

A453/2012

IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE NUMBER:

A453/2012

5 **DATE:**

2 NOVEMBER 2012

In the matter between:

PHUMLANI NZIMA

Appellant

and

10 **THE STATE**

Respondent

J U D G M E N T

NYMAN, AJ:

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The appellant, Phumlani Nzima, who was legally represented was convicted of murder and possession of a firearm in the Cape Town Regional Court on 12 October 2011 and he was sentenced to 10 years imprisonment, both counts having been
20 taken together as one for the purpose of sentence. Leave to appeal against the conviction was granted by the trial Court.

On the evening of 30 July 2009, Mbosikhaya Mbanbandiso ("the deceased") had an altercation with the appellant which
25 resulted in the firing of a fatal gunshot wound to the head of
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the deceased.

At the trial, the State relied on the evidence of Linda Stikhela ("Stikhela"), a single witness, to prove that the appellant had
5 fired the shot that killed the deceased.

Stikhela testified that on the evening of 30 July 2009, he and the deceased, his brother, paid a visit to Daniel's Tavern ("the tavern") in Joe Slovo informal settlement ("Joe Slovo").
10 Stikhela stated that whilst the deceased was running in the street outside the tavern to buy electricity, the appellant attempted to trip the deceased. Thereafter, Stikhela and the deceased returned to the tavern, whereupon they came across the appellant (Accused 2) and Andile Dabadane ("Dabadane",
15 Accused 1).

The deceased told the appellant to desist from what he had done earlier and, furthermore, told the deceased he was also staying in Joe Slovo. The appellant then pushed the deceased
20 and swore at him and left the tavern.

Five minutes later, when the deceased and Stikhela were outside the tavern, the appellant arrived with a firearm and started shooting at them. Stikhela heard the appellant firing
25 four shots. Stikhela and the deceased ran in the direction of

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the door of the tavern. He heard the appellant firing more shots. Stikhela managed to get inside the tavern, but the deceased failed to get inside because the people inside the tavern pushed the door closed. When Stikhela went outside
5 again, he saw the deceased falling and the appellant and Dabadane running in the direction where the deceased fell. Stikhela went to where the deceased was lying and found him dead.

10 Detective Constable Shaun van den Heever ("Constable Van den Heever") testified that he had arrested Dabadane after an informer had pointed him out as one of the suspects. Constable Van den Heever put him in the boot of his vehicle. At their arrival at the police station, Constable Van den Heever
15 opened the boot and saw Dabadane throwing something into the corner of the boot. Upon inspection, he found a point 38 black revolver loaded with 5 live rounds. Constable Van den Heever interviewed Dabadane who told him that he had received the firearm from the appellant.

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After conducting a trial within a trial, the Court *a quo* made a ruling that a statement that Dabadane had made to the police after his arrest, was admissible. In the statement, Dabadane stated that the appellant had given him the firearm that
25 Constable Van den Heever had found in the boot of his

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vehicle. The appellant testified that on the night of the shooting, he and his friend named Moosa, were walking on their way to buy electricity. Moosa went inside the tavern and after a while, the appellant also went inside the tavern. The
5 appellant met the deceased to ask him for the whereabouts of Dabadane. The appellant replied that he did not know of Dabadane's whereabouts, whereupon the deceased smacked him twice.

10 The appellant went outside the tavern and the deceased followed suit. The deceased then took out a gun from the waist of his pants and ran towards the appellant and asked him the same question. The police van arrived and the deceased hid the firearm in the waist of his pants. The appellant then
15 used this opportunity to run away from the deceased. The deceased did not follow him. Moosa joined the appellant and they went to buy electricity. That evening, the appellant went to sleep at his friend's house. The following morning, the deceased's relatives fetched the appellant, took him by taxi to
20 the deceased's house, and gave him a beating.

In its judgment, the trial Court expressed the view that what is an issue is whether both the accused possessed the firearm and ammunition and participated in the shooting of the
25 deceased as alleged by the state witnesses, and denied by the

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accused. The trial Court was of the opinion that in its determination of the issue, the Court has to:

5 "...assess the totality of the evidence to determine which version to accept, taking into account the credibility of all the witnesses, the nature of the State's case, the nature of the defence's case and the probabilities emerging there from".

10 The trial Court noted that, with regard to the actual shooting, the State placed reliance on the evidence of Stikhele who was a single witness, therefore Stikhele's evidence has to be approached with caution and may only be accepted if it is clear and credible on all material aspects. In its assessment of
15 Stikhele's evidence, the Court found him to have been:

20 "...an honest witness, because he was not prepared to strengthen evidence against the accused. He conceded out of his own that the incident occurred at night when it was dark and the area is usually well lit by streetlights and an overhead light at the tavern as depicted in the photographs".

A further concession made by him was that when the two
25 accused first came they "came from the side that was dark and

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then into the lit area where they could be seen". He testified that he knows both the accused well and could identify them. He was honest in his evidence when he stated that it was only the appellant who carried a firearm and had shot at the
5 deceased.

In the trial Court's opinion, the manner in which Stikhele testified was satisfactory and it found no improbabilities in his version. The trial Court also accepted Constable Van den
10 Heever's version that stood up to the lengthy cross-examination. The trial Court rejected the appellant's version on the basis that it did not make sense. Even though on his version, the deceased assaulted him twice. He did not retaliate but merely walked away from the deceased, despite
15 the fact that the deceased took a firearm, he did not run to the police for protection or made a report to the police.

In the appeal it was submitted on behalf of the appellant that the Court *a quo* erred in accepting the evidence of Stikhele on
20 the grounds that his evidence in respect of the shooting was not satisfactory in every respect mainly that, firstly, he first testified that he saw the appellant shooting the complainant and later on he testified that he did not in fact witness the actual shooting. Secondly, he testified that the lighting was
25 poor outside the tavern. Thirdly, he testified that a brief

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altercation took place prior to the shooting, but yet it was the appellant who was in fact the aggressor.

In my view, I find no merit in these submissions. The record of the proceedings shows that Stikhele had testified that when the appellant returned after the altercation with the deceased, he stood in front of them and he was shooting at them. This time of the shooting should therefore be distinguished from the time when the deceased was shot, which Stikhele did not witness. In my opinion, this does not constitute a contradiction. I therefore do not find this ground of appeal sustainable.

I am unable to uphold the second ground of appeal, that it was Stikhele's evidence "that the lighting was poor outside the tavern". The record shows that Stikhele had testified that although the street lights were not lit the evening of the shooting, the tavern light was on. This light was at the front of the tavern. From the proven facts, the shooting occurred in front of the tavern and therefore there was sufficient light for Stikhele to witness the shooting at him and the deceased.

In my opinion, Stikhele's evidence that a brief altercation took place prior to the shooting, does not contradict his evidence that the appellant was the aggressor. The description of the

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incident as an altercation describes the nature of the exchange while the identification of the appellant as the aggressor describes the nature of the altercation in greater detail. In S v Webber, 1971 (3) SA 754 (A) 758g-h, the Court held that it is impossible to establish a formula for evaluating the evidence of a single witness, however it is necessary to approach such evidence with caution. The good qualities of such evidence should be balanced with all the factors that will negate the credibility of the witness. It is further necessary to compare the quality of the evidence of the complainant with that of the appellant (See: Marke v DPP, 2011 (1) ALL SA 468 (SCA) 628.). In my view, on the consideration of the totality of the evidence, I find that the State has proven its case beyond a reasonable doubt.

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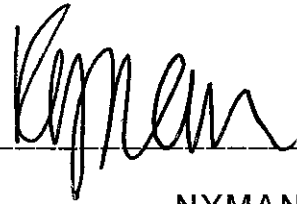
The ballistics report indicated that the bullets that were found in the firearm match the cartridge that was found in the head of the deceased. The State proved beyond a reasonable doubt that the appellant used this firearm to shoot the deceased. The evidence of Stikhele placed the appellant at the scene of the shooting and as the person who had fired the shot that killed the deceased.

In the result I would dismiss the appeal and confirm the two convictions.

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NYMAN, AJ

5 I agree. The following order is made:

The appeal against the convictions is dismissed. The convictions by the Court *a quo* are confirmed.

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GAMBLE, J