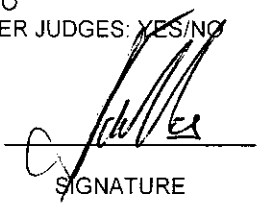




IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO. A772/2013

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES / NO
(3)	REVISED: YES / NO
<u>08/06/2015</u>	
DATE	 SIGNATURE

In the matter between:

CALVIN MASUKU

and

THE STATE

8/6/2015

Appellant

Respondent

JUDGEMENT

DE VOS J:

- [1] This is an appeal against the appellant's conviction on a charge of murder (count 1) and a charge of attempted murder (count 4). After conviction the Magistrate who convicted the appellant granted leave to appeal against the said convictions.
- [2] Both convictions followed after a shooting incident took place near Thokazane Tavern on 29 December 2004. The incident happened at night at approximately 22h00. I pause to mention that the appellant was also charged with two other counts as set out in counts 2 and 3 respectively. The incident relating to counts 2 and 3 happened at a different time and place and is not related to counts 1 and 4. The acquittal on counts 2 and 3 followed

upon the court's finding that it depended on mostly hearsay evidence which therefore rendered it inadmissible. I will return to this aspect at a later stage in this judgement.

- [3] The State called several witnesses. The eye-witness on count 1, Bheki Innocent Mtsweni, testified that at about 22h00 he was at Thokazane Tavern. He observed the appellant in discussion with the deceased. The deceased wanted to run away and the appellant grabbed him by the trousers. He then observed the appellant shooting the deceased with a firearm in the stomach. Thereafter the appellant ran away. He also testified that there was sufficient light for him to make his observations. During cross-examination it was put to the witness that the appellant was at the scene of the crime but that he was not responsible for shooting the deceased. The witness denied the appellant's version and stated that he saw only the appellant with a firearm. However, he conceded that some of the other people who accompanied the appellant might also have had firearms in their possession. He also denied that a person with the name of Lazarus, who was accompanied by Tebogo, shot the deceased. Sipho Bata Mathubela also testified as to what happened on the night of the 29th December 2004. He testified that he was in the company of the deceased. Later in the evening, the appellant arrived at the scene together with some friends of his. Another friend of the witness was chased and shot at by the appellant. The appellant's friends also participated in chasing the deceased. Thereafter, the appellant called the deceased, indicating that he wanted to discuss something with him. The witness departed from the scene. Shortly thereafter he heard the shot being fired. He personally did not see the appellant shooting the deceased. The chain evidence is not in dispute and was properly admitted by the appellant. It is common cause that the deceased died as the result of a stomach wound. That concluded the evidence on count 1.

- [4] Sipho Morathadi Ntashé is the complainant on count 4. He testified that on the night of the incident he was on his way to his girlfriend. He passed a group of people. The appellant was with them. After he passed, the appellant ran towards him and pointed a firearm at him. The appellant started to search him. At that stage he was close to the appellant and he was facing him. The Appellant started firing shots and he was hit. Before the incident the appellant was well-known to him. He further testified that there was sufficient light and the visibility was good, to such an extent that he was able to identify the appellant.

During cross-examination it was put to the witness that the appellant denies that he was present at the scene of the crime and that he was in Pretoria on the night of the incident. The witness denied this allegation.

- [5] Warrant-Officer Solomon Moshine was also called by the State to testify. He is attached to the SAPS. He visited the scene of the crime in regard to count 1. He received information regarding the appellant's involvement. He investigated the matter but was unable to retrieve any firearm. During cross-examination it was put to the witness that the appellant was at the scene but that the appellant did not shoot the deceased. It was also put to the witness that the appellant will say that he saw Tebogo and Pat pointing firearms at the deceased and that one of them shot the deceased.

That concluded the evidence for the State.

- [6] The appellant also testified. The appellant denied his involvement in either of the offences. The appellant admitted that he was present at the scene when the deceased in count 1 was shot, but stated that he was just an innocent bystander. In relation to

count 4 the appellant stated that he did not know the complainant and that he was in Pretoria on the day of the incident. During cross-examination the appellant contradicted himself as to when he actually departed for Pretoria. The appellant also called Musi Kabene as a defence witness. She testified about the whereabouts of the appellant for a period of three days during 2004 and 2005. Her evidence is of very little value as she could not recall the exact dates when the appellant was with her in Pretoria. In any case her evidence does not help the appellant at all in so far as it relates as to what happened on the 29th December 2004, as he admitted that he was at the scene when the shooting occurred.

- [7] The Magistrate found that the identity of the appellant was proven beyond a reasonable doubt and that there was sufficient light and opportunity to identify the appellant as the person who shot the deceased in count 1 and who injured the complainant referred to in count 4.
- [8] Before us the appellant's counsel argued that the issue to be determined is not about the appellant's identity, but about who killed the deceased. According to the appellant's version he was at the scene and he was accompanied by about seven other young men. He cannot say who fired the shot but two of them, Patrick and Tumi, had firearms. It is further contended that Bheki Innocent Mtsweni is a single witness and is the only State witness who positively identified the appellant as the person who fired the shot that killed the deceased. It is also contended that the Magistrate failed to analyse the version of the appellant and that the appellant's version is reasonably possibly true. It is further contended that the Magistrate failed to apply the cautionary rule and that there exists no corroboration for the eye-witness on count 1's version that the appellant was the one who shot and killed the deceased. The complainant on count 4, Siphon Ntshhe's evidence was

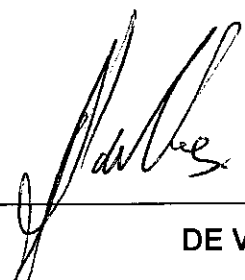
also criticised and it was submitted that he made a contradictory statement to the police, which was not handed in as an exhibit. It was argued that Ntashé told the police that he was shot by Tebogo and his friends. In court he testified that he was shot by the appellant. His evidence was also criticised on the basis that he testified that the appellant searched him by using the barrel of the firearm, and pushed it against him. It is contended that this is improbable and should be rejected as false. He was further criticised in that he could not explain what clothes the appellant was wearing when he was attacked. The State, on the other hand, supports the conviction on both counts. It was pointed out that nor the eye-witness on count 1 nor the complainant on count 4 had a reason to lie and that the objective facts support the conclusion that the appellant was the assailant, that he was armed with a firearm and shot both the deceased and the complainant on count 4. There was also no reason for both these witnesses to falsely implicate the appellant. The court further found that Bheki Mtsweni had sufficient opportunity to identify the appellant and that he was a credible witness with no motive to falsely implicate the appellant. The court also found that Sipho Ntashé, the complainant on count 4, knew the appellant "very well for a long time", and that due to the prevailing light conditions, he had sufficient opportunity to identify the appellant as the assailant. The Magistrate further concluded that the tendered evidence shows that the appellant was identified as the perpetrator. The Magistrate also evaluated the evidence of the appellant and concluded that the evidence of the defence witness did not assist the appellant in any way, and that the version of the appellant cannot be reasonably possibly true. Having regard to the totality of the evidence, the Magistrate duly evaluated the evidence before him and accordingly the appellant was convicted.

- [9] Having regard to the totality of the evidence I cannot find that the Magistrate misdirected himself. All the relevant facts were considered before judgement was pronounced.

According to the appellant's own version he was present at the scene when the shooting took place. I am further satisfied that there is sufficient corroboration between the evidence of the State witnesses to prove that the appellant was the aggressor who shot both the deceased and the complainant on count 4. The Magistrate correctly concluded that the appellant was identified as the perpetrator who committed the two offences he was convicted of. Consequently, the appeal against the conviction on both counts ought to be dismissed.

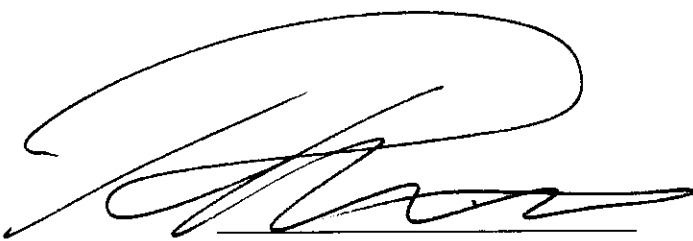
[10] I therefore make the following order:

- a) The convictions on both counts 1 and 4 are confirmed and the appeal against the said convictions is dismissed.



DE VOS J
JUDGE OF THE GAUTENG
DIVISION OF THE HIGH COURT

I agree.



HERTENBERGER-BRACK AJ
ACTING JUDGE OF THE GAUTENG
DIVISION OF THE HIGH COURT

It is so ordered.