

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 2012

JUDGMENT BY: PHALATSI, AJ

DELIVERED ON: 5 APRIL 2012

[1] This is an appeal in which the appellant appeals against his conviction on a charge of murder by C.J. Musi, J in the High Court at Bethlehem, leave to appeal against conviction having been granted by the Court *a quo*.

[2] The appellant, a police constable, was sitting in his rented room with his colleague, who was also a constable by rank, the deceased, in the backyard in Petsana, Reitz.

- [3] In the room adjacent to his, his co-tenant, Ms Merrika Mnguni, was celebrating her birthday and having a party with her friends. The landlord was in the main house.
- [4] She, Mnguni, had given beer to the deceased and the appellant and left both of them in the appellant's room. The appellant had a basin on the chair and was preparing himself to go to work and the deceased was sitting on the bed, drinking his beer. The deceased had come there with the appellant in his car, as the appellant had asked him to take him to work.
- [5] Whilst they were so together in the room, a shot was fired, fatally wounding the deceased. It is if therefore common cause that the deceased died of a gunshot wound, which was fired when it was only himself and the appellant in the appellant's room. It is further common cause that the shot was fired from the appellant's service pistol.
- [6] The state's case as to what led to the shooting, is based on circumstantial evidence, as there is no direct evidence as to what happened in the room during the shooting. The test as

set out in the classical case of **REX v BLOM** 1939 AD 188 at 202 – 203, must be applied, viz:

“In reasoning by inference there are two cardinal rules of logic which cannot be ignored:

- (1) The inference sought to be drawn must be consistent with all the proved facts. If it is not, the inference cannot be drawn.
- (2) The proved facts should be such that they exclude every reasonable inference from them save the one sought 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.”

[7] The appellant testified that the deceased shot himself with appellant’s firearm, but he did not know whether he did it accidentally or intentionally, to commit suicide.

7.1 The trial court rejected this contention and it has so ably and convincingly demonstrated that the deceased could not have shot himself at all, either accidentally or intentionally.

7.2 Indeed, I cannot find fault with the learned judge’s reasoning and conclusion on this aspect.

7.3 He described the conduct of the appellant from the moment the deceased was shot to the day he pointed out the body as a poor, amateurish attempt by somebody who has committed a crime to hide the fact that he committed a crime. But the main question is: Which crime?

7.4 Can it be said that, from his conduct, the only reasonable inference that can be drawn is that he has committed murder and not culpable homicide?

[8] Having concluded that it is the appellant who shot the deceased, the next logical step is to determine whether he did it justifiably, negligently or intentionally.

8.1 **Justifiably**

It is neither the evidence nor defence of the appellant that he shot the deceased based on any ground of justification. If he had shot him justifiably, he could have raised a defence based on such ground of justification. It can therefore be safely concluded that the appellant did not shoot the deceased based on any ground of justification.

8.2 **Intentionally or negligently**

It is only from the conduct of the appellant after the shooting that it could be determined whether he shot the deceased intentionally or negligently.

8.2.1 Immediately after the shooting incident, the appellant went out of the room to ascertain whether the people outside or next door, have heard the sound of a gunshot being fired.

8.2.2 He asked his co-tenant where the deceased was in order to let her to believe that the deceased left his room, knowing fully well that he was dead in his room.

8.2.3 He further told his landlord that the sound he heard was of a kettle which burst, because of short-circuit.

8.2.4 Upon realising that no one was aware that a shot was fired from his room, he started taking all steps to conceal the corpse in an attempt to conceal the incident.

8.2.5 It is clear that the appellant would not have known before hand that the people in the yard would not hear the gunshot when he fired same.

8.2.6 Both the deceased and the appellant were under the influence of alcohol, increasing the possibility of unintentional but negligent shooting.

8.2.7 If the appellant had wanted to intentionally kill the deceased, he would not have done it in his room, with other people gathered next door, more so that he was still to go with him to work. He could have waited for them to leave the yard and shoot him along the way.

8.2.8 The conduct and relationship of both the appellant and the deceased upon their arrival in his room and subsequent thereto, as set out by the witnesses, clearly indicate that there was no animosity between the two.

8.2.9 The appellant himself testified that he was going to be asked many questions and he did not know how he would answer those questions.

[9] Taking all this factors into account, I find that it is improbable that the appellant intentionally shot the deceased and find that the only reasonable conclusion is that the appellant wrongfully and negligently shot the deceased.

[10] I consequently make the following order:

10.1 The appeal should succeed.

10.2 The order of the Court *a quo* should be set aside and substituted with the following:

“The accused should be convicted of culpable homicide.”

10.3 The matter should be remitted to the trial judge for sentence.

N.W. PHALATSI, AJ

On behalf of appellant: Mr. J.D. Reyneke
Instructed by:
Bloemfontein Justice Centre
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On behalf of respondent: Adv. E. Liebenberg
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