

**FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA**

APPEAL NO:A59/2012

In the matter between:

JONAS PHAHLA MOKHAHLA

APPELLANT

AND

THE STATE

RESPONDENT

CORAM:

C. J. MUSI, J et MURRAY, AJ

JUDGMENT BY:

C.J. MUSI, J

HEARD ON:

21 MAY 2012

DELIVERED ON:

14 JUNE 2012

[1] On 23 May 2009 at approximately 06H00 Constable Selwin Seisa was fatally wounded in front of the Tumahole Community Service Centre.

[2] Constable Jonas Phahla Mokhahla (the appellant), was subsequently convicted of his murder and sentenced to 12

years imprisonment of which 4 (four) years imprisonment was suspended for 5 (five) years on certain conditions. He appeals, with leave of the court a *quo*, against the conviction and sentence.

- [3] On this fateful morning Constable Tladi was supposed to drive his two colleagues (the deceased and Constable Thwane) and Mr. Steward Malili (Malili), a prospective witness, home in an official police double cab pick-up. Thwane was seated on the left front seat; the deceased was seated behind Thwane, i.e. on the left rear seat and Malili was on the right rear seat. The appellant who handed over the pick-up's keys to Tladi was standing next to the right front door.
- [4] Tladi inspected the vehicle and saw peanut skins on the driver's seat. He then said the peanut skins on the seat indicate that the appellant drove the vehicle. The appellant then jokingly hit him with his hand on his thigh. The deceased then said "Yes Mr Peanuts" or "we know that Mokhahla is Mr Peanuts" or words to that effect. Everyone except the appellant laughed.

- [5] According to Malili, the appellant inserted the magazine into the firearm, pointed the firearm at the deceased, by putting his hand with the firearm in it behind the driver's seat, and fired a shot which fatally wounded the deceased. The appellant then said "Seisa". He (Malili) saw that the appellant looked confused.
- [6] Tladi and Thwane testified that they did not hear the appellant's firearm being cocked or the magazine being inserted in the firearm. They also did not see how the deceased was shot because they were talking to each other at that moment.
- [7] Warrant Officer Motsoeneng testified that on 23 May 2009 he was the commanding officer at the Tumaholi Community Service Centre. He confirmed that they received a complaint about an armed robbery and that the appellant and other police officers were on the look-out for the suspects. He confirmed that, depending on the circumstances, it would not be unusual for a police officer to carry his firearm with a bullet in the chamber while searching for armed suspects. He

confirmed that the police officers had to stand at a parade before going off duty. He further testified that before the parade all police officers must ensure that their firearms are safe, i.e. removing bullets, if any, from the chamber. He confirmed that the incident happened after the parade.

[8] The State handed in a ballistic report which indicated that the appellant's firearm "functioned normally without any obvious defects."

[9] The appellant elected not to testify.

[10] The regional magistrate accepted the evidence of the State witnesses and found that the State had proved beyond reasonable doubt that the appellant had the necessary intention, in the form of *dolus eventualis*, to murder the deceased.

[11] Mr Van Rensburg on behalf of the appellant, argued, before us, that the regional magistrate should have convicted the appellant of culpable homicide and not murder. He submitted that there was sufficient evidence on record to reach the

conclusion which he advanced. According to him, the fact that Malili saw that the appellant looked confused and the fact that the appellant called the deceased's name after the shooting clearly indicates that the appellant was negligent.

[12] The regional magistrate made the following factual findings:

“12.1. That there was a bullet in the chamber of the firearm when the deceased was shot.

12.2. That the appellant must have cocked the firearm before the shooting but in all probability when they were searching for the robbers.

12.3. That the appellant was aware that the firearm was cocked and that there was a bullet in the chamber.

12.4. That the appellant did not ensure that his firearm was safe before the parade.

12.5. That the appellant did not check whether the safety catch of the firearm was on or not.

12.6. That he pointed the firearm in the direction of the deceased.

12.7. That the firearm was functioning perfectly.

12.8. That the appellant pulled the trigger.

12.9. That the appellant foresaw that if he pulls the trigger a shot might be fired and wound the deceased or someone in the vehicle.

12.10. That he recklessly accepted the bargain and fired a shot.”

[13] Mr Van Rensburg did not criticise any of the regional magistrate’s factual findings. He however pointed out that the regional magistrate’s inference is not the only reasonable inference that can be drawn from the facts. According to him the inference that the appellant acted negligently is plausible and reasonable given Malili’s evidence.

[14] It is trite that a court of appeal will not lightly interfere with the factual findings of the trial court. It will only do so if the trial court has misdirected itself or has overlooked other facts or probabilities. Where there has been no misdirection on fact the presumption is that the trial court’s conclusion is correct. Likewise if this court is merely left in doubt as to the correctness of the trial court’s conclusion, it must uphold it. **See Rex v Dhlumayo and Another 1948 (2) SA 677(AD) at 705 – 706.**

[15] Malili’s evidence that the appellant looked confused is not incompatible with a finding of dolus eventualis; for example, the appellant might have looked confused because he

wanted to shoot through the window where the deceased was sitting but shot at and wounded the deceased instead. Under these circumstances the finding that he foresaw and recklessly accepted the bargain would still be justified. Put differently, a confused look or expression does not negate a finding of *dolus eventualis* because the result is not his main aim. The same applies to him calling out the deceased's name after the shot was fired.

[16] Although the appellant did not testify, there are discrepancies in his plea explanation and the evidence that he gave under oath during his disciplinary inquiry. The proceedings of the disciplinary inquiry were handed in by the appellant's legal representative in an attempt to discredit Malili. Mr Van Rensburg correctly conceded that the inconsistent statements made by the appellant during those proceedings are admissible against the appellant in these proceedings because the appellant handed in those proceedings without reserve and unconditionally.

[17] During the plea proceedings the appellant's legal representative said the following:

“Die verweer is inderdaad dat beskuldigde die vuurwapen nalatiglik afgevuur het, die skoot is afgevuur weens sy nalatige hantering van die vuurwapen as te ware (sic) wat dan inderdaad neerkom op ‘n pleit van skuldig op strafbare manslag.”

[18] The regional magistrate, in order to clarify the situation and to record the correct admissions, then said the following:

“Hof: Goed, ek gaan dit maar soos volg probeer notuleer. As een van die partye nie eens is met die wyse waarop ek dit notuleer nie neem tog die vrymoedigheid om my so mee te deel. Goed, ingevolge Artikel 220 van die Strafproseswet 51 van 1977 word die volgende dan as formele erkennings genotuleer, 1, dat die identiteit van die oorledene Selwyn Seisa is: 2, dat daar op 23 Mei 2009 en te Parys in die streekafdeling Vrystaat ‘n voorval plaasgevind het waartydens die oorledene noodlottig beseer is deur ‘n skoot wat afgevuur is deur die beskuldigde: 3, dat die oorledene geen verdere besering opgedoen het vanaf die voorval plaasgevind het en tot dat daar ‘n regsgeneeskundigelyskouing op hom uitgevoer is nie op die 26ste Mei 2009.”

[19] The appellant did not object to the admission the he fired a shot.

[20] During the disciplinary inquiry, he testified, in his evidence in

chief, that:

“Constable Tladi was about to inspect vehicle and I said “I was driving and there were no problems” as we usually do. He then said one could see by the peanuts that I was driving. I came to him and patted him on thigh and commented that we all eat peanuts. We all laughed I said to Constable Thwane I will see them on next Thursday. When I turned I remembered my firearm was not made safe and decided to make it safe. When I took it out it went off. I was amazed and when I looked into the car Constable Tladi was leaning forward and I saw Constable Seisa was leaning to the right and I called him...” (Quoted without emendation).

[21] During cross-examination, the following is recorded:

“Question: Let’s go to where the shot was fired did you fire a shot at the deceased or what happened?

Answer: As I have explained I did not fire any bullet, the firearm discharged a bullet when I took it out of the holster.”

[22] Later during cross-examination he testified as follows:

“Question: In your evidence in chief you stated, you remembered your firearm was on fire and you wanted to make it safe?

Answer: In my testimony I said I wanted to certify/check

whether on which condition.

Question: In other words you were not making it safe?

Answer: Yes just to ensure that if not safe then I make it.

Question: Was it safe to do so?

Answer: Yes

Question: If it was safe how it happened that a round was then fired and hit Seisa?

Answer: That I cannot say, I don't know how it happened.

Question: You agreed that a round came from your gun?

Answer: Yes we agreed but not where it was directed..."

[23] It is clear that the appellant's evidence during the disciplinary inquiry is inconsistent with the admission that he made during the trial. The appellant's version during the disciplinary inquiry is also inconsistent with the accepted evidence of Malili that he pointed the firearm at the deceased and fired a shot.

[24] The appellant's problem is compounded by the fact that his version was never put to any of the State witnesses. The appellant's legal representative went on a fishing expedition hoping that evidence favourable to the appellant will be volunteered or elicited from the State witnesses.

[25] Malili explicitly implicated the appellant. No version, at all, was put to Malili. In **S v Boesak 2000(1) SACR 633 (SCA)** at paragraph 50 – 52 it is stated that:

"[50] In the context of the dispute now under discussion, i.e. proof of the authenticity of the letter of 30 March 1988, but also in the wider context of the outcome of this appeal and the conduct of the defence in the trial Court, it is clear law that a cross-examiner should put his defence on each and every aspect which he wishes to place in issue, explicitly and unambiguously, to the witness implicating his client. A criminal trial is not a game of catch-as-catch-can, nor should it be turned into a forensic ambush.

[51] In this respect, we are in full agreement with the comments made by the Constitutional Court in *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* 2000 (1) SA 1 (CC) at E 36J-37E.

'[61] The institution of cross-examination not only constitutes a right, it also imposes certain obligations. As a general rule it is essential, when it is intended to suggest that a witness is not speaking the truth on a particular point, to direct the witness's attention to the fact by questions put in cross-examination showing that the imputation is intended to be made and to afford the witness an opportunity, while still in the witness-box, of giving any explanation open to the witness and of defending his or her character. If a point in dispute is left unchallenged in cross-examination, the party calling the witness is entitled to assume that the unchallenged witness's testimony is accepted as correct. This rule was enunciated by the House of Lords in *Browne v Dunn* (1893) 6 R 67 (HL) and has been adopted and consistently followed by our Courts.

[62] The rule in *Browne v Dunn* is not merely one of professional practice but 'is essential to fair play and fair dealing with witnesses'. [See the speech of Lord Herschell in *Browne v Dunn*, above] . . .

[63] The precise nature of the imputation should be made clear to the witness so that it can be met and destroyed . . . particularly where the imputation relies upon inferences to be drawn from other evidence in the proceedings. It should be made clear not only that the evidence *is* to be challenged but also *how* it is to be challenged. This is so because the witness must be given an opportunity to deny the challenge, to call corroborative evidence, to qualify the evidence given by the witness or others and to explain contradictions on which reliance is to be placed.'

[52] The rule stated by the Constitutional Court applies also to the

challenging of all evidence adduced by the counter-party, whether on the basis of hearsay, inadmissibility or lack of proof of authenticity, accuracy, etc."

[26] The appellant did not testify. In **S v Boesak 2001 (1) SACR 1 (CC)** at paragraph 24 Langa DP, as he then was, said the following in this regard:

"[24] The right to remain silent has application at different stages of a criminal prosecution. An arrested person is entitled to remain silent and may not be compelled to make any confession or admission that could be used in evidence against that person. It arises again at the trial stage when an accused has the right to be presumed innocent, to remain silent, and not to testify during the proceedings. 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. The fact that an accused has to make such an election is not a breach of the right to silence. If the right to silence were to be so interpreted, it would destroy the fundamental nature of our adversarial system of criminal justice.'"

[27] As stated above the appellant did not testify or put his version to the State witnesses, specifically Malili. He cannot expect the court *a quo* or this court to base its findings on speculation and conjecture when there is clear,

unambiguous, uncontroverted and acceptable evidence pointing to his guilt.

[28] In **S v Sauls and Others** 1981 (3) SA 172 (AD) at 182

Diemont JA said the following:

“...all sorts of fanciful motives for his conduct may be suggested. The State is, however, not obliged to indulge in conjecture and find an answer to every possible inference which ingenuity may suggest any more than the Court is called on to seek speculative explanations for – conduct which on the face of it is incriminating. And when the accused misleads the court by lying, arguments based on improbable inferences are not calculated to impress a trial judge.” See also **S v Rama** 1966 (2) SA 395 A at 401.

[29] The appellant took a calculated risk not to testify or put his version to the State witnesses. His motives and state of mind when he pointed the firearm and pulled the trigger was, like his state of digestion, patent only to himself. If an accused decides not to take the court into his confidence and tell the court what went on in his mind or when he lies about what actually happened or when he deliberately gives a version that is inconsistent with the proved or acceptable facts he cannot claim a benefit in his favour when the evidence clearly indicates that he committed the offence.

[30] Snyman, in Criminal Law 5th Ed at page 184 defines *dolus eventualis* as follows:

“A person acts with intention in the form of *dolus eventualis* if the commission of the unlawful act or the causing of the unlawful

result is not his main aim, but:

- a) He subjectively foresees the possibility that, in striving towards his main aim, the unlawful act may be committed or the unlawful result may be caused, and
- b) He reconciles himself to this possibility.”

[31] The person must “consent” to the foreseen consequence and must reconcile herself/himself to it or he/she must take it into the bargain. See **S v Ngubane 1985 (3) SA** 677 (AD) at 685 C-E.

[32] On the facts of this case it is clear that the only reasonable inference is that the appellant foresaw the possibility of him shooting the deceased. He pointed the firearm at the deceased or, at best for him, in the direction of the deceased and he reconciled himself with the possibility by voluntarily pulling the trigger. He willed the act and resigned himself to the possibility of harm. See **W Bertelsman**. What happened to Luxuria? Some observations on Criminal Negligence, Recklessness and *Dolus Eventualis* 1975 SALJ vol 92 page 59 at page 74.

[33] The regional magistrates’ reasoning and findings are unassailable. The appeal ought to be dismissed.

[34] Although there is an appeal against the sentence as well, Mr Van Rensburg conceded that the regional magistrate was lenient. He advanced no argument on why we should interfere with the sentence.

- [35] The appellant was 31 years old, married and the father of one minor child. He was a first offender. He was a police officer and earned R7800-00 per month.
- [36] The regional magistrate found in the appellant's favour that he shown remorse because he admitted to killing the deceased negligently although he did not specify the nature and extent of his negligence. He appreciated the difficulty that he was faced with based on the unique facts of this matter. He accepted that there was no confrontation between the appellant and the deceased. He was however of the view that the recklessness and irresponsible manner in which the deceased was killed called for a custodial sentence.
- [37] The regional magistrate found that there were substantial and compelling circumstances. Having made that finding he correctly applied his mind and imposed an appropriate sentence.
- [38] In my view there is no irregularity or misdirection and the sentence is not shockingly inappropriate. There is no ground upon which we can and should interfere with the sentence.
- [39] I accordingly make the following order:
1. The appeal is dismissed.

C.J. MUSI, J

I concur

MURRAY, AJ

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