

IN HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Case No. : A279/2014

In the matter between:-

PHILLIP RANTSOLO MAKHETHA

and

THE STATE

CORAM: MOCUMIE, AJP *et* EBRAHIM, J

JUDGMENT BY: MOCUMIE, AJP

HEARD ON: 4 MAY 2015

DELIVERED ON: 14 MAY 2015

MOCUMIE, AJP

- [1] This appeal arises from events which occurred during the night of 13 June 2008 during which M. L. K. (the deceased) was shot and killed. As a result, appellant appeared in the regional court, Botshabelo, on one count of murder. At the end of the trial the regional magistrate, Ms Khuduga, convicted him of murder. On 8 September 2011, he was sentenced to undergo fifteen years' imprisonment. He appealed unsuccessfully to the trial court. This appeal is with the leave of this court which was granted on 1 December 2014.
- [2] The main attack against the judgment and order of the trial court is that the trial court erred in convicting the appellant of murder as the State had failed to prove its case beyond reasonable doubt considering appellant's version that the deceased was attacking him, he acted in self-defence to prevent the deceased from robbing him of his firearm. During the struggle for the firearm the deceased was shot and killed.
- [3] The State led evidence of two witnesses; Kgotsimang Pule Khalake (Khalake) and Malebohang Susan Choute (Choute) who were at the church service where this incident happened. Appellant testified in his own defence and called one witness, Moleko Paulus Sekhalo (Sekhalo) to testify on his behalf.
- [4] Khalake testified that he was with the deceased at a church service in Botshabelo township on 2 March 2012. He, the deceased and Itumeleng assisted women who were preparing food for the congregants by chopping wood for the fire. When they were done with their chore, they went into a shack in the same premises but at

the back of the main house to play video games. Not long after they went into the shack, deceased left them behind in the shack to eat as the food was apparently ready. Shortly thereafter, **just as deceased had closed the door**, he heard a sound resembling a gunshot and opened the door to see what was happening. He found the deceased lying on the ground next to the shack. Appellant was next to the deceased shaking him from side to side. When he asked appellant what had he done, appellant said 'I got him' and left the premises.

- [5] Choute testified that she was attending church on the night in question. She knew both appellant and deceased and both were present in church on the night in question. When the service was about to end it was reported to her that someone had been shot. She went to investigate and found the deceased lying on the ground closer to the outside of the tent, shot. She did not see who shot the deceased. She did not find appellant on the scene.
- [6] According to the post mortem report handed in as exhibit C the deceased died as a result of a single gunshot wound to the head. Photographs of the scene of crime were handed in as exhibit D.
- [7] Appellant testified that on the night in question he was home. After he lit the stove to prepare food, he left home to go to a nearby shop to buy bread. On his way to the shop he came across a group of five to six men who, for no apparent reason, pelted him with stones. He thought that those people wanted to rob him and for his safety he fled into the premises where the church service was going on. After some few minutes, he attempted to leave the premises, but then he saw the

group of people, he was convinced it was the same group that had attacked him earlier on, standing at the gate of this premises he had fled into.

[8] He retreated into the tent where the church service was going on. After some few minutes, just as the service about to end, he decided to leave the premises through the back gate to continue to go to the shop to buy bread. As he was walking out of the premises an unknown person came from the direction of the tent, bumped into him, reached for his waist where he had his firearm in its holster. This person got hold of his firearm which was now out of the holster. The two wrestled over the possession of the firearm, a shot went off and the unknown person fell to the ground fatally wounded. He pulled his firearm from underneath this person and ran to his parental home to report the incident. Along the way he phoned his brothers to relate what had happened. His two brothers and Sekhalo found him at his parental home and accompanied him to the police station to report the incident. He was detained for the murder of the deceased.

[9] The main issue before us is whether, in the absence of direct evidence, the only reasonable conclusion the trial court could draw was that the appellant intentionally killed the deceased and did not act in self-defence as he alleged.

[10] In *S v Monyane and Others*¹ the Supreme Court of Appeal stated that:

¹ *S v Monyane and Others* 2008(1) SACR 543 (SCA) para [15].

“This court’s powers to interfere on appeal with the findings of fact of a trial court are limited. It has not been suggested that the trial court misdirected itself in any respect. In the absence of demonstrable and material misdirection by the trial court, its findings of fact are presumed to be correct and will only be disregarded if the recorded evidence show them to be clearly wrong (*S v Hadebe and Others* 1997 (2) SACR 641 (SCA) at 645e-f). This, in my view, is certainly not a case in which a thorough reading of the record leaves me in any doubt as to the correctness of the trial court’s factual findings, bearing in mind the advantage that a trial court has of seeing, hearing and appraising a witness, it is only in exceptional cases that this court will be entitled to interfere with a trial court’s evaluation of oral testimony (*S v Francis* 1991 (1) SACR 198 (A) at 204E)”.²

[11] The legal principles applicable as expounded in *R v Blom*³ when dealing with circumstantial evidence, as in this case, are well known and need no repeat. Khalake did not witness the actual shooting; he found appellant next to the deceased, shaking him, thus the inference drawn by the trial court that appellant shot and killed the deceased. As a single witness his evidence must be credible and satisfactory in all material respects⁴ and it must be approached with caution.⁵

[12] The trial court in its analysis of the evidence came to the conclusion that appellant intentionally killed the deceased on the basis that appellant was vague on certain parts of his evidence; that there was no reason for Khalake to falsely implicate him; the appellant tried to

² In *S v Naidoo & others*² the Supreme Court of Appeal reiterated this principle as follows: ‘In the final analysis, a Court of appeal does not overturn a trial Court’s findings of fact unless they are shown to be vitiated by material misdirection or are shown by the record to be wrong.’

³ *R v Blom* 1939 AD 188.

⁴ See section 208 of the Criminal Procedure Act 51 of 1977. See also *S v Gentle* 2005 (1) SACR 420 (SCA) para 220G; *S v Olawale* 2010(1) All SA 451 (SCA).

⁵ See *S v Sauls* 1981 (3) SA 172 (A).

mislead it when he testified that the deceased was less than three meters from the door of the tent when the struggle ensued between them which ended up with the deceased fatally shot, instead of just outside the door of the shack as Khalake testified.

- [13] The trial court however disregarded the contradictions between the two state witnesses on the material aspect of where the deceased was found after the shooting in relation to the shack and the tent on one hand; and on the other hand the corroboration between appellant and Choute that the deceased was lying close to the tent than to the shack. It also relied on its finding that Khalake did not know the deceased prior to this incident and thus had no reason to falsely implicate him. This is entirely contrary to what is recorded on the transcribed record that Khalake in fact knew the deceased. He described how he knew the deceased as Itumeleng's friend some days before this night in issue. The trial court further watered down the serious contradiction in the evidence of Khalake with regards to the time lapse between the time the deceased had left the shack to go and eat and when Khalake heard what sounded like a gunshot. Initially Khalake said the time lapse was four minutes. He later changed the four minutes to four seconds. Then later to less than five minutes. This Mr Van der Merwe argued was a result of Khalake not being sophisticated nor conscious of the time difference but knew that the gunshot went off immediately after the deceased left the shack. This, however, as Mr Dryer correctly argued, flew in the face of what Khalake testified earlier on. In his evidence in chief Khalake said that after the deceased had left the shack, Khalake, he continued to play the game on the computer. This could have been four to five minutes

give credence to the submission by Mr Dreyer that as he initially stated in his evidence in chief which would have given the deceased sufficient opportunity to either attempt to rob appellant alone or as part of a group. The State failed to clarify this aspect.

[14] The State, as Mr Van Merwe correctly lamented, also failed to take appellant to task to explain how the deceased was shot in the head if the firearm was at all times in his hands during the struggle which ensued between the two over its possession. There are some aspects of appellant's version which do not make sense which if followed through proper cross examination would have exposed him to be either lying or covering up to avoid a conviction but it is not for the trial court to put the pieces together and totally ignore material contradiction and improbable in order to strengthen the case for the State. It is the State that is bound to correct such contradictions and or improbabilities which may be fatal to its case; because the onus rests on it to prove its case beyond reasonable doubt. Mere preponderance of probabilities is not enough⁶.

[15] Although there was no link between the deceased and the earlier attack on appellant that night, and there may be a suspicion that he was avenging himself by killing the deceased, appellant stuck to his version as set out in his plea explanation and as put to the witnesses. He did not contradict himself. Even if the suspicion remains that he did not act in self-defence, he cannot be convicted on suspicion alone. The State must prove its case beyond reasonable doubt. An accused does not bear any onus to prove his innocence. Whether

⁶ *S v Shackell* 2001 (2) SACR 185 (SCA) para 30.

one subjectively believes him or her is not the test. The test is whether there is a reasonable possibility that his evidence may be true.⁷ In this case in the absence of direct evidence and sufficient *facta probanda* from which the only inference which the trial court drew, his evidence may be true. For these reasons, the appeal must succeed.

[16] In the result the following order is granted.

ORDER

1. The appeal is upheld.
2. The order of the court a quo is set aside and replaced with the following:

‘The appellant’s conviction and the sentence imposed are set aside.’

C. MOCUMIE, AJP

I concur.

S. EBRAHIM, J

⁷*S v Shackell* 2001 (2) SACR 185 (SCA) at 194H-H; *S v V* 2000 (1) SACR 453 (SCA) at 455A-B.

On behalf of the applicant: Adv. Van der Merwe
Instructed by:
Director: Public Prosecutions
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On behalf of the respondent: Adv. Dreyer
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