# THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

**JUDGMENT**

NOT REPORTABLE

Case No: 20089/14

In the matter between:

**THEMBANI BAMBA** **APPELLANT**

and

**THE STATE** **RESPONDENT**

**Neutral citation:** *Bamba v S* (20089/14) [2014] ZASCA 219 (11 December 2014)

**Coram:** Shongwe and Swain JJA and Mocumie AJA

**Heard:** **27 November 2014**

**Delivered:** **11 December 2014**

**Summary:** Criminal law and procedure – circumstantial evidence – failure by the State to prove factual link between exhibits allegedly collected at scene and tested at ballistics laboratory – utmost care required of police in recovering, storing, recording and conveying exhibits – duty on prosecution to prove these elements.

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**ORDER**

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**On appeal from** Western Cape High Court, Cape Town (Nyman AJ, (Louw J concurring) sitting as court of appeal);

1 Special leave to appeal to this court against conviction is granted.

2 The appeal is upheld.

3 The order of the court a quo is set aside and substituted with the following:

'(a) The appeal is upheld.

(b) The order of the trial court is set aside and substituted with the following order:

"The accused is found not guilty and discharged".'

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**JUDGMENT**

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**Mocumie AJA (Shongwe and Swain JJA concurring):**

[1] This is an appeal against the conviction coupled with an application to lead further evidence. The appellant was charged in the Wynberg Regional Court with one count of murder. The State alleged that the appellant shot and killed Ludwe Golotile (the deceased), a 23 year old young man, on 20 January 2007. The appellant was legally represented at the trial and pleaded not guilty. In spite of his plea he was, however, convicted as charged and sentenced to 10 years' imprisonment. Not satisfied with his conviction and sentence, the appellant thereafter appealed against both conviction and sentence to the Western Cape High Court (Nyman AJ, Louw J). On 3 September 2013, the court a quo dismissed his appeal against the conviction, but altered the trial court's finding that he possessed the requisite intention to murder in the form of dolus directus to that of dolus eventualis. As a result, the court a quo remitted the matter to the trial court for sentencing afresh. However, before this process was completed, inexplicably, the court a quo entertained and granted an application by the appellant for leave to appeal to this court against his conviction, on 28 August 2013. By virtue of the fact that

the Superior Courts Act 10 of 2013 (the Act) repealed the Supreme Court Act 59 of 1959, as at 23 August 2013, the court a quo did not possess the requisite jurisdiction to do so. The special leave of this court was required.[1] Before us counsel for the appellant applied for special leave to appeal on the ground that the prospects of success were so strong that the refusal of leave would result in a manifest denial of justice. For the reasons set out below, dealing with the merits of the appeal, the grant of special leave to appeal is justified.

[2] I turn to the merits of the appeal. The appellant, Constable Khunjulwa Koboni and Constable Lulamile Galela (Galela) together with a number of other policemen, were on crime prevention operation/patrol duty in Samora Machel an informal settlement in Nyanga township, on the night in question. They came across a group of people standing in the street who then scattered in different directions into shacks along the street. Some of the people in the group threw rocks at the police. Galela testified that he lost sight of the appellant who had disappeared in amongst the shacks when he heard a gunshot. He then met up with the appellant in between the shacks and asked him whether he had fired a shot. The appellant replied that he had not, but there was an individual hiding amongst the shacks. They found this person seated behind one of the shacks. The appellant searched him but found nothing. They then returned to the road where the truck they were travelling in was parked. As they gathered with other police officers, Inspector Sebola, the team leader that night, asked them whether anyone of them had fired a shot. They all replied that they had not and then continued with their patrol of the area.

[3] Mr Mondi Golotile (Golotile), the brother of the deceased, stated that he and the deceased had run away from the police into different directions when he heard a gunshot. Shortly thereafter he saw the police coming from the direction the deceased had ran. A neighbour, Mr Themba Fondezi (Fondezi) told him that the police had shot his brother. Fondezi stated that

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[1] *Van Wyk v The State* (20273/2014) and *Galela v The State* (20448/2014) [2014] ZASCA 152 (22 September 2014).

after he saw the deceased run past his shack he heard a gunshot. When he looked out of the door, he saw two policemen walking in the direction the deceased had ran. After the police left, he went out of his shack and found the deceased seated and he lifted the deceased's head and a bullet head fell from the deceased's shirt. The deceased then gave a gasp and passed away, whereafter Golotile arrived on the scene.

[4] In his defence the appellant stated that he together with Galela had followed some of these people in amongst the shacks. As he entered the shacks he heard a gunshot. Because it was dark he could not tell from which direction the shot had come, he retreated to an open area to get to safety. Under cross-examination he stated that after he heard the gunshot he saw a person sitting down whom he thought was drunk. He asked this person who he was but he received no response. He did not search the person but instead said to Galela they must leave, which they did.

[5] A report made later that night to the station commander of Nyanga Police Station was that the deceased had been shot by the police. All the police officers who were on duty in that area were questioned and their firearms and magazines were confiscated by the operation commander, Captain Stephen Brian McEvoy. The matter was then handed over to the Independent Crime Directorate (ICD)[2] the following day for further investigations, by principal investigator Nkosiyedwa Booi (Booi).

[6] Seven semi-automatic firearms and six magazines which had been confiscated from the police officers concerned were handed to Booi which he placed in a safe at the ICD headquarters in Bellville. Booi then visited the crime scene on 21 January, but did not find anything. He revisited the area on 22 January where he met Golotile, who gave him a spent bullet which he referred to as a 'bullet point'. Golotile also pointed out where the bullet head, which Booi referred to as a 'cartridge case', was located as pointed out in photo A, on the photo of the scene, handed in as an exhibit.

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[2] Independent Crime Directorate is now known as the Independent Police Investigative Directorate (IPID).

[7] I turn to consider the manner in which Booi dealt with the exhibits he received, which were to be taken for ballistic examination. It must be accepted that the object of the ballistic examination was to ascertain whether the bullet head or cartridge was fired from any of the firearms belonging to the police officers concerned. The appellant's legal representative in the trial court did not challenge the conclusion made in the ballistic report that the projectile (bullet head) and cartridge examined by ballistics were matched to the appellant's firearm. What was challenged, however, was the link between these exhibits and the scene of the crime and specifically the reliability of the evidence connecting the projectile to the scene.

[8] Booi said he took the 'bullet point' to his unit headquarters at Bellville where he placed it in a safe and entered it in the ICD 1 register. He said it would have been placed in an exhibit bag with a serial number but he could not remember the number. He later identified a document as a copy of the ICD firearm register and said that the number in respect of the firearms, 6 magazines and 'a projectile and a fired cartridge' was ICD 46/2007 as well as Nyanga case number 52201/2007. He then repeated that ICD 46/2007 included 'a projectile and a fired cartridge'. He said he placed the firearms in one bag and 'the fired cartridge' in a different smaller plastic bag. He took these bags to the ballistic laboratory for a ballistic comparison between the firearms and the cartridge and the bullet head which Golotile gave to him.

[9] It is difficult to understand why Booi said he placed the cartridge in a separate plastic bag to take to ballistic laboratory, if he had already placed it in an exhibit bag, when he placed it in the safe. If this was not done, the real danger arises of confusion with other exhibits which may have been in the safe before. It is for this reason that exhibits must be sealed in exhibit bags with a specific reference number for safekeeping. The unreliability of Booi's evidence concerning the preservation and conveyance of the exhibits to the ballistic laboratory is starkly illustrated when the ballistics report is examined. This report was admitted by the trial court in terms of s 212 of the Criminal Procedure Act 51 of 1977 without calling the author. The relevant parts of this report read:

'On 2007-02-12 during the performance of my official duties I received a sealed exhibit bag with number **ICD-10230** marked inter alia "NYANGA CAS 522\01\07," "07WC 70" from Case Administration of the Ballistic Section, containing the following exhibits:

3.6 One (1) 9mm Parabellum calibre Republic Arms RAP401 semi-automatic pistol, serial number R 04275.

3.9 One (1) 9 mm Parabellum calibre Republic fired cartridge case, marked by me "13556/07 A".

3.10 One (1) 9mm calibre fired bullet, marked by me "13556/07 B".

8.1 There is sufficient agreement of class characteristics and individual characteristics, therefore the bullet and cartridge case mentioned in paragraph 3.9 and 3.10 were fired from/in the firearm mentioned in paragraph 3.6…' (My own emphasis).

The report patently makes no reference to ICD 46/2007. In addition contrary to Booi's evidence there was no separate bag for the projectile and cartridge. When the disparity between the ICD numbers was brought to the attention of counsel who appeared for the State, she fairly and properly conceded that no reliance could be placed upon the ballistic evidence.

[10] On the facts of this case this evidence was crucial in establishing the guilt of the accused beyond a reasonable doubt. In this regard, the trial court erroneously concluded that it was common cause that 'the fired bullet as well as the fired cartridge found at the scene were linked to and proved to have been fired by a firearm which had been issued to the accused by the South African Police'. The court a quo simply stated that 'a spent bullet head and cartridge that were allegedly found in the vicinity of the shooting, were handed to the investigating officer. Ballistic evidence linked the bullet head and cartridge to the appellant's firearm'. It did not, however, consider the reliability of the evidence to prove that these were the same exhibits which were subjected to ballistic testing.

[11] I turn to consider the remaining evidence led by the state. None of the witnesses saw the appellant or any police officer shoot the deceased. Although the appellant did not dispute that he was in the vicinity where the

deceased was found shot, he denied that he had discharged his firearm that night. He maintained that when he surrendered his firearm and magazine at the end of the operation, his firearm still contained its full complement of ammunition issued to him prior to the operation. As is evidenced from the record, there is no direct evidence to gainsay his version.

[12] In rejecting the appellant's denial that he was the person who shot the deceased, the trial court relied mainly ─ if not exclusively ─ on the results of the ballistic examination, concluding that the fired bullet head which killed the deceased, as well as the cartridge case were fired from the appellant's firearm. The trial court also made a finding that the only reasonable inference that could be drawn from the established and proven facts was that the person who fired the shot at the scene caused the death of the deceased; and that it was the appellant who fired this shot. The trial court also accepted the evidence of Golotile that he found the projectile and the cartridge at the scene of crime. It surmised that it would have been impossible for Golotile to have found the cartridge and projectile from anywhere else unless he had access to the appellant's firearm. For the reasons set out above, the trial court erred in concluding that the link between the exhibits subjected to ballistic testing and those allegedly found at the scene, had been established.

[13] What happened on the night in question is common cause. What is in issue is who shot and killed the deceased. The crux of the matter is then about drawing a reasonable inference from the proven facts. In *R v Blom*[3] this court observed:

'In reasoning by inference there are two cardinal rules of logic which cannot be ignored:

(1) The inference sought to be drawn must be consistent with all the proved facts. If it is not, the inference cannot be drawn.

(2) The proved facts should be such that they exclude every reasonable inference from them save the one sought to be drawn. If they do not exclude other reasonable inferences, then there must be a doubt whether the inference sought to be drawn is correct.'

[3] *R v Blom* 1939 AD 188 at 202-203.

[14] Applying the test to the facts of this case, in the absence of the ballistic evidence linking the appellant's firearm to the bullet head and fired cartridge allegedly found at the scene, in substance, the inference that the trial court sought to draw was not the only inference to be drawn from the proven facts.

[15] It is trite that the prosecution must prove its case beyond a reasonable doubt. 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.[4] For the reasons set out above the appellant's version is reasonably possibly true. Simply put, a reasonable doubt exists as to the appellant's guilt and the appellant must be afforded the benefit of that doubt

[16] This brings me to the application by the appellant for the matter to be remitted to the trial court for the hearing of further evidence. After counsel for the State conceded that no reliance could be placed upon the ballistic evidence, counsel for the appellant abandoned the application. This was because the further evidence was aimed at establishing that the appellant had in the past fired several warning shots in the informal settlement, to explain the alleged presence of the bullet head and cartridge at the scene.

[17] Lastly, what this case illustrates is that the utmost care must be taken by the police particularly investigating officers in the recovery, storing, recording and conveying of ballistic exhibits which is to be subjected to ballistic examination. In addition, the state must ensure that the requisite evidence to prove these requirements is led. This is to avoid material discrepancies seen throughout the entire proceedings in the trial court.

[18] In the light of the conclusion I have reached, the appeal ought to succeed.

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[4] *S v Shackell* 2001 (4) All SA 279 (A).

[19] In the result, the following order is granted:

1 Special leave to appeal to this court against conviction is granted.

2 The appeal is upheld.

3 The order of the court a quo is set aside and substituted with the following:

‘(a) The appeal is upheld.

(b) The order of the trial court is set aside and substituted with the following order:

“The accused is found not guilty and discharged”.’

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B C MOCUMIE

ACTING JUDGE OF APPEAL

Appearances

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|---|---|
| For the Appellant: | P V Higgo<br>Instructed by:<br>Parker & Khan Inc, Lansdowne<br>E G Cooper Majiedt Inc, Bloemfontein |
| For the Respondent: | Ms M Engelbrecht<br>Instructed by:<br>The Director of Public Prosecutions, Cape Town<br>The Director of Public Prosecutions, Bloemfontein |