

SOUTH GAUTENG HIGH COURT, JOHANNESBURG

Registrar Ref. No: 247/2007

DATE:31/03/2010

In the matter between:

THE STATE

versus

ALPHEUS PHUTHI MATLALA

Accused

MEYER, J

[1] The accused, Mr. Alpheus Phuthi Matlala, has been arraigned for trial on an indictment containing one charge of the murder of the late Mr. Daniel Matome Bopape ('the deceased') on 2 May 2007 at or near Sandton Drive, Hurlingham.

[2] Adv. Stellenberg represents the state and the accused is represented by an attorney and by Adv. Dreyer. The accused pleaded not guilty to the charge of murder and he elected not to furnish a plea explanation. He made formal admissions in terms of s 220 of the Criminal Procedure Act 51 of 1977

(exhibit 'A') *inter alia* relating to: the identity of the deceased; the date and place of the death of the deceased; that the body of the deceased sustained no further injuries from the time of his death until a *post-mortem* was conducted; the correctness of the findings of the *post-mortem* examination conducted by Dr. Nicola Lee Jessop on the body of the deceased as recorded in exhibit 'B', except for paragraphs (iv) and (v) of the report; the correct depiction of the scene of the crime in the photo album, key and sketch plan and the correctness of the photographs taken during the *post-mortem* examination (exhibit 'C'); the firearm licence of the accused (exhibit 'D'); the correctness of certain ballistic tests and the findings in respect thereof relating to the accused's firearm (exhibit 'E'); the death of the state witness, the late Mr. William Mosete, on 15 September 2009 as a result of natural causes and the correctness of his death certificate (exhibit 'F').

[3] The State called three witnesses. They are: Mr. Solomon Mathaba, who was an eyewitness to the incident; Capt. Tshililo Edson Khalushi, who is the investigating officer, and Dr. Nicola Lee Jessop, who is a pathologist and who conducted a *post-mortem* examination on the body of the deceased. The witness statement made by the late Mr. William Mosete was admitted as evidence before the state closed its case (exhibit 'G'). The accused testified. He also called Mr. Samuel Skokota as a witness. His case was then closed. The investigating officer, Capt. Khalushi, was recalled as a witness due to certain allegations that were made against him by the accused when he testified and with which allegations the investigating officer was not confronted

when he testified. Adv. Dreyer, on behalf of the accused, did not object to the recalling of the investigating officer and conceded that it was advisable.

[4] It is common cause that Mr. Solomon Mathaba ('Solly') sells liquor and cigarettes at a park on Sandton Drive, Hurlingham ('the park'). Solly testified that the deceased and his friends, who were Mr. Zoliswa Kuwane ('Zoliswa'), Mr. George Sphombo ('George'), and the late Mr. William Mosete ('William'), were sitting and drinking beer at a parking area in the park during the early evening on 2 May 2007. Solly, his wife, and their child were also seated with them. It was just after 7:00 pm when the accused arrived to buy cigarettes. He asked to speak to the deceased. The two of them walked a distance away. They remained within Solly's sight, but he was unable to overhear their conversation. The deceased rejoined his friends and the accused left. A few minutes later the accused returned to the park in a Jetta motor vehicle, which he parked about 5 – 6 metres away from where the deceased and those in his company were seated. The accused alighted from the motor vehicle armed with a firearm in his hand which he pointed at the deceased. Those who were seated with the deceased moved away. The accused opened the boot of the motor vehicle and told the deceased to get into the boot. He said he wanted to take the deceased to the police station. The accused fired a shot. Solly testified that he is not certain whether it was fired into the air or into the ground. The deceased turned to run away immediately after the firing of this shot. The accused fired a second shot. The deceased fell to the ground. Solly testified that this shot was aimed at the deceased. The accused told

Solly and the others that he was going to the police station and that it had nothing to do with them.

[5] The investigating officer, Capt. Khalushi, testified that George and Zoliswa attended this court on the previous occasions when this matter was on the roll in April and again in June 2009. They have no fixed addresses and are unemployed. Capt. Khalushi previously traced them by going to public places where liquor is consumed. Capt. Khalushi testified that he attempted to trace George and Zoliswa for the purpose of the present hearing, but he was unable to find them. They disappeared. It is common cause that William had died. George, Zoliswa, and William are reflected as witnesses on the state's list of witnesses.

[6] Dr. Nicola Lee Jessop is a Fellow of the College of Forensic Pathologists and she conducted a *post-mortem* examination on the body of the deceased on 3 May 2007 (exhibit 'B'). The cause of death in her opinion was a gunshot wound to the chest with blood loss. In terms of her *post mortem* findings the entrance gunshot wound was on the posterior aspect of the left shoulder. It was 7,5 cm below the shoulder line and 17 cm from the midline. The entrance gunshot wound measured 1,3 cm x 1,3 cm with a concentric collar of abrasion. A spent bullet was recovered in the right anterior chest. The gunshot wound tract involved the left back chest wall in the third rib (the bullet went through and perforated the third rib), both lungs, the aortic arch and the left subclavian artery (they are two of the main blood vessels in the chest cavity), and the right front chest in the second intercostal

space where the spent bullet lodged in the sub-cutaneous tissue (under the skin). The gunshot wound tract was from the left back to the right front and downwards.

[7] The hearsay evidence contained in the witness statement made by the late Mr. William Mosete to Capt. Khalushi on 1 April 2008, was admitted as evidence in terms of s. 3(1)(c) of the Law of Evidence Amendment Act 45 of 1988 before the state closed its case (exhibit 'G'). He was according to Solly and according to his statement also an eyewitness to the incident. It appears from the statement that William was 41 years old and employed by Tara Hospital, Sandhurst in the capacity of property caretaker at the time when he made it. The statement reads:

'On Wednesday 2nd May 2007 at about 19:45 I was in the Park with Solomon Mahtomola Mathaba. Solomon was selling liquor. The late Bopape Daniel was drinking some beers with his friends. Phuti Alpheus Motlala arrived and called the late Bopape Daniel about hundred meters (100 m) from the place were sitted (*sic*). I didn't hear what they were discussing with the deceased Bopape Daniel Matome.

After a short time the same Phuti William Matlala came driving a car (Jetta). He parked his vehicle next to us. He got out of his vehicle with a firearm in his hand. He instructed the deceased to get into the boot of his car. The deceased refused to get into the boot. He stood up from where he was with the intention to run away. Phuti Alpheus Matlala shot two bullets to the deceased. The deceased ran away for a distance after he was shot and fell down.

After the shooting Phuti Alpheus Matlala said to us that he was going to Morningside Police Station to report the matter. Solomon Mathaba took me with his car and he dropped me where I stay.'

[8] These are my reasons for the admission in evidence of William's witness statement. This being a *criminal trial* I was mindful of the caution that 'a Judge should hesitate long in admitting or relying on hearsay evidence

which plays a decisive or even significant part in convicting an accused, unless there are compelling justifications for doing so.’ Per Schutz, JA in *S v Ramavhale* 1996 (1) SACR 639 (A), at p 649 d – e. The true test for the evidence to be admitted is ‘whether the interest of justice demands its reception.’ *S v Shaik and Others* 2007 (1) SA 240 (SCA), at p 299C. The *nature of the evidence* relates to an eyewitness account of the events at the park on the evening in question. The account incriminates the accused. I should mention that the accused’s version foreshadowed in the cross-examination of Solly and of Capt. Khalushi is a denial that William was present at the park at the time of the incident. It was suggested to Capt. Khalushi that Solly and William discussed the matter before their statements were made, but Solly was not confronted with such suggestion. These are, however, issues that should be determined on the totality of the evidence. The *purpose for which the state sought the admission of the disputed statement* was essentially to strengthen the state case by corroborating material aspects of the evidence of the only eyewitness who testified at the trial. An accused may, of course, in terms of s 208 of the Criminal procedure Act 51 of 1977, be convicted of any offence on the single evidence of any competent witness. The *probative value of the disputed statement* depends on the credibility of William at the time of making the statement. Capt. Khalushi testified that William, the deceased, and the accused were unknown to him. The statement was taken in his office. Only he and William were present. They communicated in Sepedi, which was William’s language. Capt. Khalushi wrote down in English what William had said to him. He read it back to William after it had been taken and William confirmed his

satisfaction with the content thereof. William signed the statement and it was commissioned by Capt. Khalushi. It is accepted on the unchallenged evidence of Capt. Khalushi that the statement accurately reflects what William told Capt. Khalushi. Corroboration and guarantees for the reliability of the contents of William's statement were to be found in the evidence of Solly and, most importantly, in the medical evidence and opinions of Dr. Jessop. William's statement is in all material respects corroborated by the evidence of Solly. Dr. Jessop expressed the opinion that the gunshot wound sustained by the deceased – from the left back to the right front and downwards – is consistent with the the deceased turning and running away. The evidence under consideration seemed reliable. This conclusion was only based on the evidence presented by the end of the State case. The *reason why William was not called as a witness* was because he had died of natural causes on 15 September 2009 (exhibit 'F'). The aspect of *prejudice to the accused which the admission of the hearsay could entail* was not a consideration in this instance that militated against its admission. Solly's evidence and that contained in William's statement are essentially similar and Solly was cross-examined on behalf of the accused. The conflicting accounts of the state and of the defence were also put to Dr. Jessop. I accordingly concluded that it would be in the interests of justice to admit William's statement in evidence.

[9] The accused testified that on the evening in question he arrived at the park in his motor vehicle to buy cigarettes from Solly. It was around 19h45. The accused parked his motor vehicle about 8 metres from where the incident took place. Solly, his wife, their child, Zoliswa, and the deceased were sitting

around a fire under a tree. When he arrived he overheard the deceased saying: 'There he is.' The deceased approached the accused and called Zoliswa to accompany him. The deceased appeared drunk and aggressive. He swore at the accused and threw a bottle at him. Zoliswa did not say anything. The accused stepped backwards. When the deceased reached the accused and was next to his left side, the accused pushed the deceased with his left hand or left forearm against the chest away to the side. The accused retreated further and pulled out his firearm with his right hand. The deceased was about one and a half metres away from the accused and on his left side and Zoliswa was about two and a half metres away from him on his right side when the accused fired a first shot. This happened about five metres away from the tree where the deceased and his friends had sat earlier. The accused noticed that the deceased 'was pulling something from his waist (the front part of his trousers). He retreated further and fired another shot into the ground right between the deceased and Zoliswa who were at that stage about two and a half metres away from each other and facing the accused. The surface was even or level grass. The deceased turned around and ran towards a tree where he picked up a plastic bag and ran away. Zoliswa also ran away. The time lapse between the two shots was about fifteen seconds. The accused got back into his motor vehicle to go home. On the way he changed his mind and decided to report the matter to the Morningside Police Station. He accompanied police officers to the scene of the incident. The deceased was lying on the ground approximately 60 metres away from where the accused fired the shots.

[10] The accused did not make a favourable impression upon us as a witness. There are material contradictions in his evidence and between his evidence and what had been put by his counsel to state witnesses. Other material aspects of his evidence were not put to state witnesses.

[11] The accused's initial evidence in chief that he pushed the deceased away before he fired the first shot is contradictory to what was put to Solly when he was cross-examined. It was put to him that the deceased shouted at him and threw beer bottles at him when he approached to buy cigarettes; that the deceased and Zoliswa approached him; that he retreated while they were approaching him and he told them to stop; that he drew his firearm and fired a warning shot into the ground; that it then appeared to the accused as if the deceased drew something from his belt while he proceeded towards the accused; that the accused pushed the deceased away with his left hand; and that he then fired a second warning shot into the ground. When the contradiction was brought to the attention of the accused while he was still testifying in chief, he replied that he fired the first shot before he pushed the deceased away and he then changed his evidence to that he pushed the deceased to his side before he fired the first shot.

[12] Under cross-examination the accused said that he did not say anything to the deceased and Zoliswa. He was confronted with his version that was put to Solly that he told them to stop while they were approaching him. He then changed his evidence by saying that he enquired from them what they were trying to do. Later on under cross-examination he said that he enquired

this from them after he had fired the first shot. Under re-examination he said that he enquired from them what they intend to do before he fired the first shot.

[13] The accused vacillated between a statement of fact, namely that he noticed that the deceased was taking out something from his waist, and one of perception, namely that it appeared to him 'as if' the deceased was taking something from his waist. The accused, however, did not see anything in the hand of the deceased, neither before nor after he fired the second shot.

[14] The accused testified that on his way home he decided to report the matter to the Morningside police station. He denied that he told Solly and the others that he was going to the police station to report the matter. Yet, Solly's evidence that the accused told them that he was going to report the matter to the police was not challenged when he was cross-examined.

[15] The accused denied any friendship between him and Solly or that they ever visited each other as friends. He testified that he was merely a customer of Solly. Yet, the evidence of Solly that he considered the accused as a friend since the year 2000 and that they used to visit each other was not challenged when he was cross-examined.

[16] The unchallenged evidence of Solly is that there was never any animosity between him and the accused. But under cross-examination the accused suggested otherwise and referred to an incident when Solly had told

him to leave the place where Solly is trading since the accused according to Solly was taking customers away from him. Solly was not confronted with this when he was cross-examined.

[17] The accused denied that William was present at the time of the incident. He testified that William approached him at his residence around May 2008 'to confirm' that he was not at the scene and 'to apologise' for having become involved in the matter although he was not present when it happened. William told him that a police officer promised them money. He promised the accused that he would pay him R15, 000.00 if a court finds him guilty, because he was sorry about his actions. William told the accused that Solly, George, Zoliswa, and he 'held a meeting' or meetings when they discussed this matter. The accused called his neighbour, Mr. SE Skokota, to witness what William had said to him and William repeated what he had told the accused in the presence of the neighbour. The accused then asked William to leave, which he did. The accused's version in this regard was confirmed by Mr. Samuel Skokota when he testified on the accused's behalf.

[18] We find it improbable that William, who the accused testified he only knew by sight from the area where they resided and that they were not friends, would have gone to the accused and made such self-incriminating disclosure and undertaking to him. The allegations of meetings that were allegedly held by Solly, of collusion between *inter alia* Solly, William, and a police officer, and of a police officer who promised them money were not put to Solly when he was cross-examined. Such allegations were also not put to

Capt. Khalushe when he initially testified. He is the only investigating officer in this matter and he did not have an assistant in the investigation. Such allegations were only put to him when he was recalled after the close of the accused's case. They were denied by him.

[19] The accused testified that he was approached by Capt. Khalushe at his residence a week after he was released on bail. On this occasion Capt. Khalushe made what amounts to a corrupt proposal to him. This was not put to Insp. Khalushe when he initially testified and the accused's attempt at explaining why Capt. Khalushe was not confronted with these allegations is not plausible. He said that he told his first attorney about this. He did not tell his second attorney about this, because he thought these aspects were recorded in the documents that were handed over to his second attorney. The accused, however, has only been represented by one counsel and he testified that he consulted with her a number of times and he had adequate opportunity of telling her everything that he needed to tell her. The allegations relating to Capt. Khalushe's alleged corrupt approach to the accused were only put to him when he was recalled after the close of the accused's case. He testified that he had been an investigating officer for about 13 years. He did not know the deceased, the accused, or any of the other state witnesses. He investigates about five new murder cases per month. The present matter was one in the ordinary course. He denied the accused's allegations of corrupt and improper conduct on his part. He testified that he only attended at the accused's residence to confirm his address. The only occasion upon which he heard of these allegations was here in court. The alleged corrupt

approach occurred almost three years ago. Even though the accused reported the refusal of Capt. Khalushe to hand back his identity book to Capt. Khalushe's Station Commander, he did not report Capt. Khalushe's alleged corrupt conduct. This he did not do despite his firm belief that criminals should be brought to book and anything suspicious should be reported. His explanation for not having laid a charge against Capt. Khalushe, namely that he thought that Capt. Khalushe would come back to him and that he was waiting for more evidence, is simply not plausible.

[20] The accused testified that he had seen the deceased once before the incident when the deceased accompanied by *inter alia* Zoliswa tried to sell him a computer at the sports centre at the park about four to five months prior to the date of the incident, and he had otherwise seen Zoliswa about five or six times when he bought cigarettes from Solly. The accused testified that he enquired from the deceased from where he had obtained the computer. The deceased was unable to tell him and the accused accordingly informed a security guard about the deceased and those who were in his company. The accused ascribed the deceased's aggressiveness towards him on the evening in question to this incident. Solly's unchallenged evidence was that he had frequently seen the accused and the deceased in each other's company.

[21] I have mentioned that Dr. Jessup expressed the opinion that the gunshot wound sustained by the deceased – from the left back to the right front and downwards – is consistent with the state version of the deceased turning and running away. She also expressed the opinion that the gunshot

entrance wound sustained by the deceased is inconsistent with the version of a ricochet bullet. The deceased sustained a typical or common gunshot entrance wound. One with irregular or atypical features is consistent with a ricochet bullet entrance wound since the bullet is already deformed before it hits the body.

[22] Approaching the evidence of Solly with the required caution that should be applied to the evidence of a single witness, we have no reservation in finding on the totality of the evidence that he was a credible witness and that his evidence is satisfactory in all material respects and reliable. His evidence is corroborated by the medical evidence and opinion expressed by Dr. Jessup. Our conclusion with regard to the evidence of Solly remains unaltered whether or not any weight is attached to the hearsay evidence contained in the statement of William. Capt. Khalushe was an impressive witness and his evidence is reliable.

[23] The totality of the evidence, in our judgment, proves beyond reasonable doubt that the accused gave a false explanation of the fatal assault that he committed on the deceased. He attended at the park twice. He was neither attacked nor threatened. When he arrived on the second occasion with his motor vehicle his main aim was to deprive the deceased of his liberty. He was armed with a firearm. The inescapable and only reasonable inference drawn from the accused's conduct and from all the circumstances in which the crime was committed is that when the accused fired the second shot at or in the direction of the deceased at a stage when he

was trying to get away from the accused's threatening deadly force, the accused foresaw the possibility of his act resulting in death to the deceased, and he persisted in it, reckless of whether death ensues or not. He acted with *dolus eventualis*. His guilt of the murder of the deceased has on the totality of the evidence been proved beyond reasonable doubt.

[24] In the result the accused is found guilty of the murder of the late Mr. Daniel Matome Bopape.

P.A. MEYER
JUDGE OF THE HIGH COURT

31 March 2010