



IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE LOCAL DIVISION, PORT ELIZABETH)

In the matter between:

Case No: CC 26/2020

THE STATE

And

GRANWILL BAILEY

Accused

JUDGMENT

GOVINDJEE AJ:

Background

[1] The shooting of Mirlene Wilson (the deceased) is another unfortunate chapter in the persistent gang-related warfare in Port Elizabeth's northern area suburbs. In this case the victim was an innocent passer-by killed by a single

stray bullet, but the events that resulted in her shooting ultimately stem from the vengeful way in which life is lived in certain parts of the city.

[2] The deceased died as a result of a gunshot wound to the head in Human Street, Arcadia on 5 January 2020. The accused was charged with her murder, three counts of attempted murder and two contraventions of the Firearms Control Act, 2000,¹ (FCA) related to unlawful possession of a firearm and ammunition. He pleaded not guilty to all the charges. I do not deem it necessary, for purposes of this judgment, to repeat the contents of the six charges in the indictment. I direct that the indictment be treated as if specifically incorporated at this stage of my judgment.

[3] The various charges emanate from an altercation between the accused and LeRoy Scholtz. Scholtz and his sister, Gaynor Coetzee (Coetzee) both testified that he had been sent to a nearby shop in Arcadia when his encounter with the accused ensued. On this version, Scholtz was enraged at the accusation, levelled against him by the accused, a Honde Koppe gang member, that he was somehow involved in the murder of a gang associate of the accused, Dwayne ‘Duey’ Jantjies (Jantjies). He returned home, changed sandals into takkies and despite the protestations and warnings of his mother (Patricia Coetzee) and sister, Coetzee, set-off to accost the accused. Scholtz, followed by the two,

¹ Act 60 of 2000.

collected stones along his route in Jenneker Street and turned into Human Street. He threw one stone, and then another in quick succession. The accused evaded this attack, produced a firearm from his pocket, and fired once towards Scholtz, with Coetzee and their mother a metre or two behind him at that time. It was this shot that resulted in the death of the deceased, the charge of murder and three charges of attempted murder (in relation to Scholtz, Patricia Coetzee and Coetzee).

[4] The essence of the accused's version is that he was not a gang member. He was on the scene on the day of the incident and involved in a stone-throwing altercation with Scholtz. The Coetzee ladies were not present. He saw the deceased coming into picture out of the corner of his eye at the time that a shot was fired from somewhere behind him. That shot was fired at him by Chiecoucewills Hartnick (known as 'Ian'), but resulted in the deceased's death. Scholtz and Coetzee held a vendetta against him because he had previously assaulted their cousin, Lester Loots. Hartnick, a G-Stars gang member, had attempted to kill him because he was witness to another gang-related shooting the day before the deceased was shot and killed.

The state's case

[5] Coetzee testified that she knew the accused well, given that the accused's mother had been involved in a relationship with her cousin that had yielded

three children. The accused would accompany his mother to her mother's house and she and the accused had been at school together. She knew that the accused was a member of the Honde Koppe gang and had no reason to be in conflict with him. The witness clearly described the conduct of her brother on the day in question, admitting his anger at the time. Scholtz had explained the issue briefly when returning home to change into his takkies. The allegation that Scholtz would have somehow been involved in Jantjies' death was surprising to Coetzee, given that Scholtz was not affiliated to a gang, although he did purchase drugs from the leader of the G-Stars gang. She had followed him, seen him carry two stones, one in each hand, and had cautioned him not to engage with the accused, whom she suspected would be carrying a firearm. Coetzee testified that she had seen her brother throw stones at the accused, observed the accused point a firearm at him, looked at the accused's face and heard the shot before turning around and running back towards Jenneker Street. She had been two metres behind Scholtz at the time the shot was fired. The accused had turned and run towards Esterhuizen Street. She had also seen the deceased falling and the entire incident had lasted approximately twenty seconds. The witness had not observed anybody at all while running behind her brother in Jenneker Street. She had noticed one person in the distance in Human Street (where the incident occurred). Coetzee could offer no explanation as to where the deceased might have been or come from immediately prior to the shooting.

The deceased had appeared suddenly and seemingly out of nowhere, and people had emerged in the street only after the shooting.

[6] Coetzee's version of events was corroborated in material aspects by the testimony of Scholtz. He testified that he was not gang affiliated, but visited a G-Stars gang post to obtain drugs. The accused was known to him because of the relationship between the accused's mother and his cousin, Lester Loots, but they were not friends. There was no prior conflict between the two.

[7] The witness testified that the accused had confronted him at the shop about the death of a friend and proceeded, with another person, to chase him down the street by throwing stones at him. He was angry and left his home despite the protestations of his sister and mother. He picked up stones at the corner of his street, entered Human Street with his mother and sister in tow and threw the stones at the accused. The accused evaded the stones by ducking, took out a black gun and pointed it at him with his arm extended horizontally. Scholtz was looking at the accused's face, approximately three metres away from him, when a shot went off. He was bending at the time and then stood up, turned around and saw the deceased falling to the ground. He ran towards home, accompanied by his mother and sister, and past the deceased who had fallen with an arm raised above her head. The accused was seen running towards

Esterhuizen Street and the incident had lasted approximately twenty seconds. Nobody else had been visible to the witness in Human Street at the time.

[8] The witness admitted during cross-examination that he had been unable to point out the accused in a photograph parade that had been conducted and put this down to a change in the accused's appearance, saying that he had been thin at the time of the incident. He contradicted himself about the reason for his failure to identify the accused in the photograph parade which had taken place the day after the incident, initially disputing the number of photographs he had been shown and subsequently denying that the accused's image had been included. He confirmed that he had not previously mentioned the other person that had initially been with the accused (in relation only to the first stone throwing incident), and was not completely clear when explaining the purpose for his original visit to the shop.

[9] Hartnick testified that he was a shooter for the G-Stars gang living in Jenneker Street. He indicated that he did not know the accused or Jantjies and had never been questioned by the police in connection with the latter's death. On 5 January 2020 he had been woken and informed about the deceased's death. He would never walk in Esterhuizen Street because this was Honde Koppe territory and he would be shot there, given the poor relationship between the rival gangs.

[10] Hartnick's testimony was supported by Sergeant Xolani Peta, stationed at the Provincial Organised Crime (Anti-Gang) Unit for the past five years and the Investigating Officer in this matter. He confirmed that he was involved in northern area investigations on a daily basis. He became aware of the alleged shooter after taking the statement of Scholtz on 5 January 2020, and started to trace the accused, based on that information, on 7 January 2020, visiting his home and leaving his number at various Honde Koppe posts so that the accused could contact him. No information was obtained until the accused was arrested on 9 January 2020.

[11] Sergeant Peta confirmed that the photograph of the accused that had been included in the photo album shown to Scholtz was dated in comparison to an image of the accused at the time of his arrest, handed in as an exhibit. The accused was tattooed with the letters 'NBA', signifying allegiance to the Honde Koppe and their motto of 'Never Broke Again'. He was a known gang member, having been profiled as such based upon witness testimonies. He also frequented Honde Koppe drug posts, particularly that of a person known as 'Kaffertjie', the Honde Koppe gang boss, and sported the tattoo known to be associated with that gang. Under cross-examination, he denied that it was possible for the accused to have the NBA tattoo because of an affinity for basketball (on the basis that 'NBA' is also the acronym for the National

Basketball Association). Gangsters, he testified, did not trust other people easily and would not typically permit non-gang members to associate with them.

[12] The witness also confirmed that Jantjies' police investigation docket was known to him and contained no mention of the accused. He had assisted the defence to secure the attendance of other police officers for purposes of consultation, and could confirm that the pocket book of a Sergeant Page contained no reference or entry to the incident involving Jantjies on 4 January 2020.

The defence

[13] The accused testified in his own defence. He stated that he lived in his grandfather's house together with his mother, grandmother, three half-brothers (aged approximately between 12 and 7), sister and uncle. His father has been serving life imprisonment since he was five years of age and the father of his half-brothers is Lester Loots, who is related to the Coetzees and Scholtz.

[14] He was at school with Coetzee and got to know her when he would take his half-brothers to her house. Loots supported the Coetzees with money for alcohol and drugs. He would occasionally visit the accused's mother in an intoxicated and argumentative state and was physically abusive towards her. On one occasion, four years ago, Loots had visited his home while drunk. The

accused had opened the door as Loots was about to kick it in, and had grabbed him and hit him continuously, knocking him to the ground. Loots had then travelled to Gaynor Coetzee's home and returned with the Coetzees and Scholtz. According to the accused, this incident could be the only possible reason why Coetzee and Scholtz had made up the allegations against him. Their vendetta was occasioned by Loots supporting them with alcohol and drugs, and due to the anger caused by his assault on Loots.

[15] The accused denied being a Honde Koppe gang member, although he would buy drugs from one of their drug posts. He had been walking with Jantjies on 4 January 2020 in Esterhuizen Street when Jantjies had told him about an incident that had occurred the previous day. Jantjies had allegedly been involved in an altercation with Hartnick and a person called Jonty, and had been threatened. Both these people were known to the accused. As Jantjies was sharing this information, the accused noticed two people walking down an alley and realised that these were the same two people Jantjies had been speaking about. He then noticed Hartnick produce a firearm. Jantjies and the accused ran away in Esterhuizen Street, Hartnick and Jonty followed and shots were fired in the direction of Jantjies, who was on the sidewalk. He heard a number of shots, the last of which struck Jantjies. He assisted Jantjies and noticed a hole in his body where he had been shot. He then called for an ambulance and, when that took long to arrive, arranged with another friend to take Jantjies to the hospital.

They then went straight to the police station, where he noticed Sergeant Page, who was known to him, and Captain Ross. They were on their way to the hospital and advised him that they would visit him at his home at 9am the following day. The accused testified that the officers had not noted anything in their pocket books at the time, because they were on their way to visit Jantjies in hospital.

[16] On 5 January 2020, the accused had been minding his own business, smoking outside a shop in Human Street when Scholtz had arrived. Their verbal altercation resulted in him perceiving Scholtz to have made reference to the shooting of Jantjies. He threw a stone at Scholtz, which hit him in the chest. Scholtz ran home whilst threatening him. The accused remained in the vicinity of the shop. Scholtz returned approximately five minutes later and a stone throwing fight ensued, with the accused facing Jenneker Street and Scholtz facing Esterhuizen Street. Nobody else was in the street at the time. The accused at some stage moved towards the roadside, threw a stone and, out of the corner of his eye, noticed the deceased walking. At that time he heard a shot sounding from behind him. He ran towards Jenneker Street, saw the deceased fall, and turned to look back towards Esterhuizen Street, noticing that Hartnick had a gun in his hand which was being lowered from a shooting position. Scholtz ran towards his home and the accused turned left and ran in the opposite direction up Jenneker Street. He turned around at that stage and then noticed the

Coetzees running from their house towards Scholtz. The accused testified that Scholtz could not have seen the deceased, because he was looking towards Esterhuizen Street at the time of the stone throwing incident. He had seen the deceased come around the corner from Jenneker Street, turning left into Human Street. He suspected that Hartnick, who was a G-Star member, had aimed to kill him because he was a witness to the Jantjies shooting. The accused denied being in possession of a firearm on that day and had not fired any shots towards the complainants or the deceased.

[17] Under cross-examination, the accused indicated that he had assaulted Loots as described four years ago, when he was 21 years of age. He could not adequately explain why his version of Coetzee and Scholtz being present after that incident was not put to them. He merely indicated that he had forgotten this. He also admitted that he had failed to indicate to Hartnick that he recognised him because of an association between Hartnick and his cousin – this too was only recalled after Hartnick had testified. He admitted that the version that had been put on his behalf relating to the shooting incident on 4 January 2020 was different from his own testimony and could not explain this discrepancy. His version had also changed as to whether or not he and Scholtz had both initially been throwing stones at one another, and whether they were still stoning one another at the time the shot was fired.

[18] Hartnick had testified that he could not walk in Esterhuizen Street because of his G-Star association, and this testimony had remained unchallenged, despite the accused's version being that Hartnick had fired the shot from close to that street, and a matter of a few metres away from the Honde Koppe gang boss' drug post. On his version of events, Scholtz was at that stage at the bottom of Human Street, and must have then been very close to the deceased. Significantly, the accused could offer no explanation whatsoever for failing to report the 5 January 2020 shooting to the police, despite this being the second occasion in two days, on his version, that his life had been in danger at the hands of Hartnick. He testified that he had been at his house from the day of the shooting until the day of his arrest, and suggested that he may have been at the back of the house when Sergeant Peta had looked for him. This was never put to Sergeant Peta. Again the accused explained this by indicating that he had forgotten this piece of evidence.

[19] The accused confirmed that he had heard that he was being implicated a few minutes after the incident. Yet he did not visit the police station to report his alleged sighting and identification of the real shooter.

Analysis

[20] It is true that the identity of the perpetrator of a crime depends on human observation and that, when in dispute, a court must carefully consider all the

surrounding circumstances before deciding whether the state has proved beyond reasonable doubt that the accused is the perpetrator.² In order to address the two mutually destructive versions relating to the shooter, I have specifically considered all the direct evidence available, including the credibility and reliability of the witnesses, and measured the reliable evidence against the evidence found to be false and measured this against the probabilities.³ In respect of the actual identification of the shooter, this has included consideration of the possible fallibility of human observation, the extent of the witnesses' prior knowledge of the accused and the corroborative dimensions of their testimony, the inability of Scholtz to identify the accused during the photograph identification process, the mobility of the scene, opportunity for observation and evidence presented by the accused. I have also considered that the state did not call Patricia Coetzee to testify, and found that, given the other available evidence presented, no adverse inference ought to be drawn.

[21] There is no dispute that the accused was on the scene and engaged in stone throwing with Scholtz. The defence suggests, however, that he was not the person who produced the firearm and fired the shot. The state's case relies heavily on the eye-witness accounts of Coetzee and Scholtz. Both these witnesses, and Scholtz in particular, were unsophisticated, but appeared to me to be honest in respect of the material components of their testimonies. I find that

² *S v Mthetwa* [1972] 3 All SA 568 (A) at page 570.

³ See *S v Janse van Rensburg and Another* 2009 (2) SACR 216 (C).

Coetzee's version of events was cogent and believable. It is true that she was unable to account for minor discrepancies in her testimony when compared to the written statements made at the time of the shooting.⁴ She spoke very softly and became flustered at times when trying to explain these contradictions. Despite this, on the whole she was a very good witness. She made a particularly favourable impression in respect of her identification of the accused and her certainty that he had been the one who had fired the shot. She expressed incredulity at the suggestion that she had some reason to fabricate her evidence and spoke with clarity on that point.

[22] Despite the shortcoming in Scholtz's testimony relating to the photograph identification process, which I have considered, he too appeared to me to be an honest witness to the main events in question. In *S v Sauls and Others*,⁵ the court held that:

“The trial judge will weigh his evidence, will consider its merits and demerits and, having done so, will decide whether it is trustworthy and whether, despite the fact that there are shortcomings and defects or contradictions in the testimony, he is satisfied that the truth has been told.”

⁴ See *S v Bruiners en 'n Ander* 1998 (2) SACR 432 (SEC) at 437g *et seq* on the relevance of non-substantial variations.

⁵ 1981 (3) SA 172 (A).

And in *S v Mkohle*:⁶

‘Contradictions *per se* do not lead to the rejection of a witness’ evidence...They may simply be indicative of an error...not every error made by a witness affects his credibility; in each case the trier of fact has to make an evaluation; taking into account such matters as the nature of the contradictions, their number and importance, and their bearing on other parts of the witness’ evidence.’

I accept that Scholtz, a relatively uneducated individual, was involved in a fast-moving scene in which he was engaged in a fight with the accused. His testimony in respect of distances and time was clearly influenced by this. Scholtz’s testimony describing his altercations with the accused on the day in question was clear, and I have no hesitation in finding that he too clearly witnessed the accused drawing a firearm and firing the shot that killed the deceased. It would be speculative to suggest reasons for his failure to identify the accused in the photograph that was included in the photo album, and why he did not find it easy to admit that he had erred in that regard. His direct evidence of the incident, however, corroborates Coetzee’s identification of the accused as the shooter, and was unshaken in that respect.

⁶ 1990 (1) SACR 95 (A).

[23] I found Hartnick to be a credible witness, who also stood firm in cross-examination. He completely denied the accused's version and testified that he had never seen the accused prior to giving testimony. Sergeant Peta's testimony must also be accepted, all evidence pointing to the accused being a Honde Koppe gang member and that there is no mention at all of his alleged involvement in the Jantjies investigation.

[24] By contrast, the accused was a poor witness who was unable to explain material contradictions and improbabilities in his testimony. His testimony lacked candour and amounted to an attempt to convince the court of a version of events that is, in material parts, not reasonably possibly true and can only have been fabricated. His version suggests a fanciful connection between his assault of Loots and a plot by Coetzee and Scholtz to enact revenge by fabricating his involvement in a fatal shooting some three years later. The evidence does not support this suggestion at all. Scholtz and, particularly, Coetzee, knew the accused well and over a long period of time and there is nothing to suggest any preceding bad blood or vendetta. The time lapse between the assault of Loots and the shooting of the deceased is significant, and the belated suggestion that Coetzee and Scholtz were brought to the accused's home by Loots after the assault is unsupported. Likewise, his attempt to convince this court that his chosen tattoo is completely unrelated and instead demonstrates his affinity for basketball is ludicrous when considering all the evidence suggesting his gang

affiliation. I also find that his identification of Hartnick as the person involved in the shooting of Jantjies is improbable given the circumstances he described and that it is likely that he did not even know what Hartnick looked like prior to his appearance in court. The suggestion that Hartnick, a G-Star shooter, would have somehow crossed to Esterhuizen Street, where he was *persona non grata*, and fired a shot from Honde Koppe territory standing a few metres away from the house of the Honde Koppe gang boss towards the accused, must be rejected as being wholly improbable and not reasonably possibly true. This is also the case in respect of his suggestion that he ran towards Jenneker Street in making his escape from the scene, on the basis that Hartnick was firing at him from Esterhuizen Street. Although not identical, the testimony of Coetzee and Scholtz regarding the position of the accused at the time of the shooting, and his retreat towards Esterhuizen Street immediately thereafter, fits in with the other facts found to be proved and must be accepted. The accused's version of events in all these material aspects is so improbable that it cannot reasonably possibly be true.⁷

[25] On the time and sequence of events, it is the version of Coetzee that accords most satisfactorily with the balance of proven facts: the stone throwing incident involving the accused and Scholtz took some time following Scholtz and the Coetzees running into Human Street from Jenneker Street. It must be

⁷ See *S v Shackell* 2001 (2) SACR 185 (SCA) 194g-i.

accepted that Scholtz and Coetzee simply did not see the deceased before they turned into Human Street. They were running and would only have been in Jenneker Street for a few seconds before turning into Human Street. Some seconds thereafter, and while the fight was taking place, the deceased walked somewhere from the bottom side of Jenneker Street to the corner of Human Street. At that stage the accepted evidence demonstrates that the accused had crossed the street to the side opposite the shop and would have had a straight view to that street corner. Even without the accused's testimony in this regard, it is clear that the deceased must have been seen by him prior to being shot and killed.

[26] Weighing the accepted facts in the light of the totality of the evidence and the probabilities results in the clear conclusion that the state has proved beyond reasonable doubt that the accused was the person who fired the shot that killed the deceased.⁸

[27] It remains to be determined whether, in the light of all the evidence adduced at the trial, the guilt of the accused has been established beyond reasonable doubt in respect of each of the charges. On the count of murder, it is clear that there was no direct intention on the part of the accused to shoot and kill the deceased. The question is whether the state has proved, beyond

⁸ On the importance of prior knowledge in identification, see *R v Dladla and others* 1962 (1) SA 307 (A) at 310.

reasonable doubt, that the accused subjectively foresaw the possibility that his actions would result in the death of the deceased, and nevertheless persisted in his conduct.⁹ As the court noted in *S v Makgatho*:¹⁰

“A person acts with intention, in the form of *dolus eventualis*, if the commission of the unlawful act or the causing of the unlawful result is not his main aim, but he subjectively foresees the possibility that in striving towards his main aim, the unlawful act may be committed or the unlawful result may ensue, and he reconciles himself to this possibility.”

[28] The question is whether there was a real, as opposed to a remote, subjective appreciation of the reasonable possibility of the shot that the accused fired at Scholtz killing the deceased. It is so that the dividing line between culpable homicide and murder with *dolus eventualis* is notoriously thin and that subjective foresight may be proved by inferential reasoning based on the premise that ‘in accordance with common human experience, the possibility of the consequences that ensued would have been obvious to any person of normal intelligence.’¹¹ That possibility must have been foreseen by the accused when he witnessed the deceased walking into his vision during his altercation with Scholtz. While Scholtz and Coetzee would have been facing Esterhuizen Street so that the deceased was behind them in Jenneker Street turning into Human

⁹ 2013 (2) SACR 13 (SCA) para 11.

¹⁰ *Ibid* para 9.

¹¹ *Ndlanzi v S* 2014 (2) SACR 256 (SCA) at para 32.

Street, she would have directly faced the accused for some moments before the shot was fired. In *Mgade v S*,¹² the accused also denied firing a single shot at the complainant and the court *a quo* rejected his version of the shooting. On appeal, Jones J held:

‘In my view this argument is unsound. It assumes that the evidence shows that the single shot was aimed exclusively at the complainant...in circumstances where the possibility that it might strike the deceased was neither foreseen nor foreseeable. It fails to take into account the totality of the evidence. Instead it selectively concentrates on the fact that the appellant quarrelled only with the complainant and that he had no motive to aim a shot at the deceased. It fails to appreciate that this is not relevant to the real issue before the court *a quo*, which was whether on all the evidence the only reasonable inference was that, whatever his motive, the appellant fired the fatal shot in reckless disregard of the possibility, which he foresaw, that he might hit the deceased...There is no reason to think that the appellant, like the complainant, did not see the deceased. Indeed, the appellant did not have his back to the deceased as the complainant may have done. The appellant was facing the deceased who must have been either next to the complainant to his left or partly behind him...It is significant that the appellant did not give a version that he did not see the deceased, and could not have seen him. On the contrary, it is proper to accept from his version...in court that he knew all along that the deceased was there. There can be no doubt on the evidence, therefore, that the

¹² [2006] ZAECHC 30 at paras 4, 7.

appellant knew that the deceased was close to the complainant when the fatal shot was fired. In the circumstances he must have foreseen and therefore did foresee the possibility that the deceased might be struck by a shot fired at close range in his direction.’

[29] The same holds true on my assessment of all the evidence, including the accused’s acknowledgment that he had seen the deceased walking prior to her death. It was approximately 8:30 am on a Sunday morning. The street was empty other than the accused, the Coetzees and Scholtz. The accused was facing them from the side of Human Street opposite the shop and drew a firearm during the altercation. From there, he was looking down Human Street and straight towards the corner of Jenneker Street. The deceased came into picture out of that same corner, he reconciled himself to the possibility that she may be killed, and recklessly persisted in firing the shot that killed her. This was not a remote possibility given the length of the street, the vantage point he held and his angle of sight, and the likely distance between the accused and the deceased, as is evident from the testimonies of the eye-witnesses, aided by the photographs of the scene. There is no reasonable possibility that subjectively the accused did not foresee that the shot he fired could kill the deceased, and proof beyond reasonable doubt has accordingly been established.¹³ The accused must accordingly be convicted of murder on count 1. It follows from these findings that the accused is also guilty of counts 5 and 6 in respect of unlawful

¹³ See *S v Sigwahla* 1967 4 All SA 431 (A). Also see *S v Nkombani and Another* 1963 (4) SA 877 (A).

possession of a firearm and ammunition in terms of the FCA, there being no evidence to suggest that the accused was licenced for these purposes.¹⁴

[30] I am also satisfied that the state has proved beyond reasonable doubt that the accused unlawfully and intentionally attempted to kill Scholtz by firing at him, so that the accused must be convicted on Count 2.

[31] The state noted that there was insufficient evidence to convict the accused of Counts 3 and 4 in relation to attempted murder of the Coetzees. I agree and find the accused not guilty on those counts.

Order

[33] I make the following order:

- 1. The accused is found guilty on counts 1, 2, 5 and 6.**
- 2. The accused is found not guilty, acquitted and discharged on counts 3 and 4.**

A. GOVINDJEE

ACTING JUDGE OF THE HIGH COURT

¹⁴ Section 250(1) of the CPA.

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