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IN THE HIGH COURT OF SOUTH AFRICA

JOHANNESBURG CASE NO: SS49/00

2000-08-00

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(2) OF INTEREST TO OTHER JUDGES YES/NO
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DATE 12/9/21 SIGNATURE

In the matter between

THE STATE

and

VINCENT NCEBA BHACELA Accused

JUDGMENT

WILLIS, J: The accused faced three counts. The first count was murder in that on or about 12 June 1998 and at or near 1395 Kubedi Street, Vosloorus, in the district of Boksburg, the accused wrongfully and unlawfully killed Benen Sibusiso Mtshali.

The second charge is a contravention of section 1, read with sections 1 and 39 of the Arms and Ammunition Act No. 75 of 1969, unlawful possession of a firearm. It is alleged that at or about the same place and time mentioned in count 1, the accused unlawfully possessed such arm without being the holder of a valid licence to possess the same.

The third charge is a contravention of section 36, read with sections 1 and 39 of the Arms and Ammunition Act No. 75 of 1969, unlawful possession of ammunition. It is alleged that at or about the same place and time mentioned in count 1 the accused possessed ammunition, the quantity and calibre thereof being unknown to the state, while he was not in lawful possession of a firearm from which such ammunition could be fired.

The accused, when asked at the commencement of the proceedings to plead, initially said that he pleaded guilty to the first charge but that he did not do it intentionally. He pleaded not guilty to counts 2 and 3. After an adjournment was allowed in order to enable the accused's counsel, Mr Jacobs, to confer with him, it was decided to record a plea of not guilty by the accused to all the charges.

The accused exercised his rights not to give any explanation of plea in terms of section 115.

Certain formal admissions were made by the accused in terms of section 220 of the Criminal Procedure Act No. 51 of 1977. These were that the deceased died on 12 June 1998 as a result of a bullet wound of the lung, liver and interior vena cava. It was admitted that the deceased sustained these injuries at or near 1395 Kubedi Street, Vosloorus, in the district of Boksburg. It was admitted that the deceased sustained no further injuries from the time on which the wound was inflicted on 12 June 1998 until a post-mortem examination was conducted thereupon. The fact that Dr Jan Georg Pieterse conducted a post-mortem examination on the body of the

deceased on 19 June 1998 as well as the correctness of his findings were admitted.

There were also certain formal admissions relating to photographs which were taken at the time of the post-mortem and also at the home of the deceased.

The report of Dr Pieterse reveals that the deceased died of a 9 mm round penetrating wound with a ring of stamped abrasion on the chest at the left of the level of the sixth rib, just to the right of the sternum, bullet entrance wound. This wound passes backwards and slightly downwards into the chest cavity, passes through the right lung, enters the peritoneal cavity, passes through the liver and inferior vena cava, leaves the peritoneal cavity and the body through a wound marked as number 5. In other words, it is clear that the deceased died as a result of an injury from a bullet wound which was fired from in front.

It is common cause that at the time of the shooting incident there was no one else present who could have fired the shot which killed the deceased other than the accused.

The accused's version, with which I shall deal in more detail later, was essentially this: He went to the home of the deceased to visit him and the deceased came out of his home. He pulled a firearm from somewhere on his body and pointed it at the accused in a playful manner. Thereafter some horseplay resulted between the accused and the deceased and accidentally the shot went off which killed the deceased.

The state relied on the evidence of two witnesses, namely

Thembi Mtshali, the sister of the deceased and Anna Matshidiso Mtshali, the mother of the deceased. Both of them had been at home at No. 1395 Kubedi Street where they lived with the deceased immediately before the shooting incident.

Thembi Mtshali described how on the day in question she was at home at approximately 19:00 in the evening. She was listening to a small radio in the kitchen. She was with her younger sister at the time. Her mother and father were in the dining room. At 19:00 the deceased, her brother, had not yet arrived at home but shortly thereafter he did arrive at home and went to the dining room and watched television there. She heard a motor vehicle stopping outside their home. The vehicle was a white Toyota Corolla with which she was familiar. It was old and made a considerable noise. She had seen the accused driving this vehicle in the past. She saw her brother leave the dining room and go outside. The brother left through the kitchen door. After about three minutes she heard a sound of a gunshot. Immediately before this gunshot two persons had been in conversation. She looked out through the window and saw the accused running towards a vehicle, this white Toyota Corolla, open the door and enter the passenger side thereof. The vehicle drove off. At the time that she had seen the accused approach the vehicle, she had noticed that he was carrying a firearm which she described as silver in colour. She was able to see clearly because there was an Apollo light immediately outside the premises of 1395 Kubedi Street. She described how this light was particular tall and presented powerful illumination in the area at the time.

She confirmed the facts which were common cause namely that the deceased and the accused had been good friends for a number of years, the accused being a frequent visitor to the family home. After she had seen the accused leave in this particular vehicle she returned to the kitchen and saw her brother lying on the floor of the kitchen. Her father was there at the time. She asked what happened and according to her the deceased said that Nceba had shot him. The admissibility of this evidence was challenged by Mr Jacobs and I shall deal with it later in more detail.

She went off to telephone for assistance having left the deceased with his father. When she returned she discovered that the deceased had already been taken to hospital. She saw the deceased again some time after 20:00 at the hospital. At the hospital she again asked him why Nceba had shot him and his reply had been that Nceba had asked for R50,00 from him. She categorically denied that her brother had ever possessed a firearm. This statement that was made by the deceased in hospital to the witness had its admissibility challenged as well. Again I shall deal with this issue later.

Anna Matshidiso Mtshali also testified. She confirmed in every material respect the evidence of her daughter Thembi. She did not, however, see a firearm in the possession of the accused. She similarly, after the gunshot had gone off, had gone to see the deceased and asked him what had happened and she said that the deceased told her that Nceba had shot him. In other words, her evidence in this respect was identical to that of her daughter. She had travelled with the deceased to hospital. On the way to hospital

the deceased had told her that he was dying and that he could see that he was not going to live. At about this time, in fact within seconds of this indication by the deceased that he knew he was dying, the deceased had been asked by his mother whether there had been any quarrel between him and the accused. The deceased had said that there had been no quarrel. She had asked him why he had done what he did and the deceased said to her that the accused had asked him, the deceased, to give the accused R50,00 for petrol. This statement is accordingly very similar to that which the deceased allegedly made to his sister Thembi when at the hospital.

Mr Jacobs criticised the evidence of the mother for the fact that she had in her statement made to the police shortly after the incident omitted to state that he had looked out of the window and also that she had omitted to state that she had seen the accused climb into a motor vehicle. I do not think that there is any substance in these criticisms. Both the two witnesses for the state gave their evidence in a clear and convincing manner.

The accused testified in his defence. I have summarised already the essence of his version. The accused said that he went to the home of the deceased on foot and that he had left on foot. He said that he had run away because at the time when the shot went off the deceased had said that he should go because otherwise the deceased's father would come and see what had happened.

It is common cause that the accused was arrested approximately a year after this incident; that he had left his place where he had been staying at the time of the incident and he

explained his failure to surrender himself to the police by stating that he had been terrified of the police because he had been severely assaulted when he had previously been a suspect. The accused denied that he possessed a firearm and said that he had no licence to possess any such firearm. He agreed that he knew that a firearm was a very dangerous weapon. He said that the firearm had belonged to the deceased. He said that he had seen it previously in the deceased's room. Curiously he could not describe how long before the incident he had seen the firearm in the room of the deceased. This evidence was hotly contested by the deceased's mother who said that she regularly cleaned the room of the deceased and had never seen a firearm there. She said that she had never seen the deceased in the possession of a firearm.

According to the accused the deceased was a very intelligent person. Indeed, the accused said that he had often relied on the deceased for advice on issues that he could not properly grasp himself. The accused said that at the time when this horseplay had been taking place the deceased had never uttered words such as "be careful, the firearm is loaded" or words to this effect.

There are a number of criticisms that can be levelled at the evidence of the accused. It is entirely ridiculous to believe that an intelligent person such as the deceased apparently was would have taken a loaded firearm and pointed it at the accused as some kind of game. It is extremely difficult to believe that even if the deceased had acted in so foolish a manner, that he would not immediately the horseplay has started have protested that the firearm was loaded and

accordingly dangerous. Obviously if the firearm had been the deceased's and he had drawn it, he would in all probability have known that it was loaded.

The accused contradicted himself as to where the deceased had taken the firearm from. At one stage he said that he had removed it from his lumberjacket and at another he said that he had removed it from his groin; in other words, from under his briefs under his trousers.

The accused at stages attempted to deny that he had actually fired the firearm whereas he said at one stage, under cross-examination, that he had fired the shot. This was much the same version as he gave when he originally gave his plea explanation. When confronted with the fact that he had conceded under cross-examination that he had fired the shot he denied ever having said this or words to that effect. When asked to explain this, he could not and then, interestingly enough, again he had a slip of the tongue and said yet again that he had pulled the trigger. At one stage he attempted to blame a very experienced interpreter for the difficulties in which he had landed. He contradicted himself as to whether he had struggled with the firearm or merely played with it. He said that the butt of the firearm had never left the hand of the deceased. Given the nature of the injury which the deceased sustained, then it is impossible to see how the injury could have been sustained unless the firearm had been turned either by the deceased himself or by the accused directly onto himself. The accused was asked to described how it was then that the injury of the kind that was inflicted was sustained. He could not

explain it. He was asked on several occasions to demonstrate how the horseplay which he described had occurred. His explanations contradicted each other and none of them could explain the injury which the deceased sustained.

The accused testified that he did not arrive by vehicle nor leave by vehicle. This aspect was never disputed when the state witnesses testified. The accused could give no satisfactory explanation for why if he had run away immediately the deceased had been injured, no firearm was ever found in the vicinity of the deceased. The accused's explanations for why he ran away and why he did not hand himself over to the police are unconvincing.

The evidence during the state case that the deceased had collapsed on the floor in the kitchen had not been disputed when it was given but the accused said that the deceased had collapsed on the ground immediately outside the kitchen.

As I have already indicated certain statements which both the sister of the deceased and his mother said were made by the deceased to them had their admissibility challenged. Mrs Ranchhod, counsel for the state, said that this evidence should be admitted in terms of section 3 of the Law of Evidence Amendment Act of 1988. I was referred to the well-known case of S v Ramavhale 1996 (1) SACR 639 (A) in which it was said at 649d:

> "I would agree with the remarks in this and other cases, the effect of which is that a Judge should hesitate long in admitting or relying on hearsay evidence which plays a decisive or even significant part in convicting an accused unless there are compelling justifications for doing so."

Subsection 3(1)(c) of the Act relies that a court, in determining admissibility, shall have regard to (i) the nature of the proceedings; (ii) the nature of the evidence; (iii) the purpose for which the evidence is tendered; (iv) the probative value of the evidence; (v) the reason why the evidence is not given by the person upon whose credibility the probative value of such evidence depends; (vi) any prejudice to a party which the admission of such evidence might entail; and (vii) any other factor which should in the opinion of the court be taken into account.

Mr Jacobs, who appears for the accused, relied very heavily on (vi) namely the prejudice to the accused. It is clear that any evidence which is admitted may operate to the prejudice of someone else who is involved in a dispute. This fact has to be weighed in the light of all the other factors that must be weighed.

It is clear that the statement which the deceased made to his sister at the hospital and to his mother on the way to the hospital would have been made by the deceased aware of his impending death. Therefore, it seems to me that all the common law requirements of dying declarations apply in this regard. The statements would have been admissible even if section 3 of the Law of Evidence Amendment Act were not applicable.

As to the statement which the deceased apparently made to both his sister and his mother while lying on the floor namely that Nceba had shot him, it is probable, although not proven beyond reasonable doubt, that that time the deceased was aware of his being in mortal danger. In any event, if one looks at the evidence as a

whole, it is clear that these statements do not really add much to the inferences that are likely to be drawn in any event. This evidence certainly would not play a decisive or even significant part in coming to a conclusion in this particular case. If anything, they really serve merely to corroborate other evidence.

I would also wish to point out that the admissibility of this evidence could operate in favour of the accused in the sense that if the motive for the shooting was to try and expect money from the deceased, then *dolus directus* is not necessarily present although *dolus eventualis* would be. Accordingly this evidence is admissible and some weight will be attached to it although not much.

I have already indicated that I found the evidence of the mother and the sister of the deceased to be of a high standard. The cumulative weight of the evidence points to the following conclusions being drawn.

1. The accused was carrying a firearm at the time that he left the premises of the deceased after the deceased had been shot.
2. That the firearm had not been possessed by the deceased.
3. That it must have been the accused who fired the shot.
4. That he must have foreseen the possibility that the deceased would die as a result of such shot being fired.
5. That he persisted with his actions reckless as to whether such possibility occurred or not.

These facts compel the conclusion that the accused is guilty of the murder of the deceased although the form of intention can only be proven as *dolus eventualis*.

It is common cause that the accused did not possess a licence to possess a firearm. Given my actual finding that he must have possessed a firearm in order to fire the shot at the deceased, it follows that he must be guilty on count 2 and 3. As it is clear that the deceased died of a bullet wound which was fired from this firearm, the accused must have been in unlawful possession of the ammunition.

Count 1, the murder charge, you are found GUILTY AS CHARGED.

Count 2, the charge of unlawful possession of a firearm, you are found GUILTY AS CHARGED.

Count 3, the charge of unlawful possession of ammunition, you are found GUILTY AS CHARGED.