REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG HIGH COURT
(LOCAL DIVISION JOHANNESBURG)

CASE NO: A138/2013

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: YES
(3) REVISED.

23 OCTOBER 2013

FHD VAN OOSTEN

In the matter between

TIMOTHY MOENG **APPELLANT**

and

THE STATE **RESPONDENT**

Appeal - against conviction on murder and attempted murder and effective sentence of life imprisonment - evidence on behalf of the State correctly accepted by court a quo - appeal against conviction dismissed.
Appeal - against sentence - emotional distress of appellant at time of incident - nature and effect on appellant's subjective state of mind - misdirection by court a quo in affording insufficient weight thereto - court on appeal accordingly entitled to consider sentence afresh - appeal upheld to the extent that life imprisonment reduced to 25 years' imprisonment.

J U D G M E N T

VAN OOSTEN J:

[1] The appellant was convicted in this court (Semenya AJ) of murder and attempted murder and sentenced to life imprisonment and 5 years' imprisonment respectively, the sentences ordered to run concurrently. The appeal is directed against both conviction and sentence and is with leave of the court *a quo*.

[2] The facts of the incident from which the charges arose are mostly not in dispute. The appellant on the evening of the incident arrived home from work. His wife and children, including two girls then aged 24 and 21, were at home. Later that evening an argument developed between the appellant and his wife. One of their daughters, Lerato, called the police. Inspector Tshabalala and his colleague, Sgt Matjeka (the deceased), who were stationed at the Dobsonville police station, arrived shortly afterwards. The appellant's wife made a report to the police concerning the events but the appellant refused to respond to it and demanded that it be dealt with at the police station. The appellant and the two police officers proceeded to the police vehicle in order for the appellant to get into the back of the police van. In that process altogether 11 shots were fired from the appellant's firearm, two of which struck Tshabalala in the left hip and right chest and four the deceased. The deceased died on the scene, the cause of death being 'multiple gunshot wounds'. The appellant fled the scene with the firearm in his possession. He surrendered himself to the police some 7 days later.

[3] The appellant's defence as stated by his counsel at the commencement of the trial was that the deceased was shot 'purely accidentally'. It however became apparent that the appellant's defence was that the deceased, during an alleged scuffle between the appellant and the deceased for possession of the appellant's firearm, the deceased in fact not only shot himself but also at some stage, caused two shots to strike Tshababala. The court a quo rejected the appellant's version as false on the basis that the appellant's account of the shooting was 'fanciful and probably far-fetched'. This is the only finding attacked on appeal before us.

[4] For a proper assessment of the credibility of the appellant's version it is necessary to traverse his version in more detail. The appellant was employed as a quality control inspector at Khosi Pharmaceuticals in Industria. He worked 12 hour shifts. On 19 November 2000 at 20h15 he proceeded home after work. Having arrived home at 21h30 he joined his wife and the children in the lounge where they were watching

television. The children shortly thereafter went to sleep and so did his wife. Shortly after midnight his wife came into the lounge and without any reason attacked the appellant by hitting him in the face. As a result his skipper was torn, his face scratched and blood was running from his ear and face. She returned to the bedroom and the appellant followed her some 30 minutes later. As was customary, he locked the door of the bedroom. He woke his wife to show her what she had done to him. She did not respond and he pushed her onto the bed. She started screaming and called on Lerato to call the police. The children started bashing the door with a chair causing a hole in the door. The appellant unlocked the door and told Lerato to phone the police which she did. They arrived shortly afterwards. The appellant opened the gate at the entrance to the premises for the police and his wife and children who had followed him, were behind him. His wife reported to the police that he had assaulted her. The appellant however, refused to discuss the incident and told them that his house was not a police station and that he was only prepared to make a statement there. He significantly, neither mentioned nor referred to the injuries he allegedly had sustained which according to him were clearly visible.

[5] I interpose to briefly refer to the evidence of the State witnesses concerning the events I have thus far alluded to. Refiloe, Lerato and their mother, the wife of the appellant, testified. Their version contradicts that of the appellant on several aspects. I do not consider it necessary to refer to those in any detail. Suffice to say that on their version it was the appellant who assaulted his wife, by *inter alia* attempting to strangle her. They also denied the alleged injuries sustained by the appellant. I am satisfied that the appellant minimised his role in the incident and that his evidence concerning the unexpected attack on him by his wife, for no reason, as well as the resultant injuries he sustained, lacks probability and must therefore be rejected. The fact however, of the domestic episode having occurred and that it caused the summoning of the police to the house, however, was common cause.

[6] Of pivotal importance to this matter is the appellant's firearm and the use thereof during the shooting. It is described in the ballistic reports and duly admitted, as a '9mm short calibre CZ model 83 single and double action demi-automatic (self-loading) pistol'. The appellant was the licenced holder of the firearm. It is common cause that all shots

fired at the scene were fired from the appellant's firearm. The appellant testified that the magazine was loaded with 11 live rounds of ammunition. The deceased accordingly died and Tshabalala was injured as a result of gunshot wounds emanating from the appellant's firearm.

[7] The appellant testified that he had, for purposes of self-defence, always kept the firearm on his person in a holster, which was tucked away on the inside of his trousers. At work he locked it away in a safe and on going home he would take it out again and on arrival at home lock it in the safe there. The firearm was always 'cocked' which according to the appellant meant that a live round of ammunition was in the chamber of the firearm with the hammer at rest in front, with the result that the trigger merely needed to be pulled in order to pull back and release the hammer to fire a shot or shots. The firearm however had to be out of the holster for the purpose of firing. On the day of the incident, so the appellant testified, he still had the firearm on him at the time of the arguments occurring. He was unable to explain why he had not locked it away in the safe on his arrival at home. After the arrival of the police and having told them that he preferred to deal with the dispute at the police station, it is common cause that the appellant went back into the house. According to the state witnesses he wanted to fetch a jersey. Refiloe and Lerato testified that one of them warned the police that the appellant had a firearm and that he was going to fetch it. The appellant on the other hand testified that he went into the house in order to 'go and change'. He entered the bedroom and left his cell phone, watch and wallet on the dressing table as these were valuable items which he thought might be lost at the police station. He 'did not think anything about the firearm'. He changed his clothing and shoes except for his trousers with the holster and firearm still in place and proceeded outside.

[8] The two policemen agreed to take the appellant to the police station. The appellant was told to get into the back of the police van. They opened the back of the van. The appellant walked to the van but felt that he was being held by the arms and waist by the two police officers. They, for no reason, started hitting him on the head. The appellant bent forward. He could feel that the hand of the deceased was on his firearm, which the deceased was trying to take out. The appellant told them to 'leave out this firearm, the firearm is dangerous, you will injure me'. A struggle ensued between the appellant and

the deceased for possession of the firearm. The appellant with both hands grabbed hold of the deceased's arm/hand in an attempt to prevent the deceased from pointing the barrel at him. During the struggle several shots went off. At times the firearm pointed at the deceased. The deceased had his finger on the trigger and the appellant maintained that he had not at any time, touched the trigger. The deceased fell down and the firearm fell out of his hand. The appellant picked the firearm up, took hold of it and fled the scene. He did so because so he would have it, the deceased might have taken out his firearm and shot him. The appellant as I have mentioned, disappeared but eventually after some 7 days, surrendered himself.

[9] The appellant's version is riddled with improbabilities. It is clear from the evidence as a whole that the appellant was well-aware of the firearm being in his possession. There was no good reason for the appellant, on his version, to resist the taking of or for that matter to volunteer the handing over of the firearm to the police: there was no danger of him being hurt as the firearm was still in its holster from which it had to be removed in order to pull the trigger. In this regard the version of Tshabalala is to be preferred. He was almost next to the appellant, and testified that the deceased wanted to search the appellant as he was mounting the steps onto the van. The appellant obliged and raised his hands to be searched. When the deceased placed his hands on the area where the firearm was kept, the appellant quickly bent down and the deceased got hold of him by the scruff of his neck. Tshabalala approached them to assist and two shots were fired both of which struck him. The deceased was pushing the appellant away from him. Several further shots were fired and the deceased fell down. He pertinently denied the defence version that was put to him in cross examination and consistently remained adamant that the appellant in fact had fired the shots.

[10] The trial court accepted the evidence of Tshabalala. In this regard the poor lighting at the scene, the mobility of the scene to which he testified and the fact that he was injured were duly taken into account in the assessment of his evidence. He was a single witness to the actual shooting and the court a quo approached his evidence with the necessary caution. I am unable to fault either the court a quo's approach to or assessment of Tshabalala's evidence.

[11] But, it does not end there. The high-water mark of the unreliability of the appellant's version is his inability to explain how the deceased could have sustained the gunshot injuries all over his body, on the assumption that the deceased had pulled the trigger. In this regard is important to note that the deceased sustained four bullet wounds, located as follows: one in the head (the left occipital region), one in the left upper arm, one in the right anterior chest and one in the left anterior abdomen. According to the medical evidence the head injury would have resulted in instantaneous death. It is simply inconceivable that the deceased, in the circumstances as described by the appellant, could have inflicted those injuries upon himself. It has been shown beyond reasonable doubt that the appellant fired all shots during the incident. The court a quo accordingly, correctly rejected the appellant's version as false.

[12] As to sentence the trial court duly considered the appellant's personal circumstances as well as the seriousness of the offences. The appellant was 47 years old at the time of sentencing. He had been in employment with no previous convictions. The offences no doubt fall into the most serious category: the deceased was shot in execution style while performing his official duties. The facts of this matter however reveal this anomaly: the appellant for no apparent reason emptied his firearm on the police officials. At the stage of the shots being fired at the deceased there was no threat to the appellant at all: Tshabalala was then on the run and he was moreover told by the deceased not fire any shots at the appellant. The deceased did nothing to provoke the appellant. Yet, the appellant proceeded to fire a large number of shots. The question arising is why did the appellant do so?

[13] The answer to the question is hard to find when the evidence is considered. Compounding the difficulty is an understandable absence of evidence as to what exactly caused the appellant to fire the shots at the deceased. The appellant regrettably did not to take the court into his confidence and resorted to a false version. The state witnesses did not observe the interaction between the appellant and the deceased at the crucial time when the shots were fired. The court accordingly is reliant on some speculation in order to arrive at the probable cause for the appellant's conduct. The appellant right from the outset that evening was minding his own business. He was less than willing to interact with his wife. When the police arrived he refused to discuss the

domestic problems with them there and then. Instead he insisted on the matter being dealt with at the police station. The police were remarkably patient with the appellant: they agreed to abide his decision. When they were informed that the appellant had a firearm which he was legally entitled to possess, they left it at that. It is only when the deceased indicated to the appellant that he wanted to search him, that the appellant showed signs of resistance. From all this it is abundantly clear that something must have triggered the appellant to literally empty his firearm. That, in my view, is to be found in his subjective state of mind. By then there had been a history of domestic problems. The events prior to the police arriving on the scene showed at least the appellant's unhappiness. The appellant stubbornly pursued his own agenda and it is clear form his conduct that he was not going to submit to authority or orders: he decided that the problem be dealt with at the police station. All this moreover transpired in front of his wife and children with the resultant embarrassment. At the crucial moment he was told that he would be searched. That, although a routine police exercise with no sinister intention must have added to the already existing stress. The appellant snapped and the shooting followed. The large number of shots fired by the appellant is the grim testimony thereof. The appellant accordingly, in my view, acted under emotional stress which contributed to his subjective state of mind causing him to act the way he did.

[14] The court a quo duly considered the seriousness of the ever increasing acts of violence against members of the police. The emotional distress the appellant experienced, however, was not afforded sufficient weight in the trial court's determination of an appropriate sentence. In my view this resulted in a misdirection. I am moreover not satisfied that the ultimate sentence is proportionate to the crime the appellant has been convicted of (*S v Vilakazi* 2009 (1) SACR 522 (SCA)). It follows that this court is entitled to consider sentence afresh. Having considered all the relevant circumstances an effective sentence of 25 years' imprisonment in my view would be appropriate. To this extend the appeal against sentence ought to be upheld.

[15] In the result the following order is made:

1. The appeal against the appellant's conviction is dismissed.

2. The sentence imposed by the court a quo is set aside and substituted with the following:

> "On counts 1 and 2, taken together for the purpose of sentence, the accused is sentenced to 25 years' imprisonment."

The date of commencement of the sentence is backdated to 31 October 2002.

FHD VAN OOSTEN
JUDGE OF THE HIGH COURT

I agree.

MA MAKUME
JUDGE OF THE HIGH COURT

I agree.

D VILAKAZI
ACTING JUDGE OF THE HIGH COURT

COUNSEL FOR APPELLANT	***ADV E TLAKE***
COUNSEL FOR RESPONDENT	***ADV JJ MLOTSHWA***
DATE OF HEARING	***21 OCTOBER 2013***
DATE OF JUDGMENT	***23 OCTOBER 2013***