

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

CASE NO: A615/2010

In the matter between:

29/7/2011

MICHAEL MTHOKOZISI KHUBEKA APPELLANT

And

THE STATE

RESPONDENT

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE: YES/NO.	
(2) OF INTEREST TO OTHER JUDGES: YES/NO.	
(3) REVISED.	
DATE	SIGNATURE
2011-07-29	

DRAFT JUDGMENT

MAVUNDLA J;

- [1] The appellant, an adult male aged 27 years old, was on the October 2009 convicted at the Standerton Regional Court on one count of murder and was sentenced to 7 years imprisonment. Leave to appeal against conviction and sentence was granted on petition.

- [2] The appellant was charged with murder, in that on or about 25 November 2005 at or near Sakhile in the regional district of Mpumalanga, he unlawfully and intentionally killed Sibusiso Innocent Khanyile by shooting him.
- [3] The appellant was duly legally represented through out the trial. He pleaded not guilty. His defence was that he acted in self – defence. It was further admitted that the cause of death was a gun shot wound in the stomach and that the deceased did not sustain any other injury from the scene of crime.
- [4] It is trite that the State bears the *onus* to prove the guilt of the appellant beyond reasonable doubt. It is equally trite that the appellant bears no onus to prove his innocence. On the contrary, if his version is reasonably possibly true, then he is entitled to an acquittal.
- [5] The only issue to be decided *in casu*, is whether the appellant acted in self-defence when he shot and killed the deceased.

The defence of the appellant needs to be considered in the background of what was said by Holmes AJA in the matter of *R v Patel*¹:

"The general principles mentioned by Watermeyer C.J. in *R. v. Attwood*, 1946 A.D. 331 t p. 340, are that an accused is entitled to an acquittal on the ground that he was acting in self-defence if it appears as a reasonable possibility on the evidence—

- "(a) that he had been unlawfully attacked and a reasonable ground for thinking that he was in danger of death or serious injury. (Though there may be cases of lawful self-defence where the accused was originally the aggressor *R.v. Ndara*, 1955 (4) S.A. 182 (A.D.) at 184E.);
- (B) that the means of self-dence which he used were not excessive in relation to the danger;
- (C) that the means he used were the only or a least dangerous means whereby he could have avoided the danger."

In considering these, the Court must be aware of being an arm-chair critic, and must take into account the exigencies of the occasion. Thus in *Union Government (Minister of Railways & Harbours) v. Buur*, 1914 A.D. 273 at p. 286, Innes J.A. (as he then was) said

" Men faced in moments of crisis with whole alternatives are not to be judged as if they had had both tie and opportunity to weigh the pro. and cons. Allowance must be made for the circumstances, but it is none the less applicable in cases such as the present one."

¹ 1959 (3) SA 122 (AD) at 123A-E.

In the same line of thought Van Den Heever, J.A., in *R. v. Zikalala*², approved the following passage from *Gardiner and Lansdown's Criminal Law and Procedure*:

" Where a man can save himself by flight, he should flee rather than kill his assailant.But no one can be expected to take flight to avoid an attack, if flight does not afford him a safe way of escape. A man is not bound to expose himself to the risk of a stab in the back, when by killing his assailant he can secure his own safety....In considering the question of self-defence, the jury must endeavour to imagine itself in the position in which the accused was."

- [6] However, since this matter comes to us by way of an appeal, this Court must decide whether the magistrate misdirected himself in rejecting the version of the appellant as being reasonably possibly true, bearing nonetheless the authority referred to herein above.

² 1953 (2) S.A. 568 (A.D.) at p. 572.

[7] In the matter of *S v Francis*³ Smalberger continues to state that:

"The Court's powers to interfere on appeal with the findings of fact of trial Court are limited (*R v Dhlumayo and Another* 1948 (2) SA 677 (A)). In the absence of any misdirection the trial Court's conclusion, including its acceptance of the witness' evidence, is presumed to be correct. In order to succeed on appeal, the appellant must therefore convince the Court of appeal on adequate grounds that the trial Court was wrong in accepting the witness' evidence-- a reasonable doubt will not suffice to justify interference with its findings. Bearing in mind the advantage which the trial court has of seeing, hearing, and appraising the witness, it is only in exceptional circumstances that the Court of appeal will be entitled to interfere with a trial Court's evaluation of oral testimony."

[8] The State's case was premised on the evidence of Mr. Lucy Innocent Kubheka, Bongani David Mchunu. The appellant testified in his own defence and called Mr. Mark Ray Maseko as a witness.

[9] According to Mr Khubeka, on the unfortunate day, he was with the deceased and Mr. Mchunu travelling in a motor vehicle which the deceased was driving. They came to a stationary

³ 1991(1) SACR 198 at 204c-e.

bakkie along which the deceased, for unknown reasons, abruptly applied his brakes and stopped his motor vehicle next to. The deceased alighted and went towards the bakkie next to which two male were standing. It looked as if there was an argument between the deceased and one of the two men whom the former slapped on the cheek. Thereafter, it seemed as if the deceased was arguing with the second person. The second man pulled a firearm from underneath his clothes, extended his gun-holding hand towards the deceased, fired a shot but missed him. The appellant fired a second shot and the deceased fell. The appellant and the other man jumped into their bakkie and raced away.

- [10] Under cross examination Mr. Kubeka said that the head lights of both motor vehicles were off but there was an Apollo light that illuminated the area and he could see clearly. He did not know whether the deceased was cross or not when he exited from his motor vehicle. Both motor vehicles had stopped on the side of the road facing each other. The appellant's motor vehicle had stopped on its wrong side, in relation to its path of

travel, and off the shoulder of the road, with the deceased's motor vehicle on its correct side of travel, but off the road. He also stated that the outside mirror of their vehicle was damaged as the result of the shot that missed the deceased. He denied that the deceased assaulted the appellant with a fist. He further said that because the windows of their motor vehicle were closed, he did not hear what was said outside between the appellant and the deceased. He conceded that he saw the deceased from the back. It was further put to him that the deceased pulled a firearm from underneath his jacket. He disputed that the deceased had a jacket on. He also disputed the version of the appellant, put to him, that he fired a warning shot into the ground.

[11] The second State witnesses, Mr. Mchunu, substantially confirmed the evidence of the first State witness, in so far as the fact that their motor vehicle stopped and the deceased climbed out and approached the two men. According to him, when the deceased slapped one of the two men, Mr. Mchunu

climbed out of their motor vehicle and tried to intervene. The deceased slapped one of the men.

[12] The evidence of Captain M. J. Moloi, relates to the arrest of the appellant and the handing in of his firearm and one round of a live bullet. I deem it not necessary, for purposes of this appeal, to chronicle his evidence. It needs mentioning that at closure of the State's case, the defence applied in terms of section 174 for the discharge of the appellant which was, however, in my view, quite correctly turned down.

[13] The appellant testified that he shot the deceased in self defence. According to the appellant, he and his friend, on the day in question, had parked outside the road when a silver LTW motor vehicle stopped near their vehicle. The left passenger window was opened. The driver then asked whether they still recognized him. His friend responded that they did not know him. The driver then said to them that they are forward. The driver then alighted from his motor vehicle, approached them

and assaulted his friend with an open hand and a fist without any provocation.

[14] The appellant further testified that when the deceased alighted from his motor vehicle, it was only then that he recognized him as the person, a week earlier, he had some incident with, the details of which, for purposes of this appeal, It suffices to state that during the said incident, according to the appellant, the deceased called him names, inter alia, a dog.

[15] According to the appellant, the deceased, after assaulting his friend, said that he must finish these dogs, referring to the appellant and his friends, and that he should shoot them. The deceased charged towards him. He saw the deceased having a firearm. The appellant retreated backwards. He warned the deceased to stand still as he too had a firearm with him. As he was retreating backwards, the appellant drew his firearm from its holster. He further said that the deceased pulled his firearm from somewhere underneath his clothes.⁴ The appellant further

⁴ Paginated page 62 lines 23-24.

said that the deceased pulled his firearm and pointed it towards him. According to the appellant, it was at that stage that he fired a warning shot in the ground to show the appellant that he too had a firearm. The appellant further said that the deceased was still far when he, the appellant, fired the warning shot. The second shot he directed it towards the deceased. He further said that he warned the deceased to stand still or else he would shoot him.⁵ When the deceased did not stop after the warning, the appellant realised that he is not safe he then shot the deceased as he had no choice.⁶

[16] Under cross examination, according to the appellant, before the deceased assaulted his friend, the appellant said that: "This dog, let me shoot this dog." ⁷ He further said "Let me shoot these dogs and be done with them."⁸ Immediately thereafter the deceased pulled something from underneath his clothes, but the appellant did not see precisely wherefrom and what it was the deceased pulled because he was afraid. Because the

⁵ Paginated page 64 lines 15 -20.

⁶ Paginated page 65 lines 1-10.

⁷ Paginated page 68 lines 18-19.

⁸ Paginated page 69 lines 9-10.

the deceased pulled because he was afraid. Because the deceased had just assaulted his friend, the appellant was afraid and scared.⁹ He was unable to see what type and colour of the firearm because it was dark. The place was illuminated by an Apollo light. The deceased was about 3½ metres away from him. According to the appellant, when the deceased approached him, it was not safe. The appellant further said that he fired the warning shot to the ground to the side of the deceased.¹⁰

[17] During cross examination, it was further pointed out to the appellant that the outside mirror of the motor vehicle of the deceased was damaged during the shooting. The appellant was asked to explain and to demonstrate the position of the deceased's motor vehicle when he fired the warning shot. It would seem that according to his demonstration, the motor vehicle would have been at 90° angle with him, to be in a position to strike the mirror. It was further pointed out to the appellant that whereas it was put to the State witnesses that,

⁹ Paginated page 69 lines 11-18

¹⁰ Paginated page 75 lines 7-10.

according to him, the projectile that struck the mirror had ricocheted. The appellant responded by saying that he knew nothing thereof as the police never told him thereof. Further the appellant said that he could not dispute that the deceased did not have a jacket on. He further said that he did not have time to observe what the colour of the clothes the deceased had on.

[18] The appellant further said that the deceased produced his firearm, and he, the appellant, warned him verbally and shot him. He further said that he could not shoot the deceased on the leg because the deceased would then have shot him on the head. He further said that he did not intend to kill the deceased. He said that he shot the deceased at the vital part so as to warn him¹¹.

[19] To the court's questions, the appellant said that the deceased was the first to draw his firearm and pointed it at him. The appellant drew his firearm and released the safety pin. He fired the warning shot and then fired the second shot that killed the

¹¹ Paginated page 80.

deceased. He further said that he does not know why the deceased did not shoot him first. He further said that when he saw the deceased lifting his hand which had the firearm, he warned him that he too has a firearm and should stop, as he was advancing towards him, and he then shot the deceased.

[20] Mr. Mark Ray Maseko testified on behalf of the appellant. According to him, he was seated in the appellant's motor vehicle when another motor vehicle stopped next to theirs. The appellant at that moment was outside their motor vehicle. The driver of the other motor vehicle that stopped there said something. Because he could not hear what he was saying, he then got out of their motor vehicle so that he could hear what the other person was saying. The driver of the other motor vehicle started screaming at them. The deceased got out of his motor vehicle and slapped him in the face twice. The deceased then advanced towards the appellant. According to Mr. Maseko, the deceased leaned into his motor vehicle, returned tucking something or his shirt into his pants. As Mr. Maseko was talking

to one of the men, he heard a shot being fired. Immediately thereafter he heard the second shot.

[21] Under cross examination Mr Maseko said that the deceased assaulted him with an open hand and on the second occasion with a fist. After the intervention of his legal representative, Mr. Maseko then said that at first, the deceased hit him with his fist and with an open hand on the second occasion. He further said that the deceased mentioned that he must go back to his motor vehicle to collect his gun. He however said that he did not see any gun in the hands of the deceased when he returned from his motor vehicle but charging at the appellant. He conceded that in his statement to the police he said nothing about being assaulted nor about the shots. Mr. Maseko further said that he did not focus on the deceased because he was talking to Mr. Dlamini who was admonishing him to get into his motor vehicle. He further said that he could not say anything about the deceased having a firearm. Neither does he know whether the appellant fired a warning shot. The appellant told him after they

got into their motor vehicle that he was the one who fired a shot.¹²

[22] The Magistrate found that the deceased was the aggressor.

The Magistrate rejected the version of the appellant that he fired a warning shot. He found that it is not reasonably possible that, if he shot into the ground on the side of the deceased, he could also have struck the mirror of the deceased's motor vehicle. The Magistrate also found that the appellant had the requisite to kill the deceased when he fired at him. In this regard he took into account that the appellant had said that he decided not to shoot on the deceased's leg but the vital parts. The Magistrate rejected the version of the appellant that he was acting in self-defence.

[23] From the evidence of both the State and the defence, it is clear that the deceased was bellicose on this particular date and time in question. He approached the appellant aggressively, after assaulting Mr. Maseko. The Magistrate correctly found that the

¹² Paginated page 110 lines 12-24

deceased was the aggressor. The appellant said that he was afraid that the deceased was going to assault him. Such belief is subjective. In the circumstances that prevailed, it is reasonably possible that the appellant believed that the deceased was going to assault him. He was therefore justified in defending himself, in the circumstances.

[24] The fact that the appellant was justified in defending himself, does not necessarily mean that he should therefore have been acquitted. The measures employed to defend one self must be commensurate with the force or threat to be repelled.

[25] Mr. Maseko's evidence is that the appellant told him when they were in their motor vehicle that he is the one who fired the shot. It is strange that the appellant would mention only one shot, if there were two shots fired. The State witnesses said that there was only one shot fired.

[25] The State witnesses denied that the deceased was armed. There was no firearm found at the scene. Mr. Maseko was not

helpful on the aspect whether the deceased had a firearm. The appellant himself was unable to give much detail about the alleged firearm of the deceased. He claimed that it was dark and could not see clearly.

[27] The appellant contradicted himself in various ways, inter alia, whether the deceased had a jacket on. He could not say wherefrom the deceased drew the firearm. His evidence does not accord with that of Mr. Maseko who said that the deceased fetched a firearm from his motor vehicle. Whether the deceased was armed, cannot be determined on the unsatisfactory evidence of appellant. The State witnesses said that the deceased was not armed.

[28] The appellant's evidence regarding the firing of the warning shot is equally unsatisfactory. The magistrate rejected the version of the appellant on this aspect. I am unable to find fault on the Magistrate's finding that the deceased was not armed.

Magistrate was steeped with the atmosphere that prevailed and as Court of appeal, I cannot interfere with such findings.

[30] In as much as the deceased was the aggressor, the appellant was not entitled to employ force that was not commensurate with the threat. He exceeded the bounds of self defence in shooting the unarmed deceased. Besides, the appellant, on his own admission, decided not to shoot the deceased on the leg, but at his vital parts, the stomach.

[31] I do accept that the deceased was not armed. The Magistrate concluded that the appellant had the necessary *mens rea* to kill the deceased. He further held that the appellant could have shot the deceased on the leg, which would have been enough to immobilize the deceased from assaulting him. I am unable to fault the Magistrate's finding and conclusion in this regard.

[32] The appellant was sentenced to 7 (seven) years imprisonment. In imposing this sentence, the Magistrate took into account the fact that the deceased was the aggressor. Further taken into

[32] The appellant was sentenced to 7 (seven) years imprisonment.

In imposing this sentence, the Magistrate took into account the fact that the deceased was the aggressor. Further taken into account were the youthfulness of the appellant, the fact that he is breadwinner and a first offender.

[33] The Magistrate exercised his judicial discretion in imposing the sentence. A judicial discretion cannot be tempered with on appeal, unless the sentence is shockingly inappropriate. Life is a most precious commodity to be taken away from a person. A sentence of 7 (seven) years imprisonment in this case can hardly be said to be inappropriate. In the circumstances, I am unable to find that the Magistrate misdirected himself in imposing the sentence appealed against.

[34] Consequently, I am of the view that both the appeal on the conviction and sentence must fail.

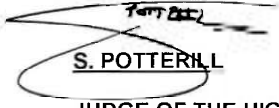
[35] In the result, I make the following order:

1. That the appeal against both conviction and sentence is dismissed and both are confirmed.


N.M. MAVUNDLA

JUDGE OF THE HIGH COURT

I agree


S. POTTERILL

JUDGE OF THE HIGH COURT

DATE OF JUDGMENT : 29/07/2011

APPELLANT'S ATT : G.F. BOTHA & VAN DYK INC.

APPELLANT'S 'S ADV : M JUNGBLUTH

RESPONDENT'S ATT : DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT'S ADV : MR C.P.HARMZEN