



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

Case No: A89/2023

REPORTABLE: NO
OF INTEREST TO OTHER JUDGES: NO
REVISED: NO
DATE: 15 FEBRUARY 2024

SIGNATURE: [REDACTED]

In the matter between:
MUHAMAD SAJID KHAN

Appellant

and

THE STATE

Respondent

APPEAL JUDGMENT

MOGALE AJ

Introduction

[1] This is an appeal against both the conviction and sentence. The appellant was convicted of two counts of murder (1st deceased being Kabelo Tshetlo Matlala and 2nd deceased being Avelo Mbewu) read in terms of Section 51(1) of the Criminal Law Amendment Act 105 of 1997 and one count of attempted murder of Oriel Goitseone Moopane.

[2] The appellant was sentenced to life imprisonment in respect of the two counts of murder and six years imprisonment for the count of attempted murder. The court found no compelling and substantial factors justified a lesser sentence than the prescribed life imprisonment.

[3] The appeal is against both the the judgment and orders granted by Mosopa J on 4 March 2022 and 31 May 2022. The trial court dismissed the application for leave to appeal against both the conviction and sentence on 29 July 2022. The Appellant petitioned the Supreme Court of Appeal, and on 28 September 2022, leave to appeal was granted against conviction and sentence to the full court of this division

[4] It is trite that an appeal court may only interfere where there is a misdirection of the law and/or facts. The issue in this appeal is whether the trial court misdirected itself in finding that the offence was premeditated there was an intention to commit the crimes (*dolus directus*). The essential function of an appeal court is to determine whether the court below came to a correct conclusion¹.

Grounds of appeal

[5] The appellant's grounds of appeal pertaining to conviction, in essence, was that the trial court erred in rejecting the defence of the applicant (private defence) and further accepting the evidence of the State despite the glaring contradictions. Moreover the trial court failed to apply the law applicable to private defence correctly. The court failed to evaluate the evidence presented by the State and defence properly and further failed to consider the objective expert evidence of the ballistic expert Mr Pieterse.

Background

[6] The appellant was a businessman and owned various properties in Pretoria West, Atteridgeville, and Laudium. He is a naturalized South African citizen but of Pakistan origin.

¹ See *Quatermark Investments v Mkhwanazi* 2014 (3) SA 96 SCA at 103A - B and *Sarrahwitz v Maritz* 2015 (4) SA 4 SA 491 CC at 505).

On the date of the incident, the appellant was contacted and informed that a group of people were at one of his properties. Upon his arrival at the said premises, this group identified themselves as the Concerned Tshwane Residency Group ("CTR"). They were represented by the deceased and wanted proof of the appellant's ownership of the said property in question. They demanded to see the Title Deeds of the property.

[7] The appellant testified that he had previously sought the court's assistance to interdict the CTR group from illegally occupying his properties. The deceased, in count 1, was a member of CTR and was due to appear in the Pretoria Magistrate's Court on 3 February 2020 for violent and illegal dispossession of immovable property. The appellant pleaded not guilty to the charges, and a written plea explanation in terms of section 115 of Act 51 of 1977 was admitted into evidence.

[8] Central to the evidence was a video footage which recorded the initial argument between the appellant and the group of people, including the deceased. The footage depicts the altercation between the CTR group members and the appellant at the scene. The recording does not however encapsulate the altercation till the end.

State's evidence

[9] Oriel Goitsemanang Moopane and Joseph Oliphant testified on behalf of the State. They claimed to be both members of the CRT group. They testified that on the day of the incident, they were together with other people, including both deceased (in count 1 and count 2), when they proceeded to the appellant's property. The appellant was contacted to come to the scene. On his arrival, he was asked to produce proof of ownership of the property being the title deed. He said he would bring it on Monday, and they should meet at the police station. There was a forceful and violent struggle between the appellant and members of the group at the appellant's gate. During that struggle, the appellant turned towards Mr. Moopane and fired a shot that missed him but the bullet hit the deceased (in count 2), who was behind him. Mr. Moopane fled the scene and saw the appellant walking towards the deceased (in count 1), who was lying on the ground. He then at the time fired two shots at the deceased (in count 2), who was also on the ground.

[10] Mr Oliphant testified that the appellant shot the deceased's chest (in count 1) whilst the deceased lifted his hands and was retreating.

[11] During cross-examination, both witnesses testified that the appellant was the only person who carried a firearm. Mr Oliphant confirmed that he was carrying a bottle of cold drink and not a firearm. Hence the appellant's explanation that it was a holster of a gun was incorrect.

Appellant's case

[12] The appellant testified that the demand from the group to produce his title deed was aggressive. He noticed some group members were armed and concealed their firearms under their shirts. He tried to close the gate of the property manually, but the group prevented him from closing it. A violent and forceful struggle occurred as he was trying to close the gate. The appellant specifically recalled a firearm being pointed at him, then took out his firearm. There was an attempt made to grab his firearm from his hand, but he managed to break free from their grip. During this struggle, he was pushed away and lost his balance. While he stumbled in a backward motion inside the yard, he started firing shots with his licensed firearm, a 9mm Parabellum Caliber Block Model 19 semi-automatic Pistol, at the members who tried to overpower him. Both deceased's (in count 1 and count 2) death was caused by injuries they sustained during the shooting. The appellant denied that he acted unlawfully as he feared for his life.

[13] The appellant also testified that he was threatened by this group and that they wanted to kill him. One of them uttered: "You do not know how many people I have killed before." Someone also pointed a finger at him. He testified that he saw something at the back of Mr. Oliphant's T-shirt that looked like a holster, which gave him the impression that there was a firearm. He also saw a person in a green T-shirt carrying a firearm on his waist. Based on these observations and utterances, he believed that his life was in danger.

[14] Mr. Uner Habib confirmed that one of the people in the group wearing a green T-shirt was armed and entered the premises with a cocked firearm. Mr. Shoaib Rasheed recorded the video footage and called the 10111 emergency number attempting to seek help. The police did not respond to his call.

[15] Mr. David Stefanus Landsberg Pieterse, a ballistic expert, testified the probable position the appellant was in when both the deceased were shot. According to him, there was an absence of "*shored exit wounds*" on the bodies of both deceased. The bullet trajectory showed that the person was shooting without aiming and was not stable on his feet. The court accepted the expert's evidence.

Analysis

[16] The trial court made the following findings:²

"However, there is scientific evidence to prove that the accused was moving backward when they started shooting, according to the expert evidence by Mr. Pieterse. Mr. Moopane saw the accused retreating backward, even though he could not say whether he was upright or bending backward, but he saw the accused retreating backward and started firing. The bullet trajectory in the bodies of the deceased is in line with such movement at the time of the shooting."

[17] Despite accepting the expert's finding, I find that the court misdirected itself by finding that there was *dolus directus*, and the appellant's conduct was premeditated. The undisputed bullet trajectory finding shows that the person who was shooting shot at the deceased without aiming and was not stable on his feet. This evidence corroborates the appellant's version that he was stumbling backward when he started shooting. The expert evidence is proof that there could not have been an intention on the part of the appellant to commit the act. The trial court erred in its finding that the deceased was shot multiple times on the upper part of the body; this shows that the appellant had *dolus directus*. On the facts, therefore, there was no direct intention. *Dolus directus* (direct intention) is a form of

² Volume 9 – 14 page 761

intention that comprises a person directing his will towards achieving the prohibited results and performing the prohibited act.³ The result or act is his goal⁴.

[18] It is evident that the trial court accepted the evidence of the State as reasonably possibly true and but at the same time accepted uncontested ballistic evidence of Mr Pieterse. The trial court misdirected itself by not accepting the version of the appellant since it was in accordance with the finding of the ballistic expert, Mr Pieterse.

[19] On the finding of premeditation, it was argued that there was a misdirection.⁵ The trial court found:

"He arrived there with his pistol on the cock mode, ready to fire shots. The explanation that his firearm is always cocked is very suspicious, as there are instances where a firearm can mistakenly be discharged."

[20] In *Baloyi v S*⁶ the court stated as follows: *"Having outlined the above, it is essential to state that a finding of premeditation requires inferential reasoning. The trier of facts (a presiding officer) has to interrogate the facts of each case and adduce from them whether the commission of the offence was premeditated or not. That is partly due to the legislature not having defined "planned" or "premeditation" in the CLAA"*.

[21] In my view, the court also misdirected itself by not accepting the appellant's explanation that his firearm is always cocked. It did so without supporting expert evidence. Furthermore the fact that the appellant requested Mr. Rasheed to seek assistance of the police demonstrated that there was no premeditation.

[22] It is my view that the appellant acted lawfully in believing that his life or property was

³ Snyman's Criminal Law Seventh edition, updated by SV Hoorntje

⁴ Ferreira 2004(2) SACR 454 (SCA) 475c-d; Humphreys 2013 (2) SACR 1 (SCA) par 12

⁵ Volume 9-14 page 762-763

⁶ (2022) ZASCA 35 (1 April 2022) para 17

in danger. The version of the appellant was reasonably possibly true. The appellant admitted to shooting and killing the deceased but alleged that he acted in private defence, since he feared for his life and the fact that a firearm was pointed at him. In a defence excluding unlawfulness, the test is objective. The test to be applied is whether the appellant genuinely believed the attack was imminent and had to act to ward off an attack.

[23] During oral submissions, the appellant argued that the trial court misapplied the test for putative private defence as well. The appellant's submissions relied primarily on the contention that the trial court failed to correctly articulate the test for putative private defence and that it conflated the requirements for fault and negligence. The appellant argued that the incorrect understanding of the putative private defence test constitutes a miscarriage of justice.

[24] The trial court's finding on putative private defence⁷ was:

"The defence of putative private defence is not available to him based on his version. He cannot say that he mistakenly thought that his life was in danger as he was grabbed and an attempt was made to disarm him of his firearm by the group, and more specifically, he saw a person cocking a firearm and pointing the firearm at him.

The accused failed to meet the requirements available for the defence of private defence, as he was not attacked, and his life was not threatened."

"Both the deceased were not armed, they were not posing a real threat to the appellant, and the accused cannot say whether they were a part of the group that grabbed him. The threat was imminent if the person with a green T-shirt and Mr. Oliphant were the ones shot as they were posing a real threat to the appellant. The trial court finds that the appellant's version excludes the applicant's reliance upon putative defence".

[25] In this regard the trial court failed to take into account the appellant's testimony pertaining to the altercation between the parties.⁸

⁷ Volume 9-14 page 762

⁸ Volume 4 Of 14 page 314-315

[26] In *S v De Oliveira*⁹ 1993 (2) SACR 59 (A), "the appellate division held that the difference between private defence and putative private defence was significant: A person who acted in private defence acted lawfully, provided his account satisfied the requirements laid down for such defence and did not exceed its limits. In putative private defence it was not lawfulness, which was an issue, but culpability. If an accused honestly believed his or her life or property to be in danger but objectively viewed were not, the defensive steps he or she took could not constitute a private defence. If, in those

The accused testified:

"Accused: Then they started while I was waiting, M'Lord, they started threatening me with the group of people; they were saying they would kill me. Then, M'Lord, all of the members of those groups, if I can see them, I can recognise them, but right now, I do not remember their names. He informed me, and he told me you do not know how many people I have killed before. Then I saw the group members they were more aggressive. Then I was thinking to myself, M'Lord, let me go and close that gate so that they can remain outside the yard. Then I tried to close the gate; M'Lord, those members, all of the people, came to me and grabbed my hand. Then M'Lord, when I tried to close it, the members of that group held the gate, and there was a struggle. Then they again, the one wearing a green T-shirt, was sited outside, loaded the gun and pointed at me, and the members of the group grabbed me.

Then when I took out the firearm, they grabbed me, all of the people, all the members who held my right hand, and they tried to take my firearm from me. At that time, I was struggling to take out their hands and also the firearm. They wanted to take my firearm from my possession, M'Lord, then I start firing, I start shooting.

Ms: Killian: In what position were you when you shot, in other words, were you up straight what exactly what was your position?

Accused: M'Lord, I went to move back, but I remained standing, but my body was a little bit back.

Ms Killian: Now at the time when you fired, can you recall where exactly the firearm was pointing?

Accused: it was in the group; it went straight to them

Ms Killian: When you use the word fire, what exactly did you have in mind?

Accused: because they grabbed me, four or five people, and it was a struggle."

⁹ 1993] ZASCA 62; 1993 (2) SACR 59 (A) at 631-64B

circumstances, he or she killed someone, his or her conduct was unlawful. His or her erroneous belief that his or her life or property was in danger may well exclude dolus, in which case liability for the person's death based on intention will also be excluded, at worst for him or her, he or she could then be convicted of culpable homicide".

[27] Even if the trial court did not err in law, the contention remains that she erred on the facts. The appellant counsel relied on the case of *S v Tuta*¹⁰ where it was held that "*If the trial court made no error of law in formulating the test for putative private defence, then the misapplication of the correct test to the evidence before the trial court is not a matter that engages our jurisdiction. The written submissions made on behalf of the applicant sought to persuade us that the trial court failed to consider all the evidence and thus failed properly to draw warranted inferences as to the applicant's subjective state of mind. That may or may not be so, but the failure of a trial court to properly evaluate the evidence is an error of fact and not one of law.*"

[28] This court is of the view that the appellant was genuine in his belief that his life was in danger and he had the right to protect himself and his property. The appellant's belief that his life was in danger was not a mistake. Hence the issue of putative private defence does not come into play.

[29] The trial court placed emphasis on the evidence of state witnesses. The appellant argued that the court was highly critical of the appellant's version and found that he was dishonest without providing reasons for the finding. It is trite that an accused's version cannot be rejected only because it is improbable. It can only be rejected based on the inherent probabilities if it can be said to be so improbable that it cannot be reasonably possibly true.¹¹

¹⁰ *Tuta v S* supra at paragraph 50.

¹¹ *S v Shackell* 2001(2) SACR 185 (SCA)

[30] Moreover a trial court is required to consider the totality of the evidence to determine whether the essential elements of a crime have been proved.¹² Nugent J stated in *Van der Meyden*,¹³ a passage oft-cited with approval in this court:

"The proper test is that an accused is bound to be convicted if the evidence establishes his guilt beyond reasonable doubt, and the logical corollary is that he must be acquitted if it is reasonably possible that he might be innocent. The process of reasoning appropriate to the application of that test in any particular case will depend on the nature of the evidence the court has before it. What must be borne in mind, however, is that the conclusion which is reached (whether it be to convict or to acquit) must account for all the evidence. Some of the evidence might be found to be false; some of it might be found to be unreliable; and some of it might be found to be only possibly false or unreliable, but none of it may simply be ignored."

[31] It is my view the State failed to prove beyond reasonable doubt that the appellant had the intent to commit murder when believing that his life and his property were threatened. He testified he was entitled to act in private defence. No evidence refutes the version that he was acting in private defence is found to be reasonably possibly true. As a result, the appellant acted lawfully in defending himself and his property; this excludes criminal liability.

[32] In summary, the evidence reflects that this was a spur-of-the-moment incident that escalated by several events that led to the shooting incident. The CTR had no legal authority and was not lawfully entitled to enquire or demand that the appellant prove ownership of his property by providing them with the title deed, neither was the CTR lawfully permitted to become aggressive and threatening when the appellant informed them, they would receive the title deed on Monday at the police station. There was a forceful and violent struggle with the appellant at his gate. Some of the CTR members were allegedly armed with a firearm and pointed at the appellant. As he was pushed and

¹² *S v Libazi & another* 2010 (2) SACR 233 (SCA) para 17

¹³ *S v Van der Meyden* 1999 (1) SACR 447 (W) at 449I-450B

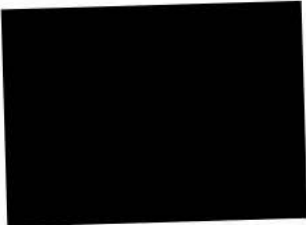
stumbling backwards, he discharged his firearm, genuinely believing that his life was in danger at the hands of the aggressive members of the group. His belief was genuine and reasonable and lacked the intention of unlawfulness.

[33] In conclusion, the trial court misdirected itself in convicting and sentencing the appellant. Under these circumstances, the convictions of murder and attempted murder cannot be sustained. As a result, the appeal succeeds. The conviction on two counts of murder and attempted murder is hereby set aside.

Order

[34] Consequently, the following order is made:

1. The appeal is upheld.
2. The conviction and sentence are set aside.
3. The appellant to be released immediately.



KJ MOGALE
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION,
PRETORIA

I agree, and it is so ordered



JS NYATHI
JUDGE OF THE HIGH COURT
GAUTENG DIVISION,
PRETORIA

I agree



H KOOVERJIE
JUDGE OF THE HIGH COURT
GAUTENG DIVISION,
PRETORIA

Electronically submitted.

Delivered: This Judgment was prepared and authored by the Judges whose names are reflected and is handed down electronically by circulation to the parties/their legal representatives by email and uploading to the electronic file of this matter on Case Lines. The date for hand-down is deemed to be 15 February 2024

Date of hearing: The matter was heard in an open court. The matter may be determined accordingly. The matter was set down for a court date on 20th November 2024

Date of Judgment: 15 February 2024

Appearances

For the Appellant:

Adv. P PISTORIUS SC
Circle Advocates Chambers
PRETORIA

For the Respondent:

Adv. E V SIHLANGU
The Director of Public Prosecutions
PRETORIA