



**IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE LOCAL DIVISION: BHISHO**

CASE NO: CA&R: 16/2022

In the matter between:

MASONWABE NJARA

APPELLANT

AND

THE STATE

RESPONDENT

Coram: M Makaula ADJP

Heard: 22 March 2023

Delivered: 17 August 2023

JUDGMENT

M MAKAULA ADJP:

A. BACKGROUND.

[1] The appellant was convicted and sentenced on 22 October 2020 by the Regional Court for the Division of the Eastern Cape sitting at Peddie for attempted murder of Masibulela Ngamngam (Mr Ngamngam) and the murder of Hombakazi Gaga (the deceased). He was sentenced to ten (10) years' and life imprisonment respectively. The appeal is against both conviction and sentence.

[2] The deceased and the appellant were in a love relationship. Mr Ngamngam testified that he fell in love with the deceased in October 2017 and at that time the appellant was no longer in a love relationship with the deceased. However, the appellant contended that he was still in a love relationship with the deceased at the time of her untimely death on 22 January 2018. The deceased was killed with a firearm, at her home, which belonged to the appellant. The appellant alleged that the deceased was shot at by Mr Ngamngam when they were struggling over the firearm. Mr Mngamnga contended otherwise. The court a quo found that the deceased and Mr Ngamngam were shot by the appellant hence the appeal is before us.

B. THE FACTS.

[3] Mr Ngamngam is a single witness regarding the events that led to the killing of the deceased. As aforesaid, they fell in love in October 2017. The deceased informed her that she was, before she met him, in a romantic

relationship with the appellant which she ended. However, the appellant did not want to accept being rejected to an extent that he threatened to kill her.

[4] On a certain day, the appellant gave him and the deceased a lift in his motor vehicle. When they got to near deceased's home, where they were to alight, the appellant refused to let the deceased alight. The appellant instructed him to alight from the motor vehicle. The appellant drove off with the deceased. After a while, the deceased came back and made a report about the appellant. She had bruises on her knees and thighs. She informed him that the appellant while riding with her jumped from a moving motorcycle allowing the deceased to crash.

[5] On a subsequent day the deceased showed him messages on her phone, which she alleged, were from the appellant. In the messages, the appellant was threatening to kill the deceased. One evening at about 22h00, the deceased requested him to accompany her to the police station to lay charges against the appellant. The police read the messages. They, together with the police went to the appellant's home. He was not at home. The police asked the deceased to phone the appellant from her phone and ask him to come to his home. The deceased indeed phoned the appellant and put the phone on speaker so that everybody could hear the conversation. The deceased requested to meet with the appellant at his home. The appellant asked the deceased what the police wanted at his home and refused to come to meet them. The police gave up and they went

home. The threatening messages continued to an extent that the deceased had to obtain a protection order against the appellant.

[6] On 22 January 2018 the deceased was with Mr Ngamngam in her room. She went outside to brush her teeth. She suddenly came back and locked the door behind her. She reported to him that she saw the appellant coming towards her room. The appellant knocked at the door, and no one answered the knock. The appellant thereafter pushed the door open. The appellant asked to see the deceased outside. At that stage, the deceased was standing against the wall closer to a washing machine facing the deceased and he was seated on a sofa. He heard a gunshot. He immediately stood up and looked. The appellant was standing on the other side of the glass door. The appellant was carrying a gun and he fired a shot through the glass opening of the door at the deceased. The deceased fell on the other side of the washing machine. The appellant again shot at the deceased while she was lying on the floor. He turned and pointed the gun at him. He jumped for the appellant. They wrestled over the firearm. He testified as follows in this regard.

**“... whilst we were wrestling, we ended up falling,
and I was underneath and he was on top of me, and
Your worship, I could feel then feel that my left leg
was not balancing anymore.” (sic)**

At that stage they were already outside the yard in front of the gate. He managed to dispossess the appellant of the firearm. The appellant ran away. Thabiso called on him not to shoot at the appellant. He told Thabiso that the appellant had killed the deceased. He noticed that the firearm had jammed. There was a bullet stuck in its chamber. In hindsight, he thought that was the reason the appellant could not fire shots anymore and decided to let go of it. He proceeded and placed the firearm on top of the washing machine. The deceased was lying on the floor. There was a lot of blood on the floor. They took her to the hospital where she passed on.

[7] After the struggle, he noticed that he had been injured. He was not sure at what stage the appellant shot at him. He assumed it was when he jumped at him because it was after that that he felt his leg going numb. He testified that he was of the view that the appellant had planned the killing of the deceased because he came on foot leaving his motorcycle at a distance away from the deceased's home.

[8] Mr Thabisa Manjezi confirmed the evidence of Mr Ngamngam insofar as it related to him. He was at his home when he heard three (3) gunshots. They were not fired in quick succession. He went to investigate. He saw men at the deceased's home involved in a scuffle. They carried on until they exited the gate. It transpired later that it was the appellant and Mr Ngamngam. The appellant was

overpowered, and he ran away. He noticed that they were struggling over a gun, which ended up with Mr Ngamngam. He shouted at him not to shoot the appellant. He enquired from him what had happened. Mr Ngamngam said the appellant shot at them and invited him to the deceased's room. He saw the deceased lying in a pool of blood on the other side of the washing machine. Neighbours gathered and rendered assistance to the deceased. He noticed that Mr Ngamngam was also injured.

[9] Constable Luyanda Hlekani testified that he had helped the deceased when she went to lay a complaint about the death threats she had been receiving from her ex-boyfriend. The ex-boyfriend was the appellant. Indeed, he responded to the complaint by visiting the home of the appellant. The appellant was not present at his home. The deceased phoned him on his cellphone. He spoke to the appellant as the phone was on loudspeaker. The appellant initially said he was busy with his goats. He asked the deceased why she was in the company of the police. The appellant then told the deceased that he was not going to come and meet them. His colleague, Constable Badu pleaded with the appellant to come but he refused. They gave up and went back to the police station. They did not open a case docket because the deceased was advised to apply for a protection order, but the incident was recorded in the occurrence book. The entry in the occurrence book was read into the record.

[10] Constable Hlekani stated that the threatening messages were not shown to him. He found that to have been strange because it was at 22h00 and did not know how the appellant was able to see the police van because it was at night.

[11] Warrant officer Xabangele, as the investigator, was given the deceased's phone by her family four days after she was shot and killed. He then searched for the threatening messages on the phone and found that they had been deleted. He sent the phone to their Cyber Unit in East London. He never received the phone back and did not know what eventually happened to it.

[12] Dr Dominique John conducted the postmortem on the deceased's body and his chief postmortem findings were two entrance and exit gunshot wounds; fragmented skull cap; left collar bone; intracranial bleeding; lacerated brain; lacerated left subclavian vein and her organs were pale.

[13] Warrant Officer Nomboniso Makapela worked for the Local Criminal Record Centre (LCRC) as a forensic field worker. She visited the crime scene, took photos, and compiled a photo album i.e., exhibit A. The crux of her evidence is that when she took photos of the crime scene there were no cartridges inside the room where the deceased was killed. All the cartridges were on the verandah and outside.

[14] The evidence of the accused somewhat overlaps with that of the appellant in some respects. The appellant insisted that he was in a love relationship at the time of the death of the deceased. He confirmed the evidence of Mr Ngamngam about him giving them a lift from town and dropping him off next to the deceased's home. He however denied that he jumped off a moving motorcycle because of which the deceased fell and sustained bruises. He further confirmed receiving a phone call from the deceased. He however denied refusing to meet with the police. He told them that he was at his farm and had no transport to meet them at his home, especially that it was at night. This is contrary to the version of Mr Ngamngam and Constable Hlekani as reflected above.

[15] The appellant did not dispute that he was at the deceased's house when she was killed. He was doing his chores and decided to go and visit the deceased. The time was between 11h00 and 12h00. He proceeded to her rondavel and knocked. There was no response. He pushed the door open and met with the deceased. He enquired as to why she did not respond to his knock. She said she had been sleeping. At that juncture someone pounced at him around his waist and took out his firearm which was tucked in his waistband. That person turned out to be Mr Ngamngam. They both struggled for the possession of the firearm. During that process, the firearm discharged a shot. He did not see where the bullet landed. After a while a second shot went off again. The tussle continued outside of the rondavel. A third shot was discharged whilst they were outside.

He noticed that the firearm had jammed. He let go of it and ran away towards town on foot. He denied that he drove off on a motorcycle as it had been booked in for repairs at that stage. He produced a receipt which did not reflect a date, which his attorney conceded was irrelevant.

[16] The appellant was given an opportunity to explain in detail as to how the deceased happened to be shot twice, while standing and while lying on the floor. He could not explain how that occurred. His reply was that he did not know because he was concentrating on the person who was attempting to dispossess him of his firearm which was tucked on his waist. He however, denied that he shot the deceased through the glass door as she was answering to his knock. He further denied that he shot her while lying on the floor. He stated that he had knowledge of how a firearm worked. Immediately he realized that it had jammed, he let go of it and ran away. He also stated that he would cock his firearm and then engage the safety lock. What that meant is that there was always a bullet in the chamber ready to fire once the safety catch is released. He, therefore, surmised that the safety catch was tampered with during the struggle and Mr Ngamngam pulled the trigger because he was always holding it on the barrel during the struggle.

[17] The court *a quo* correctly identified the issues it had to decide and the burden of proof. It was alive to the fact that , the version of the accused and that

of Mr Ngamngam are diametrically opposed to one another. It also had regard to the evidence presented prior to the death of the deceased. Having reviewed the law applicable, it dealt with its duty as follows:

“The court will be required to make findings on mainly three aspects, namely (a) credibility of factual witnesses, (b) their reliability, and (c) probabilities and must ultimately be satisfied that the balance weighs so heavily in favour of the onus bearer that it has succeeded in discharging the onus of proof.”

Having analysed the evidence, the court *a quo* accepted the evidence of the state and found that it had proved the case against the appellant beyond a reasonable doubt. The court *a quo* found Mr Ngamngam and the state witnesses to be credible and reliable.

C. **Grounds of Appeal against conviction.**

[18] In a nutshell the grounds of appeal may be summarised as follows.

- (a) That the state failed to prove that the killing of the deceased was premeditated and planned.

(b) The court erred in failing to find that the death and the injury sustained by Mr Ngamngam resulted from a struggle between the latter and the appellant for the possession of the firearm.

(c) The injuries sustained by both the deceased and Mr Ngamngam were frontal thus corroborating the evidence of the appellant that they were sustained during a struggle for the possession of the firearm. The contention on appeal therefore is that the court *a quo* erred in finding that the state proved the case against the appellant beyond a reasonable doubt.

[19] I have dealt in detail above with the evidence. The events preceding the death of the deceased are captured in the evidence of Mr Ngamngam and Constable Hlekani and partly confirmed by the appellant. It had been established beyond reasonable doubt by the state that there were threats made by the appellant against the deceased. The evidence of Mr Ngamngam about the first encounter he had with the appellant when he gave them a lift from town is confirmed by him albeit that he denied driving off with the deceased under duress. Mr Ngamngam's accepted evidence however is that when she returned she had bruises. Such bruises were consistent with someone who had fallen from a moving motorcycle. There is no reason why the evidence of Mr Ngamngam was to be rejected in this regard.

[20] Mr Ngamngam testified about threatening messages which were allegedly sent by the appellant to the deceased. To establish the truthfulness of that allegation the deceased and Mr Ngamngam proceeded to the police station to report that. Indeed, Constable Hlekani confirmed the report. He and Constable Badu acted on it and proceeded to look for the appellant. They spoke to him, and he refused to come and meet with them. The evidence of the appellant was correctly rejected by the court *a quo* in this regard. Constable Hlekani testified as follows:

“... firstly, he said he was at the goats; ... and then he then – he changed his stance and said he can see us. ... He said why are you in the company of the police if you are looking for me. ... Before she – the complainant could answer he said that he is not going to go there; or he is not going to come there; Your Worship.” (Sic)

[21] This is a clear indication that the appellant knew he was sought by the police, and he was avoiding and being disrespectful towards them. If the appellant had done nothing wrong or was in this good love relationship with the deceased, there was no reason for him not to have gone to his home to meet with the deceased and the police. Seeing the police with his loving girlfriend, would have been the cause for him to have wanted to go to them to enquire why was she in their company.

[22] The court *a quo* accepted their evidence in this regard. It further found Constable Hlekani to have been a credible and reliable witness. I have no reason to interfere with this finding. His evidence is without fault. The court *a quo* correctly rejected the appellant's evidence in this regard.

[23] The evidence of Mr Ngamngam, starting from the time the deceased came back hurriedly from brushing her teeth outside and closed the door had not been challenged. The deceased reported to him that the appellant was approaching, and she was afraid. Indeed, the appellant pushed the window that was part of the door, inserted his hand and shot at the deceased who staggered up to the washing machine and fell. The appellant then shot her again while lying on the floor. This Mr Ngamngam witnessed. All that he did not know was how he got injured. He saw the appellant pointing the firearm towards him, he jumped for it and a tussle over it ensued. This evidence is logical and straight forward. It gives light to exactly what occurred. It cannot be faltered as also accepted by the *court a quo*.

[24] The same cannot be said about the evidence of the appellant. The appellant did not know how the deceased was shot and killed. He also did not know how Mr Ngamngam was injured. All he relied on are possibilities and probabilities. He testified that he went to visit the deceased. He had his firearm, which he carried with him all the time. He further testified that he always had it cocked with one bullet in the chamber ready to be fired. He used the safety catch. There

was no misunderstanding between him and Mr Ngamngam. The relationship between the latter and the appellant should be viewed in the light of their previous encounter. They were not meeting each other for the first time. They never quarrelled, either before or on that day. Without a reason and unexpectedly, Mr Ngamngam pounced on him and wanted to dispossess him of the firearm. That action was unprovoked.

[25] Weighing the version of Mr Ngamngam and what is stated above by the appellant, common sense dictates that Mr Ngamngam's version is more plausible. It is unconceivable that Mr Ngamngam who never had any bad words or ill feelings against the appellant would have behaved in the manner described by the appellant. One may argue that Mr Ngamngam did not like what the appellant was doing to his new girlfriend. However, that could easily be dismissed by the actions of the deceased supported by those of Mr Ngamngam of reporting the matter to the police and seeking a protection order against the appellant. This view is fortified by the unceasing death threats meted out by the appellant towards the deceased, the last of which promised to kill the deceased inside that week. Indeed, the deceased was killed inside that week as promised by the appellant.

[26] As previously stated, no reasonable account has been given as to how the deceased was shot. The accused's account of how that occurred is unconvincing. It is guess work from the time the scuffle started, how the safety lock was

unlocked, the pulling of the trigger, the striking of the deceased by the bullets, the positions they were in at the time and how Mr Ngamngam was injured. What is clear from his evidence is that, on noticing that the firearm had jammed, he let go of it and ran away. That as well should be viewed in the backdrop of Mr Ngamngam that after he gained possession of the firearm, the appellant ran away. The appellant could not account for anything that occurred. Mr Ngamngam on the other hand convincingly told how the deceased died at the hands of the appellant and was honest enough to state that he did not know how he sustained the injury because immediately after shooting the deceased twice, the appellant turned the gun on him, and he jumped for it and a scuffle over it ensued. I agree with the court *a quo* when it reasoned and found.

“The court is rather of the view that the circumstance’s surrounding the gunshot injury of Masibulele supports the honesty of his version. He could have concocted a much simpler version than to present a scenario where it is not clear to him how he sustained that injury ... the objective surrounding circumstances leading up to the demise of the deceased, supports the credibility of Masibulele, rendering his version not only relatively honest, but most importantly also reliable.”

[27] There is no reason for this court to interfere with the credibility findings of the court a quo in respect of this and other witnesses.

[28] This court must look at the conduct of the parties prior and post the shooting of the deceased. The accused knowing that he was sought after by the police i.e., Constables Hlekani and Badu, never bothered himself to go and enquire from them why they wanted him to an extent of visiting his home in the company of the deceased. That on its own is telling about the behaviour of the appellant towards the deceased. The ineluctable conclusion is that he knew exactly that he was wanted because of his threats towards the deceased. After the deceased was shot at, the appellant did not mention that he made enquiries about whether the deceased was not “**accidentally**” shot during the scuffle as expected of a person who was so in love with her. He did not even go to report the incident to the police until he received a call from them.

[29] Mr Ngamngam on the other hand did not behave like a person who had shot and killed the deceased. Immediately, after the appellant ran away, he reported to Mr Manjezi who, after hearing three gunshots, came out of his home to investigate. Mr Ngamngam reported to him that the appellant had shot the deceased and him. Mr Ngamngam kept the firearm in the state in which he dispossessed the appellant and showed it to the police. He further made means to see to it that the deceased was taken to hospital. The conduct of Mr Ngamngam

is inconsistent with a person who was an instigator and caused the death of the deceased. The contrary is correct about the behaviour of the appellant after the incident.

[30] Once the evidence of the appellant is rejected, as it was correctly done by the court *a quo*, his intention to kill the deceased does not become an issue. The appellant, despite what he said in his evidence went to the deceased's home armed with a cocked firearm which was ready to discharge rounds of ammunition. He shot at the deceased at point blank range thus fatally wounding her. The circumstances under which she was shot at, as described by Mr Ngmangam, are consistent with the injuries depicted in the post-mortem report as found and testified to by Dr John who conducted the post-mortem. I have dealt with his findings regarding the entrance and exit wounds and the location of the injuries. I shall not venture into the realm of speculating about how Mr Ngamngam could have sustained his injury and the trajectory of the bullet that struck him.

[31] The court *a quo* amply dealt with the reason why it concluded that the murder of the deceased was premeditated. It correctly relied on the following dictum in *S v Raath* 2009 (2) SACR 46 (C):

**“Should the state produce sufficient evidence for a finding
that the murder had been premeditated it will trigger the**

imposition of the prescribed mandatory sentence of life imprisonment. If not, the applicable sentence regime will be in terms of the provision of section 51(2) read with Part II of Schedule 2 of the CLAA which is 15 years imprisonment for a first-time offender convicted of murder.”

See also; Baloyi v The State (739/2021) [2022] ZASCA 35 (01 April 2022)

Accepting the evidence of the state, as we must, there is no other inference that could be drawn from the circumstances leading to the death and killing of the deceased by the appellant other than that the appellant intended to kill her. He did so because he could not accept the rejection and in cold blood carried out that plan by going to her home to shoot her. There is therefore no merit in the appeal against the conviction of the appellant.

Ad Sentence.

[32] The appellant relied on his personal circumstances, that he contributed towards the funeral of the deceased and that he developed arthritis whilst he was in prison, to argue that life imprisonment was too severe. This court is not allowed to interfere with the sentence imposed by the court *a quo* unless it failed to exercise its sentencing discretion properly and the sentence induces a sense of shock. At the inception of the trial, the appellant was advised of the provision of

section 51(1) of the Criminal Law Amendment Act 105 of 1977. The provision requires a court convicting an accused of amongst other offences premeditated murder to hand down life imprisonment not unless there are substantial and compelling factors which justify a departure thereof. It is by now trite what constitutes those circumstances. The exercise to determine such, still involves the balancing act between the personal circumstances of the convicted person, the offence itself and the interests of the community at large. The court *a quo*, adequately dealt with the law in this regard. It considered the personal circumstances of the appellant. In rejecting the notion that the personal circumstances should take precedence over the other two factors, the court measured as follows:

“The court has come to the conclusion that the accused personal circumstances and his prospects of rehabilitation should pale into insignificance if weighed against the aggravating features of this case ... Nothing out of the ordinary stems from the personal circumstances of the accused and as such it lacks any weightily justification for a finding that substantial and compelling exist; be it individually or cumulatively. Time spent awaiting trial cannot on its own constitute substantial and compelling circumstance where life imprisonment is imposed. The court consequently finds that there are no substantial and

**compelling circumstances present, justifying the imposition
of a lesser sentence in count”**

[33] I agree with the court *a quo* that there are no substantial and compelling circumstances in this matter. The evidence that has been accepted is that the appellant planned to kill the deceased for quite some time. He sent threatening messages to the deceased. A protection order was granted against him. He on one occasion forcibly left with the deceased who later came back with bruises on her legs. As if that was not enough, the deceased came to the deceased’s home and shot her. His intention was to kill her because he shot her on the forehead and on the collarbone while lying on the floor. She was a defenceless woman who lost her life in the hands of the appellant who did not accept her rejection. Mr Ngamngam was fortunate to survive with only a bullet wound to his leg. The sentences imposed by the court *a quo* are justified in the circumstances and there is no reason for this court to interfere with them.

Consequently, I make the following order:

1. The appeal against both conviction and sentence is dismissed.

M MAKULA
ACTING DEPUTY JUDGE PRESIDENT OF THE HIGH COURT

DAWOOD J

I AGREE:

F B A DAWOOD
JUDGE OF THE HIGH COURT

Appearances:

For Appellant: Adv Giquwa

Instructed by: LEGAL AID SOUTH AFRICA
KING WILLIAMS TOWN LOCAL OFFICE
KING WILLIAMS TOWN

For the Respondent: Adv Philisane

Instructed by: DIRECTOR OF PUBLIC PROSECUTIONS
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