

FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Case No. : A115/2015

In the matter between:-

MALEFETSANE PAULUS RAMOHAPI
KHOTSO ELIAS KHEU

First Appellant
Second Appellant

and

THE STATE

Respondent

CORAM:

MOLOI, J et CHESIWE, AJ

HEARD ON:

15 FEBRUARY 2016

DELIVERED ON:

31 MARCH 2016

MOLOI, J

[1] In this matter the appellants were given leave to appeal their convictions on a charge of murder and a sentence of fourteen (14) years imprisonment of which six (6) years imprisonment was suspended conditionally for five (5) years by this court on petition. The appellants and two others were charged in the regional court. The appellants and their co-accused were all members of the South African Police Service.

[2] The evidence is that on 30 May 2009 the deceased, one Booijie Manase Tohlane was sought by the police on a charge of domestic violence. The police were called by the deceased's wife and directed to her home in E-section, Botshabelo. When the policemen arrived at the said home, the deceased was aggressive and attacked the two policemen with a stick and also set his dog upon them. The policemen, in self-defence, deprived the deceased of the stick and shot the dog dead. The deceased got into his motor vehicle and drove away. The two policemen pursued him in their vehicle and called for a backup from other police and a high-speed chase took place towards a certain house in H-section Botshabelo.

[3] When the appellant and his companion arrived at H-section the deceased was still aggressive and the appellants and other policemen fired warning shots to the ground in an endeavour to quell the deceased down. It was later found that the deceased was fatally shot and had sustained approximately eight (8) gunshot wounds though the gunshot wound to the thorax was found to have been the one that caused his death. At the scene at H-section ten spent

cartridges were found. It was determined through ballistic examination that five of the cartridges were fired from the fire-arms belonging to each accused. At the post-mortem examination one bullet head was found lodged in the deceased's body but it could not be determined from which fire-arm it was discharged.

- [4] Evidence shows that before and after the appellants' arrived at the scene, many policemen at the scene fired shots. There is no direct evidence of which of the policemen fired a shot or shots at the deceased. There is no evidence either that the appellants had common purpose to shoot and kill the deceased. This leaves the case to be decided on circumstantial evidence: R v Blom 1939 AD 188. In order that an inference of intention to kill by the appellants to be drawn it is necessary that there be evidence to that effect. I have pointed out above that the mere fact that the ten cartridges found at the scene were discharged from the appellants' firearms is not sufficient to prove common purpose. The evidence, on the contrary, is that several other policemen fired shots at the scene and their cartridges were not analysed, suggests inadequate or poor investigation of the

matter. Secondly is the inference sought to be drawn the only reasonable inference possible in the set of facts. The answer is obviously no in the absence of the linkage of the cartridges found to the bullet head that caused the deceased's death.

- [5] It was contended on behalf of the respondent that the mere fact that the cartridges found at the scene were fired from the appellants' firearms the only inference to be drawn was that the appellants fired the shots that killed the deceased. This logic evades me as cartridges cannot cause death but bullets heads can. It is the bullet head that must be linked to the firearm to can justify such as inference especially in the circumstances where so many policemen fired shots. Mr Monyamani who represented the first appellant was correct in equating the facts of this case with the facts of Thembani Bamba v The State (20089/14) [2014] ZASCA 219 (11 December 2014) where Mocumie, AJA expressed herself as follows:

“Applying the test to the facts of this case, in the absence of ballistic evidence linking the appellants’ firearm to the bullet head and fired

cartridge allegedly found at the scene, in substance, the inference the trial court sought to draw was not the only inference to be drawn from the proven facts.”

[6] In the light of the finding I make in this matter the need to deal with the issue of sentence falls away.

[7] The following order issues:

The appeal against the convictions succeed. Both the appellants are acquitted.

K.J. MOLOI, J

I concur

S. CHESIWE, A.J

On behalf of the first appellant: Mr B.A Monyamani
c/o Mphafi Khang Inc
BLOEMFONTEIN

On behalf of the second appellant: Adv P.W. Nel
Instructed by:
Bloemfontein Justice Centre
BLOEMFONTEIN

On behalf of the respondent: Adv. L. Zweni
Instructed by:
The DPP
BLOEMFONTEIN