

FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Appeal No. : A74/2011

In the appeal between:-

MOJALEFA JAPPIE TSHABALALA

Appellant

and

THE STATE

Respondent

CORAM: RAMPAL, AJP *et* DAFFUE, J *et* PHALATSI, AJ

HEARD ON: 19 MARCH 2011

JUDGMENT BY: DAFFUE, J

DELIVERED ON: 29 MARCH 2011

[1] On 24 February 2011 the appellant was convicted by C.J.

Musi, J on a charge of murder. He was sentenced to 12

(twelve) years imprisonment.

[2] The appellant successfully applied for leave to appeal

against his conviction.

[3] The grounds of appeal are the following:

- 3.1 That the court *a quo* incorrectly found that the trajectory of the cartridge indicated murder and irreconcilable with a shooting accident;
- 3.2 That the court *a quo* erred in not finding that the firearm was closer to the deceased's head and that the deceased fatally killed himself;
- 3.3 That the court *a quo* erred in not considering that the appellant would not kill the deceased in cold blood and within hearing distance of the people next door;
- 3.4 That the court *a quo* erroneously found that the State had proven its case beyond reasonable doubt and that appellant's version was not reasonably possibly true;
- 3.5 That the court *a quo* misdirected itself in finding that appellant's falsehoods and concealment of the deceased's body was to cover up a murder and not a shooting accident in terms whereof the deceased killed himself.

[4] The court *a quo* assessed the evidence and found that (a) the deceased and appellant were the only two persons in the appellant's room when the shooting incident occurred, (b) the deceased did not shoot himself, and (c) the appellant

murdered the deceased by wrongfully and intentionally shooting him with his (the appellant's) service pistol (herein later referred to as the firearm). It is apparent from the evidence that the appellant was the only person with knowledge as to what happened in his room when the deceased was killed.

- [5] The appellant not only lied to various witnesses from the very moment after a shot was fired in his room, but concealed the deceased's body underneath his bed for a few days and a few more days later he removed it by using a car borrowed from a friend to a place approximately eight kilometres from the town of Reitz on the way to Bethlehem. He also lied to Colonel Tsatsa who was called upon to assist with the investigation.

- [6] The following falsehoods, concealment and/or improbabilities are apparent from the appellant's version:

6.1 Me Mnguni, the appellant's neighbour, heard a shot emanating from the direction of the appellant's room. Five to ten minutes later – and not immediately as one would have expected in case of a shooting accident –

the appellant entered her room, enquiring about the whereabouts of deceased. She informed him that she left the deceased with him in his room. At that stage the appellant was in civilian clothes, while a few minutes earlier his torso was naked as he was busy washing himself. The appellant obviously made this enquiry to put the witness on a wrong track and to let her believe that the deceased left his room earlier.

6.2 After a while the appellant went back to Me Mnguni, dressed in his SAP uniform and again enquired about the deceased's whereabouts. He told her that the deceased might cause him to be late for work. Again he made a misrepresentation to the state witness in order to let her believe that the deceased was not in his room anymore.

6.3 The appellant also informed Me Mnguni that he tried to contact the deceased telephonically, but that he did not answer his cellphone. It was not possible for anyone to reach the victim for two obvious reasons. Firstly, the deceased was already dead and secondly, his phone's sim card had been removed by the appellant.

6.4 Mr. Mosholibe also testified. He is the landlord who

stays in the main house whereas the appellant and Me Mnguni live in separate rooms at the back of his house. The appellant also informed him that he was looking for the deceased and that he unsuccessfully tried to get hold of him telephonically. When the witness was informed that the appellant might be late for work, he offered him a lift to the police station by his vehicle.

6.5 When Mr. Mosholibe enquired from the appellant as to the origin of the shot that he had heard, he was informed by the appellant that his kettle caused an electricity shortcut. It is clear from the information provided to the landlord that the appellant also tried to put his landlord on the wrong track.

6.6 From the evidence of Me Mnguni and Mr. Mosholibe, as well as Me Motlounq who confirmed Me Mnguni's version to a large extent, the appellant and the deceased were under the influence of alcohol when they arrived at the premises prior to the shooting incident. The witnesses contradicted each other as to the degree of intoxication. The appellant denied that he was intoxicated at all. His version was corroborated by his colleague, Warrant officer Pheta. It is significant

that not one of these witnesses testified that the appellant appeared to be shocked, confused, emotional and/or frightened when he left for work. This is contrary to what he wanted the court *a quo* to believe.

6.7 The next morning the deceased's wife, Me Ngwenya came to the appellant's premises. The deceased's vehicle was still parked on or adjacent to these premises. She was referred to appellant's room where she knocked, but there was no reply. She came back later with a spare key to remove deceased's vehicle. There was still no sign of the appellant. Apparently he did not come back to his room after doing night shift.

6.8 Me Ngwenya testified that deceased was right-handed and never played with his firearm. He was in the employ of the South African Police Service since 2002 and as far as she was aware he had no reason whatsoever to commit suicide.

6.9 Colonel Tsatsa interviewed the appellant on 11 May 2010, ten days after the fatal shooting incident on 1

May 2010. On his arrival at the room where the appellant stayed prior to 1 May 2010 – he moved to other premises after the incident - he noticed blood stains on the carpet and curtain. The appellant explained that he slaughtered a sheep earlier. A police dog identified the blood as human blood. The appellant was not prepared to accept the expertise of the dog and requested a further test to be undertaken with an ox liver. However the dog did not show any interest in the liver, indicating that it was not tissue from a human body. This was the last straw that broke the camel's back. The appellant made certain pointing outs immediately hereafter.

6.10 He pointed out a drain next to his room where he got rid of the 9 mm cartridge and casing. For the first time he came up with a version relevant to the disappearance of the deceased. He alleged that the victim shot himself.

6.11 Hereafter he did a pointing out of the deceased's body next to the Reitz/Bethlehem road. He also took the Colonel to his new home and handed him his firearm and magazine containing 15 cartridges. It is evident

that he inserted a new cartridge after the fatal shot was fired in order to ensure that the required number of cartridges was in his firearm at all relevant times. He was fully aware of regular firearm inspections undertaken by his seniors and that magazines at all times had to contain the correct number of cartridges.

6.12 Contrary to standing orders that in the event of a firearm being used, it had to be reported immediately to the officer in charge who had to visit the scene and make the necessary enquiries, this did not happen *in casu* as the appellant withheld relevant information from his seniors.

6.13 It was denied by the Colonel as well as the ballistics expert, Sergeant Shadung that police officials received training to shoot with both right and left hands. This cross-examination was embarked upon in an attempt to show that it would be possible for the deceased to shoot himself by using his left hand. It is apparent from the entrance wound on deceased's head and the trajectory of the cartridge that it was virtually impossible for the deceased to shoot himself by using his right hand.

6.14 Dr. Book who did the medico-legal post-mortem examination did not find any traces of soot, searing and/or gunpowder tattooing at either the entrance or exit wound. From the expert information he has always relied upon, this is indicative of a shot being fired at a distance of not less than one half to two thirds of a meter from the target. He therefore discarded any allegation that the shot was fired from a closer range. The appellant's legal representative endeavoured to obtain concessions in cross-examination that if the specific cartridge had been under-loaded or defective, it would not have the same effect pertaining to soot and gunpowder tattooing as a normal cartridge when being fired from the same distance. Similar propositions were made to Warrant officer Shadung. No value can be placed on any concessions made by these two witnesses in this regard. No reasonable foundation has been laid for the cross-examination and the propositions put to the witnesses. The opposite may rather be more probable. Having regard to the force of the cartridge would have been of inferring the skull, going through the brain and exiting at the other side, a

normal and well-loaded cartridge was probably used. There is on probabilities no acceptable reason or explanation why members of the SAPS would be issued with sub-standard ammunition and/or why the specific cartridge would have been of inferior quality.

6.15 The appellant kept the deceased's body in his room from 1st to 5th of May where after he lied to his friend in order to borrow his car for purposes of transporting the body to the place where he dumped it next to the Reitz/Bethlehem road.

6.16 It is alleged that the appellant, a constable in the South African Police Service, was so shocked by the accidental death of his friend and colleague that he embarked upon a series of lies and concealment of the body. He was also afraid of the questions that would have been put to him relating to standing orders and the use of his firearm. This, it was argued on his behalf, is quite understandable and not indicative of a guilty mind and/or murder. In my view this argument is untenable and was correctly rejected by the court *a quo*.

6.17 Immediately after the death of the deceased the

appellant removed the sim card from the deceased's cellphone to ensure that the cellphone would not be ringing, should anybody try to contact the deceased.

6.18 In stead of running out of his room and calling for help and explaining immediately what happened, i.e. that the deceased accidentally wounded himself, he concealed the body underneath his bed, took out the sim card, dressed himself, probably inserted an extra cartridge in the magazine and made the firearm safe, left his room and made enquiries about the whereabouts of the deceased.

6.19 The appellant, being a police officer, should have known that if he reported the alleged accidental shooting immediately, the deceased's fingerprints would have been found on the firearm. Furthermore and on all probabilities soot and/or gunpowder tattooing would have been found on the deceased's left hand as well. His version for not acting as such is improbable and false.

6.20 The appellant told an unbelievable story about an incident that happened two weeks before the fatal shooting. According to him he heard footsteps outside

his room. He then cocked his firearm which caused a cartridge to be inserted in the chamber. He never made the firearm safe when it appeared that there was no danger and thus left the cartridge in the chamber and the safety pin of the firearm on “fire” since then. He reported for service on several occasions since that incident until the fatal shooting with an unsafe firearm which is totally contrary to standing orders and logic.

6.21 It is improbable that the deceased would have used his left hand if he wanted to commit suicide and/or aimed at his head from a distance in stead of pressing the barrel of the firearm against his head before pulling the trigger. Mr. Reynecke conceded this.

6.22 It is inconceivable and improbable that the deceased, a relatively experienced police officer, would play with the firearm in his left hand without noticing that the safety pin was on “fire” and hold the firearm by turning his hand in an extremely awkward position to ensure that the barrel was facing his head and thereupon pull the trigger – either with his index finger which would be very difficult, or his thumb which would be easier but extraordinary - with a certain amount of force in order

for the shot to be fired. It must also be remembered that the appellant wanted the court *a quo* to believe that the deceased picked up the firearm and enquired from his friend, the appellant, whether he knew how to operate it as if neither of them had any knowledge thereof.

- [7] Although this is not a case where reliance was placed on the evidence of a single witness, the dictum of Holmes JA in **S v ARTMAN AND ANOTHER** 1968 (3) SA 339 (A) at 341 C is apposite, i.e.

“... the ultimate requirement is proof beyond reasonable doubt; and courts must guard against their reasoning tending to become stifled by formalism. In other words, the exercise of caution must not be allowed to displace the exercise of common sense.”

- [8] In **S v LACHMAN** 2010 (2) SACR 52 (SCA) at 64 d the Supreme Court of Appeal dealt as follows with circumstantial evidence:

“I bear in mind in this regard that circumstantial evidence should never be approached in a piecemeal fashion. The court should not subject each individual piece of evidence to a consideration of whether it excludes the reasonable possibility that the explanation given by an accused is true. The evidence needs to be considered in its totality.”

The court went on in par. [43] at 65 b of the judgment:

“[43] This evidence on behalf of the State becomes even more compelling when weighed against the improbability of the appellant's total denial of all knowledge of the brown cellphone. As pointed out above, his version, which is entirely speculative, was that the cellphone must have been 'planted' on his desk by an unknown person in a deliberate attempt to frame the appellant.”

- [9] The approach adopted by Mr. Reynecke was popular at the Bar many decades ago, i.e. that proof beyond reasonable doubt required the State to eliminate every hypothesis which was inconsistent with the accused's guilt or which, as it was also expressed, consistent with his innocence. This approach was rejected by Malan JA in a minority judgment in **R v MLAMBO** 1957 (4) SA 727 (A) at 737 F – 738 C. The

learned judge formulated his views as follows:

“In my opinion, there is no obligation upon the Crown to close every avenue of escape which may be said to be open to an accused. It is sufficient for the Crown to produce evidence by means of which such a high degree of probability is raised that the ordinary reasonable man, after mature consideration, comes to the conclusion that there exists no reasonable doubt that an accused has committed the crime charged. He must, in other words, be morally certain of the guilt of the accused.

An accused's claim to the benefit of a doubt when it may be said to exist must not be derived from speculation but must rest upon a reasonable and solid foundation created either by positive evidence or gathered from reasonable inferences which are not in conflict with, or outweighed by, the proved facts of the case.”

This dictum has found approval of the SCA and the former AD on several occasions. See **S v PHALLO AND OTHERS** 1999 (2) SACR 558 (SCA) at paras [10] and [11] p. 562 g – 563 e.

- [10] Cognisance should be taken of the caution expressed by Hoexter JA in **S v STEYNBERG** 1983 (3) SA 140 (AD) at 147 H – 148 C where the learned judge opined that the

MLAMBO *dictum* should not be relied upon without qualification. It does not mean that in every instance where an accused gives a false explanation of a fatal assault of which he was the sole witness, the deduction ought to be made that he intended to kill. Put otherwise, there is no room in applying the **MLAMBO** *dictum* to find an accused guilty as retribution for his false version. See also **S v MTSWENI** 1985 (1) SA 590 (AD) at 594 A – D. Notwithstanding an accused's lies, a court should not necessarily find him to be the criminal. There may be reasons why an accused is untruthful and falsehoods do not always justify the most extreme conclusion. The Supreme Court of Appeal issued the following warning in **S v BURGER AND OTHERS** 2010 (2) SACR 1 (SCA) at par. [30]:

“[30] There might be suitable cases in which it is safe to conclude that lies, together with other acceptable evidence, prove the guilt of an accused. However, courts should be careful to decide against an accused merely as punishment for untruthful evidence.”

[11] It was argued before us on behalf of the appellant that taking into consideration the trajectory of the cartridge, the

uncertainty as to the distance from which the shot was fired and whether the cartridge was defective or under-loaded, there was sufficient room for a finding in favour of the appellant that reasonable doubt existed and consequently, the appellant's version that the deceased shot himself accidentally, could not be discarded as not reasonably possibly true.

- [12] The court *a quo* evaluated the evidence and dealt with the arguments presented to it in a thorough and well-reasoned judgment. It may also be mentioned that, bearing in mind the objective facts such as the seated position of the deceased with his left-side facing the appellant standing, and the diagonal trajectory a deduction that the shot was fired by the appellant from a higher position in the direction of the lower position of the seated deceased, is much more probable than the appellant's version that the deceased grabbed the firearm with his left hand and in one movement, whilst asking whether he knew how it operated, turned it around with his hand in an extremely awkward position and pulled the trigger thereof, killing himself.

[13] No evidence was presented that the specific cartridge or any of the other cartridges in the appellant's magazine were under-loaded or defective. In fact the severe consequences militate against such deduction. The appellant did not testify about the distance between the firearm and deceased's head when the shot was fired. The further away from deceased's head the firearm was held, the more difficult it would have been to operate it and to fatally wound the deceased. The court *a quo*'s observations and finding in this regard cannot be faulted.

[14] The appellant was the only other person in the room and he did not testify that the deceased tilted his head in a manner described by Dr. Book. That might have explained the trajectory of the cartridge if it could be found that the firearm was held horizontally. Accordingly such a proposition is baseless.

[15] The appellant claims to be entitled to the benefit of reasonable doubt. Such doubt cannot be founded on mere speculation or unproven hypotheses. No reasonable and solid foundation was created, either by the evidence

tendered, or gathered from reasonable inferences which are not in conflict with, or outweighed by, the proven facts of the case.

[16] In my view the court *a quo* dealt with the principles of inferential reasoning as set out in **R v BLOM** 1939 AD 188 at 202 – 203 correctly. The inference that it drew from the evidence, of all the proven objective facts excluded all other reasonable inferences, showed that appellant wrongfully and intentionally killed the deceased by shooting him with his firearm. Anything is possible as the well-known cyclist, Lance Armstrong, exclaimed after he had beaten cancer and went on to win the gruelling Tour de France, but that is not enough to find an accused not guilty in a court of law. In the words of Denning J the “law would fail to protect the community if it admitted to fanciful possibilities to deflect the cause of justice.” See **MILLER v MINISTER OF PENSIONS** [1947] 2 ALL ER 372 (King’s Bench) at 373H, a *dictum* which found approval in **PHALLO** *loc cit* at para 11.

[17] It is not appellant’s case that he at any given time handled his firearm when the fatal shot went off and in particular that

he accidentally or negligently killed the deceased. Such possibility cannot reasonably be inferred from the objective and accepted facts. Firstly, it is not appellant's case and secondly, if it happened that way, any reasonable person in the shoes of the appellant would immediately alarm the neighbours and arrange for medical assistance in order to try and save the deceased's life. The reasonable person in such a situation would lend support to the investigation process and showed remorse to the deceased's wife immediately. The appellant *in casu* did exactly the opposite.

[18] In conclusion there are no merits in appellant's arguments and no reasons have been advanced as to why the conviction should be set aside.

[19] Consequently I would dismiss the appeal.

J.P. DAFFUE, J

I concur. The appeal is dismissed.

M.H. RAMPAL, AJP

On behalf of appellant: Mr JD Reyneke
Instructed by:
Bloemfontein Justice Centre
BLOEMFONTEIN

On behalf of respondent: Adv E Liebenberg
Instructed by:
Office of the Director of Public
Prosecutions
BLOEMFONTEIN

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