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

CASE NO: AR700/15

In the matter between:

SIPHO KUBHEKA **Appellant**

And

THE STATE **Respondent**

APPEAL JUDGMENT

Delivered on: 20 September 2016

MBATHA J:

[1] The appellant was convicted of murder of one Kwanele Emmanuel Ngcobo and the attempted murder of Sipho Ngqeza Kubheka. These incidents arose on 15 September 2012 at or near Cornfields, Estcourt, KwaZulu-Natal. With leave of the court *a quo* the appellant appeals against his convictions.

[2] The appellant submits that the state failed to prove its case beyond a reasonable doubt because the evidence of the two main witnesses was riddled with contradictions and inconsistencies. Further, that the court failed to accept the version of the appellant, which was a more probable version than the one given by the state witnesses.

[3] At the hearing of the appeal counsel for the state withdrew her concession that the appeal against the convictions should be upheld and set aside.

[4] At the trial the appellant had tendered a plea of not guilty. In terms of section 115 of the Criminal Procedure Act[1] he pleaded the basis of his defence as being self-defence in respect of both counts. He made admissions in terms of section 220 of the Act whereby he admitted the identity of the deceased in count 1, that the deceased died as a result of a gunshot wound as stated in the post mortem report Exhibit "B", and that the cause of death was a spinal cord injury.

[5] Dr Badhul who conducted the post mortem examination was also called as a witness. His testimony was that the deceased died as a result of a gunshot wound. The entry wound was from the back of the neck and the exit wound was on the right side of the mouth. The bullet had fractured the third vertebra and exited the mouth of the deceased.

[6] Dr Kande, who examined the complainant in count 2, testified that Vilakazi had a gunshot wound which entered from the left buttock and exited from the left pubic area. There was an entry wound on his right thigh which exited on the medial aspect. He found an injury which fractured the complainant's femur, an injury which was life threatening due to loss of blood. He testified that the buttock wound could have been life threatening, as it could have penetrated the bowels and severed the arteries.

[7] The question before us is whether the appellant had acted in self-defence. We have borne in mind what was stated in *S v De Oliveira*[2] where the court held that:

> 'A person who acts in private defence acts lawfully, provided his conduct satisfies the requirements laid down for such a defence and does not exceed its limits.'

It was therefore incumbent upon the learned magistrate to consider that an unlawful act had been committed against the victims and that the evidential burden is placed upon the accused to rebut the *prima facie* presumption of unlawfulness. The version of the complainant in count 2, the witness Sithomo and the appellant's version had to be considered by the court *a quo*.

[1] Act 51 of 1977
[2] 1993 (2) SACR 59 (A)

[8] It is trite that the court *a quo* had to take certain factors into consideration in the evaluation of the defence raised by the appellant, being the relationship between the parties, their respective ages and physical strength, the nature, severity and persistence of the attack, the nature of the weapon used, the means available to avert the attack, the nature and means used to defend himself and the extent of the harm likely to be caused by the weapon used. It is our view that in coming to a decision the court *a quo* considered the evidence in its totality and not in a piecemeal fashion.

[9] It is important that we summarise the version of the two state witnesses and that of the appellant. Sizwe Vilakazi's version is that on the evening of 18 September 2012 he was in a bakkie being driven by the appellant. The bakkie belonged to Mbhele, one of the occupants seated in the front, who was too drunk to drive. The deceased was seated in between the two at the front. The complainant in count 2, Vilakazi and Sithomo were seated in the loading bin of the bakkie, which had a canopy.

[10] When they reached their destination he observed the deceased and the appellant fighting over a firearm. The appellant fired shots at the deceased whilst he was still in the vehicle. Then the deceased managed to alight from the vehicle and walked around to the driver's side. The deceased, who was unarmed at that stage, was then shot twice in the head by the appellant. The appellant then moved to the back of the bakkie, opened the canopy, Sithomo alighted and ran off. Vilakazi remained behind and enquired as to what they had done to the appellant.

The appellant responded by shooting him in the lower part of the arm and struck him in the forehead with the firearm. The appellant fired another shot, which struck him in the abdomen. He tried to run away but the appellant fired two more shots, one hit him on the right calf and the other on the right upper thigh. Vilakazi fell near the deceased.

[11] The appellant then drove off leaving the deceased and Vilakazi on the ground. He returned after a short while, moved the deceased with his feet, possibly checking if he was alive. Whilst this happened Vilakazi pretended to be dead by keeping still on the ground. The appellant fired a shot at him, but the bullet ejected itself out.

Then the appellant fired again at Vilakazi, who was struck at the neck and passed out.

[12] The witness Sithomo's evidence was that the appellant walked to the passenger side of the motor vehicle, shot at the deceased and Vilakazi who at that stage were in front of the motor vehicle.

[13] What is common cause between the two witnesses is that they each confirm that the deceased was shot at by the appellant. They did not mention any attack or imminent attack upon the person of the appellant. Their evidence also confirmed that no one was armed save for the appellant and that the shots were directed at the deceased and Vilakazi.

[14] The appellant's version is that the deceased was seated next to him in the bakkie. Sithomo and Vilakazi were at the back of the bakkie. At the place where he had to drop the deceased and Vilakazi, he stopped the motor vehicle whereupon Mbhele alighted to urinate. He had observed the deceased reaching for his firearm on his waist as he was disembarking from the bakkie. He dispossessed him of that firearm. He then alighted and moved to the back of the bakkie to report to Sithomo and Mbhele about what had happened. Then Vilakazi ran past him towards the front of the bakkie. The deceased and Vilakazi moved towards him and approached him in a confrontational manner. Vilakazi touched his waist as if to pull out a firearm and ordered him not to move. He retreated and fired four shots in their direction. He observed the deceased falling down and Vilakazi ducking behind the bonnet of the motor vehicle. He then drove off with Sithomo and Mbhele.

[15] It is clear to this court that the court *a quo* was alive to the contradictions in the evidence of the two state witnesses. However, when we analyse those contradictions, they are not material to a point that the court would say that their evidence was fabricated or they did not have an opportunity to observe or the truth was not told. The scene was moving and each witness described it as it was unfolding in front of his eyes.

The version given by the appellant is completely different to the version given by the two state witnesses. Sithomo was not shot at, is a close friend of the appellant and

had no reason to fabricate the evidence against the appellant. Sithomo, who was an independent witness in this trial, informed the court that the deceased was shot twice when he was already outside the motor vehicle. It was accepted by the trial court that the shooting took place only outside the motor vehicle, as it would have been inescapable that the motor vehicle that they were seated in could not have been damaged. It is our view that the version of Sithomo materially corroborated that of Vilakazi.

[16] Sithomo placed himself on the scene and confirmed that he had observed the appellant shoot at the deceased and Vilakazi. It would not have affected the state's case even if the court *a quo* accepted that Sithomo had bolted away as the appellant's defence was that he acted in self-defence in shooting the deceased and Vilakazi.

[17] The court *a quo* rightfully accepted that there were two moving scenes, the killing of the deceased and the attempted killing of Vilakazi, as opposed to the appellant's version that he shot both the deceased and Vilakazi as they approached simultaneously towards him.

[18] We agree with the decision of the court *a quo*, in that there was no imminent attack upon the appellant and that even if there had been an imminent attack upon him, he exceeded the bounds of self-defence by repeatedly shooting at the deceased and Vilakazi.

[19] We cannot accept that there was no subjective intention to kill on the part of the appellant, as that would only be in line with the improbable version which he gave to the court. The state bore the onus of proof and on the evidence given by the state witnesses we conclude that it was proved that he had the requisite intention to kill the deceased and Vilakazi.

[20] There are two approaches in establishing the intention of an accused. This intention could be subjective or objective. These can be established from the facts of the case.

[21] This court is satisfied that, given the nature of the weapon that he used, that he shot both victims several times, and the nature of the injuries sustained by both victims, the state had proved beyond any reasonable doubt that the appellant intended to kill the defenceless victims.

[22] In our law a person is guilty of attempting to commit a crime if, intending to commit that crime, he unlawfully engages in conduct that is not merely preparatory but has reached at least the commencement of the execution of the intended crime. In *S v Agliotti*[3] the court stated as follows:

> 'Attempted murder is an attempt to do or commit the [crime of murder]. A person is guilty of attempting to commit a crime if, he/she intending to do so, unlawfully engages in conduct that is not merely preparatory but has also reached at least the commencement of the execution of the intended crime. A person is equally guilty of attempting to commit a crime even though the commission of the crime is impossible, if it would have been possible in the factual circumstances which he/she believes exist or will exist at the relevant time. A person will also be guilty of an attempt even when he/she voluntarily withdraws from its commission after his/her conduct has reached the commencement of the execution of the intended crime. The stage of commencement of execution is also called the stage of consummation. Once this stage is reached, "attempt" as a crime is complete.'

[23] The intention in the form of *dolus eventualis* was proved with regard to Vilakazi. *Dolus eventualis* is applicable if the commission of the unlawful act or the causing of the unlawful result is not his main aim, but he subjectively foresees the possibility that, in striving towards his main aim, the unlawful act may be committed or the unlawful result may be caused and he reconciles himself to that possibility.

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[3] 2011 (2) SACR 437 (GSJ) para 10

[24] In light thereof, we are of the view that the appeal be dismissed.

[25] The following order is made:

‘The appeal against the convictions is dismissed and the convictions are confirmed.’

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MBATHA J

I agree:

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BALTON J

Date of hearing	:	25 August 2016
Date delivered	:	20 September 2016

Appearances:

For the Appellant	:	Adv L Marais
Instructed by	:	Justice Centre Pietermaritzburg
For the Respondents	:	Adv A Watt
Instructed by	:	The Director of Public Prosecutions Pietermaritzburg