IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG

Case No: AR243/09

In the matter between:

LUCKY SIPHIWE HLONGWANE Appellant

and

THE STATE Respondent

JUDGMENT

Vahed J (Kruger *et* Chetty JJ concurring):

[1] The appellant was arraigned on a charge of murder in the Regional Court, Camperdown and on 20 August 2008 he was convicted thereof. On the same day he was sentenced to serve a term of imprisonment of 18 years. A subsequent application for leave to appeal against both conviction and sentence was refused by the learned Regional Magistrate. Thereafter, on petition to the Judge President of this division, his application for leave to appeal was again refused. His appeal serves before us as a result of leave to appeal having been granted to this court by the Supreme Court of Appeal on 22 November 2013.

[2] The appellant's heads of argument were due on or before 02 January 2015. When they were not forthcoming the respondent, on 15 January 2015, gave notice that it intended, at the hearing of the appeal, applying for the appeal to be

struck from the roll. The appellant's heads of argument were delivered later that same day. On 26 January 2015 the appellant delivered an application for condonation for the late delivery of the heads of argument. It was opposed by the respondent. When the appeal was called on 30 January 2015 we first heard argument on the application for condonation.

[3] The appellant's attorney deposed to the affidavit delivered in support of the application. It was remarkably short, extending to only 4 typed, double-spaced pages. The affidavit attempts to explain that the reason for the delay was the fact that his firm had not been placed in funds. He says that he made contact with the appellant and his wife during June 2014 when he handed to them a statement of account and discussed the early settlement thereof. When he received the Notice of Set Down of the appeal during July 2014 he again reminded the appellant and his wife to attend to early payment of the fees.

[4] The next event occurred in November 2014 when he received a report from the appellant that raising the required funds was a struggle, accompanied by a promise to pay, which did not eventuate. The appellant's attorney then indicates that his office was closed for the December recess from 12 December 2014 until 12 January 2015. However, he says that on 3 January 2015 he held and urgent meeting with the appellant's wife who indicated to him that she had failed to raise the agreed sum and that she would not be able to raise that sum by the date of the appeal.

[5] The attorney then goes on to say that when counsel of choice returned to chambers after his break he negotiated with counsel to prepare the heads of argument at a reduced fee. He thereafter approached another junior advocate to take over the argument at a reduced fee.

[6] Before analysing that explanation it would be useful to recall the remarks of Heher JA at paragraph 6 of *Uitenhage Transitional Local Council v SA Revenue Services* 2004 (1) SA 292 (SCA).

> "One would have hoped that the many admonitions concerning what is required of an applicant in a condonation application would be trite knowledge among practitioners who are entrusted with the preparation of appeals to this Court: condonation is not to be had merely for the asking; a full, detailed and accurate account of the causes of the delay and their effects must be furnished so as to enable the Court to understand clearly the reasons and to assess the responsibility. It must be obvious that, if the non-compliance is time related then the date, duration and extent of any obstacle on which reliance is placed must be spelled out."

[7] I am also reminded that in *Blumenthal and Another v Thomsom NO and Another* 1994 (2) SA 118 (A) at 121 I, Joubert JA said the following:

> "This Court has often said that in a case of flagrant breaches of the Rules, especially where there is no acceptable explanation therefor, the indulgence of condonation may be refused whatever the merits of the appeal are; this applies even when the blame lies solely with the attorney (*Tshivhase Royal Council and Another v Tshivhase and Another; Tshivhase and Another v Tshivhase and Another* 1992 (4) SA 852 (A) at 859 E-F)"

[8] Does the explanation pass muster? I think not. Having said that I am very aware that the appellant's attorney is saying that the appellant was unable to raise sufficient funds to timeously prosecute his appeal. However, in my view the affidavit

falls far short of what could pass for a proper explanation. I highlight the deficiencies that strike one on even a casual reading of the affidavit:

a. It will be recalled that leave to appeal to this Court was granted on 22 November 2013. No explanation is proffered as to why the attorney waited until June 2014 to begin his fee gathering process.

b. There is no explanation as to what transpired between July 2014 and November 2014.

c. The appellant's attorney indicated that his offices were closed for a whole month for the December recess. The significance of this is unexplained, particularly when he says that he met with the appellant's wife on 3 January 2015.

d. The information relating to how much was in fact raised by the appellant's wife, if anything at all, is extremely sketchy.

e. The date when contact was made with counsel of choice, and when he agreed to prepare the heads of argument at a reduced fee, is not revealed.

f. The date when the services of alternate counsel were secured is not revealed.

[9] A properly motivated application for condonation ought to have covered all of those factors.

[10] We however proceeded to hear argument on the merits of the appeal.

[11] At the trial in the court *a quo* it was common cause that the appellant shot the deceased thereby causing his death. The plea tendered by the appellant was in essence one of self-defence.

[12] It was also common cause that there was an altercation between the appellant and the deceased on the day in question. That altercation occurred in two distinct phases some hours apart.

[13] It was common cause that during the first phase the appellant came upon the deceased who was urinating at the time. The dispute during this phase centred around whether the deceased was standing on the road or next to the road while urinating and whether the deceased was under the influence of alcohol. As the evidence unfolded the extent of the altercation between the appellant and the deceased during the first phase also widened as an issue.

[14] It was common cause that during the second phase the deceased and the appellant encountered each other at or near a container that was utilised as a payphone facility. It was common cause that the appellant utilised the facilities of the payphone at this container and then moved towards his motor vehicle which was parked nearby. It was during this phase that the appellant produced his firearm and shot the deceased, thereby inflicting the injuries which resulted in the deceased's death. Those injuries were described in a post-mortem report which was also admitted into evidence without challenge. The issues during the second phase, and which were in dispute in the court a quo, included whether the deceased was alone as alleged by the State or whether he was part of a group of persons which accosted

the appellant. Also in issue during this second phase was whether the appellant reached into his motor car to retrieve the firearm from the vicinity of the dash-board of the vehicle or whether he had it on his person and whether the appellant shot the deceased without provocation and for no reason or whether that took place during a struggle as contended for by the appellant.

[15] Three witnesses testified for the State.

[16] Skumbuzo Mabaso ("Mabaso") was the deceased's brother and an eyewitness to both phases of the altercation. On 11 November 2006 he and the deceased were visiting their sister, Nomusa Queen Hlengwa ("Hlengwa") at her home which was situated near the container. This was in the Emalangeni Area, Mpumalanga, KwaZulu-Natal.

[17] At some time during that morning Mabaso and the deceased left Hlengwa's home and proceeded to the vicinity of the container in order to smoke a cigarette. Whilst the deceased was urinating next to the road, the appellant drove past and stopped.The appellant asked the deceased why he was urinating next to the road and the deceased thereupon enquired of the appellant whether this had caused him i.e. the appellant, a disturbance. The appellant threatened to shoot the deceased who apologised to the appellant. Hlengwa was reasonably close by and witnessed this conversation. Moving closer and joining the parties it was clear to Mabaso that she overheard what was said and she also apologised to the appellant on the deceased's behalf. The appellant did not respond but simply drove away. Turning to the second phase Mabaso said that later that afternoon he and the

deceased again left Hlengwa's residence. As they were near the container the appellant was noticed walking away from the container down some steps towards his motor vehicle. The appellant summoned the deceased who went to him. They leaned against the bonnet of the appellant's motor vehicle on the driver's side. They spoke for a brief while after which the appellant retrieved his firearm from inside the motor vehicle on or near the dash-board through the open driver's side window.

[18] Mabaso testified that the appellant grabbed at the deceased at the back of his neck and fired shots injuring him in the groin and thigh areas. The deceased fell to the ground and whilst lying on his stomach the appellant shot him again in the back. The appellant left the scene in his motor vehicle and the deceased was thereafter conveyed to a nearby clinic. He succumbed to his injuries about a week later and died.

[19] Mabaso was cross-examined and during such cross-examination disputed the following propositions put to him:

a. That both he and the deceased were intoxicated on the day in question;

b. That after the appellant made a telephone call at the container a group of men, including Mabaso and the deceased, surrounded the appellant;

c. That the deceased attempted to snatch or grab the appellant's cellular telephone;

d. That a struggle ensued between the deceased and the appellant over that cellular telephone;

e. That a number of men tried to grab at the appellant's body;

f. That the appellant thereafter reached for his firearm, which was in a holster on his hip, as a result of which the cellular telephone fell to the ground;

g. That the struggle continued over the appellant's firearm;

h. That during that process shots were fired;

i. That the deceased grabbed at the appellant's legs trying to bring him down;

j. That the appellant did not shoot at the deceased while the latter was lying on his stomach on the ground.

[20] Hlengwa testified that she was the sister of the deceased and also an eyewitness to both phases of the incident. She corroborated Mabaso in all material respects.

[21] During her cross-examination it emerged that:-

a. The deceased had been urinating on the side of the road (i.e. not while standing in the roadway itself);

b. That the deceased apologised to the appellant if he had disturbed his driving by urinating next to the road;

c. That the appellant said to the deceased that he would strike him with a bullet;

d. That she was uncertain whether the deceased, Mabaso and others were under the influence of alcohol on the day in question;

e. That after the appellant had summoned the deceased at the container during the second phase, they were leaning against the bonnet of the appellant's car and spoke for a while;

f. That the appellant grabbed the deceased around the latter's neck, reached for his firearm from within the vehicle, and commenced shooting at the deceased. After having released the deceased the appellant shot him on his shoulder;

g. That she disputed the appellant's version entirely.

[22] Mzwake Bhekani Chonco ("Chonco") testified that he was related to Hlengwa in that he and her husband were cousins. He was an eyewitness to the second phase of the interaction between the deceased and the appellant.

[23] Chonco corroborated the evidence of Mabaso and Hlengwa insofar as the shooting incident at the container is concerned. His corroboration extended to all the material aspects testified to by both Mabaso and Hlengwa.

[24] He was the person that took the deceased to the clinic and he confirmed that the deceased died after spending approximately a week in hospital.

[25] Under cross-examination Chonco:-

a. Denied having been under the influence of alcohol on the day of the incident;

b. Indicated that he did not see the deceased and Mabaso consume any alcohol on that day. However, he assumed that they were slightly intoxicated as they appeared to be, as he termed it, “happy”;

c. He confirmed that after Hlengwa testified she had told him that it had transpired during her evidence at court that two gunshots were fired whereas in actual fact the appellant had shot the deceased repeatedly;

d. That a person by the name of Similo Gumbi (“Similo”) was present and with Mabaso at the container across the road from where the appellant was shooting at the deceased;

e. Disputed the appellant’s version entirely.

[26] The appellant testified that whilst driving near the container on the day in question he noticed some men standing around. He saw the deceased urinating in the middle of the road. He stopped and asked the deceased if he was aware that it was wrong to urinate on the road. The deceased enquired as to whether he had

disturbed the appellant by doing so and indicated that there was sufficient space for him to drive past. The appellant indicated that he noted that the deceased and his companions were drunk and accordingly he simply drove on past them. He denied that the deceased had apologised to him or that he had threatened to shoot the deceased. He testified further that later that day he returned to the container to make a telephone call from one of the payphones located there. Again he noticed that the deceased and his companions were present. They were still intoxicated. As the appellant was leaving the container the deceased and his companions approached him after which the deceased attempted to grab hold of his cellular telephone which he said was in his left hand. The deceased's companions attempted to assist the deceased in dispossessing the appellant of his cellular telephone.

[27] The appellant testified that he remembered that he had his licenced firearm in a holster tucked into the waistband of his trousers. He pulled out his firearm after which the deceased let go of the cellular telephone and grabbed hold of the barrel of the firearm. In so doing he held onto the deceased's hand. The deceased's companions came to the deceased's assistance. The appellant testified that he then reached for the trigger and a shot or shots went off, as he put it "uncontrollably". He indicated that he was unaware as to which parts of the deceased's body were struck as he was unable to control the firearm as a result of the deceased holding on to its barrel. At some point during the struggle the deceased let go of the firearm and bent down in an attempt to grab hold of the appellant's legs. At this point he shot the deceased in the deceased's shoulder. The appellant testified that he thereafter retrieved his cellular telephone and drove to the nearby police station to report the attempted robbery.

[28] He denied that he beckoned the deceased to him before shooting at him, that he retrieved his firearm from the dash-board of his motor vehicle and that he shot at the deceased while the deceased was falling to the ground.

[29] During cross-examination it emerged that:-

a. The deceased was rude to the appellant and that he was upset and disgusted by the behaviour of the deceased earlier that day (i.e. during the first phase);

b. That he did not see Hlengwa at the point where he came across the deceased when he was urinating in the roadway during the first phase;

c. That he knew Similo prior to the incident and that he, Similo, was in Mabaso's company during both phases on the day in question. According to him Similo played an active role in assisting the deceased to deprive him of his cellular telephone.

d. That the deceased's companions assisted the deceased in attempting to rob the appellant. In this regard he testified that while the deceased grabbed the cellular telephone in the appellant's left hand, Similo grabbed the appellant's right hand. During that stage Mabaso was assisting an unknown person from behind the appellant, to search the appellant's rear trouser pockets;

e. That about ten assailants accosted the appellant when the deceased, Similo, Mabaso and the other unknown person were attempting to rob him;

f. That after the first shot was fired, the struggle over the firearm continued and the appellant fired further shots at the deceased. It was at this stage that the appellant testified that the deceased's finger also entered the enclosed space of the trigger guard of the firearm;

g. That the deceased's finger could have pushed his finger which would have led to the trigger being pulled while they were struggling over the posession of the firearm;

h. That the deceased let go of the barrel after several shots had been fired and bent down to hold the appellant's feet. The latter then shot the deceased in the back (i.e. the shoulder);

i. That while the allegation of murder was being investigated against the appellant, he was informed of his constitutional rights and afforded an opportunity to make a statement but nevertheless elected to remain silent.

[30] Sifiso Emmanuel Mthembu ("Mthembu") also testified on the appellant's behalf. He was the owner of the container from where he conducted a public payphone business and sold cigarettes and sweets. Although he was in the container at the time of the incident he was unable to see the appellant shoot the

deceased because of the elevated situation of the container. However, during cross-examination, he conceded that he could not see what had happened in the vicinity of the front of the appellant's motor vehicle. After he had heard shots, he took note of the deceased's body which was lying approximately three paces away from the front of the appellant's motor vehicle.

[31] After the defence closed its case the court *a quo* called (as a "court witness") a forensic analyst attached to the ballistic section of the forensic science laboratory. That evidence did not take the case further.

[32] At the conclusion of the evidence the court *a quo* in a carefully reasoned judgment accepted the evidence tendered by the state and rejected that of the appellant.

[33] On my reading of the evidence it is clear that the appellant's version was riddled with inconsistencies, untruths and contradictions. It was a tale that grew with the telling. I highlight a few of these:

a. It was not put to any of the state witnesses that the appellant had hooted at the deceased during the first phase of the incident. The appellant did not mention this during his evidence in chief as well. This emerged for the first time during cross-examination.

b. It was put to Mabaso that the appellant did not take serious offence at the fact that the deceased was urinating in the road way. However, in cross-

examination, he conceded that he was upset and disgusted by the behaviour of the deceased that morning.

c. The appellant did not challenge Hlengwa's evidence regarding her presence during phase one of the incident. However, in cross-examination, he said that he did not see her during that first phase.

d. Mthembu, who was called to testify on the appellant's behalf, said that he had seen the deceased, Chonco and others drinking at Hlengwa's house. He added that he had seen Mabaso bringing quarts of beer to her house. At no stage was any of this put to any of the state witnesses.

e. There were at least three different versions as to how the deceased and others accosted the appellant during the second phase. Firstly, it was put to Mabaso that the appellant noticed a group of males, including the deceased and Mabaso, surrounding him, whereafter the deceased attempted to grab hold of the appellant's cellular telephone. Secondly, it was put to Hlengwa that the appellant noticed a group of black males including her two brothers, who had the intention of robbing him of his cellular telephone. Thereafter there was a struggle over the telephone and the deceased was at the forefront of that group. Thirdly it was put to Chonco that the appellant suddenly noticed a group of black males approaching him and that the deceased was at the forefront of that group. As they were approaching, the deceased grabbed hold of the appellant's

cellular telephone and there was a struggle over the telephone. The rest of the group assisted the deceased by holding the appellant.

f. The proposition that Similo was part of the group that approached the appellant and thereafter assisted the deceased in holding the appellant during the attempted robbery was put for the first time to the State witnesses when Chonco testified. It was not put to either Mabaso or Hlengwa when they were cross-examined. When the appellant testified he indicated that not only was Similo one of the men present when the deceased was urinating in phase one but that he noticed him again that afternoon with the others when he approached the container to make a telephone call. That aspect of his version also grew with the telling because as his cross-examination unfolded the role attributed to Similo by the appellant became more and more prominent and significant. As the tale developed Similo was now also one of the people who grabbed hold of the appellant's right hand in an effort to assist the deceased to dispossess him of his cellular telephone.

g. It was never put to any of the State witnesses that while the appellant and the deceased struggled over the cellular telephone Mabaso and another unknown person had approached the appellant from behind and one or both of them were searching his rear trouser pocket.

h. It was never put to any of the State witnesses that the deceased was holding onto the appellant's firearm by its barrel during the struggle. This

only emerged during the appellant's evidence in chief. It was also never put to any of the State witnesses that the deceased continued to hold onto the barrel while the firearm went off more than once.

i. At no stage was it also put to any of the State witnesses that the deceased's finger was also in the space within the trigger guard while he and the appellant were struggling over the firearm. This only emerged towards the very end of the appellant's cross-examination.

[34] Those few incidents that I have highlighted were crucial features of the case and ought to have been put to one or other of the State witnesses. The failure to do so is significantly suggestive of a version that was tailored to suit the State's case as it unfolded.

[35] Against that background a number of improbabilities emerge:-

a. That the appellant, after becoming upset and disgusted during phase one would not be harbouring a continued anger towards the deceased when he came across him for the second time that day.

b. That the deceased would accost the appellant in the circumstances described after having been threatened that he would be shot during phase one of the incident.

c. That a group of persons would continue to attempt to dispossess the appellant of his cellular telephone even after he produced a firearm.

d. That the deceased would still hold onto the barrel of the pistol after the first shot had been discharged.

e. That if the firearm went off in the struggle described by the appellant, others in the crowd who had gathered around would not also have been injured.

f. That given the description proffered by the appellant as to how the deceased was holding onto the barrel of the firearm that the deceased's hands remained uninjured and unblemished.

[36] At the end of the day I cannot fault the learned Regional Magistrate's reasoning and neither can I find any misdirection on his part. In my view the appellant was rightly convicted.

[37] Insofar as the sentence is concerned, it would be recalled that the learned Magistrate *a quo* sentenced the appellant to serve a term of imprisonment of 18 years.

[38] In heads of argument submitted on behalf of the appellant and during the course of oral argument it was suggested that the provisions of section 51 of the Criminal Law Amendment Act, 105 of 1997 were not explained to the appellant. It was also suggested that this was not pertinently raised in the charge sheet. I have had regard to the original court file and, contrary to that suggestion those provisions were indeed raised as part of the charge and a pertinent reference to the provisions

of that section are contained in the charge sheet. In addition, the appellant was legally represented in the court *a quo* and there is no suggestion that that representation was inept or inadequate in any manner. See generally in this regard *S v Mthembu* 2012 (1) SACR 517 (SCA)

[39] In mitigation of sentence in the court *a quo* it was submitted that the appellant was 34 year old self-employed plumber, earning an average of R3 700,00 per month; that he contributed to the support his eight children (all from different mothers) who were at school ranging from crèche up through to grade 7; that he had a grade 10 level of education and that the incident involved the use of a licenced firearm (this latter submission intending to mean that he was not some renegade with an unlicenced firearm). An admitted previous conviction for assault some eight years old was rightly ignored by the court *a quo*.

[40] None of those factors were considered by the court below to be sufficiently substantial and compelling facilitating a deviation from the prescribed minimum sentence of 15 years imprisonment. On the accepted version of the events the deceased was shot at least twice in the area of his groin. The court below regarded this as an aggravating feature, indicative of the fact that the appellant wanted to punish the appellant for his disgusting behaviour. For that the learned magistrate imposed a sentence 3 years in excess of the minimum, ie. 18 years imprisonment.

[41] I can find no misdirection on the part of the learned Magistrate *a quo* during the sentencing phase of the trial and to my mind the sentence imposed is not

one that I would regard as being shocking, startling or disturbingly inappropriate. Accordingly the appeal against sentence must fail as well. See *S v Malgas* 2001 (1) SACR 469 (SCA).

[42] In the result the appeal against both conviction and sentence is dismissed.

_____
Vahed J

_____
Kruger J

_____
Chetty J

Appearances

For the Appellant:	B. Manyathi (instructed by Mbele, Dube & Partners)
For the Respondent:	E. Smith (Director of Public Prosecutions, KZN)
Date of Hearing:	30 January 2015
Date of Judgment:	03 March 2015