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REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

DATE: **28/2/17**

CASE NO: **A700/2016**

REPORTABLE: **NO**

OF INTEREST TO OTHER JUDGES: **NO**

ABEL KOTIKOTI SELOTA

APPELLANT

AND

THE STATE

RESPONDENT

JUDGMENT

THOBANE AJ,

[1] The appellant who enjoyed legal representation throughout the entire trial, was arraigned in the High Court, North Gauteng, sitting as the Circuit Local Division for the Eastern Circuit District in Middelburg, before Madam Justice Pretorius on the following counts;

Count 1, murder;

Count 2, attempted murder and

Count 3, attempted murder.

[2] He pleaded not guilty to all the counts and offered a written explanation in terms of section 115(2) of the Criminal Procedure Act, 51 of 1977. The nub of his explanation as it pertains to count 1, is that he acted in self defence. With regard to the remainder of the counts, he explained that it was a sudden emergency in that when he fired the shots at the motor vehicle, he was not aware that there were passengers in the motor vehicle. The appellant further made admissions in terms of section 220 of the Criminal Procedure Act, pertaining to the identity of the deceased, the transportation of his body, the post mortem report and the findings contained therein, the photo album as well as the J88 Medico Legal Report.

[3] Notwithstanding his plea, the appellant was found guilty as charged and sentenced as follows;

Count 1, 12 years imprisonment,

Count 2, 5 years imprisonment,

Count 3, 5 years imprisonment.

It was further ordered that the sentences imposed in respect of counts 2 and 3 run concurrently with the sentence imposed in respect of count 1. The effective term of imprisonment was therefore 12 years.

[4] This appeal which is directed at the conviction only, is with leave of the trial court.

[5] At the commencement of the appeal it was pointed out that the record was partially incomplete in that a portion of the evidence of Ms P. S., a state witness, was not transcribed. It was however agreed that the record was sufficient for purposes of the appeal, and that in the interest of justice the appeal be proceeded with.

[6] The appellant contends that this court must intervene and set aside the conviction in that;

(a) He did not intentionally shoot at the deceased as he acted in self defence and or out of necessity;

(b) He did not have the intention to kill and/or did not attempt to kill his ex-wife and his daughter.

STATE CASE

[7] L. S. M., the first state witness, testified that she had been in a relationship with the appellant as he had paid lobola for her. The relationships, which had been abusive, lasted between 1989 and 2003 when she eventually left owing to the abuse. On the 3 February 2008 she was accompanied by her daughter P. and the deceased to visit his son who had been admitted to hospital. The appellant had also been visiting at the hospital. Upon exiting the ward, she met the appellant who without saying anything wanted to grab her. She hid behind some people and was advised by a police woman to run away. She eventually managed to run away to the car which had been parked at the gate of the hospital. The appellant, so she testified, had been insulting her calling her a woman of loose morals. They thereafter left the hospital and drove in the direction of a marula tree where the deceased intended to buy food. While driving slowly towards the tree she heard three gun shots coming from the front of the motor vehicle. She did not see the shooter. She opened the door and fell to the ground. She then ran to the hospital where she was taken to the toilets and later to the ward where she was later admitted.

[8] P. S. testified that she went to the hospital to visit his brother in the company of her mother as well as the deceased. Her father, appellant, who had also been visiting, was the first to exit the ward. When they exited they met him outside and he asked to speak to her mother who blatantly refused. He thereafter tried to grab her hand tightly but she managed to break free. She thereafter did not hear the appellant speak to the deceased or

her mother. They walked back to where the car was parked. The deceased left them momentarily and returned to the hospital. During that time the appellant was in the company of two other persons. When the deceased returned from the hospital he entered the motor vehicle and drove, at normal speed, in the direction of the marula tree. The next thing she saw her father in front of the vehicle, 5 meters ahead with an out stretched hand, firearm in hand and firing in the direction of their motor vehicle. She tried to duck and hide but could feel that she had been shot. She observed the appellant pull out the deceased from the driver's seat. She got off the vehicle on the passenger side and soon thereafter lost consciousness.

[9] The third witness to be called was Sinah Madigage, a fruit and vegetable vendor under the marula tree across the hospital. On the day of the incident the appellant approached one of the vendors in the company of two other persons and bought some item and started eating it. He observed a motor vehicle, a bakkie, approaching the marula tree. As it drove around the tree she heard sound of a firearm being discharged. She saw the appellant move closer to the vehicle and open the drivers door and pull down the driver. She then heard another shot being fired. She saw three people in the bakkie. She was at a distance of about six meters from the bakkie when the shooting took place. She confirmed that she made a statement to the police but that she initially refused to make it as she was afraid of the accused. Eventually she relented and signed the statement. She confirmed that when consulting with the prosecutor, at the commencement of the trial she pointed out to her that she did not agree with a portion of the statement, namely, that the vehicle had been driving at high speed. According to her it was driving at normal speed. She heard three shots being fired and she saw the appellant on his phone calling the police. She was quizzed about the two statements she made to the police and the

contradictions contained therein and she explained that she had initially been reluctant to make a statement but was prevailed upon by the police. Even then, the contents are not as she recalls the events of the day.

DEFENCE CASE

[10] Appellant testified in his own defence that on the day of the incident he had been at the hospital to visit his son. That at some point he saw his ex wife approach and he asked her for a copy of a birth certificate so that he could apply for an ID for a child. His ex wife did not answer him instead it is the deceased who asked him why he wanted to talk to his wife. He walked away but came back and stabbed the appellant on his chest with his finger and said *"I will strike you here and you will die there at the gate"*, turned and walk away. He drove off in the car but came back after 5 seconds. He was then told by a security guard with whom he had been standing, that he should run away as the deceased would kill him because he had a gun. He then ran away in the direction of where the taxis were. The deceased moved towards the security guard with whom the appellant had been standing and said him *"where is that dog"*. He was told by the security guard that he had left. The deceased then proceeded towards the hospital. The appellant emerged from where he had been hiding and proceeded towards the taxis thinking he could catch a taxi and and leave. He then heard sound of the deceased vehicle and saw it coming towards him at high speed. He thought the deceased will shoot him. He saw it move off the road and come towards him. He then fired a shot thinking the motor vehicle would stop. He also saw the deceased move his hand off the steering wheel in a downward motion and he thought he was pulling out a firearm, he fired another shot which was aimed at the deceased, but he did not see other passengers.

[11] After the defence closed its case the parties argued the matter. The trial Judge felt that

there were certain issues that needed clarification. Dr. Nkondo, who performed the post mortem, was called as a witness of the court. She testified as to the number of shots, injuries to appellant's daughter as well as the location of the wounds in relation to where the shooter may have been positioned. According to her, the shooter was probably positioned at the front of the deceased when the shots were fired unless if the deceased turned his upper body to his right prior to the firing of the shot, in which event the shooter would probably have been positioned on the driver's side.

THE LAW

[12] The correct approach to the evaluation of evidence in a criminal trial was enunciated by the SCA as follows in ***S v Chabalala 2003 (1) SACR 134 (SCA)*** para 15:

"The trial court's approach to the case was, however, holistic and in this it was undoubtedly right: S v Van Aswegen 2001 (2) SACR 97 (SCA). The correct approach is to weigh up all the elements which point towards the guilt of the accused against all those which are indicative of his innocence, taking proper account of inherent strengths and weaknesses, probabilities and improbabilities on both sides and, having done so, to decide whether the balance weighs so heavily in favour of the State as to exclude any reasonable doubt about the accused's guilt. The result may prove that one scrap of evidence or one defect in the case for either party (such as the failure to call a material witness concerning an identity parade) was decisive but that can only be an ex post facto determination and a trial court (and counsel) should avoid the temptation to latch onto one (apparently) obvious aspect without assessing it in the context of the full picture presented in evidence...."

[13] The aforementioned salutary approach was also adopted in ***S v Trainor 2003 (1)***

SACR 35 (SCA) para 9. In **S v Van der Meyden 1999 (2) SA 79 (W)**, Nugent J, as he was then, made it clear that:

"Purely as a matter of logic, the prosecution evidence does not need to be rejected in order to conclude that there is a reasonable possibility that the accused might be innocent. But what is required in order to reach that conclusion is at least the equivalent possibility that the incriminating evidence might not be true. Evidence which could incriminate the accused, and evidence which exculpates him, cannot both be true - the one is possibly true only if there is an equivalent possibility that the other is untrue. There will be cases where the state evidence is so convincing and conclusive as to exclude a reasonable possibility that the accused might be innocent, no matter that his evidence might suggest the contrary when viewed in isolation."

[14] The conclusion which is arrived at by the court as to whether the evidence establishes the guilt of an accused beyond reasonable doubt must account for all of the evidence. The Judge continued:

"The process of reasoning which is appropriate to the application of that test in any particular case will depend on the nature of the evidence which 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."

[15] In **S v Olawale 2010 (1) All SA 451 (SCA)** at para 13 it was held:-

"It is a trite principle that in criminal proceedings the prosecution must prove its

case beyond reasonable doubt and that a mere preponderance of probabilities is not enough. Equality trite is the observation that, in view of this standard of proof in a criminal case, a court does not have to be convinced that every detail of an accused's version is true. If the accused's version is reasonably possibly true in substance, the court must decide the matter on the acceptance of that version. Of course it is permissible to test the accused's version against the inherent probabilities. But it cannot be rejected merely because it is improbable; it can only be rejected on the basis of inherent probabilities if it can be said to be so improbable that it cannot reasonably possibly be true."

[16] Finally, a court of appeal will be hesitant to interfere with the factual findings and evaluation of the evidence by a trial court, (see ***R v Dhlumauyo and another 1948 (2) SA 677 (A)***) and will only interfere where the trial court materially misdirects itself insofar as its factual and credibility findings are concerned. In ***S v Francis 1991 (1) SACR 198 (A)*** at 198j - 199g the approach of an appeal court to findings of fact by a trial court was crisply summarised as follows

"The powers of a court to interfere with the findings of fact of a trial court are limited. In the absence of any misdirection the trial court's conclusion, including its acceptance of a witness's 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's evidence a reasonable doubt will not suffice to justify interference with its findings. Bearing in mind the advantage which a trial court has of seeing, hearing and appraising a witness, it is only in exceptional cases that the court of appeal will be entitled to interfere with a trial court's evaluation of oral testimony".

SUBMISSIONS

[17] It was submitted on behalf of the appellant that the two witnesses being the appellant's ex-wife and her daughter, harboured some resentment towards the appellant and that they were not independent. The source of the resentment is identified as the many years of abuse that his ex wife endured and the fact that the daughter sustained a bullet wound at the hand of the appellant on the day of the incident. Their evidence, it is contended, ought to have been treated with caution.

[18] Contrary to what is submitted, the trial Judge observed that Ms. M., gave the impression that she was reluctant to give evidence against her father. Nothing on the record suggests that the fact that she was shot and injured played an extraordinary role in her testimony. The record reflects that she testified about what she observed and experienced. Her relations to the appellant, in my view, did not play a role in her testimony.

[19] It was further argued that there were contradictions in the testimony of the witnesses and that as a result, it was erroneous for the trial court to have found them to be credible witnesses. In dealing with the contradictions, the trial Judge noted in her judgment that the witnesses were not perfect in every respect. She nevertheless found them to be credible and accepted their evidence. The credibility findings by the trial Judge, are a hurdle that the appellant must clear.

[20] One must bear in mind that the defence of the appellant which was advanced when he tendered his plea is that he acted in self defence. This defence was however rejected by the trial court as being improbable and that it was not reasonably possibly true. In an attempt to show that he was under attack, the appellant alleged that the motor vehicle driven by the deceased, came towards him at high speed and that he ran away from it.

All the three state witnesses disputed this. According to them the vehicle had been driven normally or at normal speed. It is not immediately clear what attack the appellant was defending himself against, whether it was the chasing by the car driven by the deceased or the movement of the deceased's hand from the steering wheel towards his hip. From the record the appellant suggested that it was movement of the deceased's hand from the steering wheel to the hip that he interpreted to mean that the deceased was drawing a firearm. Despite it being pointed out to him several times that it was impossible to see a hand moving to the hip while standing outside a vehicle, he was adamant that it is exactly what he saw.

[21] In his plea the appellant indicated that he fired the first shot towards the car thinking that the deceased would stop chasing after him. He further said, "*I then produced a firearm, firing shots, firing towards the car of the deceased, aiming at him as I was in fear that he will shoot me*". During cross examination he denied that he aimed at anyone. He went further to deny that he was aware that there were passengers in the motor vehicles. The latter denial was strange in light of the fact that the evidence of the appellant was that he had seen his ex-wife and his daughter getting into the deceased's motor vehicle, seconds before he saw it move towards him and further that he never saw them alighting therefrom.

[22] The appellant was adamant that he had not been standing in front of the deceased's motor vehicle when he fired the shots in the direction of the vehicle. The evidence of the three state witnesses, contradicted him. He insisted that he was more to the side of the vehicle. The evidence of Dr. Nkondo was however decisive. She gave three pieces of evidence that in my view dispelled the notion that the appellant had no intention to kill;

22.1. She testified firstly that there were three entry wounds on the body of the

deceased and that there existed two exit wounds. The third bullet that entered the deceased was found embedded inside him, on the front of the neck. The explanation by the appellant that he had fired only two shots and that the first shot did not even hit the vehicle, was clearly not supported by evidence.

22.2. She testified that the shooter would probably have been standing in front of the motor vehicle in view of the location of the entry and exit wounds but most importantly the tract. Two of the entry wounds were described as *"right upper side of the*

chest 15cm from midline and 3.5cm above and laterally from the nipple". Another one, *"left upper chest wall 2.5 from the midline and 5 cm from the collared bone".*

During cross examination, the version of the appellant to the effect that he shot the deceased through the driver's window, was put to her. It was suggested that one of the wounds could have been inflicted when the appellant was so positioned. The opinion of Dr. Nkondo was that on that postulation, the deceased would have had to turn his body to face the driver's window for such a wound to be inflicted. She confirmed that the wound could only have been inflicted by a person who was in front of the deceased. There was no evidence before the trial court to the effect that the deceased had turned his body to face the driver's window. The inescapable conclusion is that the appellant had been standing in front of the vehicle when he fired those shots.

22.3. Dr. Nkondo was asked about the significance of "burned skin" as noted from the description of one of the wounds in the post mortem report. She explained that it is caused by gas and heat when a bullet is discharged. Further, that it could be indicative of the range from which the bullet was discharged. Although she noted the "burned skin" she refrained from commenting about the range because the deceased's shirt

had been removed. What is significant though from her answers is that to burn the skin around the wound, the shooter would have been standing at a distance of not more than a meter. (my emphasis). This is significant because the version of two of the state witnesses is that the deceased was pulled off the bakkie and shot.

[23] As indicated above, the trial Judge made strong credibility findings in this matter. She found Ms M. and Ms S. to be credible and reliable witnesses. Whereas the court noted contradictions by Ms S., it nevertheless accepted her evidence in that it was corroborated by both her mother and Ms Madigage. The trial Judge was not impressed by the appellant. Ostensibly this finding was based on her observations of all the witnesses who testified before her which include the appellant. The trial court found that the appellant; *"..... was a unconvincing witness who changed his evidence to suit the circumstances"*. Further, *".....the court finds that the accused's version is so improbable due to the inconsistencies in his own case that it can not be reasonably possibly true"*. Lastly, the court found that *".....the accused was a dishonest witness who changed his evidence to suit the circumstances when he was cross examined. He failed to mention material evidence when consulting with his legal representative which resulted in crucial evidence not being canvassed"*. In my view appellant has not demonstrated that the trial Judge was demonstrably wrong on the credibility and factual findings which she made.

[24] Having heard the submissions before us and having gone through the record of the proceedings I am unable to conclude that the factual findings as well as the credibility findings by the trial court are demonstrably wrong as to justify interference therewith. In my view, the record proves that the trial court was correct in its findings. Given the conspectus of the evidence, I am unable to find that the trial court erred in finding that the appellant's version is so inherently improbable as not to be reasonably possibly true. It follows that the appeal must

fail.

[25] I would therefore propose the following order;

25.1. The appeal is dismissed.

SA THOBANE

ACTING JUDGE OF THE *HIGH* COURT

I agree

MHE ISMAIL

JUDGE OF THE HIGH COURT

I agree and it is so ordered

CP RABIE

JUDGE OF THE HIGH COURT