

IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE, MTHATHA

NOT REPORTABLE

Case No.:CA04/2013 (119/07)

Date Heard: 21 June 2013

Date Delivered: 4 July 2013

In the matter between:

FYLEMAN NKUBUNGU

Appellant

and

THE STATE

Respondent

JUDGMENT

EKSTEEN J:

[1] The Appellant was convicted in the High Court in Mthatha of one count of murder and a further offence of failing to produce his licenced firearm within seven days after being required to do so. He was sentenced to life imprisonment on the charge of murder and to two years imprisonment for failing to produce his firearm. The appellant appeals against his conviction and sentence with leave of the Court *a quo*.

[2] At the commencement of the trial the appellant, who was represented at the hearing, pleaded not guilty. He gave no plea explanation. At the close of the State's case an application was made for his discharge in terms of the provisions of section 174 of the Criminal Procedure Act. When this application was refused the defence case was closed and the appellant did not testify.

[3] The facts which emerge from the evidence are, for the greater part, not contentious. The appellant was the Deputy Principal of the Qobo Junior Secondary School in Bizana. At some stage the position of principal of the school fell vacant and the appellant was appointed to act in this position. He occupied this position in an acting capacity for an extended period before the position was advertised. A shortlist of candidates was duly compiled and interviews were held and an appointment was made to fill the position. Although the appellant had applied and was shortlisted and interviewed he was not the successful candidate. This caused much unhappiness and the appellant resisted the introduction of the successful candidate to the position. At this time the appellant stated that it would be wrong to proceed with the introduction and said that he did not wish to have blood on his hands. In these circumstances the introduction did not initially proceed and it is apparent that there was division in the school community which caused volatility. The appellant sought the involvement of the South African Police Services alleging that positions were being corruptly “sold” by some in the Department of Education.

[4] At the time of the events Patrick Ngceke (the deceased) held the position of District Manager in the Department of Education at Bizana. The evidence establishes, however, that he was not involved in any manner in the short listing process, the interviewing panel or in the making of the recommendation in respect of the appointment of the principal.

[5] On 4 November 2004 a meeting was held at the school attended by Captain Fremantle of the South African Police, by the appellant and by the deceased. At this

stage an investigation was to be instituted. The evidence does not reveal what the terms of reference of the investigation were to be and whether it was to relate to the alleged corruption in the appointment process or the cause for the division and volatility at the school or the conduct of the appellant. Whatever the focus of the investigation was to be the deceased instructed the appellant to report for work during the investigation period at the offices of the Department of Education as opposed to the Qobo Junior Secondary School. He further assured the appellant that he would protect the appellant whilst the investigation was being conducted.

[6] During cross-examination Captain Fremantle testified that when the appellant came to enlist the intervention of the police he had showed documents to Colonel Siyoyo, the then Station Commander at Bizana, to emphasise the dissatisfaction at the school. There was written on the papers that there would be bloodshed at the Qobo Junior Secondary School. The evidence does not suggest who the author of these documents was or where the threat of bloodshed was likely to emanate from.

[7] The appellant duly complied with the instruction which the deceased had given and reported for work the following morning at the office of the deceased at the Department of Education. Whilst the appellant waited at the door of the office of the deceased he was seen to be holding an A4 sized envelope. When the deceased arrived for work and as he approached his office a shooting occurred and the deceased was struck and killed.

[8] The witness Ndubeki was a Sports Officer stationed at the offices of the Department of Education. She had arrived at work early in the morning and testified

that she had seen the appellant sitting a bench in the passage, which, it appears, is approximately three to four metres from the door of the office of the deceased. There were a number of other members of the public also seated on the bench waiting to be attended to. Shortly thereafter as she was intending to leave the building she noted the appellant standing at the door of the deceased's office and she thereafter passed the deceased as he was arriving for work. As she left the building she heard the shots being discharged and the deceased was shot. The trial Judge found the witness Ndubeki to be a good witness. The presence of this bench and other members of the public in the immediate vicinity of the shooting was raised later with the witness Mseleni. Mseleni's evidence in respect of this bench was unsatisfactory. He initially denied that such a bench was present. Later he states that he could not remember seeing the bench but he conceded that there is a bench that is used when people are going to be attended to. Still later he sought to justify his uncertainty by stating that the bench is sometimes moved when people were cleaning. The Judge *a quo* found Mseleni too to be an impressive witness, however, he did recognise the contradictions in his evidence relating to the bench. Whilst the Judge *a quo* made no finding in respect of the bench and the persons sitting on it I think that this is clearly established.

[9] There were, save, to the extent set out below, no eyewitnesses to the shooting, however, when persons emerged from the various offices very soon after the shots had been fired the deceased was seen lying on the ground in the passage. The appellant stood next him with his shirt stained with blood. No one else was seen in the passage at this time and the envelope which the appellant had earlier held was

lying on the ground along with various papers with the handwriting of the appellant on.

[10] On enquiry from the appellant he stated that he did not know who had shot the deceased. He explained that the deceased had staggered towards him pleading for help and had fallen against him. He held the deceased in order to prevent him from falling on his face.

[11] The police arrived on the scene approximately ten minutes later. On their arrival the appellant was standing next to the body of the deceased still with his bloodstained shirt. Inspector Mtshengu states that he appeared confused. Captain Fremantle again asked him what had happened and again the appellant stated that he did not know neither did he know who had shot the deceased.

[12] Inspector Mtshengu states that he was aware that the appellant was a licenced owner of a firearm. He therefore advised the appellant that he was a suspect in the murder of the deceased and he demanded that he hand over his firearm. The appellant responded that he would not provide his firearm as Mtshengu would then say that he had killed the appellant.

[13] A spent cartridge was found on the scene near the rear entrance to the building approximately eight metres from where the deceased lay. Forensic tests established that it was a 9mm long cartridge. The appellant is licenced to own a 9mm pistol.

[14] Inspector Mtshengu searched the appellant there on the scene. He found no weapon nor any ammunition on the appellant. None of the witnesses who testified to seeing the appellant in the passage at the scene of the shooting either before or after the shooting saw a firearm in possession of the appellant. Nevertheless a search warrant was obtained to search the home of the appellant. The firearm of the appellant was not found in his home. At the home of the appellant a safe was found in one of the rooms. The safe was removed and opened but it did not contain the appellant's firearm. The evidence does not, however, disclose that the safe removed from the appellant's home was the only safe in the house.

[15] The appellant was arrested at the scene of the shooting as a result of a report made to the police by a bystander. Forensic samples were taken from the hands of the appellant in order to test for primary residue which could confirm that he had discharged a firearm. This was sent for analysis but the results were negative. The absence of primary residue does not exclude the possibility that he may have discharged a firearm as such residue may have washed off. It could, however, not confirm that he had discharged a firearm.

[16] Two witnesses who were present at the scene of the shooting at the time of the event died prior to the trial, namely one Nzekeni and one Nonzaliseko. Each had made a witness statement to the police in respect of their knowledge of the events. At the trial the State applied to hand in these statements as evidence. The application was strenuously opposed. The Judge *a quo* ruled that the statements could be handed in provisionally and that a final ruling would be made later. The statements were then handed in in evidence and the Judge *a quo* addressed the

matter again in his judgment where he ruled that the statements were admissible as evidence. In argument before us Mr **Shapiro**, for the appellant, attacked both the procedure adopted by the Court *a quo* and the admissibility of the statements. By virtue of the conclusion to which I have come hereafter it is not necessary to resolve this issue. I shall assume for purposes of this judgment, without making any finding in this regard, that the statements were correctly admitted.

[17] The statement by Nzekeni adds nothing to the facts set out above. The witness Nonzaliseko, however, states that she arrived at her work at the offices of the Department of Education that morning and as she entered she saw the appellant standing in the passage. She proceeded to her office and commenced working when she heard a gunshot. She initially tried to hide under the table but clients in the office proceeded to open the door. She went to the door and states that she saw the appellant, who had earlier been sitting at the bench, struggling with the deceased. At about that stage a second shot was heard and she retreated into the office to phone the police whilst the two persons remained struggling in the passage.

[18] Assuming, as I have, that the statement was admissible in evidence I do not think that much weight can be attached to it. The witness was not available for cross-examination. The probative value of her statement depends on the reliability of her observation and the accuracy of her perception. These are issues which fall to be tested under cross-examination. I do not think that her account is necessarily at variance with the explanation given by the appellant to witnesses on the scene of the shooting. She confirms that her observation was made after the first shot had been discharged and it may well be that the first shot had struck the deceased

causing him to stagger forward and fall against the appellant. Whilst a statement records that she heard a second shot being discharged it does not suggest where the shot emanated from and she does not say that the appellant carried a firearm or discharged the second shot. In the circumstances, even accepting, as I have done, that the statement was admissible in evidence, I do not think that it takes the matter any further.

[19] The Court *a quo* correctly recognised that it had no direct evidence before it. The guilt of the appellant accordingly had to be established by way of inferential reasoning. In ***R v Blom*** 1939 AD 188 at 202 and 203 Watermeyer JA referred to the two cardinal rules of logic which govern the use of circumstantial evidence in criminal trials. He formulated them thus:

- “1. The inference sought to be drawn must be consistent with all the proved facts. If it is not, then the inference cannot be drawn.
2. The proved facts should be such that they exclude every reasonable inference from them save the one to be drawn. If they do not exclude other reasonable inferences, then there must be a doubt whether the inference sought to be drawn is correct.”

[20] The Court *a quo* found the following facts to be proved:

- “1. That the deceased in this case, one Pathuzolo Patrick Ngceke, was shot and killed on the date in question.
2. That the deceased was a district manager stationed at the offices of the Department of Education, Bizana.
3. That a firearm was used in shooting and killing the deceased.
4. That the accused was a teacher and deputy principal at Qobo Junior Secondary School, Bizana during the time of the happening of this incident.

5. That there was a vacant post of principal at Qobo Junior Secondary School, Bizana during the time of the happening of this incident.
6. That the accused had acted as a principal at Qobo Junior Secondary School, Bizana for a long time up to and before the happening of this incident.
7. That the post of the principal at Qobo Junior Secondary School, Bizana was advertised.
8. That the accused, one Mr Vakele and others applied for the vacant post.
9. That Mr Vakele and not the accused was approved by the interviewing panel to be the new Principal of Qobo Junior Secondary School.
10. That there was some dissatisfaction about this approval or nomination of the new principal either by the accused or the school governing body as both parties alleged differently.
11. That the introduction of the new principal was stopped.
12. That on the following day, the day following the day on which the new principal was supposed to be introduced, the accused visited the building in which the offices of the deceased in the Department of Education, Bizana was situated.
13. That the accused early in the morning of the day of the incident was seen standing next to the door of the office of the deceased carrying an A4 sized brown envelope. Later during that morning the deceased entered into that building, that is the building in which his offices were, and which the accused was visiting or had gone to.
14. That while in the passage going towards his office the deceased was shot with a firearm and killed.
15. That the deceased was found lying on the floor on his back, dead, full of blood and the accused was found standing next to the deceased, about four paces away from him, with his shirt stained with blood. There was no person on the scene of this incident other than the accused who had clothing bloodstained."

[21] In addition to these facts the evidence clearly establishes that the appellant himself was integral in preventing the introduction of the new principal and that he had stated that he did not wish to have blood on his hands. This I think has been established as a fact.

[22] I think that there are further facts which emerge from the evidence. Firstly, as stated above, I think that it is established as a fact on the evidence that there was a bench situated in the passage a few metres from the door of the deceased's office. There were a number of unknown people seated on the bench shortly before the deceased entered the passage. Secondly, moments after the shooting occurred a number of persons emerged from the offices and the surrounding area into the passage where the appellant and the deceased were. At that stage there were no members of the public in the passage. Thirdly, the police arrived on the scene approximately ten minutes after the event and searched the appellant. He had no weapon in his possession nor any ammunition. Fourth, forensic tests to determine whether any primary residue was present on the hands of the appellant proved negative.

[23] H C Nicholas discussed the two cardinal rules of logic in *R v Blom supra* in a useful article published in *Fait Iustitia: "Essays in Memory of Oliver Deneys Schreiner"* (1983) p. 312. At 317 with reference to the first rule in *Blom* Nicholas states:

"The first rule was given striking expression by T H Huxley: 'The great tragedy of Science – the slaying of a beautiful hypothesis by an ugly fact'. The rationale of the rule was stated by Starkie:

'For as all things which have happened were necessarily congruous and consistent, it follows, that if any one established fact be wholly irreconcilable with the hypothesis, the latter cannot be true. Such an incongruity and inconsistency is sufficient to negative the hypothesis, even although it coincide and agree with all the other facts and circumstances of the case to the minutest extent ... [I]f the incongruity cannot eventually be removed, the hypothesis must fall, although no other can be suggested. ...'

The case of *R v Hodge* has been referred to above, in a quotation from Wills. According to the report of that case contained in the English Reports, Alderson B referred in his address to the jury to

‘... the proneness of the human mind to look for – and often slightly to distort the facts in order to establish such a proposition – forgetting that a single circumstance which is inconsistent with such a conclusion, is of more importance than all the rest, inasmuch as it destroys the hypothesis of guilt.’”

[24] It seems to me that the ugly fact in the present matter is the fact that the appellant did not have a firearm in his possession. As I have stated earlier persons began to emerge from the offices upon hearing the shots. The appellant could hardly have disposed of a firearm in that brief interlude. He immediately offered an exculpatory explanation for the blood on his shirt and made no attempt to flee from the scene. The evidence shows that numerous people remained present in the passage whilst the police were summoned. Nobody testified to seeing a firearm in his possession. When the police arrived a body search revealed that he had no weapon in his possession. I think that this fact is of more importance than all the rest. If this incongruity cannot be removed the hypothesis of the appellant's guilt must fail even though no other could be suggested. An attempt was made to remove this incongruity by the carrying out of forensic tests on samples lifted from the appellant's hand. The tests proved negative. In these circumstances it seems to me that the facts of this matter do not pass muster when weighed against the test in the first rule in *Blom*. For this reason alone I would allow the appeal against the conviction on count 1.

[25] On behalf of the appellant it was further argued in the Court *a quo* that the evidence establishes that there were a number of other people present in the

passage, notably those seated on the bench, and any one of them might have discharged the firearm. The Court *a quo* dismissed this argument stating:

“I have already indicated that the argument that because there is a piece of evidence (that) there were a number of other people in the passage there then there (*sic*) is a possibility that someone from those other number of people might have shot and killed the deceased, I have indicated and stated clearly that there is no evidence before this court which lays a basis for that possibility to be inferred from. The argument is rather speculative, a widely speculative – or it is a conjecture.”

[26] It seems to me that the Court *a quo* erred herein in effectively placing the onus on the appellant to lead evidence and lay a basis for the inference. In discussing the second rule in *Blom* Nicholas states at 317-318:

“In *Lejzor Teper v The Queen* Lord Normand said:

‘It is ... necessary before drawing the inference of the accused’s guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference.’

A discussion by a logician of the rule formulated as the second rule in *Blom* is contained in Sidgwick. He says:

‘... [I]f we accept a conclusion without considering how far the facts will support an opposite one, we do so at our peril. ...[I]n establishing an explanation, a law of nature, or a prediction not yet verifiable by the event, the important point is to exclude all alternative theories ... [B]efore we can consider any theory proved, whether such theory be a sweeping law, like that of gravitation, or an explanation or prediction of some one actual event, we must have sound reasons for excluding every possible rival theory.’”

[27] In the present case there is no evidence of the distance from which the deceased was shot. There is uncontradicted evidence (save for the unsatisfactory and contradictory evidence of the witness Mseleni to which I have referred earlier)

that a number of other people were seated on the bench close to the door of the deceased's office where he was shot. These, I think, are "other co-existing circumstances" which certainly serve to weaken the inference drawn. The question is not whether there are sufficient proven facts to draw an inference that one of these persons in fact shot the deceased, but rather whether it is reasonably possible that one of them may have done so.

[28] I do not lose sight of the evidence that when the first witnesses began to emerge from the offices the appellant and the deceased were the only persons present in the passage. I do not, however, think that this factor is destructive of the possibility that the deceased might have been shot by one of the persons who had been seated on the bench. It is a reasonable human reaction for unsuspecting persons to flee the scene immediately when gunfire occurs in their immediate vicinity. This is borne out by the evidence of Mseleni that when the gunshots were fired he proceeded into the office rather than to approach the scene. Similarly, human experience teaches us that where a criminal commits an offence of this nature he frequently flees from the scene immediately so as to escape detection. I think therefore that the fact that these persons were not seen in the passage immediately after the shooting does not detract from the validity of the evidence that they were present very shortly before the shooting.

[29] I furthermore do not lose sight of the fact that a 9mm cartridge was found at the scene and that the appellant is licenced to own a 9mm pistol. Again experience in the criminal courts has shown that the 9mm calibre is perhaps the most common

calibre for hand weapons in South Africa. There is no evidence that the cartridge found was discharged from the firearm owned by the appellant.

[30] On a consideration of all the evidence I think that the presence of other members of the public in the immediate vicinity is a factor which, at the very least, weakens the inference of guilt (compare *Lejor Teper supra*). In these circumstances what is required is to examine whether there is sound reason to exclude this “rival theory” (compare *Sidgwick supra*). This the Court *a quo* did not explore. I think that it erred in this regard.

[31] In the present instance the appellant failed to testify in the face of the evidence which I have set out earlier herein. Does this feature change the position? In **S v Boesak** 2001 (1) SA 912 (CC) at para [24] Langa DP stated:

“... The fact that an accused person is under no obligation to testify does not mean that there are no consequences attaching to a decision to remain silent during the trial. If there is evidence calling for an answer, and an accused person chooses to remain silent in the face of such evidence, a court may well be entitled to conclude that the evidence is sufficient in the absence of an explanation to prove the guilt of the accused. Whether such a conclusion is justified will depend on the weight of the evidence. What is stated above is consistent with the remarks of Madala J, writing for the Court, in *Osman and Another v Attorney-General, Transvaal*, when he said the following:

'Our legal system is an adversarial one. Once the prosecution has produced evidence sufficient to establish a *prima facie* case, an accused who fails to produce evidence to rebut that case is at risk. The failure to testify does not relieve the prosecution of its duty to prove guilt beyond reasonable doubt. An accused, however, always runs the risk that, absent any rebuttal, the prosecution's case may be sufficient to prove the elements of the offence. ...’”

[32] Two features emerge from this passage. Firstly, where there is evidence against an accused calling for an answer an accused who chooses not to testify will be at risk. Secondly, whether the court would be entitled to conclude that the evidence on behalf of the State is sufficient, in the absence of an explanation, to prove the guilt of the accused will depend upon the weight of the evidence. The failure to testify does not relieve the prosecution of its duty to prove the guilt of the accused beyond reasonable doubt.

[33] In the judgment of the Supreme Court of Appeal in the same matter, reported at 2000 (1) SACR 633 (SCA) at 646 Smalberger JA stated:

“[47] Of course, a *prima facie* inference does not necessarily mean that if no rebuttal is forthcoming, the *onus* will have been satisfied. But one of the main and acknowledged instances where it can be said that a *prima facie* case becomes conclusive in the absence of rebuttal, is where it lies exclusively within the power of the other party to show what the true facts were and he or she fails to give an acceptable explanation.”

[34] ***S v Tandwa and Others*** 2008 (1) SACR 613 (SCA) illustrates this kind of situation. In this matter the seven appellants had been convicted of robbery arising out of an incident in which a large sum of money had been taken from vaults of a bank. The first and second appellants were employees of the bank and the circumstantial evidence led at the trial had indicated overwhelmingly that when the robbery had taken place things had been so profoundly amiss at the bank as to point strongly to the guilty complicity of the first and second appellants. The second appellant testified at the trial and was thoroughly discredited. The first appellant choose not to testify. The court reasoned that it was for the first appellant who was in a position to explain the deviations from the bank procedure and the failure to

complete the registers in question to do so, and it was he who could have told the court whether the second appellant had acted alone, without his own complicity. In these circumstances the court held that his failure to supply answers on any of these matters “inexorably strengthen[ed] the [s]tate’s case, because in the absence of anything to gainsay it, the circumstantial web pointed overwhelmingly to his complicity”. (See *D T Zeffertt and A P Paizes: The South African Law of Evidence* (2nd ed p. 595.)

[35] I do not think that this is such a case. For the reasons which I have set out above I do not think that the State has proved its case beyond reasonable doubt. The “circumstantial web” in the present matter was equally consistent with the deceased having been killed by another person present in the passage at the time and could be consistent with the explanation immediately given by the appellant at the scene. In all the circumstances I am of the view that the appeal against the conviction for murder must succeed.

[36] No argument was presented to us in respect of the appeal against the conviction of count 2. The charge against the appellant is that he contravened the provisions of section 106 of the Firearms Control Act 60 of 2000. Section 106(1)(c) provides that:

“Subject to section 107, any holder of a licence, permit or authorisation issue in terms of this Act must-

(a) ...

(b) ...

(c) produce the firearm in respect of which the licence permit or authorisation is issued within seven days of being required to do so by any police official or by any person authorised by the Registrar.”

[37] Section 107 of the Firearms Control Act provides as follows:

“(1) Any person who carries with him or her a firearm must at the request of a police official or any person authorised by the Registrar produce the licence, permit or authorisation, as the case may be, in respect of such firearm for inspection.

(2) A person referred to in subsection (1) must-

- (a) at the request and to the satisfaction of a police official or any person authorised by the Registrar, identify himself or herself forthwith; and
- (b) at the request of a police official or any person authorised by the Registrar, produce such firearm for inspection.

(3) If a person fails to comply with subsection (1) or (2), the police official or authorised person may seize the firearm without a warrant and keep the firearm in custody until the licence, permit or authorisation is produced or the firearm is disposed of in terms of this Act.”

[38] On the evidence set out earlier in this judgment the appellant was not a person envisaged in section 107 of the Firearms Control Act in that it has not been established that he carried a firearm with him. There is no evidence from any witness that the appellant was requested to produce his firearm within seven days from the date of his arrest. At best Inspector Mtshengu demanded that he should hand over his firearm. Inspector Mtshengu was, no doubt, of the view that the appellant had a firearm in his possession. He was incorrect. I do not think that the demand made by Inspector Mtshengu could possibly have alerted the appellant thereto that he was required to produce his firearm within the period of seven days. In the circumstances I do not think that there is any evidence to establish that he was ever required to produce his firearm within seven days as envisaged in section 106 of the Firearms Control Act.

[39] In the circumstances I would allow the appeal and set aside the conviction and sentence in respect of both count 1 and count 2.

J W EKSTEEN
JUDGE OF THE HIGH COURT

PAKADE ADJP:

I agree. The conviction and sentence in respect of count 1 and count 2 are set aside.

L P PAKADE
ACTING DEPUTY JUDGE PRESIDENT OF THE HIGH COURT

HARTLE J:

I agree.

B HARTLE
JUDGE OF THE HIGH COURT

Appearances:

For Appellant: Mr P I Shapiro instructed by S Shapiro Attorneys, Johannesburg
c/o B Makade Incorporated, Mthatha

For Respondent: Mr S Bera instructed by the National Director of Public
Prosecutions, Mthatha