SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

CASE NO: 531/2012

Not Reportable

In the matter between:

ALFRED MBALAKWA MNISI **APPELLANT**

and

THE STATE **RESPONDENT**

Neutral citation: *Alfred Mnisi v The State* (531/12) [2012] ZASCA 41 (28 March 2013).

Coram: Mpati P, Tshiqi, Pillay JJA et Southwood, Mbha AJJA

Heard: 5 March 2013

Delivered: 28 March 2013

Summary: **Criminal law – murder - appeal on fact – defence of self-defence rejected.**

ORDER

On appeal from: Transvaal Provincial Division (now North Gauteng High Court, per Du Plessis J and Hassim AJ sitting as court of appeal):

The appeal dismissed.

JUDGMENT

MBHA AJA (MPATI P, TSHIQI, PILLAY JJA ET SOUTHWOOD AJA CONCURRING)

[1] On 5 March 2002, the appellant was convicted by the regional court, Benoni (the trial court) on a charge of murder and sentenced to imprisonment for a term of 15 years. His appeal to the Transvaal Provincial Division (now North Gauteng High Court, per Du Plessis J and Hassim AJ) against both the conviction and sentence, was dismissed. This appeal, with the leave of that court, is against both the conviction and sentence.

[2] The charge sheet alleged that on or about 21 January 2001 and at Daveyton, the appellant wrongfully and intentionally killed Daniel Mwale (the deceased), by shooting him with a firearm.

[3] It is common cause that the incident happened at a taxi rank in Daveyton, where the appellant fired one fatal shot at the deceased. The issue for determination by the trial court, and which is the subject of this appeal, was whether or not the appellant acted in self-defence when he shot and killed the deceased. It thus became important to determine whether or not the deceased had himself drawn a firearm with which he threatened to shoot the appellant, as the appellant alleges.

[4] The circumstances surrounding the shooting of the deceased can be gleaned from the evidence of the two state witnesses, Wandi Floyd Masuku (Masuku), who testified as an eyewitness to the shooting, and Richard Masombuka (Masombuka), who corroborated Masuku's evidence insofar as it related to the events immediately prior to and after the shooting. Masombuka did not witness the actual shooting of the deceased. It also bears mention that the recordings of an inspection in loco by the trial court, which depict the scene at the taxi rank where the shooting occurred, and inter alia, where Masuku had stood and observed the shooting, the position of the deceased's combi and where the deceased was shot and where he fell after the shooting, were admitted into evidence.

[5] Masuku testified that shortly before the shooting both the deceased and the appellant were inside the deceased's stationary combi which was parked at an Engen Garage at the taxi rank. The brakes of the taxi were being repaired. After the repairs had been effected, the deceased drove the taxi to a washing bay to have it washed. The deceased alighted from the driver's door and proceeded to the back of the combi, whilst carrying wheelcaps. After he had opened the boot and put in the wheelcaps, the appellant got out of the deceased's taxi using its sliding door on the left. The appellant approached the deceased and when he was approximately three metres from him, he produced a pistol from his waist, pointed it at the deceased who was now facing him, and shot him. The deceased fell at the spot where he was shot behind his taxi. A crowd, obviously attracted by the sound of gunfire, came and chased after the appellant, who fired a further shot as he ran away. Masuku, who witnessed the shooting incident from a distance of approximately 30 metres, disputed a proposition put to him in cross-examination that the deceased had produced a firearm which he pointed at the appellant shortly before the latter produced his and shot the deceased. Masuku thus disputed the further proposition that in shooting the deceased the appellant was acting in self-defence. He said that from where he stood, he had a clear, unobstructed view of the shooting. Furthermore, his attention at the time was focused on the deceased's taxi as he was supposed to drive and operate it on behalf of the deceased after it had been washed. He was adamant that as he was a close friend of the deceased they would meet regularly, and he therefore well knew that the deceased had never owned any firearm.

[6] Masombuka, who did odd jobs washing cars at the taxi rank, confirmed that

shortly before the shooting the deceased arrived at the washing bay driving his combi and asked him to wash it. The appellant was a passenger in the deceased's taxi at the time. Masombuka saw the deceased alight and proceed to the boot of the combi at the back, where he put in some wheelcaps that he was carrying. He also observed the appellant getting out of the taxi and follow the deceased to the back. Masombuka testified that he took a bucket to go and fetch water approximately 100 metres away. As he was walking back to the deceased's taxi, he suddenly heard a gunshot. When he got to the combi he saw the deceased lying on the ground behind his vehicle and realised that he had been shot. He never saw the actual shooting of the deceased. He was adamant that there was no firearm lying near the body of the deceased. Immediately after the shooting he saw the appellant run away from the scene whilst being chased by a crowd of people consisting mainly of other taxi drivers and owners.

[7] The appellant's version was, briefly, that on 21 January 2001 he went to meet with the deceased at the taxi rank. There was a problem between them relating to a sum of money the deceased allegedly owed to him. The deceased had not, according to him, accounted to him for, or rendered takings from, the usage of the taxi concerned over the past four weeks. He said whilst they were inside the deceased's combi discussing the problem, an argument ensued and the deceased swore at him, threatening to kill him. Immediately thereafter, the deceased alighted and went to the back of the combi. He also alighted and followed the deceased to the back of the combi. When he got to the deceased, the latter produced a gun from his waist and pointed it at him. However, he was quicker and managed to pull out his gun and shoot the deceased. He said other taxi drivers came to the scene and fired shots at him. An unknown male, whom he had seen walking slowly up behind the deceased with a firearm in his hand, also fired shots at him.

[8] The trial court, in a detailed analysis of the evidence, found that Masuku, though a single witness regarding the shooting incident, was a credible and trustworthy witness whose testimony could be relied upon. It rejected the accused's version that the deceased had produced a firearm and threatened to shoot him as being untrue and found that the appellant's explanation that he acted in self defence when he shot the deceased, was not reasonably possibly true. The trial court accepted Masuku's evidence that the deceased did not produce any gun on the scene as alleged by the appellant.

[9] In this court Masuku was criticized by counsel for the appellant for being biased against the appellant because of his close friendship with the deceased; that they had grown up together; that he was aggrieved by the deceased's death and that all he wished for was to see the appellant behind bars. In my view this criticism is unjustified. It is so that Masuku was adamant that he wanted the appellant to be punished for the wrong he had committed, but the fact that he might have been biased against the appellant is not the sole criterion for rejecting his evidence. In *S v Webber*[1], this court, in laying down the correct approach when assessing the evidence of a single witness, stated that the evidence of a single witness ought not necessarily to be regarded as not being credible merely because he 'has an interest or bias adverse to the accused', and that it is necessary to assess the intensity of the bias and to determine the importance thereof in the light of the evidence as a whole.

[10] The appellant on the other hand contradicted himself and gave different versions on the important aspect about when exactly did the deceased produce his firearm. At first he said the deceased already had his firearm in his hand when he got outside the taxi. He later changed this, saying the deceased only produced his firearm when he was at the back of the taxi. Upon being asked to explain this contradiction, he tried to wriggle his way out of the conundrum by stating that he meant to say the deceased had his firearm in his waist when he alighted from the taxi. The appellant could not furnish any reasons as to why he followed the deceased to the back of the combi after the deceased had allegedly threatened to kill him whilst they were still inside the combi. It needs to be mentioned, in any case, that the allegation that the deceased threatened the appellant with death whilst they were inside the combi was never put to Masuku during cross-examination. Nor was it even put to Masuku, who appeared to have been at a good vantage point, that, either immediately before, or after the shooting an unknown person, armed with a gun, was walking slowly up behind the deceased and allegedly fired at the appellant from a distance of two to three meters.

[11] It is trite that an appeal court can only interfere with the factual findings of a trial court where it finds that the trial court misdirected itself on questions of facts. In *R v Dhlumayo*[2] the court had occasion to set guidelines for an appeal court when it is

[1] 1971 (3) SA 754(A)
[2] *R v Dhlumayo* 1948 (2) SA 677 (A).

considering an appeal on the facts. Davis AJA quoted with approval the statement of Lord Buckmaster in *Clarke v Edinburgh & District Tramways Company* (1919 S.C. (H.L.), 35) that '[c]ourts 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'.[3] Davis AJA thus held that where there has been no misdirection on fact by the trial judge, the presumption is that his conclusion is correct and the appellate court will only reverse it where it is convinced that it is wrong.[4]

[12] I am unable to fault the trial court's finding and conclusion. Masuku's honesty and openness with the court cannot be questioned. It is noteworthy that he was even prepared to freely disclose certain unlawful conduct in which his friend, the deceased, was involved pertaining to his combi. He said that the deceased had illegally utilized documents of a stolen car in order to register his own vehicle. The deceased had also been arrested for being in illegal possession of the combi and bribed traffic officers in order to secure his release. Masuku also freely disclosed that he worked as a taxi driver even though he was not in possession of a public driver's permit, which was a requirement, but which he could not procure because he had a previous criminal record for rape.

[13] The evidence of Masuku, considered together with the evidence pertaining to the inspection in loco, which was not disputed, the other documentary evidence in the form of a photo album which was admitted as evidence, depicting the scene of the crime, leaves one in no doubt that from where Masuku stood he had an unobstructed view of the spot where the deceased was shot. He did not contradict himself in any material respect. In my view, the trial court correctly accepted his evidence as both truthful and reliable. It follows that the appellant's version that the deceased had produced a firearm which he pointed at him cannot reasonably possibly be true. It is in fact false beyond reasonable doubt. His defence of self-defence must accordingly be rejected. Accordingly the appeal against conviction must fail.

[14] With regard to sentence, the appellant's counsel did not pursue the point raised in his heads of argument, namely that the trial court should have found that there were

[3] At 702.
[4] At 706

substantial and compelling circumstances in the appellant's case justifying a departure from the prescribed minimum sentence of 15 years' imprisonment. Instead, a completely new ground of appeal against sentence was raised during argument, which was not even contained in the heads, namely that the trial court never warned the appellant adequately, or at all, that he was liable upon conviction to be sentenced in terms of the Criminal Law Amendment Act 105 of 1997 (the Act).

[15] It is so that the charge of murder for which the appellant was convicted falls within the purview of s 52(2), read with part II of Schedule 2 of the Act, which prescribes a minimum sentence of 15 years' imprisonment for a first offender, unless there were substantial and compelling circumstances justifying the imposition of a lesser sentence. I accept that no reference was made to the Act either in the charge sheet or at the commencement of the trial. This fact does not, however, on its own, render the trial or the sentencing part thereof at least, unfair. This court has on various occasions held that although it was desirable for a charge to contain a reference to a penalty, this was not essential and that the ultimate test was whether or not the accused had had a fair trial. Thus in *S v Legoa*[5] Cameron JA said this of necessity entails a fact-based enquiry into the entire proceedings of the trial. Mpati JA, in *S v Ndlovu*,[6] endorsed this approach, saying:

'The enquiry, therefore, is whether, on a vigilant examination of the relevant circumstances, it can be said that an accused had had a fair trial. And I think it is implicit in these observations that where the State intends to rely upon the sentencing regime created by the Act a fair trial will generally demand that its intention pertinently be brought to the attention of the accused at the outset of the trial, if not in the charge-sheet then in some other form, so that the accused is placed in a position to appreciate properly in good time the charge that he faces as well as its possible consequences.'

[16] There is no complaint that the appellant was in any way prejudiced by the omission to refer to the sentencing regime created by the Act. On the contrary, appellant's counsel, in his address in mitigation to the trial court, confirmed in no uncertain terms that the Act was in fact applicable to the case. In any event and even if one were to hold that the Act was not applicable, the sentence imposed on the appellant of 15 years' imprisonment was within the ordinary jurisdiction of the trial court and is not,

[5] *S v Legoa* 2003 (1) SACR 13 (SCA).
[6] *S v Ndlovu* 2003 (1) SACR 331 (SCA) para 12.

in my view, shockingly inappropriate in light of the relevant facts and circumstances of this case.

[17] The trial court took into consideration the fact that the appellant shot and killed the deceased in cold blood over a dispute involving money that the deceased allegedly owed to the appellant. This is a serious offence but the trial court correctly balanced this against the personal circumstances of the appellant, namely that he was 35 years old, married with five dependants, that he was gainfully employed and thus economically active, and that he was a first offender.

[18] This court confirmed in *Malgas v S*[7] that an appeal court cannot, in the absence of a material misdirection by the trial court, approach the question of sentence as if it were the trial court and then substitute the sentence arrived at simply because it prefers to do so. To do so, so the court held, would be to usurp the sentencing discretion of the trial court.

[19] In my view, it has not been demonstrated that the trial court misdirected itself when it considered and imposed the sentence of 15 years' imprisonment on the appellant. In the circumstances the appeal against sentence likewise falls to be dismissed.

[20] I accordingly make the following order:
The appeal is dismissed.

B H MBHA
ACTING JUDGE OF APPEAL

[7] *Malgas v S* [2001] 3 All SA 220 (A) para 12.

APEARANCES:

FOR APPELLANT:	M VAN WYNGAARD Instructed by: A S Steijn Attorneys, Johannesburg; Honey Attorneys, Bloemfontein
FOR RESPONDENT:	J J JACOBS Instructed by: The National Director of Public Prosecutions, Pretoria The National Director of Public Prosecutions, Bloemfontein