

IN THE HIGH COURT OF SOUTH AFRICA
(ORANGE FREE STATE PROVINCIAL DIVISION)

Case No.: A417/2007

In the appeal of:

MARUCHELLE VAN WYK

Appellant

and

THE STATE

Respondent

CORAM:

EBRAHIM, J *et* VAN DER MERWE, J
et VAN ZYL, J

JUDGEMENT:

EBRAHIM, J

HEARD ON:

18 AUGUST 2008

DELIVERED ON:

16 OCTOBER 2008

[1] On the 22 June 2007 the appellant was convicted in the court *a quo* (Voges, AJ) of the murder of Leandré Coetzee, a 19 year old single female and sentenced to 10 years imprisonment. With the leave of the trial court he appeals against both his conviction and sentence.

[2] The court *a quo* found that the deceased was shot in the head at close range by the appellant on the 13 December

2005 between 19h00 and 20h00 whilst visiting him in his flat at Van Der Stell Court, Bloemfontein. In coming to this conclusion the court *a quo* made factual findings by accepting the evidence of the State witnesses, Benjamin Marais and Frederick Johannes Huisamen concerning statements made to them by the appellant of how the shooting occurred and rejected the appellant's version of the event. In analysing the evidence the court *a quo* found that little criticism could and had been levelled by the defence against the testimony of Huisamen and that his evidence that the appellant had confessed to shooting the deceased shortly after it happened was not challenged at all by the defence in cross-examination because that evidence was in fact true. The trial court thus made credibility findings upon which it ultimately relied in convicting the appellant. Essentially it is these credibility findings that form the basis of this appeal.

- [3] The principles to be followed and the approach to be adopted in appeals against findings of fact have been succinctly summarised in the judgment of Davis AJA in **R v DHLUMAYO & ANOTHER** 1948 (2) SA 678 AD at 705 -

706. See also **S v KELLY** 1980 (3) SA 301A at 307 – 308.

What has to be considered in the present appeal therefore is whether any misdirection on the part of the Court *a quo* in making these factual and credibility findings has been demonstrated. If such misdirections are absent then the appellant will have to satisfy us that the court *a quo* was wrong notwithstanding. If such misdirections are present we are entitled to disregard those findings in whole or in part, depending on the circumstances. In performing this exercise we are alive to the advantages presented to the trial judge which we do not enjoy concerning matters relating to the demeanour of witnesses.

[4] It is apposite at this point to give some background to the shooting, much of which is and was common cause at the trial.

4.1 The deceased was born and bred in Bloemfontein and had a brief sojourn in Cape Town before returning to Bloemfontein in the winter of 2005, having become pregnant in Cape Town. She lived with her parents until November 2005 when the fact of her pregnancy became known to her family,

causing tensions between her and her father. As a result she moved in with her boyfriend at the time Michael Osborne, with whom she had begun an intimate sexual relationship in August 2005. Simultaneously however she began an intimate relationship with the appellant.

4.2 On the 13th December 2005 she told Michael Osborne that she was going to visit a friend. That friend was the appellant. During the course of the visit with the appellant, she received a cellphone message from Osborne asking her where she was. She replied to him that he must leave her alone, she was with the appellant but he was welcome to join them for a “3-some”. These messages were sent via the cellphone in what is in common parlance known as an SMS. Osborne was understandably upset and sought the company of a friend who invited him to go for a drive.

4.3 Fortuitously just after 19h30 they drove past the building in which the appellant lived and saw the deceased’s vehicle parked outside the building. He entered the building where he learnt that the

deceased had been shot. He telephoned the appellant who answered but said nothing, just crying hysterically. The appellant then ended the call. It is not clear on the evidence whether Osborne made this call before or after learning of the shooting.

- 4.4 Whilst all of this was going on Frederick Johannes Huisamen decided to telephone the appellant in connection with a staff dispute at Golden Cloud Spur where both he and the appellant were employed. The appellant answered his cellphone, cried hysterically and asked the witness to come to him immediately because as he (the appellant) put it: “Ek het haar geskiet.” The witness hurried to the appellant’s flat, on his way he received an SMS from the appellant who again requested him to come to his assistance. On his arrival at the flat he could hear the appellant inside the flat, crying. The door was locked and the appellant did not react to his knock. As a result Huisamen went to the supervisor of the building, a Mr Du Plessis, who hurried to the appellant’s flat.

4.5 The appellant refused to open the door but merely cried out: “Freddie, Freddie moet my nie los nie, jy is my enigste vriend.” The door to the appellant’s flat had to be broken down. The witness found the appellant behind the door, blood all over his hands and clothes, and against the walls and on the floor. The deceased was found in a seated position on the couch clothed in shorts. Her blouse had been removed. She had sustained a gunshot wound to the head and was already dead. The appellant was hysterical and uncontrollable and had to be calmed down with a sedative. On the bed in the appellant’s flat the supervisor, Mr Du Plessis, found a .38 Taurus revolver, handed in as exhibit 1. A hunting knife was found on the floor and in the kitchen a bottle of brandy was found with blood thereon. The appellant was taken into custody and detained in police cells for the night. The following morning on being informed that he had shot his girlfriend he immediately denied this.

[5] In convicting the appellant of the deceased's murder the trial court accepted the testimony of Benjamin Marais despite heavy criticism thereof by the appellant's legal representative. His evidence that he was a close friend of the appellants and that during February 2006 the appellant had told him the deceased had shot herself by mistake while he, the appellant, was in the kitchen pouring drinks was subjected to intense cross examination. The trial court found that despite contradictions between this witness' testimony in chief and in cross examination, in its essential aspects the details which he gave about the meeting between him and the appellant were true and on that basis accepted his testimony. The learned judge found that despite Marais' absence from Bloemfontein he was still able to give minor details such as the brandy found in the kitchen, and that the appellant had cleaned his firearm that day, which evidence was consistent with the appellant's version of events. In addition the court *a quo* accepted that Marais was a friend of the appellants because of the time he had spent with the appellant in the deceased's company because he had witnessed the appellant's telephone calls to the deceased and the appellant's reaction to finding the

deceased in the company of another man on one instance. In respect of all these aspects of his evidence Marais was corroborated by the evidence of the appellant himself. I am in agreement with the trial court's approach to this witness's testimony and find that the court *a quo* was correct in accepting this witness's evidence and rejecting the appellant's version of the matters discussed at the meeting between them during 2006.

- [6] I turn now to consider the gravamen of the appeal which is whether the trial court was correct in rejecting the appellant's version of how the shooting occurred as not being reasonably possibly true.

It was the appellant's testimony that he had arranged with the deceased that she would visit him at approximately 18h30 that evening at his flat. Whilst waiting for the deceased to arrive he decided that she should accompany him when he visited his mother and sister that evening. Because they lived in an area which was not safe, he decided to take his firearm a .38 Taurus revolver with him. In preparation for this visit, he took out his revolver and

began cleaning it. He had finished cleaning and was busy loading the revolver when the deceased knocked on his door. He loaded it with one round of ammunition and left it on the couch on which he had been seated whilst cleaning it and let the deceased into the flat. On entering the flat the deceased sat on the same couch on which the appellant had left the revolver. At this point the revolver was on her left-hand-side. The evening progressed with the two of them enjoying a relaxed time together talking, watching television and flirting. By this time the deceased was in a state of partial undress, having removed her blouse. The appellant testified that there was no acrimony between them nor had anything occurred to create any tensions between them. Suddenly and without any provocation on his part the deceased became emotionally charged and wanted his assurance that he would take care of her and her unborn child. This assurance he promptly gave. But she would however not believe him so as a mark of his commitment to her, he slit his left wrist. According to the appellant even this did not satisfy and pacify the deceased. She continued crying hysterically and staring at him without speaking. She then leaned over and grabbed his revolver

with her left hand, her fingers over the cylinder of the firearm. The appellant pleaded with her to put the revolver down but she would not do so. Instead she took a firm hold of the firearm holding it in a position with the barrel pointing downwards and placed it in-between her legs and the couch. In this position she refused to release the arm. The appellant fearing that the firearm would go off moved towards her until he was standing right in front of her. All this time she continued crying. He pleaded with her to give him the firearm but she would not do so. He then put his hand in-between her legs and the couch and attempted to wrest the firearm from her by trying to loosen her grip on the firearm. He said that she was still holding onto the firearm with her left hand and he could not remember what she was doing with her right hand. He conceded that the deceased was right-handed. Eventually he managed to get a grip on the butt of the firearm, intensified his grip thereon and tugged at it at first gently until he was successful in prying it out of the deceased's grip. But just as he managed to remove the firearm from the deceased's possession, the deceased grabbed hold of his arm with her left hand and pulled it towards her. He pulled his arm back

and at that point the shot went off killing the deceased.

[7] In my view this version is so highly improbable that it is incapable of belief. I say so for the following reasons:

7.1 The appellant was adamant that at no point in attempting to gain control of the firearm did he touch the trigger or any area near the trigger or firing mechanism of the firearm.

7.2 At all times the appellant stuck to his evidence that he grabbed hold of the firearm by its butt and whilst removing it from the control of the deceased, he intensified his grip on the butt of the firearm.

7.3 His evidence that his fingers might just have slipped over the butt and touched the trigger mechanism setting it off was patchy and unconvincing and is in any event purely speculative. He did not testify that this is what in fact happened.

7.4 There is no evidence at all as to why the shot went off alternatively why the firearm was triggered and by whom. The appellant is the only person who is able to tell us how this happened and, it is clear, that he is

being evasive on this fundamental aspect. This begs the question: Why?

7.5 The appellant's evidence that the deceased chose to wage a tug of war with him for the firearm with her left hand when she was in fact right-handed gives in my view the best indication that his version is devoid of truth and is one which has been contrived in order to protect himself. Any person who is serious about possessing and taking control of a weapon will naturally use the hand which is dominant, that is the hand normally used in manual activity, to get control of the firearm. It is inconceivable that the deceased in these circumstances would have used her left hand in order to withheld the weapon from the firm grip of the appellant.

7.6 On the appellant's version there are no understandable reasons or explanations for any part of the crucial alleged sequence of events that led directly to the shot going off. There was no reason for the deceased to pick up the firearm at all or in the manner that she allegedly did, namely with the left hand over the cylinder thereof. There was no reason

for her to, whilst still holding the firearm in this manner, hold the firearm between her legs. There was no reason for the appellant to attempt to take the firearm from the deceased as it posed no real danger and there was even less reason for her in the circumstances to resist this attempt. There was no reason for the deceased to grab the arm of the appellant and most importantly, as pointed out already, there was no reason or explanation for a shot to be fired. As the whole alleged sequence of events is unmotivated it is highly improbable. His evidence that he was in shock and could not remember what happened after that flies in the face of his plea to Huisamen for support and his admission to Huisamen shortly after the shooting that he had shot the deceased. It also does not stand up to the evidence that he was hysterical but would not open the door to let Huisamen and the caretaker of the building, Du Plessis, into the flat.

- [8] I find accordingly that the appellant's version can be safely rejected out of hand as being false beyond a reasonable

doubt, that the trial court correctly found that it was the appellant who fired the shot at close range which killed the deceased, and that he did so with the requisite *mens rea*. In the result I find no misdirection in the trial court's findings on credibility and fact. On the contrary, the learned Judge weighed the intrinsic quality of the evidence and the probabilities carefully and, in my view, accurately.

- [9] I turn now to the appeal against the sentence. It was conceded by appellant's counsel that the trial court committed no misdirection in sentencing the appellant. The only issue in the appeal against sentence is whether given the trial courts finding that the minimum sentence of 15 years imprisonment was applicable and that substantial and compelling circumstances were present, the sentence of 10 years imprisonment imposed was shockingly inappropriate. In this regard there is no issue between the State and the defence that this crime falls within that category of offences termed the "crime passionale". Whilst not detracting from the extreme seriousness of the action of taking another human beings life, the courts have, generally speaking, had sympathy for offenders who, after

sustained emotional abuse, take the law into their own hands in order to end the abuse. I have acquainted myself with the authorities in this regard and what has emerged upon a reading of those authorities is that in each case when emotional conflict and stress has been present between partners or spouses, on a sustained basis over a lengthy period of time the courts have been reluctant to impose lengthy and heavy terms of imprisonment upon the offender. See **STATE v LARSEN** 1994 (2) SACR 149A, **STATE v INGRAM** 1995 (1) SACR 1A and **STATE v SMITH** 1990 (1) SACR 130A.

- [10] In **STATE v WALDECK** 2006 (2) SACR 120 (NC) the appellant was convicted of culpable homicide after the court accepted hearsay evidence of emotional conflict and stress between the appellant and the deceased which had led to the deceased being repeatedly physically abused and assaulted. On appeal the appellant's sentence of 15 years imprisonment was altered to one of 10 years imprisonment. The sentence was a heavy sentence, even though reduced on appeal, for a conviction not of murder but culpable homicide. This was indicative of the court's

attitude to a killing following emotional conflict and physical abuse that these crimes are punishable with severe and heavy sentences so as not to give the impression that the courts overemphasize emotional trauma suffered by the offender at the expense of the need to properly punish him/her for his/her actions. At page 142 of the judgment paragraph 51 the learned Judge said the following:

“Whilst this is a crime of passion and the courts tend to take a more penitent view of such crimes, the impression must never be created in the minds of the community members that the court condones such despicable conduct.”

- [11] The present case is distinguishable from the cases I have quoted. The appellant and the deceased were not involved in a serious and sustained emotional and sexual relationship in the sense that they were living together for a lengthy period of time. It is true that they were involved in an intimate sexual relationship for a few months but this was at the time when the deceased was living with Michael Osborne with whom she was also sexually active, with the knowledge of the appellant. In such circumstances there

can be no question of any sustained emotional conflict and stress suffered by the appellant. I am moved to mention that such stress which might have existed must have been brought on largely by his own need to be with the deceased. In any event I am not convinced that the emotional conflict and stress suffered by him was such as described in the authorities I have quoted.

[12] The court *a quo* in sentencing the appellant accorded the proper weight to factors in the appellant's favour, such as his unstable childhood and his lack of a suitable role model, his unstable emotional relationships with the mothers of his two children, his clean criminal record, the fact that he was at the time in gainful employment and the fact that he maintained and supported his children, mother and sisters.

[13] The court *a quo* correctly found however that the appellant, being older than the deceased by approximately 10 years, was the person in control of the emotional situation on the fateful day and that he had taken advantage of the deceased's emotional and financial insecurities. It is clear from the evidence that the deceased was an emotionally

confused young woman, worried about her future and the future of her unborn child. The fact that she continued to engage in intimate relationships with both Osborne and the appellant both of whom the evidence revealed she was looking to for financial security, speaks volumes of the emotional trauma she must have undergone when considering bringing an illegitimate child into the world. It is no wonder that she kept both Osborne and the appellant “on a string”, so to speak, in the hope, no doubt, that a firm offer of marriage or a firm commitment from one would mean that she could rid herself of the other. That the appellant took advantage of her vulnerable state makes it difficult to warm towards him as a sentencing subject despite the evidence that he had acted whilst under the influence of alcohol. There is in any event no evidence of the degree of that influence before us.

- [14] This court is therefore not at large to interfere with the sentence. The appeal is accordingly dismissed and the conviction and sentence confirmed.

S. EBRAHIM, J

I concur.

C. H. G. VAN DER MERWE, J

I concur.

C. VAN ZYL, J

On behalf of appellant:

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