton (Nicolette). After meeting Nicolette he withdrew money from an auto teller machine. They then proceeded to the Bonella Taxi Rank where they boarded a taxi home.

[13] En-route the conductor requested the passengers to pay their fares. He took out R5 from his wallet – to pay for his and Nicolette's fares – and also collected R2.50 from a fellow passenger who was seated on the same seat. The fourth passenger on his left informed him that her companion seated in the front would pay for her. At this stage the deceased nudged him on his shoulder and asked him to 'pass your fare forward'. He

ignored the deceased whilst he continued to talk to this lady. The deceased pushed him, and swore at him. He turned around towards the deceased and swore back at him. The deceased then punched him on the back of his head and at the same time shouted at Moodley to stop. He hit back by parrying the deceased's blows with his left elbow which provoked an altercation between them.

[14] When the taxi stopped and whilst he was in the process of alighting through the sliding door, he felt a blow with a hard object on his lower back which caused him to fall to the floor of the taxi. The deceased and Moodley pulled him out of the taxi. The deceased then struck him and he fell to the ground. Whilst he lay on the ground he was subjected to a sustained assault at the hands of the deceased, Moodley and Mnguni. He had no opportunity to either ward off the blows or flee from his assailants. He was repeatedly punched, kicked and struck with a sjambok all over his body.

[15] At some point Nicolette intervened by grabbing the sjambok from Mnguni. This presented him with an opportunity to get to his feet. He then drew a small knife from his pocket which he unfolded. In an attempt to keep his assailants at bay he, as he put it, 'lashed out' with his knife. This, however, did not deter his attackers who kept on advancing towards him kicking and punching him as he continued to 'lash out' with his knife. He was shocked to suddenly see blood gushing out of the deceased's neck. Prior to this it was not possible for him to flee as he was virtually pinned to the side of the taxi. On seeing blood gushing out of the deceased's neck Mnguni ran away across the road whereafter the beating ceased. He too walked to Nicolette. He was in a state of shock as he had not expected this unfortunate turn of events.

[16] Whilst he and Nicolette stood together awaiting the arrival of the police he saw what seemed to him to be a belligerent group of persons advancing towards them. Fearing for his safety he fled from that spot and took refuge in the taxi. The taxi was pelted with stones by the group of persons who had advanced towards him. He was struck only once with a brick on the side of his head behind the ear. He denied that he

at any stage chased Mnguni and Moodley with a knife as testified to by them. He went on to say that the deceased came to be stabbed not because he purposefully and consciously directed his knife at him but due to the fact that he was the most aggressive of the three assailants and thus in the forefront of the attack.

[17] In this court the conviction of the appellant was assailed on several grounds, the upshot of which was that the state's version was fraught with numerous and material contradictions and inconsistencies that rendered it unworthy of credence. It was argued that both the trial court and the court below seemingly rejected the appellant's version solely on the basis of probabilities despite the fact that no material discrepancies or inconsistencies in such version could be identified.

[18] Counsel for the appellant cited numerous passages from the appeal record which he contended showed material inconsistencies between the evidence of Mnguni and Moodley. More will be said about those inconsistencies later. Suffice it to mention at this juncture that counsel argued that the inconsistencies inherent in the state's version were at the heart of the crucial issue as to how the fracas inside the taxi started. Thus, so it was argued, they could not simply be brushed aside on the basis that given the passage of time between the occurrence and the trial such inconsistencies were to be expected.

[19] In an apparent reference to the discrepancies in the evidence of the two state witnesses the trial court in the course of its judgment said:

'[I]t is important when dealing with a matter like this that everything happened quite fast. It is therefore unreasonable to expect all the witnesses to remember everything in detail, what had transpired on the day of the incident. One must also keep in mind that memory fades as time goes by and to recall everything that happened in detail . . . on the 18th day of December 2000, that is to say more than two years ago, is unfair. It is therefore unreasonable to say that when witnesses did not corroborate one another on each and every respect, that they were telling lies. The two witnesses who testified on behalf of the State testified to the best of their abilities

what happened on the day in question. It must also be kept in mind that they had observed certain happenings from a different angle.'

[20] Later the trial court continued:

'The accused further wants the Court to believe that outside the taxi he was on the floor and assaulted. According to his evidence, the Court must accept that he was surrounded by three men who were kicking and [beating] him but strangely enough under those circumstances he managed to get on to his feet and while these person[s] were on top of him, the one armed with a sjambok and the other with an iron, he still managed to get his knife out of his pocket, to unfold it and then to wave it in front of him. What is further quite strange is that the man, the owner of the taxi with whom he had problems earlier, is the one who was so stupid to walk into this knife. The Court does not accept that version of the accused at all'.

I pause here to mention that the trial court furnished no further reasons for rejecting the appellant's version and accepting that of the state.

[21] On the other hand the court below in giving its extempore judgment said the following:

'Now the appellant described the knife as a folding knife, in my view the magistrate cannot be faulted in his rejection of the appellant's version. He found it strange that the appellant under those circumstances had managed to get onto his feet. While the deceased was on top of him with the driver and conductor on either side of him, he must have found it strange also that he, that is the appellant, was allowed by the three who were furiously engaged in assaulting him, he would have been allowed an opportunity to take out his knife out of his pocket, to unfold it, unless of course it had been unfolded in readiness in his pocket, and to flash it at them and finally to stab the deceased three times. The appellant was here not dealing with a single person, he was dealing with three huge assailants, one of whom was on top of him. I have no doubt in my mind that the magistrate took account of these unsatisfactory features in the appellant's version, which sought to explain the admitted stabbing of the deceased. Clearly the appellant would have been annoyed with the deceased who, as he perceived him, was taking an intrusive interest in whether or not he passed on the fare, which the appellant conceded to be no concern of the deceased, whose ownership of the taxi he did not know then. The magistrate rejected the appellant's evidence that he was assaulted by the deceased, Mnguni and Moodley, and that was the reason for the conviction which followed, and that they were

responsible for the injuries he sustained.'

[22] It went on to conclude that the trial magistrate was correct in rejecting the appellant's evidence that he was assaulted by the deceased. It attributed the cause of the injuries sustained by the appellant at the crime scene to the assault perpetrated by members of the public. The court below likewise furnished no discernible reasons as to why it considered the trial court's rejection of the appellant's evidence supportable on the conspectus of the evidence adduced at the trial.

[23] Before considering the thrust of the submissions advanced on behalf of the appellant in this court it will be useful to restate the basic principles that have a bearing on the issue of how evidence should be evaluated. It is trite that a trial court must adopt a holistic approach in evaluating evidence; have due regard to the mosaic of proof in its totality; and accord due weight to all the evidence in the light of the inherent probabilities of the case. (*See S v Hadebe & others* 1998 (1) SACR 422 (SCA) at 426 f-h). Where the fate of the trial hinges on probabilities it behoves the trial courts to bear in mind what was said by this court in *S v Shackell* 2001 (4) SA 1 (SCA) para 30:

'It is a trite principle that in criminal proceedings the prosecution must prove its case beyond reasonable doubt and that a mere preponderance of probabilities is not enough. Equally trite is the observation that, in view of this standard of proof in a criminal case, a court does not have to be convinced that every detail of an accused's version is true. If the accused's version is reasonably possibly true in substance, the court must decide the matter on the acceptance of that version. Of

course it is permissible to test the accused's version against the inherent probabilities. But it cannot be rejected merely because it is improbable; it can only be rejected on the basis of inherent probabilities if it can be said to be so improbable that it cannot reasonably possibly be true.'

[24] I return to the facts of the present appeal. It was argued that four cardinal issues arose for determination at the trial. These were how the altercation between the deceased and the appellant arose; who between the appellants and the deceased (and

possibly others), was the aggressor; how the stab wounds sustained by the deceased were inflicted; and whether there was a reasonable possibility that the appellant was in fact defending himself.

[25] As to the first question posed above it seems to me reasonable to conclude that the altercation between the appellant and the deceased was triggered by the appellant's failure – which the appellant testified was not a refusal – to pass on the fares that he had collected from some of his fellow passengers to the conductor. When the taxi was stopped the appellant was then pulled out of the taxi by both Moodley and the deceased. There is a conflict between the version of the state and that of the appellant as to what occurred next (once the appellant was out of the taxi).

[26] The appellant testified that as he stepped out of the taxi he was heavily assaulted by the deceased, Moodley and Mnguni and sustained multiple injuries to which reference has already been made. When an opportunity presented itself he drew a knife and 'started waving it at' his assailants. As to the injuries sustained by the appellant the court below accepted the evidence of Mnguni and said that:

'members of the public converged on the taxi and stoned the taxi and indeed assaulted the appellant. The appellant names the brick only as having been used to assault him. It is not inconceivable that there lies the answer for the injuries which the appellant sustained'.

This was a clear misdirection on the part of the court below for Mnguni confirmed that he had not witnessed the assault of the appellant by members of the public. Moodley's evidence did not shed light on this aspect either for all he could say was that the appellant 'did get injured in the van'. How and by whom the appellant's injuries were inflicted, the state, which bore the onus, was not able to clarify.

[27] The evidence of Mnguni and Moodley that the appellant was injured by members of the public was speculative. On the other hand the evidence of the appellant, that he was assaulted by the deceased and his cohorts in the manner testified to by him and sustained the injuries depicted in his hospital records, is

reasonably possibly true.

[28] Moreover the issue as to how the stab wounds sustained by the deceased were inflicted was similarly not addressed by both the trial court and the court below. In this court counsel for the appellant argued that whilst the postmortem report described the cause of death as 'penetrating incised wounds of the neck and chest' there is simply no evidence of the extent to which the wounds penetrated the body of the deceased. The doctor who prepared the report on a medico-legal postmortem examination of the deceased was not called presumably because of the admission of the content of the report by the appellant. In my view the doctor should have been called given what was put to Mnguni and Moodley on behalf of the appellant under cross-examination, namely that he merely 'lashed out' with his knife to keep his attackers at bay.

[29] In view of the serious shortcomings in the state's case, about which nothing more need be said in this judgment, save to remark that a careful reading of the appeal record reveals that there are numerous material discrepancies and contradictions between the two state witnesses who testified at the trial, all of which were merely glossed over by the trial court and the court below.

[30] Whilst I am not unmindful that Mnguni and Moodley testified as to events that occurred more than two years earlier – just as the appellant did – I am nevertheless of the view that the trial court did not give proper consideration to the contradictions inherent in their respective evidence. I mention some of those contradictions as were highlighted by counsel for the appellant. They are the following: (a) Mnguni testified that he asked Moodley to stop the taxi after observing the appellant and the deceased engaged in a violent confrontation whereas Moodley said he stopped the taxi on his own to off-load passengers; (b) Moodley said that the appellant pulled the deceased back into the taxi as the latter was in the process of alighting whereas Mnguni denied that such an incident ever occurred; (c) Moodley said he and the deceased pulled the appellant out of the taxi whereas Mnguni again denied that such an incident ever

occurred; (d) Mnguni said that after alighting from the taxi the appellant chased Moodley away and thereafter returned to stab the deceased whilst Moodley said that the appellant chased Mnguni away first before returning to the deceased and stabbing him. From this there can be no doubt that Mnguni and Moodley contradicted each other as to what precipitated the confrontation outside the taxi. The cumulative effect of the foregoing contradictions is such that they detract from the reliability of the state's case. What this then means is that the trial court should have considered the nature of such contradictions, their number and importance, and their bearing on other parts of the witnesses' evidence and given due weight thereto in reaching its verdict. See *S v Mkohle* 1990 (1) SACR 95 (A) at 98f-g.

[31] Given the nature, number and importance of those contradictions viewed in the context of the appellant's evidence it cannot be said that the probabilities favour the state's version. It therefore follows that the trial court should have entertained a reasonable doubt as to whether the state succeeded in proving that the appellant did not act in self-defence.

[32] In this court counsel for the state was, after some initial tentative attempts to support the conviction, constrained to concede that there were insurmountable hurdles in his path. He, for example, accepted that the doctor who conducted the postmortem examination on the deceased should have been called to testify in relation to his report; that expert medical evidence should have been adduced to determine whether the injuries suffered by the appellant were consistent with the assault testified to by the appellant; that the version of Mnguni and Moodley was such that, even if looked at in isolation, it was riddled with inconsistencies and contradictions that detract from its reliability; and, indeed, that the contradictions between the evidence of Mnguni and Moodley were material.

[33] It remains to deal with two issues. The first relates to the appeal record and the second concerns the heads of argument filed on behalf of the respondent. The appeal

record incorporated argument in the court below comprising 53 pages all of which were irrelevant to this appeal. This court has in the past expressed its displeasure at the habit of incorporating irrelevant material in appeal records as this creates unnecessary work. (*See Minister of Environmental Affairs and Tourism & others v Phambili Fisheries (Pty) Ltd: Minister of Environmental Affairs and Tourism & others v Bato Star Fishing (Pty) Ltd* 2003 (6) SA 407 (SCA) para 76.) When counsel for the appellant was quizzed on this aspect he professed ignorance of the import of the SCA rule 8(6)(j).

[34] Concerning the respondent's heads of argument they woefully fail to pertinently address the issues canvassed in the appellant's heads of argument. Counsel who drew the respondent's heads of argument (but did not appear at the hearing of the appeal) would thus do well in future to pay due heed to what Harms JA said in *Caterham Car Sales & Coachworks Ltd v Birkin Cars (Pty) Ltd & another* 1998 (3) SA 938 (SCA) para 37 in this regard:

'There also appears to be a misconception about the function and form of heads of argument. The Rules of this Court require the filing of main heads of argument. The operative words are "main", "heads" and "argument". "Main" refers to the most important part of argument. "Heads" means "points", not a dissertation. Lastly, "argument" involves a process of reasoning which must be set out in the heads. A recital of the facts and quotations from authorities does not amount to argument.'

[35] For all the aforegoing reasons therefore the appeal is allowed. The order of the court below is set aside and replaced with the following:

'The appeal succeeds. The appellant's conviction and sentence are set aside'.

X M Petse
Acting Judge of Appeal

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