

IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Case No: A191/2015

In the matter between:-

LENKA TLOU

Appellant

And

THE STATE

Respondent

CORAM:

VAN DER MERWE, J *et* CHESIWE, AJ

JUDGMENT BY:

VAN DER MERWE, J

HEARD ON:

22 FEBRUARY 2016

DELIVERED ON:

7 APRIL 2016

- [1] The appellant was charged in the regional court, Bloemfontein, on counts of murder (count 1) and assault with intent to do grievous bodily harm (count 2). In respect of count 1 it was alleged in the charge sheet that the appellant murdered one Mr Themba Nxaki (the deceased) on 14 April 2013. In respect of count 2 it was alleged that on the same date the appellant assaulted Mr Zolile Nxaki by hitting him with a firearm and with the open hand. The appellant was convicted on count 1 only. On 26 May 2015 he was sentenced to 10 years imprisonment. Although the trial court did not

make it clear, it must be accepted that it granted leave to appeal against the conviction and sentence.

- [2] It was common cause that the deceased was killed by a shot fired by the appellant. The bullet entered the left cheek of the deceased just below the eye and settled under the skin at the back of his neck on the right. The issue was the circumstances in which the fatal shot had been fired.
- [3] Mr Zolile Nxaki testified that the deceased was his nephew, his sister's child. During the evening of 14 April 2013, he was at a tavern in Bloemfontein. He had quite a lot to drink; he shared seven to eight quarts of beer with a friend. At some stage, when he was in the bathroom, the appellant entered. An argument ensued, during which the appellant hit him with an open hand. Security guards intervened and he returned to the tavern. The deceased had since arrived at the tavern and the two of them left. The appellant stood outside the tavern at the pavement. When they passed him, the appellant said "... that he would show us". The appellant opened a car and produced a firearm. Mr Nxaki and the deceased ran away. At some stage he took a footpath to the left whilst the deceased proceeded straight on another footpath. Whilst running, he heard a shot. When he looked back, he saw that the deceased had fallen. He went to the deceased and found that the deceased had been shot and was laying in the footpath a few metres from a heap of soil. The heap of soil was about a metre in height. The appellant was standing nearby. He asked the appellant why he did not shoot him

as he had a fight with him. The appellant responded by hitting him on the head with the firearm.

[4] Mr Kgomotso Potsanyana testified that on 14 April 2013 he accompanied the deceased to a soccer match. After the match, they went to a tavern, where they met Mr Nxaki. At some stage Mr Nxaki and the appellant had an argument. Mr Potsanyana, the deceased and two companions decided to leave. They found the appellant and Mr Nxaki arguing near the gate of the tavern. The four of them, Mr Nxaki and the appellant then left the premises. The appellant opened a car and produced a firearm. The deceased called Mr Nxaki and they walked away, in front of the others. Some friends of the appellant tried to hold him, but he managed to free himself. The deceased and Mr Nxaki started to run. Mr Potsanyana and his companions followed them. The appellant chased after the deceased and Mr Nxaki. The appellant ran onto the footpath on which the deceased was running. The appellant stopped, lifted his arm and shot the deceased. The deceased was approximately two metres from the appellant and had paused slightly at the time. This happened in view of Mr Potsanyana although it was dark in the area. Mr Potsanyana confirmed the evidence of Mr Nxaki as to what transpired after the deceased was shot in exact detail.

[5] The appellant confirmed in evidence that he was at the tavern. His evidence as to what transpired there was, however, quite different. He had about five tots of whiskey but they had no effect on him at all. There was no argument between himself and Mr Nxaki. He joked with Mr Nxaki, initially inside the bathroom and later outside

the tavern. Mr Nxaki appreciated this, but his four friends appeared to be offended by the joke. However, Mr Nxaki reprimanded them. On the version of the appellant the deceased must have been one of the four friends. They left the tavern, leaving Mr Nxaki and the appellant behind. The appellant went to his car and took out his firearm. He told Mr Nxaki that he would accompany him. He did so up to the place where the shooting took place. When they got there, Mr Nxaki's four friends returned. As they approached from the front, he saw one of them holding a shiny object. He fired a shot "at the ground" to his right into the heap of soil. Mr Nxaki pointed out to him that he had shot the deceased, who according to the appellant, was on the other side of the heap of soil.

- [6] The trial court accepted the evidence of Mr Nxaki and Mr Potsanyana and rejected that of the appellant as false beyond reasonable doubt. It is trite that a court of appeal is bound by the factual findings of a trial court, unless they were affected by a material misdirection or the court of appeal is convinced that they were wrong.
- [7] Counsel for the appellant argued that the court *a quo* overlooked material contradictions between the evidence of Mr Nxaki and Mr Potsanyana. Reference was made to the differences in respect of the argument between Mr Nxaki and the appellant and the sequence of the events outside the tavern that led to the flight of the deceased and the witnesses. I am unable to agree. Whether the argument between the appellant and Mr Nxaki was renewed outside the tavern, is not material in the circumstances. What he referred to as

joking, according to the appellant did take place inside the bathroom and outside the tavern. A proper analysis of the evidence in respect of the preceding sequence of events outside the tavern indicates that there were no real contradictions and that Mr Potsanyana simply gave evidence in more detail than Mr Nxaki. This is understandable as there was no evidence that Mr Potsanyana was intoxicated to any extent whilst the same could not be said of Mr Nxaki.

- [8] On the other hand, every material element of the appellant's version was most unconvincing and improbable. He gave no explanation for accompanying Mr Nxaki on foot. The appellant's car was parked outside the tavern. He gave no satisfactory explanation for taking a firearm along. On his version it is highly unlikely that the friends of Mr Nxaki would return to assault him. He had done nothing to them. He only joked with Mr Nxaki and the latter conveyed that to his friends when he reprimanded them. In this regard it must be pointed out that it was put to Mr Nxaki in cross-examination that there was a fight between him and the appellant at the tavern. On his version there was in any event no reason to fire a shot in the first place. The evidence of a shiny object is very vague. When asked what the reason was for the firing of the shot, the appellant said: "To protect myself Your Worship from the people that were coming, I do not know whether they were coming back to fight me because when they left they were slapping their tongues". This is obviously a most unsatisfactory reason for firing a shot. These people were the friends of Mr Nxaki and they knew that Mr Nxaki had no quarrel with the appellant. Crucially, the appellant could not explain how the deceased could in the circumstances have been shot, let alone in the face. The deceased

was one of the four approaching persons. The appellant said that he deliberately fired downwards and away from the approaching persons. On the evidence of Mr Potsanyana it is probable that the deceased momentarily looked back when he paused and was thus shot in the face.

[9] On the accepted evidence, the appellant was clearly guilty of murder. The appeal against the conviction must therefore fail. It should be added that it is difficult to understand why the trial court did not find that the appellant had assaulted Mr Nxaki by hitting him over the head with a firearm. Counsel for the appellant fairly and correctly conceded that upon acceptance of the version of the respondent, the sentence could not be faulted.

[10] The appeal is dismissed and the conviction and sentence confirmed.

C. H. G. VAN DER MERWE, J

I concur.

S. CHESIWE, AJ

On behalf of the appellants: Adv. G.J.M. Wright
Instructed by:
Horn & Van Rensburg
BLOEMFONTEIN

On behalf of the respondent: Adv. M. Strauss
Instructed by:
The Director: Public Prosecutions
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