THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

REPORTABLE
Case no: 732/12

In the matter between:

NELSON SEPURU MAKGATHO **Appellant**

and

THE STATE **Respondent**

Neutral citation: *Makgatho v S* (732/12) [2013] ZASCA 34 (28 March 2013)

Coram: **MAYA, MALAN, SHONGWE, MAJIEDT JJA and MBHA AJA**

Heard: **11 March 2013**

Delivered: **28 March 2013**

Summary: **Criminal Law – murder – mens rea – intention to kill – dolus eventualis – test subjective – discharging firearm fully aware and reckless of the danger posed to those in vicinity and deceased in particular.**

ORDER

On appeal from: North Gauteng High Court (Pretoria) (Mavundla J and Ebersohn AJ) sitting as court of appeal):

The appeal against conviction and sentence is dismissed.

JUDGMENT

SHONGWE JA (MAYA, MALAN, MAJIEDT JJA, MBHA AJA concurring)

[1] This appeal arises from the conviction and sentence on a charge of murder by the regional court magistrate (Polokwane). The conviction and sentence were confirmed by the Gauteng High Court, Pretoria (Mavundla J and Ebersohn AJ concurring). The appeal is before this court with leave of the court below.

[2] The regional court magistrate came to the conclusion that the appellant was guilty of murder on the basis of dolus eventualis in that:

'he foresaw that what he did would cause an accident, but he decided to adopt an: (sic!) "I do not care" attitude, and that attitude of his that he did not care of what was going to happen when he shot in the air in the presence of other people, resulted in the death of the deceased.'

[3] The appellant was legally represented in the courts below but due to lack of resources he approached the legal aid board for assistance and they entered the fray only at a later stage. Perhaps that is why no notice of appeal was filed. Be that as it may, counsel for the appellant raised the following questions in his heads of argument.

(a) Whether the evidence presented by the State is reliable enough for a court to find that the appellant's conduct evidenced an intention in the form of dolus eventualis, or whether the appellant should be convicted of another offence, for example, culpable homicide.

(b) The failure of the court below to provide full reasons why it agreed with the regional court magistrate.

(c) Regarding sentence, the appellant contended that the court below should have found substantial and compelling circumstances to justify a lesser sentence than the prescribed 15 years' imprisonment on the grounds that there was no pre-planning of the offence; the appellant was convicted on the basis of dolus eventualis, which, on its own is a substantial and compelling circumstance; and the fact that the incident took place at a tavern where some of the witnesses were under the influence of alcohol.

[4] The respondent, on the other hand, contended that the main issue is whether the trial court correctly accepted the evidence of the state witnesses as being trustworthy on the question whether or not it was the appellant who fired the fatal shot without any struggle over the firearm. The other issue was whether the State succeeded in proving that the appellant had the necessary intention in the form of dolus eventualis. The respondent contended that the trial court correctly convicted the appellant and that the sentence imposed was proper.

[5] A brief review of the facts is necessary. The incident occurred on 20 February 2004, between 20:00 and 21:00 in the evening, at a tavern in Senobarana in Limpopo, where the state witnesses, Stanley Maloba, Daphne Madibane, Jeanette and Nicholas Maloba were seated and drinking alcohol. Apparently other people were also sitting and drinking there. The appellant arrived in a bakkie and went straight to where the state witnesses were seated and called Daphne, who refused to go to him. The appellant returned to his vehicle and came back to the state witnesses and pulled Daphne. The others stood up and objected to the appellant's conduct. The appellant slapped Daphne on her face. He also slapped Nicholas and slapped Stanley twice. When the appellant was asked if he came to fight, he took out a firearm and grabbed Stanley with one hand and fired a shot up in the air. Nicholas, Daphne and Jeanette, ran away. Stanley said that the appellant then pointed the firearm to the front and fired a second shot. He then let go of Stanley and left for his vehicle.

[6] The appellant's version is that he did arrive at the tavern on the day in question and called Daphne who stood up and went to him. While he was talking to her one of the men (apparently it was Stanley) came up and pulled Daphne away

from him. When he enquired what was going on, Stanley slapped him with an open hand. There was an exchange of slapping between them. He said that, while this was taking place, Nicholas and Jeanette approached him wanting to attack him. He then pulled a firearm and fired one shot into the ground. They pleaded with him to put the firearm away so that they could talk, which he did. Suddenly they dragged him in an attempt to take the firearm away. A struggle over the firearm ensued and four shots went off. He overpowered them and managed to take control of the firearm. He said he did not know who pulled the trigger.

[7] After the shooting, someone reported that a person, who turned out to be the deceased had been shot. Stanley went to the appellant to inform him that he had shot someone. The appellant went to see the victim, who was still alive then. He saw that he was bleeding and had a gunshot wound on the left hand side of the neck. But because he was afraid that the people might attack him, he drove away.

[8] The nub of this appeal is whether the appellant acted with dolus eventualis when he caused the death of the deceased. Most of the facts are common cause save for the question of how the shots were fired and who fired them. The trial court accepted the version of the State and rejected that of the appellant as not being reasonably possibly true. It is trite that the State must prove its case beyond reasonable doubt and that an accused person is not obliged to give a version of events. However, if and when he does give a version, it must be reasonably possibly true for it to be accepted by the court. The trial court must, of course, examine the totality of the particular facts, and any inferences to be drawn, in considering its verdict. (See *R v Difford* 1937 AD 370 at 373 and 383 and *S v van der Meyden* 1999 (1) SACR 447 (W) at 448F-H – also reported as 1999 (2) SA 79 (W).

[9] A person acts with intention, in the form of dolus eventualis, 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 ensue, and he reconciles himself to this possibility (see C R Snyman *Criminal Law* 5th ed (2008) at 184). E M Burchell and P M A Hunt *South African Law and Criminal Procedure* 1997, at 131 said:

'It is sufficient if the accused, having foreseen the real possibility of the existence of the circumstances in question, nevertheless persisted in his conduct irrespective of whether it existed or not.'

(See also *Annual Survey of South African Law* (1964) at 73). In other words, it must be shown that a real – as opposed to a remote – possibility of that consequence resulting was foreseen. In *S v van Wyk* 1992 (1) SACR 147 (Nms) at 161b, Ackerman AJA expressed himself as follows:

'…I am accordingly of the view that the subjective foresight required for *dolus eventualis* is the subjective appreciation that there is a reasonable possibility that the proscribed consequence will ensue.'

[10] The fundamental question is not whether he should have accepted that the result would follow, but whether in actual fact he accepted that it would follow. The test in respect of intention is subjective and not objective. The objective test is applicable in cases involving negligence and not intention (see *S v Ngubane* 1985 (3) SA 677 (A) at 685D-F; *S v Dladla* 1980 (1) SA 1 (A) at 4A-B). There is a plethora of authorities demonstrating the rule that murder is a crime requiring intention; it cannot be committed negligently. See, for example, *S v Qege* 2012 (2) SACR 41 (ECG) at 48e-f where it was said that:

'Where the accused performs an action knowing or foreseeing that somebody may be killed, and yet, despite that knowledge and reckless of the eventuation of the possible result, persist with that action, the form of intention is known as dolus eventualis.'

(See also *S v Swanepoel* 1983 (1) SA 434 (A) at 440A-B; *S v Nhlapo* 1981 (2) SA 744 (A) at 750H-751C; *S v Dube* 1972 (4) SA 515 (W) at 520G-H).

[11] The question to be decided is whether the State has proven beyond a doubt that the appellant subjectively foresaw the possibility that his actions would result in the death of the deceased, and nevertheless persisted in his conduct. I must state from the outset that the appellant's version was correctly rejected by the trial as well as the court below. It is not reasonably possibly true. He contends that after Stanley and he exchanged slaps, his life was in danger, in that the other persons (Nicholas and Jeanette) who were seated with Daphne, wanted to attack him. He then fired the first shot into the ground. He was unable to say how they wanted to attack him, he simply said that they formed a circle around him. Nothing was said about whether

they carried any weapons, nothing said about what they actually did besides forming a circle around him. All the witnesses for the State testified that the appellant was the one who initiated the physical violence by slapping Daphne, thereafter slapping Nicholas and then Stanley twice. The appellant did not know the persons who were seated with Daphne, and they too, except for Daphne, did not know him. I find it very strange and unlikely that Stanley would slap him first, without a word. It is more likely that the appellant was the aggressor. He came to talk to his so-called girlfriend, and a stranger tried to stop him from doing so. I think that the appellant became cross and slapped him, thereafter produced a firearm and fired two shots. There was absolutely no evidence of any imminent danger.

[12] The appellant came to a tavern where there were many people seated around and drinking. He contends that a struggle over the firearm ensued and four gunshots went off during the struggle. He contends that the firearm was in the holster on his hip and that he was holding the butt and the others were holding the barrel. It seems to me that his hands were very close to the trigger, comparatively speaking, and if shots went off they would have either injured him or one of the people involved in the struggle. His version is not only improbable, it is palpably false and deserves to be rejected. What is even more crucial is that his version of events was never put to the state witnesses. It only came up when the appellant testified.

[13] The State relied on the evidence of Stanley, whose evidence was corroborated to some extent by Daphne, Nicholas and Molokomme. Molokomme had been seated with the deceased. He observed the appellant when he came to the tavern and when he returned to the vehicle to fetch the firearm. All the witnesses testified that the appellant came, called Daphne and returned to the bakkie, although they could not say what he did at the bakkie. Only Molokomme said that he fetched a firearm and returned to where Stanley and the others were seated.

[14] Counsel for the appellant criticized Stanley’s evidence in that he admitted being under the influence of alcohol, that he contradicted Daphne when he said they were all drinking alcohol and that he contradicted his statement to the police. In my view the criticism is ill-founded and immaterial. There is no evidence that Stanley was so inebriated that he could not remember the incident. Whether Daphne had

alcohol or not, which she denied, is of no consequence and irrelevant. The contradiction in Stanley's statement to the police is also immaterial in that it refers to whether or not after the appellant fired the first shot, he put the firearm back in its holster. The appellant himself was not sure whether he did so before the alleged struggle over the firearm broke out. It was put to Stanley that he did not see the appellant pointing the firearm at the deceased. However, counsel for the appellant, conceded before us correctly so, that the appellant did not have to know the whereabouts of the deceased at the time of the shooting.

[15] In the present case, the appellant foresaw the possibility that his firing a shot, whether into the ground or in the air, in the presence of many people, would result in harm and he reconciled himself to this possibility (see *S v Sigwahla* 1967 (4) SA 566 (A) at 570B-C; *S v van Zyl* 1969 (1) SA 553 (A) at 557A-E; *S v Mtshiza* 1970 (3) SA 747 (A) at 752A-H). As I have already mentioned, it is significant that the defence at no stage put to the state witnesses the appellant's allegation that four shots went off during the struggle over the firearm. The trial court accepted that two gun shots were fired and one of the bullets fatally wounded the deceased.

[16] The other witnesses ran away after the first shot was fired, but as I said, they corroborated Stanley's evidence on what happened before the first shot was fired. The version of the State is fortified, to some extent, by the behaviour of the appellant after he was made aware that he had shot someone. He did a noble thing by proceeding to the injured person but did not offer assistance, he simply walked away. One would have expected him to give assistance, for example, to take him quickly to a hospital. He said that he got a fright, because he thought the people might attack him, but he did not drive to the nearest police station to report this unfortunate happening. He left the scene without uttering a word until he was arrested months later. His actions after the shooting are incongruous with his plea that it was all an unfortunate accident.

[17] In *Rex v Dhlumayo* 1948 (2) SA 677 (A) at 702, Davis AJA remarked that:

'It would be most unsafe invariably to conclude that everything that is not mentioned [in a judgment] has been overlooked. … Lord Wright cites with apparent approval … the statement of Lord Buckmaster in *Clarke's* case; [*Clarke v Edinburgh and District*

Tramways Company (1919 S.C (H. L.), 35] with which Lord Atkinson had expressly associated himself, that

"Courts of appeal should not seek anxiously to discover reasons adverse to the conclusions of the learned Judge who has seen and heard the witnesses and determined the case on the comparison of their evidence."'

Marais JA in *S v Naidoo* 2003 (1) SACR 347 (SCA) para 26 also emphasized the above quotation by saying the following:

'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 misdirections or are shown by the record to be wrong.'

Counsel for the appellant, in this case, did not suggest that the trial court's conclusions were vitiated by material misdirections or were shown to be wrong.

[18] On the basis of the above reasons I find that the appeal must fail. The trial court's findings were correct, unassailable as confirmed by the court below. I now turn to the question of sentence.

[19] It is trite that sentencing is pre-eminently in the discretion of the trial court. The offence with which the appellant has been charged is unarguably a very serious one. It is also common cause that it falls within the sentencing regime of the Criminal Law Amendment Act 105 of 1997 read with Part II of Schedule 2 of the Act. The prescribed sentence is 15 years imprisonment, unless substantial and compelling circumstances exist to justify a lesser sentence. The trial court carefully considered all the necessary factors and concluded, correctly so, that no substantial and compelling circumstances existed to justify a lesser sentence. This court is therefore not at large to interfere with the sentence in the absence of a misdirection. Counsel for the appellant, correctly so, in my view, conceded that he cannot forcefully argue against the sentence imposed. I find that the appeal against sentence also cannot succeed.

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

The appeal against conviction and sentence is dismissed.

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J B Z SHONGWE

JUDGE OF APPEAL

APPEARANCES

FOR APPELLANT:	L M Manzini
	Instructed by:
	Legal Aid Board, Pretoria;
	Legal Aid Board, Bloemfontein.
FOR RESPONDENT:	E V Sihlangu
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