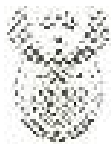


REPUBLIC OF SOUTH AFRICA



5/12/2010
NOT REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA
(NORTH GAUTENG, PRETORIA)

CASE NO: A827/2009

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES / NO
(3)	REVISED.
2010.12.15	
DATE	SIGNATURE

In the matter between:

PHILIP GOMES

Appellant

and

THE STATE

Respondent

J U D G M E N T

MAKGOKA, J:

[1] The appellant stood trial in the regional court, Witbank, on three counts, namely, murder (count 1), attempted murder (count 2), and unlawful pointing of a fire-arm (count 3). He was acquitted on the last two, but convicted on the charge of murder, upon which he was sentenced to 15 years imprisonment, of which 5 years were suspended on certain conditions. With leave of the trial court, the appellant is now before us on appeal against conviction only.

[2] The participants in the matter are the following: the appellant and his friend, Mr Collin Melville, Mr Christopher van Rooyen (Christo), Mr Jakobus Meyer (Koos), Mrs Katrina van Rooyen (Katrina), Mrs Johanna Meyer (Johanna) and the deceased, Mr Christiaan Botha. Both Katrina van Rooyen and Johanna Meyer are daughters of the deceased and are married to Christopher Van Rooyen and Jakobus Meyer, respectively, and are accordingly sons-in-law of the deceased. All the four testified in the State's case, while the appellant, Mrs Susara Joubert and Melville testified for the defence. Without intending any disrespect to the State witnesses, I would, where the context dictates, refer to them by their first names, due to the similarities in their surnames.

[3] It was common cause that the deceased in the murder count, Mr CJ Botha, died as a result of a gunshot fired from the appellant's licensed fire-arm. It was further common cause during the trial that some of the State witnesses and the appellant were neighbours in a block of flats in Witbank, occupying flats no. 2 and 4 on the second floor, respectively. There was bad blood between the parties manifesting in verbal exchanges in the past. On the day of the incident, the State witnesses were moving house and in the process of removing their belongings from their flat to a trailer. During the process Mr Van Rooyen and Mr Meyer encountered Mr Melville, the appellant's friend, at the stairways. A verbal confrontation ensued between Van Rooyen and Melville.

[4] Christo van Rooyen testified mainly on the attempted murder count. Since the appellant was acquitted on this count, his evidence is only necessary as background information to the fatal shooting of the deceased. He testified that after the first verbal confrontation, and while busy loading their belongings onto a trailer, another argument ensued between him and the appellant, which degenerated into a physical brawl, during which the appellant assaulted him with a butt of a fire-arm on his mouth. On the other hand, Koos Meyer and Melville were also engaged in a fist-fight, during which the appellant fired a shot onto the ground, which ricochet and struck him (Van Rooyen) on his upper leg. From there he heard a second gun shot but did not see who fired the shot. He became disorientated and later found himself in hospital.

[5] Koos Meyer testified about the fight between him and Melville, and that between Christo van Rooyen and the appellant. He further testified that the appellant fired a shot onto the ground, which ricochet and struck Christo van Rooyen's upper leg. After the shot was fired, the deceased, who was by then still in the flat, came down. With his hands up, he approached the appellant and requested him to put down his firearm. The appellant shot the deceased at close range and thereafter pointed the fire-arm at his (Koos's) face and uttered the following words: "Come you f--- bastard, I will kill you too." After that the appellant just stood there with folded arms, pulling faces at him and cracking jokes, as if nothing happened.

[6] Katarina van Rooyen testified that after the first gunshot, the deceased came down from the flat and with his hands up, stood at approximately 1½ metres from the appellant, requesting the appellant to put away his fire-arm. The appellant, without uttering a word, shot the deceased. The deceased collapsed to the ground. The appellant and Melville then walked across the street to Melville's car. Later the appellant returned to the scene, brandishing his fire-arm in a threatening manner to the onlookers. She rushed back to the flat where her mother and baby were. The appellant followed her, and before entering his flat, he said to her in Afrikaans: "Vanaand sal julle boertjies vrek ("Tonight you little *boers* will die").

[7] Johanna Meyer testified that during the altercation that involved the four men, she grabbed her baby from her sister Katarina, and rushed to the flat. Half-way the stairs, she heard a gunshot. She immediately came down with the deceased. With his hands up, the deceased approached the appellant, asked him what he was doing and requested the appellant to put away his firearm. The deceased was standing at approximately 2 metres from the appellant. The appellant just looked and laughed at the deceased, and then fired a shot which struck the deceased, who collapsed onto the ground. The appellant then said to her husband: "Ja, come you bastard, I will kill you."

[8] The appellant's evidence (both in chief and in cross-examination) is punctuated with a lot of inaudible portions. However, the thrust is clear. According to him, there was verbal confrontation involving him, Christo van Rooyen, and Melville and Koos Meyer. It turned into a fist-fight, during which Koos Meyer produced a knife and charged at him. He produced a firearm in return. He fired two warning shots onto the ground, one which

ricochet and hit Van Rooyen. The deceased later joined the fight and grabbed him, trying to take the firearm from him. He moved backwards, telling the deceased: "Los my, ek gaan jou skiet. Los my, ek gaan jou skiet." ("Leave me alone, I am going to shoot you")

[9] The deceased did not relent, but instead, grabbed him with both hands. He then knew that the deceased was going to take the gun away. He could not break loose of the deceased's grip. During the scuffle a shot went off and hit the deceased. He did not at that point, intend to shoot the deceased. He did not remember if he pulled the trigger, but when the shot went off, the firearm was already cocked but his finger was not on the trigger.

[10] Melville testified that the deceased grabbed the appellant's hand which was holding the fire-arm. The appellant warned Van Rooyen, Meyer and the deceased several times that he was in possession of a firearm and that he would shoot them. While the deceased so grabbed the appellant's hand, there was a struggle, during which a shot went off.

[11] In his judgment, the learned regional magistrate did not make any credibility findings in respect of any of the witnesses, nor evaluate in any significant manner, such evidence. He seemed to proceed from the premise that because he did not believe the evidence of the appellant and his witness, Melville, the appellant was therefore guilty. It is a wrong formulation.

[12] The proper approach in determining the guilt of an accused, is to weigh all elements which point towards the guilt of the accused against all those which are indicative of his innocence, taking proper account of all inherent strengths and weaknesses, probabilities and improbabilities on both sides and, having done so, to decide whether the balance weighs so heavily in favour of the State as to exclude any reasonable doubt about the accused's guilt: *S v Chabalala* 2003 (1) SACR 134 (SCA).

[13] Even if the court subjectively disbelieved the appellant, it was still required to consider whether there was a reasonable possibility of his version being true. Before his version may be rejected it must not merely be improbable, but it must be false beyond a reasonable doubt: *S v Khubeka* 1982 (2) SA 534(W); *S v Munyai* 1986 (4) SA 712 (V); *S v Jaffer* 1988 (2) SA 84 (C); *S v V* 2000 (1) SACR 453 (SCA).

[14] In my view, Katrina van Rooyen's evidence on the shooting of the deceased, should have been rejected. She made two inconsistent statements on the aspect. In her statement to the police a day after the incident, she stated that the deceased intervened in the fight between the appellant and Koos Meyer. In her evidence, she contradicted this by stating that the deceased never intervened. When pressed on this in cross-examination, she conceded that her evidence in court was a lie.

[15] On the other hand, Koos and Johanna Meyer corroborated each other in material respects on how the appellant shot the deceased. There are no inherent improbabilities in

their individual and collective evidence. The appellant's version that Koos had produced a knife should be rejected. If he had, the police would have found it on his person, as they were on the scene shortly after the deceased was shot. The appellant himself testified that he told the police about the knife. If indeed there was a knife, the police would have confiscated it. It is common cause that the deceased was at no stage armed. When he approached the deceased requesting him to put away his firearm, his hands were up. He posed no danger whatsoever to the appellant. There is therefore no basis to reject the evidence of the witnesses.

[16] On the other hand, the appellant's evidence poses difficulties. It is not clear from his evidence as to exactly what his defence was. In his plea explanation, the basis of his defence was disclosed as private defence. During cross-examination by the prosecutor, the appellant's defence seemed to shift from private defence to an unintentional discharge of a fire-arm. This is clear from the following portion of the record during cross-examination:

“Question:	And when he grabbed you with both his arms you fired the shot is that correct?
Answer:	Ja that is correct.
Question:	You knew that if you shoot someone he is going to die, is that
Answer:	Ja that is why I did not want to shoot him because ...
Question:	But at the end of the day you did?
Answer:	I had no choice.
Question:	Why?

Answer: Because he is much stronger than me. There is more than us fitter. They are rugby players and they play club rugby. You know they are tough guys and they are drunk and, and if we did not have the gun we could not have a fight with those guys.

Question: So you shot him to stop him, is that correct?

Answer: Ja.

Question: Stop doing what?

Answer: Attacking me, because he was going to take the gun. I tell you if I had, it was just a few more seconds he would have taken it because he is so strong. He grabbed my arm at the time it was so hard you know.

[17] Later on, the appellant testified that he shot the deceased because he was concerned that the deceased might remove the firearm from him, but he did not know if he pulled the trigger on purpose to shoot the deceased. Furthermore, the appellant stated that he could not remember pulling the trigger, but thought that the deceased was going to climb on top of him and squash him to the ground if he did not shoot him. This is very incoherent, muddled and simply indicative of an attempt to avoid the inescapable conclusion that the appellant shot the deceased in cold blood.

[18] The appellant's conduct after the shooting of the deceased lends credence to the version of the State. All the three State witnesses testified that the appellant just stood there and later moved over to Melville's vehicle across the street. Both Koos and his wife, Johanna, testified that he threatened to shoot Koos, addressing him in a derogatory

manner. Katarina was also threatened by the appellant when she went up to her flat. Clearly, this is not the conduct of a man who had just accidentally shot a person. He did not summon emergency medical care for the two injured men (Van Rooyen and the deceased). All three witnesses testified about him brandishing his firearm randomly. The evidence of the three State witnesses depicts the appellant in a fighting mood that fateful day.

[19] The version of the State witnesses is further supported by the object facts. It is common cause that the police found only two cartridge cases at the scene. There was one bullet jacket; the other, or fragments thereof, was lodged in the body of the deceased, according to the post mortem report. Mrs Joubert also confirmed the version of the State witnesses that only two shots were fired.

[20] The appellant could not have, objectively, acted in private-defence. On the evidence, it is clear that by the time the deceased arrived at the scene, Van Rooyen, who had a tussle with him, had been subdued with a gun shot to his upper leg. The deceased was unarmed, and posed no danger of any kind, to the appellant. To accept the version of the appellant, one has to reject the totality of the evidence of Koos and Johanna Meyer, whom I have already found to have been credible witnesses.

[21] In light of the totality of the evidence, it is safe to accept the State's evidence and reject the appellant's version as false. It simply cannot be reasonably possibly true.

[22] The appeal is therefore dismissed.



TM MAKGOKA
JUDGE OF THE HIGH COURT

I agree



PJ EERSOHN
ACTING JUDGE OF THE HIGH COURT

DATE HEARD	: 7 JUNE 2010
JUDGMENT DELIVERED	: 15 DECEMBER 2010
FOR THE APPELLANT	: ADV DJ COMBRINK
INSTRUCTED BY	: HARVEY NORTJE WAGNER
FOR THE DIRECTOR OF PUBLIC PROSECUTIONS	: ADV A COETZEE