

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

CASE NUMBER:

A596/2008

5 **DATE:**

13 AUGUST 2010

In the matter between:

DIGBY THOMPSON

Appellant

and

10 **THE STATE**

Respondent

J U D G M E N T

15 **BAARTMAN, J:**

[1] The Magistrate at Bellville convicted the appellant on one count of murder, one count of infringement of Section 2 of Act 75 of 1969 (illegal possession of a firearm, one
20 infringement of Section 36 of Act 75 of 1969 (illegal possession of ammunition) and a fourth count of pointing of a firearm. The magistrate sentenced the appellant to an effective term of eight years direct imprisonment. This is an appeal against the convictions in respect of
25 the counts of murder and the pointing of a firearm.

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[2] In his application for leave to appeal against his conviction, the appellant also sought leave to lead new evidence. The court *a quo* granted leave to lead new evidence and heard the further evidence. It is therefore
5 necessary to first deal with that application and thereafter with the merits of the appeal. However, I first set out the facts that were not in dispute at the trial as that leads to a better understanding of the application to lead further evidence.

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BACKGROUND

[3] The appellant and Francina Julius (**the deceased**) cohabited in Parow in the Western Cape, during
15 November 1997. They were not married to each other. The deceased, who was married to a third party, had a minor daughter, Rosemary Julius (**Rosemary**) who lived with her father in Elsies River also in the Western Cape.

20 [4] Rosemary spent the weekend of 2 November 1997 with the deceased at the residence she shared with the appellant. She was 13 years old at the time. Rosemary arrived at the residence on the Saturday morning. It was common cause that there was a braai at the residence
25 that Saturday evening and that the deceased was fatally

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wounded in the early hours of the Sunday morning.

[5] The shot was fired from a home-made zip gun. The appellant had taken the gun from a cupboard in their bedroom, his and the deceased's, prior to the incident and was in possession of it when the shot went off. The appellant and the deceased, as well as Rosemary, were in the passage between the bedroom and the lounge when the shot went off. At that stage, some of their guests were still in the lounge.

[6] The appellant and Rosemary were the only witnesses to the shooting incident. The appellant, at the trial, indicated that he had no memory of the shooting incident because he had consumed a large quantity of alcohol together with flu medication. According to the appellant, the guests and members of the public assaulted him after the shooting and that assault contributed to his memory loss. Therefore, Rosemary was a single witness to the shooting incident.

[7] After undergoing an operation on 2 November 2008, the appellant allegedly regained his memory and therefore applied to lead the evidence regarding his version of the shooting incident.

The application to lead new evidence

5 [8] The appellant alleged that he had regained his memory after the second of two operations he had undergone after doctors had diagnosed him with cancer. He alleged that he regained a clear memory of the shooting incident after the 2 November 2008 operation.

10 [9] A court faced with an application to lead new evidence on appeal will only allow such an application in exceptional circumstances. The principles guiding an application to lead further evidence in such circumstances are: (See **Principles of Evidence 3rd Edition Schwikkard and Van der Merwe** at 438).

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“(a) There should be some reasonably sufficient explanation, based on allegations that may be true, why the evidence which it sought to lead was not led at the trial.

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(b) There should be a prima facie likelihood of the truth of the evidence.

(c) The evidence should be materially relevant to the outcome of the trial.”

25 [10] Counsel for the State accepted that the applicant had

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met the requirements referred to in paragraphs (a) and (c) above, although further argued that the court *a quo* had erred in allowing the evidence because the appellant had not established a *prima facie* likelihood of the truth of the evidence. Counsel was sceptical of the possibility that the appellant could have regained his memory in the circumstances alleged. The latter argument may not be without merit.

5 [11] However, I cannot agree with counsel's criticism of the magistrate for having accepted the evidence. The likelihood of the truth was dependent upon factors such as credibility findings that the magistrate could only make after receiving the evidence. In the circumstances of this matter, in my view, it was in the interest of justice to have allowed the further evidence. I am satisfied that the magistrate correctly allowed the further evidence and that the further evidence forms part of the record for consideration in this appeal.

20 **The new evidence led by the appellant**

[12] The appellant testified and gave the following version of the shooting incident:

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- 5 (a) He and the deceased had allowed a friend to have a braai at their residence on the Saturday night. The braai commenced at approximately 17h00 on the Saturday night. Several people were at their residence.
- 10 (b) However, the appellant and the deceased had already started drinking before the braai commenced and the appellant, in particular, had consumed a large amount of alcohol before the braai.
- 15 (c) When the appellant went to bed, later that Saturday evening, the deceased and some of the guests were still in the living room area. While in bed, the appellant heard one of the guest urge the deceased to go to a nightclub.
- 20 (d) This angered the appellant and prompted him to take the firearm out of the cupboard and load it. The firearm was a zip gun, a homemade device consisting of two pieces of pipe.
- 25 (e) The appellant intended to scare the guest off and so prevent the deceased from going out at that hour of the night. However, on his way to the living room, he met the deceased in the passage and she grabbed the firearm from him and in doing so caused the shot to be fired. He denied that he shot

at the deceased as testified to during the trial. The magistrate, after receiving the further evidence, confirmed his initial finding of guilty in respect of the murder and the pointing of a firearm charges.

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The merits of the appeal

[13] I have indicated above that Rosemary was a single witness in respect of the shooting incident. The appellant raised various critiques against her evidence and alleged that the trial court had erred in accepting her evidence because she was a single witness, of tender age, testifying years after the incident and hostile towards the appellant.

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Discussion

[14] The principles applicable to this appeal are: (See Du Toit - **Commentary on the Criminal Procedure Act** at 30-37)

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"A Court of Appeal is aware that in principle a trial court is in a better position than the court of appeal to make reliable findings of fact. The court a quo indeed sees and hears the witnesses and is steeped in the atmosphere of the trial. In addition

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the trial judge is in a position to take into account a witness's appearance, demeanour and personality. For these reasons a court of appeal would not be inclined to reject a trial judge's findings of fact (S v Robinson & Others 1968(1) SA 666 (A) 675G-H)...

An appeal court's approach to the findings of fact by a trial court was crisply summarised in S v Hadebe & Others 1997(2) SACR 641 (SCA) 645e-f:

'...in the absence of demonstrable and material misdirection by the trial court, its findings of fact were presumed to be correct, and would only be disregarded if the recorded evidence show them to be clearly wrong'.

The court emphasised that it could be useful for the understanding of the evidence as a whole to break it down into components. But the court should, in assessing whether a trial court's findings of fact were wrong, be careful not to focus too intently on separate parts losing sight of the fact that the whole body of evidence might shed valuable light on the evidential value of its components." (See also S v Hadebe & Others 1998(1) SACR 422 (SCA) 426a-b.)

Rosemary's evidence

[15] I only deal with the evidence to the extent relevant for purposes of this judgment.

5 (a) Rosemary testified that she knew the appellant and that he lived with her mother in Parow in rented accommodation. She confirmed her arrival at the deceased and the appellant's residence as set out above. She intended to spend the weekend as she
10 had done on a number of occasions over the period of approximately 2 years that the appellant and the deceased had lived together.

(b) She described the morning activities and said that they had included shopping. She said she went to
15 the shops accompanied by the deceased and the latter's friend, Jeanie. She said that the appellant was at home during the day. She also confirmed that there had been a braai later that evening and that the appellant and her mother had consumed
20 alcohol both before and during the braai.

(c) Rosemary said that she went to bed later that evening and that the deceased joined her in the bed that she, the deceased, usually shared with the appellant. The appellant also joined them in the
25 same room later on but went to lie on a couch.

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While lying on the couch, the appellant spoke to himself and the deceased requested him to keep quiet. An exchange of words between the two followed.

5 (d) Rosemary was not able to relate the exact exchange of words between the deceased and appellant but remembered the deceased saying to the appellant, "Hy moet sy mond hou." She further remembered the appellant saying to her mother "Hy
10 het gesê vat hier jou kind en druk dan jy dit op in jou. In jou gat in op."

(e) Rosemary said that after the exchange of words, the deceased left the room. Thereafter, the appellant jumped up from the couch and went to the
15 cupboard where he got the firearm. She explained that the appellant assembled the firearm in the following terms: "... daar so in die vuurwapen geskroef." The appellant left the room in possession of the firearm.

20 (f) Rosemary said that she had been frightened, "Ek het gestaan, ge-shiver en gebewe". She said that she had followed the appellant out of the room into the passage where they encountered the deceased, who was holding a plate of chicken bones that
25 Rosemary suspected was intended either for the

dog or to be thrown into the dustbin. The deceased was heading towards the kitchen and the appellant in the opposite direction towards the lounge. The two passed each other without any exchange of words but when they were approximately 7 metres apart, the deceased turned around and the appellant shot her.

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- (g) After the appellant fired the shot, the guests who were still in the lounge came into the passage and the appellant pointed the firearm at Rosemary and one of the guests, which caused Rosemary to lock herself into the toilet where she stayed until things had calmed down. It is common cause, that the persons who were present assaulted the appellant. They hit him on the head with a brick.

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- (h) Rosemary further testified that she had never had problems with the appellant nor had she witnessed problems between the appellant and the deceased prior to that evening. She also testified that she had never seen the appellant drunk.

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- (i) Rosemary thought that the appellant was under the influence at the time of the incident but said that he was not drunk. She explained that, to her, being drunk meant slurring. The appellant's

representative cross-examined Rosemary extensively about this aspect of her evidence. She said that the appellant was not drunk because, "Hy was nie in 'n sleeptong praat of taal...".

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Critique against the above evidence

The appellant's state of intoxication

[16] The first criticism against Rosemary's evidence was that she was ambivalent about the appellant's state of intoxication. Rosemary acknowledged that the appellant had consumed alcohol prior to the shooting. However, she also said that the appellant had been under the influence of alcohol but not drunk. It is evident from the record of the proceedings in the court *a quo* that the appellant's legal representative interrogated this aspect of Rosemary's evidence in cross-examination. I am satisfied that the magistrate did not err in accepting her evidence in this respect.

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[17] Having regard to Rosemary's evidence as a whole, I find no merit in the submission that:

"Arguably because she had been advised that appellant might be able to utilise his intoxication to

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evade the charges she sought to downplay the role alcohol played. Initially she claimed not to have seen appellant drinking. Later, she testified that, although he had been drinking, appellant was not so drunk that he did not know what he was doing.”

[18] There is no evidence on this record to suggest that Rosemary knew or that anybody informed her that the appellant had an opportunity to evade criminal sanction depending on his level of intoxication.

Rosemary was not biased against the appellant

[19] Rosemary further testified that she had not witnessed any arguments or fighting between the appellant and the deceased during the period that they lived together. It is so that they lived together for a period of approximately 2 years. She also indicated that on the night in question, the appellant and the deceased were not annoyed with each other. She did not attempt to turn the exchange of words between the deceased and the appellant into more than she perceived it to be and did not suggest that there was any argument between the appellant and the deceased when they were in the passage prior to the shooting.

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[20] Therefore, I cannot agree with the appellant's legal representative's submission that "...*the magistrate erred in uncritically accepting the evidence of Rosemary Julius, a single juvenile witness with a bias or interest against the appellant.*" Rosemary had the opportunity to paint a bleak picture of the relationship between the deceased and the appellant but did not.

10 **The deceased was shot from a distance of 7 metres**

[21] Rosemary testified that the distance between the appellant and the deceased had been approximately 7 metres when the appellant shot at the deceased. Counsel criticised this evidence and said:

"The forensic evidence suggested that the shooting took place a far more shorter distance than that testified to by such witness."

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[22] I cannot agree with that submission. Doctor Pienaar testified that he was not able to say the exact distance between the appellant and the deceased at the time when he shot at her. He said the following:

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5 *"Ek kan net vir u algemene riglyne gee, maar vir die
spesifieke antwoorde op die afstand sal proefskote
geskiet moet word, maar wat algemene riglyne
betref, as 'n mens kyk na die vorm van die wond
self, tot op 'n afstand van een meter met 'n
haelgeweer is daar nie satellietgaatjies teenwoordig
nie en in hierdie geval was daar nie
satellietgaatjies teenwoordig nie. So dit sou aandui
op 'n afstand van minder as 'n meter."*

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[23] The magistrate clarified the evidence and asked Dr
Pienaar:

15 *"So u kan nie sê of dit nader as een meter of verder
as een meter was nie?"*

[24] Dr Pienaar responded by saying:

20 *"Ek dink my persepsie op algemene bevindings is
dat min of meer 'n meter afstand is, maar vir
spesifieke afstande moet proefskote geskiet word."*

[25] In my view, the criticism levelled at the court's finding in
respect of the distance between the appellant and the
25 deceased at the time of the shooting is without merit.

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[26] The appellant further argued that the court *a quo* erred in finding that:

5 *"The upward trajectory of the wound to the deceased's neck as testified to by the doctor was inexplicable by the fact that fire arms are usually fired from the hip. It is submitted that a more probable explanation, and particularly taking into*
10 *account the doctor's evidence that the shot appeared to have been fired at a range of less than a metre, was that the deceased and the appellant were in closer proximity at the time that the shot was fired and that this occurred in circumstances*
15 *significantly different from those testified to by Rosemary."*

[27] In my view, this criticism is without merit. Doctor Pienaar never said that the appellant and the deceased
20 were less than a metre from each other when the shot was fired. Instead, he said that based on general principles, the shape of the wound suggested that the shot had been fired at a closer range than testified to by Rosemary. However, he said that it would be necessary
25 to conduct trial shots to determine exact distance

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between the two.

Rosemary did not understand the mechanics of a zip-gun

5 [28] The appellant further alleged that the court *a quo* erred:

10 "...by discounting the argument of the appellant's
erstwhile legal representative regarding Rosemary's
assertion that the appellant pulled a trigger. In
disingenuous fashion, the magistrate explains away
this and other contradictions on the basis of wrong
assumptions on Rosemary's part and faults of
reconstruction."

15 [29] Rosemary testified that the appellant moved towards the
cupboard and removed the firearm from it, which firearm
she described as two pipes. Rosemary further said that
the appellant screwed ("skroef") something onto the
firearm and that the firearm looked like a gun that she
20 had seen on television. She further indicated that the
gun was approximately 18 centimetres long.

[30] The expert witnesses and the appellant testified and said
that the firearm had consisted of two pipes and that the
25 parts had first to be dismantled before the bullet could be

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placed in it and that the firearm thereafter had to be assembled. In cross-examination, Rosemary said that the pieces of pipe had initially resembled two long knives. There is no evidence on this record to indicate that Rosemary knew how to load and assemble a zip gun prior to the shooting. Her evidence that the appellant screwed something into the firearm is a remarkably accurate description of the mechanism required to load and assemble the firearm. I say this bearing her age in mind and her evidence that the firearm was similar to firearms that she had seen on television.

[31] In my view, the court *a quo* approached Rosemary's evidence with caution, appreciating her tender years and status as a single witness. It is correct that the court *a quo* did not specifically mention the cautionary rules applicable in respect of a single witness. However, it is clear from the record that the court *a quo* applied the principles. I find the criticism against the trial court's judgment in this respect without merit.

The court accepted Rosemary's version of the shooting incident

[32] Counsel further argued that the magistrate erred in
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finding that the appellant had not been able to contradict Rosemary's evidence. Counsel submitted that Rosemary's evidence was inadequate and unreliable and that the court should have rejected her evidence. It is
5 so that at the time when the court made that finding, the appellant's version was not before the court. At that point, the appellant had indicated that due to amnesia he was unable to remember the incident. However, in cross-examination, Rosemary testified and said that prior to the
10 shooting, her mother and the appellant had moved passed each other in the passage. She said the following:

*"Sy het net omgedraai, ek weet nie vir hoekom nie. Sy het omgedraai en toe staan hy saam met die
15 pistool".*

[33] Counsel further asked her:

*"Het dit nie miskien gebeur dat hulle met mekaar
20 gestry het en u moeder miskien na die gun gevat het nie?"*

[34] Rosemary denied that version. It is therefore not surprising that the magistrate did not alter his finding
25 once that the court received a more detailed explanation

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of that version from the appellant. I cannot fault that finding.

Chicken bones and plate not depicted in photos

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[35] The appellant further criticised the court *a quo* for not rejecting Rosemary's evidence because none of the photographs showed the plate of chicken bones that she alleged that the deceased had been carrying when the gun went off. There is no explanation as to why the chicken bones and the plate were not photographed. There is equally no evidence that they were never there. There is, however, evidence that when the police arrived, there were several people on the scene. It is not necessary to speculate in this regard. In my view, the magistrate correctly did not place undue significance on this aspect.

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The appellant's ability to appreciate wrongfulness

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[36] The appellant's counsel suggested that the magistrate had been wrong in finding that the appellant's loading and putting together of the zip gun was significant in that it pointed to an ability to handle the firearm.

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[37] Rosemary testified that the appellant ran around the house after he had shot the deceased. It appears as if the appellant was bewildered at the time. The court *a quo* found that this reaction indicated that the appellant had appreciated the wrongfulness of his actions at the time. The appellant's counsel criticised the magistrate for rejecting the argument by the appellant's attorney that the appellant's "wild rushing around after the incident again as testified to by Rosemary suggested an inability to resist the temptation to act unlawfully." The appellant said the following about the firearm:

"Then I got upset and I flew up to the cupboard and I grabbed the zip gun. A 12/gauge zip gun. Well, it's two pipes, the one where you put the bullet in and the other pipe goes over it and that's got the firing pin in the back. So when you knock the two together, the shot goes off...no the bullets was standing there. I grabbed the bullets in my hand... and then I went to go and chase the lady Jenny out of the house."

[38] The appellant further agreed with the following proposition put to him by his attorney:

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"Now you had, in your hands you had the zip gun and you had some bullets as well."

[39] The appellant further testified that:

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"...and I came out of the room with the gun and I put the bullet in it... I am left handed and I had to hold the zip gun like this, because it kicks when you fire it like that."

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[40] The appellant's attorney placed the following explanation for the demonstration on record:

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"...The appellant held the gun in front of him with both hands. He had a piece of pipe in each hand because "you have to bang it now to go off".

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[41] The magistrate was correct in finding that significant handling of this firearm was necessary. On the appellant's own version, Rosemary's evidence stands to be accepted. I cannot fault the magistrate's finding.

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CONCLUSION**The merits**

5 [42] It is so that Rosemary was a single witness with respect
to the shooting incident. It is further correct that the
State had to prove its case beyond a reasonable doubt. I
am satisfied that the magistrate approached Rosemary's
evidence with the necessary caution. It is so that a court
10 of appeal will not interfere with the credibility findings of
the trial court unless convinced that it is wrong. I cannot
make such a finding on these facts.

Sentence

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[43] The appellant correctly in my view did not appeal
against the sentence.

ORDER

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[44] In the circumstances, I propose that the appeal be
dismissed.

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E D BAARTMAN, J

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I agree and it is so ordered.

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P GOLIATH, J