

IN THE HIGH COURT OF SOUTH AFRICA
(WITWATERSRAND LOCAL DIVISION)

Case No.2007/0263

In the matter between:

THE STATE

Versus

TEBOGO THOMAS SMITH

Accused

MEYER, J

[1] The accused, Mr Tebogo Thomas Smith, has been arraigned for trial on an indictment containing charges of the attempted murder of Ms Phindile Mbonani on 19 August 2007 (count 1) and the murder of the late Mr Wiseman Ntand Makhanya ('the deceased') on the same day (count 2).

[2] Adv Vilakazi appears for the State, and the accused is represented by Adv Madyibi.

[3] The accused pleaded not guilty and made no plea explanation. Various admissions in terms of s 220 of the Criminal Procedure Act 51 of 1977 were made at the commencement of the trial and during its course.

[4] The State called as witnesses Ms Phindile Mbonani, Ms Sibongile Makhaya, Mr Timothy Moyo and Dr Learato Mphahlele. The accused elected to testify in his defence and he called no witnesses.

[5] It is convenient to deal with the charges of attempted murder and of murder separately.

[6] It is common cause that Mbonani and the accused were engaged, but broke up during May 2000. Mbonani testified that on Sunday afternoon, 19 August 2007, at about 4:00 pm, she, accompanied by her friend, Sylvia, went to the premises where she and the accused rented an outside room. The main house on the premises is used as a shebeen. Sylvia went into the main house and Mbonani to the accused in his room. She woke him and confronted him with their relationship. An argument ensued. He slapped her face. He walked out and went into the main house. Seeing Sylvia infuriated him even more since he held the view that Sylvia had found a new boyfriend for Mbonani.

[7] Mbonani continued packing her clothes and, upon his return into the room, the accused slapped and hit her with his hands and kicked her on her back. She ran out. The accused followed and continued to kick her on the back and threw pieces of concrete at

her. She heard the accused shouting to his friend ‘to bring his firearm so that he could finish [her] off.’ Mbonani ran into the main house for safety. It is common cause that shortly thereafter the accused shot and killed the deceased outside the house.

[8] Counsel for the accused put it to Mbonani that the accused’s version was that there was a quarrel between the accused and Mbonani about Sylvia’s involvement in their relationship, that he had slapped Mbonani several times and that he had kicked her in her back because she was fighting back physically and she had consumed liquor. Mbonani was hardly cross-examined and her evidence was otherwise essentially left unchallenged.

[9] It is common cause that Mbonani consulted a medical practitioner on 21 August 2007 and that she sustained the injuries recorded on the J88 (exhibit B) as a result of the assault on her. The recorded injuries are tenderness and swelling of the middle back, bruises on the left lower back, and headache.

[10] The accused confirmed that an argument had ensued between him and Mbonani. In his evidence in chief he said this:

‘I was hitting her and she was hitting me. I was slapping her. I kicked her at some point. She ran into the house.’

He testified that the injuries recorded on exhibit B were probably caused by his kicking and hitting her with fists on her back. He also testified that the manner in which he had hit Mbonani on her back was ‘to make her weak so that she could not fight back.’

[11] The accused denied throwing anything at Mbonani. Under cross-examination he testified that Mbonani had assaulted him first and he had then tried to create the impression that he was merely retaliating. This was, however, never suggested to Mbonani when she was cross-examined or mentioned by the accused when he gave his evidence in chief.

[12] The common cause facts that the accused followed Mbonani outside the room and that he indeed fetched his fire-arm when she ran into the main house corroborate the version of Mbonani. The reason proffered by the accused for fetching his firearm is, in our view, improbable, far-fetched and untenable. It is rejected as false beyond a reasonable doubt. He testified that because Mbonani previously alleged that he had pointed a fire-arm at her, he had decided to go to the police station to explain that he had not pointed a fire-arm at her on this occasion. He fetched his fire-arm and on his way out was approached by the deceased. This version was not put to Mbonani. It is improbable that the accused would have left the premises when Mbonani was removing her personal effects from the outside room and also threatened to take some of his furniture and other items. It was also not suggested that Mbonani on this occasion had alleged that he pointed a firearm at her. There seems to be no plausible reason why the accused would have fetched his firearm other than to intimidate Mbonani.

[13] The evidence did not establish the crime of attempted murder of Mbonani. We are, however, of the view that the State has proved beyond a reasonable doubt that the accused assaulted Mbonani with the intent to do her grievous bodily harm. Such verdict

is, in terms of s 258(b) of the Criminal Procedure Act, competent on a charge of attempted murder.

[14] I now return to the charge of murder. It is common cause that the deceased died as a result of a bullet wound of the chest. It is also common cause that the fatal shot was fired by the accused during the afternoon on 19 August 2007. The only issue is whether the accused acted in private defence.

[15] If the incident occurred at the front of the house in question, then the witnesses Makaya and Moyo would have been in a position to witness the shooting of the deceased. On their evidence the deceased posed no threat to the accused and, when he fired the fatal shot, the accused could not reasonably have feared grievous bodily harm at the hands of the deceased. On the accused's version he shot the deceased in the passage next to the house where the State witnesses would not have been able to witness the events.

[16] Makaya testified that she observed the shooting through a bedroom window that faces onto the front of the premises where the incident took place. The accused shot the deceased in cold blood without being provoked by the deceased in any way. She thereafter heard a second shot fired. Her evidence on these material issues is contradicted by her witness statement that she made a few hours after the incident. Paragraphs 5 and 6 of Makaya's witness statement read:

‘5. Ntando my deceased brother then went outside via the back door and we then locked again. I could then hear Tebogo along the passage outside the house shouting that he is being fooled, when he

then was talking to my brother the deceased whilst Ntando tried asking Tebogo what the matter was.’

6. A shot went once outside that I heard and then we opened both doors and we or I then saw my brother bleeding on his face, when suddenly another shot went off and I clearly saw Tebogo the suspect shooting my brother from outside through our bedroom window as he was standing outside facing the back door with a firearm in his hand. Throughout this incident I was still at the bedroom with Phindile of which then we did not know where Phindile’s friend ran to.’

[17] Moyo testified that the deceased stood with his left arm resting on a precast wall at the front of the house when the accused, who was standing approximately 3 metres away from him also at the front of the house, shot him. His witness statement also contradicts his evidence in this material respect. In paragraph 3 thereof it is stated that the deceased ran into the passage when he was shot by the accused.

[18] All the witnesses, except Makaya, heard or saw only one shot fired. Makaya, in her witness statement, refers to two gunshots. After the first one she noticed the deceased was bleeding on his face. Dr Mphahlele testified that there was an allegation that the deceased sustained a gunshot wound to the head, but her *post mortem* examination revealed only one bullet wound to the chest. It is common cause that the deceased had a 45 mm x 12 mm laceration on the right upper eyelid 2 mm below the eyebrow. Such injury was probably caused when the deceased fell onto a coffee table when he entered the house after he had been shot. Dr Mphahlele expressed the opinion that the laceration was a blunt force injury consistent with his head hitting against a coffee table or the floor. Makaya’s previous statement in her witness statement relating to the first gunshot that she heard and the bleeding that she noticed immediately thereafter on the deceased’s face,

appears to have been pure conjecture based on a belief that the coffee table injury was a gunshot injury. Her evidence in court is now in line with what was subsequently determined at the *post mortem* examination. Makaya's evidence in court about the other events that occurred around the main house on the premises are also on several aspects clearly based on conjecture rather than observation, since she could not have observed everything that she testified about from her position inside the house.

[19] The accused denies that Moyo was present at the scene. The State presented no explanation as to why Moyo's witness statement was only taken on 3 December 2008. He testified that the accused and the deceased wrestled over the possession of a brick before the shooting incident took place. This was not mentioned by Makaya. He also testified that the deceased thereafter stood with his arm resting on the precast wall at the time when he was shot. This was also not mentioned by Makaya.

[20] The accused testified that he walked down the passage next to the house when he was approached by the deceased. The deceased asked him 'what he was doing at his house' and aimed to hit him with a bottle on his head. The deceased came closer and the accused drew his firearm from his waist and fired a shot at the deceased's hand which held the bottle and that was half raised at the time. It is common cause that the bullet entered the deceased's body below the right arm-pit and traveled through his chest where it was removed from 'the subcutaneous soft tissues of the left upper arm posteriorly.'

[21] We are not satisfied that we heard the whole truth relating to the killing of the deceased. We are confronted with evidence of two State ‘eyewitnesses’ that is unreliable, and of the accused unsatisfactory in material respects.

[22] The accused’s version that the incident took place in the passage and out of sight of the State witnesses is on an assessment of the totality of the evidence reasonably possibly true. The State has also, in our view, not proved beyond a reasonable doubt that the accused did not act in private defence. The purpose of police statements is to obtain details of an offence in order to decide to institute a prosecution, they are frequently not taken down with accuracy and completeness, there may be language and cultural differences between the witness and the police officer who takes down the statement, and not every error by a witness and every contradiction affects the credibility of the witness. The aim is not to determine which of the State witnesses’ versions is correct, but to evaluate the honesty and reliability of their evidence in court [Mafaladiso (*infra*) at p 593 f], including their explanations for having made the statements. Such evaluation must be done on a holistic basis. [See: S v Gqulagha 1990 (1) SACR 92 (A); S v Mafaladiso en Andere 2003 (1) SACR 583 (HHA); and S v Govender and Others 2006 (1) SACR 322 (ECD)]. But the contradictions to which I have referred are material to the issue of the accused’s guilt and, in our view, negatively affect the credibility of the State witnesses.

[23] Applying ‘a robust approach, not seeking to measure with nice intellectual calipers the precise bounds of legitimate self-defence or foreseeability or foresight of resultant death’ [S v Ntuli 1975 (1) SA 429 (A) at p 437E], we are further of the view that

the State has not proved beyond a reasonable doubt that the accused exceeded the bounds of private defence. On his version he was confronted by an imminent assault that could have caused him grievous bodily harm had he not acted quickly. A person is legally justified in killing an attacker not only if his life is in danger but also if he stands to suffer grievous bodily harm [see: S v Jackson 1963 (2) SA 626 (A) at p 628F]. That the accused reasonably feared grievous bodily harm at the hands of the deceased is, on the totality of the evidence before us, reasonably possibly true. The evidence did not establish that flight to avoid the attack would have been a safe way of escape [see: R v Patel 1959 (3) SA 121 (A) at p 123F – H] and it cannot be said, on the evidence before us, that the measure of force used was not reasonable.

[24] In the light of all the evidence there is a reasonable possibility that the accused acted in private defence.

[25] In the result:

1. The accused is found not guilty of attempted murder (count 1), but instead the accused is found guilty of assault with the intent to do grievous bodily harm.
2. The accused is found not guilty of murder (count 2).

P.A. MEYER
JUDGE OF THE HIGH COURT
12 December 2008