

FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Appeal No.: A143/2011

In the matter between:

KENKENG JEREMIA MOROE

Appellant

and

THE STATE

Respondent

CORAM:

EBRAHIM, J *et* MTHEMBU, AJ

JUDGMENT:

MTHEMBU, AJ

HEARD ON:

17 OCTOBER 2011

DELIVERED ON:

24 NOVEMBER 2011

[1] The appellant was convicted in the Kroonstad Regional Court of murder. On 31 January 2011 he was sentenced to twelve (12) years imprisonment. He now appeals against both the conviction and the sentence with leave of the court *a quo* granted on 15 February 2011.

[2] Condonation for the late filing of the appellant's heads of

argument was granted at the commencement of the appeal hearing.

- [3] In his heads of argument and in oral argument Mr Swanepoel, counsel for the appellant, attacked the findings of the court a quo on the basis that the evidence adduced by the state was not sufficient to have established the state's case beyond reasonable doubt. He submitted that the presiding officer erred in finding that the state had proved the element of unlawfulness, necessary for a conviction of murder, beyond reasonable doubt. More specifically, he argued that the trial court had erred in finding that the appellant should have testified in his own defence and advanced an explanation regarding his plea of self-defence or private defence.

BACKGROUND

- [4] The state called two witnesses, namely, Warrant Officer Jeremia Radebe of the South African Police Services who visited the scene of the incident and Sarah Moroe who was present at the scene minutes before the fatal shots were fired by the appellant.

[5] Sarah Moroe testified that she was the estranged wife of the appellant and that the deceased was her sister-in-law. During the evening of 30 – 31 January 2009 she was at the premises of the deceased. At about 2 a.m. during the early hours of 31 January 2009 the appellant arrived there. From the outset the appellant stated that he was there not to fight but to speak with her. The appellant had a quart of beer in his hand which, upon his entering the premises, the deceased grabbed from his hand. The deceased poured the beer into a glass and threw it at the appellant's face injuring him on his left eye. The deceased then took a beer bottle and wanted to hit the appellant with it. The witness then intervened in the quarrel by holding onto the appellant. She discovered that the appellant was in possession of a firearm. She decided to seek help and then left the deceased's premises and went to a nearby house in order to phone the police. As she reached that house she heard shots being fired and saw the appellant, coming out of the deceased's premises shouting her name. She later returned to the deceased's premises and found her lying in the passage, dead.

[6] During cross-examination she confirmed that the appellant sustained injuries on his left eye caused by being hit with the glass thrown by the deceased and she also noticed an injury on the appellant's left cheek, the cause of which she did not know. She also confirmed that the deceased was aggressive.

[7] The defence then closed its case without calling the appellant to testify but made an admission that the two gunshot wounds reflected in the post mortem report were caused by the appellant and resulted in the deceased's death.

EVALUATION OF EVIDENCE

[8] The submissions made in the heads of argument and during oral argument on behalf of the appellant have to be seen in the context of the following common cause facts:

8.1 That the appellant had gone to the deceased's premises to talk to his estranged wife, Sarah.

8.2 That the appellant said he did not want to fight and this was specifically brought to the deceased's attention.

8.3 The deceased attacked the appellant without provocation.

8.4 The deceased was under the influence of alcohol.

8.5 The appellant sustained serious facial injuries.

[9] In convicting the appellant, the trial court relied upon **S v MANONA** 2001 (1) SA 426 TK, as authority for its finding that where it was not disputed by the accused that he had shot and killed the deceased but alleged that he had done so in self defence, a *prima facie* case of unlawfulness had been established against the accused, despite the absence of direct evidence and the presence only of circumstantial evidence of the shooting, placing an evidential burden of rebuttal on the accused' to show that he had killed in self-defence. The failure to testify in his own defence, had the effect of converting *prima facie* proof of unlawfulness into proof beyond a reasonable doubt. The court *a quo*, following this reasoning, convicted the appellant of murder.

[11] The trial court's reliance on **MANONA** *supra* was erroneous. In **MANONA**, the court was dealing with an application for the discharge of an accused at the close of the state's case in terms of section 174 of the Criminal Procedure Act, 51 of

1977. The test for such a discharge is the existence of a sufficiency of evidence against the accused, decided on the application of the objective standard of the reasonable man..

S v HELLER 1964 (1) SA 524 W; **S v BOUWER** 1964 (3) SA 800 (O); **S v LUBAXA** 2001 (4) SA 1251 (SCA). If the evidence is such that a reasonable man might convict the accused must be placed on his defence but in such a case he is still entitled to close his case without testifying.

[12] The appellant in the court *a quo*, had taken the route of closing his case without testifying or calling witnesses to testify in his defence. He did not avail himself of the opportunity of applying for his discharge in terms of section 174. In such a case the trial court was obliged, in determining the guilt or innocence of the appellant, to assess the evidence adduced in its totality in order to conclude whether or not the state had proved its case against the appellant beyond a reasonable doubt. This it did not do. Instead it applied an incorrect legal principal, as set out in **MANONA** (*supra*), in convicting the appellant.

[13] The principal enunciated in **MANONA** (*supra*) is incorrect

because the only test to be applied in deciding whether or not to place an accused person on his defence is that already set out in this judgment. The presumption of innocence, guaranteed by the Constitution of the Republic of South Africa, Act 108 of 1996 ("The Constitution") and underpinning an accused person's right to a fair trial requires that the state first prove its case before the accused can be expected to offer a defence. A conviction based solely on self-incriminating evidence in circumstances where there is no possibility of a conviction at the close of the state's case is a breach of the accused's constitutional guarantee of fairness (LUBAXA *supra*).

- [14] The only evidence presented at the appellant's trial as to the actual shooting was that of the appellant's wife, Sarah. Her evidence was purely circumstantial as to the actual shooting and exculpatory as to the events preceding the shooting

Consequently in deciding the essential issue in this appeal of whether or not the State had succeeded in proving that the appellant had shot and killed the deceased unlawfully, the two

cardinal rules of logic applicable when dealing with circumstantial evidence, enunciated by Watermeyer JA in **R v BLOM** 1939 AD 188 at 202 and 203, must be considered.

They are:

- (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.

[15] This the learned trial magistrate did not do. He did not apply the correct legal test in assessing the weight of the evidence against the appellant. He was obliged to apply this test to the circumstantial case before him. His failure to do so amounted to a misdirection justifying the setting aside of the conviction. In any event, had he applied the rule in **BLOM** to the evidence before him, it would have been plain that the only inference to be drawn therefrom is not that the appellant had shot and killed

the deceased in unlawful circumstances. Put differently, he ought to have found that a reasonable possibility existed that the appellant had acted in self-defence or as a result of private defence. The appellant's conviction and sentence is accordingly improper and unjustified.

[17] The order I accordingly make is:

17.1 The appeal succeeds.

17.2 The conviction and sentence are set aside.

J. B. MTHEMBU, AJ

I concur.

S. EBRAHIM, J

On behalf of the appellant:

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Instructed by:
Du Randt & Louw Inc
KROONSTAD

On behalf of the respondent:

Adv. R. Hoffman
Instructed by:
Director of Public Prosecutions
BLOEMFONTEIN

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