

**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)**

CASE NO: A67/2012

In the matter between:

THEMBANI BAMBA

Appellant

and

THE STATE

Respondent

Judgment delivered: 3 September 2012

NYMAN A.J.

1. The appellant, Thembani Bamba, was convicted of murder on 19 January 2011 in the Wynberg Regional Court and he was sentenced to ten (10) years' imprisonment on 20 January 2011.
2. An application for leave to appeal against the conviction was granted by the trial court.
3. The appellant enjoyed legal representation in the trial court.

4. On 17 September 2008 the appellant pleaded not guilty to the charge of the murder of Ludwe Golotile on 20 January 2007 by shooting him with a firearm. It was explained to the appellant that the minimum sentence legislation was applicable to the proceedings.
5. On the Saturday evening of 20 January 2007, armed members of the South African Police Service carried out crime prevention operations in Samora Machel informal settlement, in Nyanga. These operations involved conducting patrols where people who were found in the streets, were stopped and searched.
6. The appellant, a detective constable, was dressed in plain clothes, but wore a khaki coloured bullet proof vest. The other policemen were dressed in police uniforms. During the patrol, a police truck, driven by the appellant, who was accompanied by Constable Lulamile Galela and one other police officer, stopped next to a group of young men who were standing next to the shacks. When the appellant and Constable Galela alighted from the truck, stones were thrown at the truck and the men ran away, whereupon the appellant and Constable Galela pursued them. Soon thereafter, the deceased was found shot dead in the area.
7. The following day, a spent bullet head and cartridge that were allegedly found in the vicinity of the shooting, were handed to the investigating officer. Ballistic evidence linked the bullet head and cartridge to the appellant's firearm.
8. At the trial, the appellant denied that he had fired his firearm the evening of 20 January 2007. He furthermore denied that he had shot the deceased.

There were no eye witnesses to the shooting. The issue for determination was therefore whether it was proven through circumstantial evidence that the appellant had shot the deceased.

9. The state called eleven (11) witnesses. Themba Fondezi testified that on the evening of the shooting, he paid Bhekithemba Qebetu a visit. He was sitting at the door of Mr Qebetu's house. While he was busy talking to Mr Qebetu, he saw the deceased passing and he spoke to him. Three minutes later, the deceased came back running and ran around the corner into a dead end. Shortly thereafter, he heard a gunshot. He put his head outside and smelled the gun powder. As he was talking to Mr Qebetu about the gunshot, two (2) policemen passed and went to the place where the deceased went. Another policeman joined them later on.
10. Mr Fondezi testified further that he overheard one of the policemen saying, "here is the dog, we found it and he is pretending to be dead here now". Mr Fondezi then called out the deceased's name and upon not receiving an answer, he went around the corner and found him sitting on an old bath with his head bowed. When Mr Fondezi lifted the head of the deceased, the deceased gave his last breath. When he met Nondi Golotile in the alley there afterwards, he and told him that his brother had been shot.
11. Mr Fondezi testified under cross-examination for the first time that when he lifted the deceased's head, he found a bullet-head (intermittently referred to as the "*projectile*") that had penetrated from the back to the front of the wound that was on the side of the deceased's heart. At this time, there were many

people at the scene and he mentioned to them that the bullet-head should be handed to the deceased's brother.

12. Bhekithemba Qebetu testified that in the evening of 20 January 2007 he was sitting at home on the bed, close to the door when he saw the deceased running pass his house. He asked the deceased why he was running but he received no reply. Mr Qebetu then went outside and he saw a policeman who was already taking the corner. Thereafter he heard a gunshot. He and Mr Fondezi then went outside when the two policemen returned. Messrs Qebetu and Fondezi then went to the deceased and there were already many people.
13. Constable Galela testified that on the evening of the shooting, while he was on patrol in the police truck with the appellant and Constable Kubeni, he and the appellant disembarked from the truck next to a group of young men in order to search them. The young men threw rocks at them and Constable Galela and the appellant chased them. When the appellant was out of Constable Galela's sight into the shacks, he heard a gunshot. On meeting up with the appellant, Constable Galela asked him whether he had fired the shot, whereupon the appellant gave a denial in reply. When they emerged from the shacks, they met Inspector Sebola who asked them whether they had fired a shot and they denied this. They continued with their patrol. After ten minutes all the members on patrol met in the main road whereupon they were asked by the Station Commander if any of them had fired a shot. They all denied that they had fired the shot. He then told them to go to the police station and hand in their fire-arms to Captain McEvoy.

14. Constable Kubeni testified that on the night of the shooting, while he was on patrol in the police truck with the appellant and Constable Galela, he saw the appellant and Constable Galela climbing out of the truck and running into the shacks. They returned after a few minutes and got back into the truck.
15. Mondi Golotile, the deceased's brother, testified that on the night of the incident, he was standing with the deceased on the pavement, when police vehicles arrived. He ran into his *hokkie*. Thereafter he heard a gunshot. When he came out of his *hokkie*, he met up with the police who were coming from the direction where his brother ran to. He exchanged words with the policemen who got into their vans and drove away. Afterwards he heard from Lolithemba, his neighbour, that his brother had been shot by the police. He went to the deceased and found him with no sign of life in him. Mr Golotile then took the deceased to the hospital.
16. On the following morning, when Mr Golotile's returned to the place where his brother was shot, he found a bullet-head. Thereafter, the photographer arrived and Mr Golotile showed him where he had found the deceased's body and where he had found the bullet-head some distance away. Later on, he found a cartridge in front of his *hokkie*. He later handed both the bullet-head and cartridge to Mr Booi.
17. Nkosiyedwa Booi, who is employed as a Principal Investigator by the Independent Complainants Directive, testified that he was charged with the investigation because there was an allegation that a police officer was involved in the shooting of the deceased. On Monday, 22 January 2007 when he took a statement from Mondi Golotile, he handed to him a bullet point to

him. He also received a fired cartridge from Mr Golotile. He then took the bullet-point to the Bellville office for safekeeping.

18. Mr Booï testified further that on the same day he collected seven (7) semi-automatic firearms and six magazines from Captain McEvoy at the SAP 13 storage safe at the Nyanga Police Station. He took the firearms and magazines, which were in two separate forensics bags, to the offices of the Independent Complaints Directive where they were entered into the firearms register. Thereafter they were sent to the forensic science laboratories.
19. The ballistics report from the forensic science laboratories was handed in as evidence by agreement. It shows that the bullet and cartridge were fired from the RAP firearm that had been issued to the appellant. The RAP firearm serial number referred to in the ballistics report, matched the serial number of the firearm that was issued to Mr Booï on the evening of the shooting.
20. After he received the ballistic and medical reports, it was Booï's recommendation that the appellant be charged with murder.
21. In his evidence, the appellant did not dispute the ballistic evidence. He admitted that he was in the area where the shooting took place but denied that he fired a shot that night. He testified that he had brought the police truck that he was driving, to a standstill, next to a group of boys. The boys disappeared between the shacks. He and Constable Galela then pursued these boys into the shacks and while he was in amongst the shacks, he heard a gunshot. Immediately after the appellant heard the gunshot, he turned around and he saw a person sitting as if he was drunk in a *cul de sac*.

22. According to the post-mortem report, as testified by the pathologist, the cause of death of the deceased was a gunshot wound to the back through the chest.
23. In its judgment, the trial court summarised the salient features of the evidence against the appellant. In the trial court's opinion, relevant circumstantial evidence was corroborated by the appellant, *inter alia*, that he was at the scene of the incident with other police officials, that he pursued some of the suspects amongst the shacks, that he was in the company of Constable Galela and that he found a man who was seated, who turned out to be the deceased.
24. It was the viewpoint of the trial court that for it to draw an inference from the circumstantial evidence that it is the appellant who killed the deceased, it had to prove that the bullet point that was found at the crime scene:

"caused the fatal injuries sustained by the deceased, or that it could have been the only bullet that could have killed the deceased and that the bullet was fired from the accused's firearm".
25. The trial court accepted as evidence proven beyond a reasonable doubt that the fired bullet and cartridge were fired from the appellant's firearm. In consequence, the trial court made a finding that the only inference that could be drawn from the established and proven facts is that the appellant was the person who fired a shot at the scene that caused the death of the deceased. It was the trial court's viewpoint that: "the evidence did not accommodate another reasonable inference than the inference that the accused fired the shot and thereby killed the deceased".

26. The trial court also accepted the evidence of Mr Golotile that the fired bullet and cartridge were found at the scene of the crime. In the view of the court a quo it would have been practically impossible for Mr Golotile to have obtained the exhibits, unless he had access to the appellant's firearm. Furthermore, at the time when Mr Golotile found and produced these exhibits, the appellant's firearm was already in the hands of the appellant's superiors.
27. In its determination of whether the act constituted murder or culpable homicide, the trial court made a finding that because:
- "the deceased was shot from the back and there was no acceptable and suggested ground of justification, the only finding the court could make was that this was an act of murder".
28. It was the trial court's opinion that even though there was evidence to the effect that stones were thrown at the police officers which could have justified self defence, given that the appellant denied that he fired the shot, such evidence could not be taken into account as a ground of justification.
29. The trial court made a finding that on the facts and the evidence, there was no ground of justification in the matter. Manslaughter and *dolus eventualis* were also ruled out by the court and the trial court's official finding was that there was *dolus directus* in the fatal shooting of the deceased.
30. The submissions made on behalf of the appellant in the grounds of appeal essentially rests upon two grounds; firstly, that the state failed to present

evidence that excluded the reasonable possibility that the appellant had no interaction with the deceased, given that Constable Galela had testified, so it was submitted, that he had not lost sight of the appellant before the shot rang out; and secondly, that the ballistic evidence was fraught with uncertainty for a number of reasons.

31. I find no merit in the first ground of appeal. The record shows that Constable Galela testified in his evidence in chief that after he had heard the gunshot, he had taken cover because he tried to look for or locate the appellant, "because he was already out of sight from [him] into the shacks". According to Constable Galela's evidence, he met up with the appellant and asked him if he had fired the shot and he replied no. (See: Record, Part 1, 185: 20-25) In my view, the only reasonable inference that can be drawn from this evidence is that Constable Galela had lost sight of the appellant, as he in fact testified, before the gunshot. It is for this reason that he enquired from the appellant whether he had fired the gunshot.

32. In my opinion, the second ground of appeal is unsustainable. The state's evidence that the fired bullet and cartridge were fired from the appellant's firearm was not challenged by the appellant. The sole challenge to the ballistic evidence that was raised on behalf of the appellant at the trial was the cogency of the evidence regarding the manner in which the spent bullet-head and cartridge were found. On the evidence, there is a discrepancy which could form the basis for such a challenge and which needs to be considered.

33. Mr Fondezi's testified under cross-examination that he had found a bullet when he lifted the deceased's head. The bullet-head fell onto the top that the deceased

was wearing. He did not remember what he did with the bullet head. He remembered telling the onlookers that the bullet-head must be given to Mondle. If Fondezi indeed found such a bullet point, it would appear to be a different one from the one that the deceased's brother found the next day.

34. It was Mr Golotile's evidence that he found a bullet-head on the day following the shooting in the area where he found the deceased. He pointed out the place where he found the bullet-head to the photographers, which point-out is depicted at point "A" on the photograph, a short distance from point "B" on the photograph, being the place where the deceased's body was found.
35. The contradiction in the evidence throws up two possibilities: either two different bullet-heads were found, or only one bullet-head was found by either Messrs Golotile or Fondezi. If two bullet heads were found, then this would raise a reasonable doubt that the bullet-head that was tested, was the bullet-head that caused the death of the deceased, given that there is no forensic evidence (such as blood or DNA evidence) that established that the bullet-head that was tested was the one that penetrated the deceased's body.
36. Given this contradiction in the evidence, what, if any, impact does it have in the determination of whether the state proved its case beyond a reasonable doubt? In *S v van Aswegen* 2001 (2) SACR 97 (SCA) the court relied on the following passage in *S v Van der Meyden* 1999 (1) SACR 447 (W) at 449G for its decision that a court should not base its decision on whether to convict or acquit on only a portion of the evidence, but that the decision had to take into account all the evidence:

"The proper test is that an accused is bound to be convicted if the evidence establishes his guilt beyond reasonable doubt, and the logical corollary is that he must be acquitted if it is reasonably possible that he might be innocent. The process of reasoning which is appropriate to the application of that test in any particular case will depend on the nature of the evidence which the court has before it. What must be borne in mind, however, is that the conclusion which is reached (whether it be to convict or to acquit) must account for all the evidence. Some of the evidence might be found to be false; some of it might be found to be unreliable; and some of it might be found to be only possibly false or unreliable; but none of it may simply be ignored."

37. This leads me to consider whether Messrs Golotile, or Fondezi's evidence, should be accepted in respect of the finding of the bullet-head. The trial court accepted Mr Golotile's version, without referring to the contradiction in evidence specifically. I agree. Mr Golotile was steadfast in his evidence pertaining to the finding of the bullet-head. He pointed out the spot where he found the bullet-head to the photographers. I have no reason to doubt his version. In contradistinction, Mr Fondezi's evidence was vague. His evidence was not given spontaneously during evidence in chief, but it was only disclosed under cross-examination and in response to the question whether he had found any cartridges or projectiles around the deceased. His reply was that when he lifted the head of the deceased he found "a piece of iron". When he was asked what he did with the object he told the other people who were standing around that "the metal thing" should be given to the deceased's brother. While Mr Fondezi testified he did mention to Mr Golotile that he had found the projectile, he did not go further and state that he handed the

projectile to him. Under re-examination Mr Fondezi testified that he did not know to whom he gave the bullet head. It is therefore my opinion that Mr Golotile's evidence in respect of the finding of the bullet-head is unacceptable.

38. In my opinion on the totality of the evidence, only one bullet-head was found. The primary basis for my opinion is that it is common cause that only one gunshot was fired in the vicinity, at the time that the deceased was mortally wounded. Additionally, there is no evidence that the deceased was injured prior to the shooting, from a second gunshot. In my view, further, the totality of the evidence supports the conclusion that the appellant fired the shot that caused the death of the deceased. The bullet-head and cartridge were collected from the scene by Mr Golotile, who then handed over these exhibits to Mr Booi. Given that the ballistic report is not in dispute, the trial court's findings are based on facts that were proven beyond a reasonable doubt. It is not in dispute that seven (7) firearms and six (6) magazines were handed to Captain McEvoy by the police officers themselves and that these exhibits were then placed them in exhibit bags. In order to raise a reasonable doubt that the appellant fired the firearm himself, requires some evidence that someone else had possession of his firearm between the time that he collected the firearm from the police station, to the time of handing it in to Captain McEvoy. There is no such evidence and this possible explanation was not canvassed during cross-examination or any other time during the proceedings by the appellant himself, or on his behalf. I am therefore in agreement with the trial court's findings that, "it accepts without any hesitation

that the fired bullet and cartridge were fired from the accused's firearm", and that "the evidence in this respect is quite clear and unambiguous and solid".

39. While it is correct that the crime scene was not cordoned off and that members of the public had free access, there was no evidence that the exhibits were tainted. In this case there are a number of independent facts which point in the same direction. This is important because even if some of these facts can on their own perhaps be reconciled with the appellant's version, their combined persuasive force show in my view, that there is no reason to disturb the findings of the trial court in this regard.
40. The finding that the appellant fired the shot that killed the deceased means that the appellant's falsely denied firing a shot that evening. The fact that an accused is a liar does not by itself indicate guilt. The all important question remains whether the state case has on an evaluation of all the facts been proved beyond reasonable doubt.
41. I turn to consider what form of fault was proven. The test for intention is purely subjective. It must in this case, be the only reasonable inference from all the facts that the appellant subjectively intended to kill the deceased (*dolus directus*) or foresaw the possibility that the deceased could be killed by the shot fired by him (*dolus eventualis*). The appellant's subjective mental state may be inferred from the objective facts that were proved. The mental state required for culpable homicide, on the other hand, is negligence. The test for negligence is objective. The question is whether the reasonable person in the position of the appellant would have foreseen the possibility that the

deceased's death may result from the shot fired, whether the reasonable person would have taken steps to guard against such possibility and whether the appellant's conduct deviated from what the reasonable person would have done in the circumstances.

42. I am of the view that this is not a case of culpable homicide, but that the trial court nevertheless erred in finding *dolus directus* as a basis for murder. On the proven facts of the case, and in the absence of an explanation from the appellant who fired the shot, the only reasonable inference to be drawn is that the appellant fired the bullet in the dark in the direction of the deceased, without having the direct intention of killing the deceased but having foreseen that the shot may cause the death of the deceased. In my view, the finding of *dolus directus* as the basis for the conviction of murder should be substituted with a finding of *dolus eventualis*.
43. It is generally accepted that murder based on *dolus eventualis* is morally less reprehensible than a murder committed with *dolus directus* and should generally result in a lesser sentence. In the absence of an appeal against sentence, counsel was asked to make submissions on whether this court may consider and if satisfied substitute the sentence with a lesser sentence.
44. Counsel on both sides submitted that confirmation of a conviction but on different facts or with a different form of intent, will have an effect on sentence and will leave it open to this court to substitute its own sentence. (See: *R v Latib* 1954 (3) SA 81 (T)). There is, however, no authority regarding appeals to support the view that a high court, sitting as a court of appeal from a lower court (as opposed to a court exercising powers of review) may disturb the

sentence if there is no appeal against sentence. This court's jurisdiction in respect of appeals is determined by statute. Section 309 (1) (a) read with section 309 B of the Criminal Procedure Act No 51 of 1977 stipulates that there is no appeal, save with leave being granted and that an accused must apply for leave to appeal against a conviction, sentence or order. (I refer to the Criminal Procedure Act hereinafter as "the Act"). Sub-section 309 B (3)(a) of the Act provides that every application for leave to appeal must set forth clearly and specifically the grounds upon which the accused desires to appeal. The appellant has not sought leave to appeal against sentence and there is no appeal against sentence. In *Sefatsa and Others v Attorney-General, Transvaal, And Another* 1989 (1) SA 821 (AD) at 839 B-J the court held that neither a Provincial Division nor the Appellate Division has inherent jurisdiction to reopen a trial. Their jurisdiction relating to criminal appeals is prescribed by the Criminal Procedure Act 51 of 1977 and a court cannot have an inherent jurisdiction which will entitle it to act contrary to the express provisions of the Act. In my view this is also not a case which should be dealt with under this Court's powers of review in terms of section 304 (4) of the Act and where this court, exercising powers of review, should interfere with the sentence. This is a case which should rather be remitted back to the trial court for the purpose of reconsidering the sentence in the light of this judgment.



R.M. NYMAN, A.J.
Acting judge of the High Court

I agree and make the following order:

1. Save as set out in paragraph 2 hereunder, the appeal against conviction is dismissed.
2. The conviction of murder is confirmed but the basis of the conviction is changed from dolus directus to dolus eventualis
3. The matter is remitted back to the trial court for the purpose of reconsidering and imposing a fresh sentence in the light of the finding in paragraph 2 above.



W.J. LOUW, J

Judge of the High Court