REPORTABLE

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

CASE NO. AR66/2020

In the matter between:

JOEL ERROL ERNEST **APPELLANT**

and

THE STATE **RESPONDENT**

ORDER

The following order shall issue:

1. The appeal is upheld.
2. The conviction and sentence are set aside.
3. The registrar is directed to forward a copy of this judgment to the Director of Public Prosecutions, KwaZulu-Natal.

JUDGMENT

Steyn J (Jappie JP concurring):

[1] This appeal concerns the conviction of the appellant on a count of murder in the regional court, Durban. Leave to appeal was granted by the lower court in terms of s 309B of the Criminal Procedure Act 51 of 1977 ('the CPA'). The murder charge involves the death of Mr Llewellyn Edwards ('the deceased') who was shot and killed by the appellant on 2 July 2017.

[2] The grounds of the appeal are firstly that the learned regional magistrate was misdirected on the facts and the evaluation of the evidence, and secondly that the court was misdirected on the law. The misdirection on law relates to the fact that the regional magistrate failed to appreciate the distinction between the elements of murder i.e. unlawfulness and criminal liability.

[3] The appeal is opposed by the respondent. Mr Singh, on behalf of the respondent, has conceded that the learned magistrate had erred in the manner in which she had evaluated the evidence. He, however, has strongly argued that this court, despite the misdirection on the facts, should uphold the conviction.

[4] The version of the appellant has been summarised in his detailed statement (Exhibit 'A') which was confirmed under oath when he testified. It reads:

'1. . . .

2. . . .

3. In appreciation of the foregoing paragraphs, I record the following:

4. The deceased in this matter was known to me as Llewellyn Edwards and commonly referred as "Doogoo". The deceased was known to be a leader of a notorious gang called the "Destroyers".

5. On the 14th December 2014, the deceased and others had attacked my wife and I at the very same venue by firing several gunshots into my motor vehicle. This incident had culminated as a result of a confrontation the deceased had with my wife.

6. As a direct consequence of this incident, I had preferred charges of Attempted Murder and Malicious Injury to Property against the deceased. A case was registered under Brighton Beach Cas 170/12/2014 and investigated by same Investigating Officer who is carrying the docket in my case before this Honourable court. This case was withdrawn under mysterious circumstances. I made mention of this incident to illustrate the deceased's violent disposition and the danger and threat he poses.

7. On the 02nd of July 2017, I was asleep at home when I received cellular communication from my nieces to fetch them from the Lavo Club. They advised me that they had arranged to be fetched by my son, Juade, accused two herein however Juade was not answering his phone. I then proceeded to the club in the company of Shaun who lives with me. The club was busy and I parked my vehicle about seventy meters away from the entrance. I was in possession of my personal firearm which I placed under the front

passenger mat of my van together with another firearm licenced and registered under the name of my company, Flying Squad Security CC.

8. We then proceeded to the club and met with Andre Yull Solomon a policeman who works at the club as a bouncer. He did not search me nor did we pay an entrance fee as I told him we are there to fetch my nieces. I met with the nieces and they convinced me into buying them a cider. I bought one for myself as well. Whilst in the club, I saw the deceased and we nodded at each other. The deceased then got into a heated exchange with some other males and at this stage I noticed he had a firearm on his hip as he lifted his shirt to warn the persons he was arguing with. I ignored their altercation. Accused two then arrived and I purchased a cider for him. We finished our ciders and decided to leave.

9. As I exited the club, I observed a fight taking place across the road from the entrance to the club. I saw that the deceased was involved. I ignored the fight and proceeded towards my van parked down the road. Accused two was with me at this stage and he opened the front passenger door to shield himself as he was urinating. I was talking to him at this time when I heard someone say “blow those owes by the van too” I looked up and saw three males approaching us. One of them was the deceased.

10. I told my son to pass me my firearm from underneath the passenger’s mat as he was closest to it and he did so. The two males and the deceased kept on approaching and were now crossing the road towards me almost on the middle line, they were swearing at me. I saw that the deceased had a firearm in his hand which at this stage was pointing down.

11. I cocked my firearm to warn them that I was armed but they swore and advanced towards me. I then fired two shots into the tar road and the two persons accompanied the deceased fled. The deceased however continued to swear at me and stated that “today you will die” and proceeded to lift his firearm in my direction. I had no doubt that he was going to shoot me. I then fired three shots directly at him and he fell down.

12. Thereafter chaos broke out and many people, whom I suspect were members of the Destroyers, gathered around the deceased. I am aware that it is alleged that the deceased was unarmed but this is not so. I suspect that one of the Gang members took the firearm away. I was then placed under arrest and placed into the rear of the police van. At this stage I was being threatened with death and the police said that I should be taken from the scene before I get killed.

13. The threats of death have not stopped since the incident. Two weeks after this incident a friend of accused two was driving his car when he was attacked and killed. Furthermore, one Bianca Parsons was shot and killed at the Engen service station on Tara Road. Subsequent revelations by one of the shootists who is facing trial in the High Court

have revealed that she had been mistaken for my wife. I was in fact phoned on the day when Bianca was killed and told “we have killed your wife”.

14. I was at all times acting in defence of my life and have no doubt that had I not shot the deceased, he would have shot and killed me. The deceased was in the process of attacking me armed with a firearm. The cocking of the firearm and the two shots fired into the tar road had not scared him. He verbally stated that “today you will die” and was raising his forearm to shoot. I could not flee as I was backed up against my van and to turn my back on the deceased meant that he would have easily shot me in the back. The only means I had to avert his attack was to shoot him.’

Before I deal with the assessment of the evidence adduced in the court a quo, it is necessary to deal with the evidence adduced by the State in proving its case.

The State’s evidence

[5] The State called three witnesses: the fiancée of the deceased, Ms Hudson, Warrant Officer Soloman and Warrant Officer Rajballi. As will be seen from the summary, the State’s case was riddled with contradictions. The salient facts of the State’s case can be summarised as follows:

Ms Hudson

[6] Ms Hudson’s evidence was that she had accompanied her loving, caring fiancée (the deceased) to Club Lavo Vista on 2 July 2017. She was not aware that he was involved in gang activities, nor that he had ever been aggressive. According to her, during the evening she and the deceased gave a colleague and the colleague’s husband a lift to their home. When they returned to the club, they went and sat with their friends. Later in the evening, she was informed that there was a commotion outside the club, so she went to investigate. When she exited, she saw the deceased in front of her and the appellant in front of him. The deceased was talking to some men on his left and she asked him what was going on. He told her that he was not fighting, so she took his hand. As she held his right hand, three gunshots went off and the deceased collapsed into her arms. She asked the appellant why he had done it but he did not answer - he just stared in front of him. The deceased was taken to the hospital where he was declared dead on arrival.

[7] According to her, the deceased's firearm was in the club's safe when he was shot. During cross-examination, she denied that she was aware of any altercation at the club or that she took the deceased away from an altercation. Ms Hudson disputed that the shooting took place 70 metres away from the club. According to her, the appellant was about one foot away from the deceased when he was shot.

[8] Importantly, the version of this witness did not only contradict the evidence of Warrant Officer Solomon, it is also in stark contrast with the findings made by the pathologist. The post-mortem report revealed that at least two of the wounds inflicted appeared to be 'distant entry wounds'.[1]

Warrant Officer Solomon

[9] Warrant Officer Solomon's testimony was that he was dressed in civilian clothes and was outside the club on 2 July 2017, when he observed an altercation between the deceased, one Cody and Roddy. According to him, an argument ensued between the three which started in the club and led to the three running out to the street. Cody pointed a firearm at the deceased and he then intervened and stopped the fight. Thereafter, Cody jumped into his vehicle and drove off. Roddy swore at him, and the deceased told Roddy to leave him alone. Ms Hudson then came out of the club and took the deceased away and walked with him towards the garage. After Ms Hudson spoke to the deceased, they came back and were walking towards the entrance of the club.

[10] He noticed that the appellant was standing next to his vehicle and that the deceased turned towards the appellant and lifted his shirt as if to show that he was not armed. Hereafter, he heard a firearm being cocked, two shots went off and he saw a spark on the road. He ran towards the appellant and the deceased, and heard three more shots being fired. As he took cover in front of the appellant's vehicle, he noticed that the appellant was pointing the firearm at him. He identified himself as a police officer and arrested the appellant.

[1] See Exhibit 'H', at 2-3.

[11] During cross-examination, Warrant Officer Solomon conceded that he had worked at the club as a bouncer for a number of years. He admitted that his state-issued firearm was in his possession, despite the fact that he was doing private work at the club. He also admitted that he had used a state vehicle as transport to the club. He further conceded that he had perjured himself when he had made a statement under oath that was not true.[2] He acknowledged that he had failed to mention various relevant facts in the statement (Exhibit 'J'). He had great difficulty explaining the content of another statement, (Exhibit 'K') with the evidence presented to the court. In Exhibit 'K', he paints a picture of how he was contacted by the owner of the club regarding the firearm of the deceased whilst in truth and reality, he harassed the owner about the firearm on various occasions. The owner was, however, never called by the State as a witness.

Warrant Officer Sanjay Rajballi

[12] Warrant Officer Rajballi never made any statement to the police prior to the trial. It is clear from the record that he wrote out a statement at court on 14 January 2019, when the matter was part heard. His impartiality was challenged during the trial since he had looked at the statements in the docket whilst compiling his own statement. He also contacted Warrant Officer Solomon before he gave evidence. Warrant Officer Rajballi's evidence was that he gave the deceased's firearm to the bouncer, Geoff, and accompanied Geoff to Pool City where the firearm was put into a safe. When the evidence of Warrant Officer Rajballi is compared with the evidence of Warrant Officer Soloman, they contradict each other on various issues including on whether the safe at Pool City was big or small. Warrant Officer Rajballi's version as to where the safe was kept differs vastly from the version of Warrant Officer Solomon. This witness was at sea to explain the material contradictions when he was cross-examined.

[2] See s 319(3) of the Criminal Procedure Act 56 of 1955 (this section was not repealed by the CPA) which creates the statutory offence of making conflicting statements under oath. For a discussion of the offence, see J Burchell *Principles of Criminal Law* 5 ed (Juta) at 880 - 881.

[13] The State never called the pathologist, the owner of the club, the senior bouncer Geoff, or the investigating officer.[3]

The appellant's case

[14] The appellant testified in his own defence and was cross-examined at length by the prosecutor. He remained consistent in his explanation that the deceased was armed, that he was threatened by the deceased when he said that he (the appellant) will die that evening and that he had fired two shots into the road to scare the deceased and the two men accompanying him, but that only the two men accompanying the deceased ran away. Despite the warning shots, the deceased advanced towards him with the firearm pointed at him. When the deceased kept advancing, he fired the shots. He believed that the deceased was going to kill him and that the deceased had the ability to do it.

Private Defence

[15] The learned scholar CR Snyman[4] defines the defence as follows:

'A person acts in private defence, and her act is therefore lawful, if she uses force to repel an unlawful attack which has commenced, or is imminently threatening, upon her or somebody else's life, bodily integrity, property or other interest which deserves to be protected, provided the defensive act is necessary to protect the interest threatened, is directed against the attacker, and is reasonably proportionate to the attack'.[5]

[16] In relation to the defence, the SCA held in *S v Trainor*[6] at para 12:

'In dealing with the requirement (when assessing a claim of private defence) that there must be a reasonable connection between an attack and a defensive act, C R Snyman in *Criminal Law* 4th ed states the following at 107:

> "It is not feasible to formulate the nature of the relationship which must exist between the attack and the defence in precise, abstract terms. Whether this

[3] See *S v Schoombee & another* [2013] ZANWHC 11 para 32 where it was held that: 'Failure by the state to call a witness may under certain circumstances justify an adverse interference to be drawn (S v Texeira 1980 (3) SA 755 (A)).'
[4] CR Snyman *Criminal Law* 6 ed 2014 (LexisNexis).
[5] Ibid at 102.
[6] *S v Trainor* 2003 (1) SACR 35 (SCA).

requirement for private defence has been complied with is in practice more a question of fact than of law.'''

The law

[17] It is trite that a court of appeal will not overturn a trial court's findings on fact, unless the trial court had reached a conclusion that was vitiated by a material misdirection or is shown by the record to be wrong. Marais JA in *S v Naidoo & others*[7] affirmed the principle as follows:

'In the final analysis, a Court of appeal does not overturn a trial Court's findings of fact unless they are shown to be vitiated by material misdirection or are shown by the record to be wrong.'[8]

[18] Criminal liability requires fault or a blameworthy state of mind. In *Savoi & others v National Director of Public Prosecutions & another*[9] it was held that the fault element may take the form of either dolus or culpa.[10] In casu the appellant was charged with murder, and it was incumbent on the State to prove that the appellant acted with the necessary intention to kill the deceased.

[19] In *R v Patel*[11] Holmes AJA cautions against the practice of courts becoming arm-chair critics and re-affirmed that consideration should be given to decisions that are made in split seconds. The court in *Patel*[12] relied on *Union Government (Minister of Railways & Harbours) v Buur*[13] at 286 where Innes JA said:

'Men faced in moments of crisis with a choice of alternatives <u>are not to be judged as if they had had both time and opportunity to weigh the pro and cons.</u> Allowance must be made for the circumstance of their position.' (My emphasis).

[20] It is trite that when a court determines whether an accused, who relies on self-defence, has acted lawfully, the conduct must be judged by objective

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[7] *S v Naidoo & others* 2003 (1) SACR 347 (SCA).
[8] Ibid para 26.
[9] *Savoi & others v National Director of Public Prosecutions & another* 2014 (1) SACR 545 (CC).
[10] Ibid para 86.
[11] *R v Patel* 1959 (3) SA 121 (A).
[12] *Pate*l supra at 123D-E.
[13] *Union Government (Minister of Railways & Harbours) v Buur* 1914 AD 273.

standards.[14] In *Mugwena & another v Minister of Safety and Security*[15] the SCA stated that the following principles should apply in judging self-defence as a ground of justification:

'[21] Self-defence, which is treated in our law as a species of private defence, is recognised by all legal systems. Given the inestimable value that attaches to human life, there are strict limits to the taking of life, and the law insists upon these limits being adhered to.

> "Self-defence takes place at the time of the threat to the victim's life, at the moment of the emergency which gave rise to the necessity and, traditionally, under circumstances in which no less severe alternative is readily available to the potential victim."

(*Per* Chaskalson P in *S v Makwanyane and Another* 1995 (3) 391 (CC) (1995) (2) SACR 1; 1995 (6) BCLR 665 at para [138].)'

[22] Homicide in self-defence is justified if the person concerned

> ". . . had been unlawfully attacked and had reasonable grounds for thinking that he was in danger of death or serious injury, that the means he used were not excessive in relation to the danger, and that the means he used were the only or least dangerous whereby he could have avoided the danger."

(*R v Attwood* 1946 AD 331 at 340.)

The test is an objective one.' (My emphasis).

[21] The court a quo in its judgment approached the defence raised by the appellant as follows:

'The State however in their closing argument briefly addressed there was no justification for the killing and the accused exceeded the bounds of self-defence. Briefly just to state once again self-defence is a ground for a justification in which conduct which appears wrongful is rendered lawful. However questions which this Court found necessary to pose when deliberating a verdict is was there an attack in this scenario the case at hand, the accused alleges that the deceased verbally threatened him and also pointed a firearm at him. So if there was an attack, was it lawful, was it unlawful if there was an attack. Threats herein would make the deceased an aggressor under the circumstances. Did the accused have reasonable grounds to believe he was in danger, was the force necessary in the circumstances to repel the attack. And once again I will refer to the case that is mentioned in the heads of arguments in *R v Attwood* which is cited by the defence. Moving forward if we say that the accused have acted in self-defence and his actions are justified then his

[14] *S v Ntuli* 1975 (1) SA 429 (A) at 436; *S v Motleleni* 1976 (1) SA 403 (A) at 406; *S v Ngomane* 1979 (3) SA 859 (A) at 863; *Snyders v Louw* 2009 (2) SACR 463 (C) at 471.
[15] *Mugwena & another v Minister of Safety and Security* 2006 (4) SA 150 (SCA).

actions are not unlawful. The criteria however and as Burchell and also as in the heads of argument, the criteria however in determining unlawfulness is based on legal convictions rather than moral convictions or moral principles. And that means the justification has limits and those limits must not exceed the action. Having said that, did the accused by firing two warning shots and three shots at the deceased not exceed that limit? And if so if he had exceeded it would make his action unlawful?'[16] (My emphasis).

[22] Before I apply the law to the facts, it is necessary to turn to the lower court's findings on credibility. The trial court reached the conclusion that the evidence of Ms Hudson and Warrant Officer Solomon was unreliable.[17] It also found that the witness, Warrant Officer Rajballi, was not reliable but yet was found to be satisfactory. This last finding is not borne out by the record. The court however, rightly in my view found the State witness to be unreliable. Once the evidence of the three State witnesses was rejected, the trial court was obliged to determine the appellant's guilt on his version since it was the only reliable version that remained before the court. The version of the appellant was his evidence, his formal admissions,[18] and his plea explanation. What was required of the trial court was to judge, on the version of the appellant, whether his conduct met the requirements of self-defence.[19]

[23] The learned magistrate however, in her judgment, did not assess the appellant's conduct on his own version. Instead, she had placed reliance on the post-mortem report and concluded that the appellant's evidence contradicted the findings of the pathologist. This finding was reached without the testimony of the pathologist. In my view, the learned magistrate should have considered all the evidential material like the photograph album, and Exhibit 'E' and compared it with the post-mortem report, Exhibit 'H'. In the light of the perceived contradiction

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[16] Transcript at 273 lines 3 to 25.
[17] Transcript at 274 lines 8-9; and 276 lines 5-8.
[18] See Exhibit 'C'.
[19] The test as per *R v Attwood* 1946 AD 331 (A) at 340 is that an accused person claiming that he acted in self-defence, has to establish:
(a) He had been unlawfully attacked;
(b) He had reasonable grounds for thinking that he was in danger of death or serious injury;
(c) That the means of self-defence which he used were not excessive in relation to the danger; and
(d) That the means he used were the only or least dangerous means whereby he could have avoided the danger.

between the wounds and the version of the appellant, the court should have called upon the pathologist to clarify the findings. In *S v MM*[20] para 15 the SCA held that:

'As appears to be an increasing feature of cases such as these, the doctor's report was simply handed in by consent and the doctor was not called to give evidence. That practice is, generally speaking, to be deprecated. It means that there is no opportunity for the doctor to explain the frequently subtle complexities and nuances of the report; to clarify points of uncertainty and to amplify upon its implications and the reasons for any opinions expressed in the report. That may make the difference between a conviction and an acquittal, or perhaps a conviction on a lesser charge. Depending on the areas where there is a lack of clarity, the lack of clarification may either benefit or prejudice an accused. Neither result is desirable. Magistrates and judges who are confronted with these reports, without explanation, do not have the requisite medical knowledge to flesh out their full implications.' (My emphasis.)

[24] Faced with a potential contradiction between the version of the appellant and the findings in the medico legal report, which was crucial in my view, the regional magistrate ought to have exercised her discretion in terms of s 186 of the CPA and called the pathologist to clarify the wounds and the injuries suffered. The magistrate erred to interpret the pathologist's report and use it as yardstick to determine that the appellant exceeded the boundaries of self-defence. As stated in *S v MM* supra, magistrates and judges do not have the requisite medical knowledge to understand subtle nuances. In my view, the failure to call the doctor was detrimental to the State's case.

[25] The magistrate's finding that the appellant exceeded the bounds of self-defence because he had shot three times at the deceased is not in accordance with evidence before the court. It is evident from the record that the magistrate, in reaching this conclusion, disregarded the version tendered by the appellant, namely that he had to act swiftly to protect his life in circumstances where the deceased was pointing a firearm at him and threatening to kill him. He believed that he was in danger and that the deceased had the ability to carry out his threat. Some action on his part was required to protect his own life, and in the split second, he decided to shoot two warning shots which did not deter the deceased. Instead, he kept on

[20] *S v MM* 2012 (2) SACR 18 (SCA).

advancing towards the appellant with a firearm. The appellant then shot the deceased to protect his own life.

[26] Nothing in the record suggests that the appellant was not honest when he said that he believed that his life was in danger. No credible evidence was tendered by the State that showed that the appellant should have acted differently in the moment when he decided to shoot the deceased. Absent any criticism against the appellant's version, the trial court erred in not finding that his version was reasonably possibly true.

[27] The trial court should have assessed the evidence before it in accordance with the relevant dicta. In *S v Chabalala*[21] Heher AJA affirmed it as follows:

'The correct approach is to weigh up all the elements which point towards the guilt of the accused against all those which are indicative of his innocence, taking proper account of inherent strengths and weaknesses, probabilities and improbabilities on both sides and, having done so, to decide whether the balance weighs so heavily in favour of the State as to exclude any reasonable doubt about the accused's guilt. The result may prove that one scrap of evidence or one defect in the case for either party (such as the failure to call a material witness concerning an identity parade) was decisive but that can only be an ex post facto determination and a trial court (and counsel) should avoid the temptation to latch on to one (apparently) obvious aspect without assessing it in the context of the full picture presented in evidence. Once that approach is applied to the evidence in the present matter the solution becomes clear.'

(My emphasis).

[28] The magistrate failed to appreciate the significance of the burden of proof, which rested on the State. In *S v V*[22] the SCA affirmed the burden as follows:

'It is trite that there is no obligation upon an accused person, where the State bears the *onus*, "to convince the court". If his version is reasonably possibly true he is entitled to his acquittal even though his explanation is improbable. A court is not entitled to convict unless it is satisfied not only that the explanation is improbable but that beyond any reasonable doubt it is false. It is permissible to look at the probabilities of the case to determine whether the accused's version is reasonably possibly true but whether one subjectively

[21] *S v Chabalala* 2003 (1) SACR 134 (SCA) para 15.
[22] *S v V* 2000 (1) SACR 453 (SCA).

believes him is not the test. As pointed out in many judgments of this Court and other courts the test is whether there is a reasonable possibility that the accused's evidence may be true.'[23]
(My emphasis).

[29] On the conspectus of all the evidence, it follows that the State had failed to prove unlawfulness. The appellant's conduct in defending himself against the deceased constituted self-defence. On the acceptance of the appellant's version, there is no room for a finding of dolus in any of its forms as was found by the lower court. It follows that the conviction cannot stand.

[30] Lastly, the dishonest conduct of Warrant Officers Solomon and Rajballi should be assessed by the Director of Public Prosecutions for instituting criminal charges like perjury and defeating the ends of justice, to name a few. This court is left with a sense of disquiet to hear that state vehicles and firearms were used for private use. The record bears testimony to the nature and degree of Warrant Officer Solomon's perjury. It is not my duty to list all of the possible charges that should be preferred, that duty remains with the National Prosecuting Authority, who is tasked to uphold and protect the Constitution and the fundamental rights entrenched therein. Justice demands that police officers prevent, investigate and combat crime and that state resources be utilised to uphold, enforce the law and to protect the members of society.[24]

Order

[31] Accordingly the following order shall issue:

1. The appeal is upheld.
2. The conviction and sentence are set aside.
3. The registrar is directed to forward a copy of this judgment to the Director of Public Prosecutions, KwaZulu-Natal.

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[23] Ibid at 455a-c.
[24] See s 205 of the Constitution of the Republic of South Africa, 1996.

Steyn J

I agree

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Jappie JP

APPEARANCES

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Date of Hearing	:	20 November 2020
Date of Judgment	:	10 December 2020