THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

NOT REPORTABLE

Case No: 16/2013

In the matter between:

SIXTUS NHLANHLA MKHIZE **APPELLANT**

and

THE STATE **RESPONDENT**

Neutral citation: *Mkhize v S* (16/2013) [2014] ZASCA 52 (14 April 2014)

Coram: Maya, Shongwe, Willis and Saldulker JJA and Mocumie AJA

Heard: **27 February 2014**

Delivered: **14 April 2014**

Summary: Murder - test for putative private defence restated– conviction on murder set aside and appellant convicted of culpable homicide.

ORDER

On appeal from: Kwazulu-Natal High Court, Pietermaritzburg (Swain and Mnguni JJ sitting as the court of appeal):

1 The appeal is upheld.
2 The order of the court a quo is set aside and replaced with the following:
'(a) The appellant is found guilty of culpable homicide.
(b) The appellant is sentenced to five years' imprisonment wholly suspended for five years on condition that he is not convicted of culpable homicide or any competent verdict of culpable homicide, and for which he is sentenced to a term of imprisonment without the option of a fine, committed during the period of suspension.
(c) The sentence imposed is antedated to 19 January 2009.'

JUDGMENT

Mocumie AJA (Maya, Shongwe, Willis and Saldulker JJA concurring):

[1] This appeal arises from events which occurred in the early hours of 17 May 2003 during which the appellant shot and killed the deceased, Mr Denzil Edward Tatchell. Mr Dennis Erick Peter (Dennis), the deceased's uncle, was also shot and left severely injured. The appellant appeared in the regional court, Ixopo, on one count of murder and one of attempted murder. At the end of the trial the regional magistrate, Mr Sihlahla, convicted him of murder and discharged him in respect of attempted murder. He was sentenced to undergo 12 years' imprisonment. On appeal to the KwaZulu-Natal High Court, Pietermaritzburg (Swain and Mnguni JJ) against his conviction and sentence, the appeal was dismissed. This appeal is with the leave of this court.

[2] The main attack against the appeal was that the trial court erred in convicting the appellant of murder as the State had failed to prove its case

beyond reasonable doubt considering the material inconsistencies and improbabilities in the evidence of the State witnesses.

[3] The State led evidence of, among others, Mrs Brenda Charlotte Tatchell (Brenda), the deceased's wife; Mrs Lorna Emelda Peter (Lorna), Dennis' sister-law; Mr Lawrence Mboneni Zondi (Zondi); Mr Sifiso Innocent Mbanjwa (Mbanjwa); Superintendent Zibuse Leonard Gwala (Gwala); and Mr Siphiwe Jeffrey Nene (Nene).

[4] Brenda testified that she, the deceased, Dennis and Lorna arrived at Off Saddle Action Bar in Ixopo between 1h00 1h30. They had been at a wedding in Ixopo earlier in the day and were on the way home in Durban. They decided to buy alcohol at the bar, which was still open. There, they found Mr Mbanjwa (Mbanjwa), the bartender; Mr Camane, the security guard on duty that night and the appellant. They placed an order, sat down and chatted with everybody, including the appellant. For some inexplicable reason the appellant started to assault Dennis. The deceased intervened. Thereafter, he walked back to the bar counter where he had left his drink, lit a cigarette and smoked. At that moment the appellant started to shoot at the deceased. The deceased ran out of the bar and fell outside. Peter was found unconscious on the floor inside the bar and was rushed to the hospital where he was admitted. His injuries left him permanently disabled.

[5] Lorna did not say much except to confirm that there was a fracas that ensued between the deceased, Dennis, the security guard and the appellant which nobody could stop. She went outside the bar and waited next to the car. After some time Brenda came out running out of the bar to report that the deceased and Dennis had been shot by the appellant. Lorna did not witness the shooting.

[6] Mbanjwa testified that around 1h30 he informed the group that he was closing up as it was late, and requested them to finish drinking. The deceased and his party refused to leave. A scuffle broke out between Dennis and the security guard. Dennis manhandled the security guard and shunted him out of

the bar, but the security guard re-entered the bar. The deceased and Dennis started to hit the security guard with fists and kicked him. The appellant intervened by pulling the security guard away. The two assailants turned on the appellant and assaulted him with fists and kicked him repeatedly until he fell to the floor. Mbanjwa intervened. The appellant then managed to rise to his feet and retreated towards the pool table but was pursued by the assailants. As he, Mbanjwa, turned his back on them to get behind the bar counter, he heard several gun shots. He turned only to see the appellant shooting at his assailants. The deceased was struck by the bullets, stumbled out of the bar and fell outside the bar where he was certified dead by the paramedics some three hours later.

[7] Gwala testified that he arrived at the scene of crime around 3h45 and found the deceased still lying outside the bar wounded. The deceased was lying with his face to the ground and had a cigarette between his fore finger and middle finger.

[8] The appellant testified that the deceased and his group found him at the bar. A scuffle erupted between Dennis and the security guard on duty. He intervened. The deceased and Dennis turned on him and assaulted him severely. Whilst he was on the floor the deceased approached him, with his hand in his pocket, uttering the words ‘let us kill this bastard’. As he got up from the floor, with the deceased more or less ten metres from him, he pulled out his firearm and shot the deceased in quick succession until the latter turned around and fled out of the bar. As he was in a state of shock, confusion and drunkenness he fled the scene. Later, he handed himself over to the police at the local police station. His version was supported in all its material details by Mbanjwa.

[9] The defence also adduced evidence of an ex-police officer and a ballistics expert, Mr Jacobus Steyl. Steyl testified that the deceased was within very close proximity to the appellant when he shot him. He based this on the gun powder residue found on the deceased’s body. He testified further that, given the circumstances the appellant could not have had time to reflect

on his actions once he started to shoot. According to Steyl, a Z88 9mm Parabellum expels bullets in rapid succession. Once the trigger is pressed, the pistol will fire after which the recoil operation automatically extracts, ejects and reloads the chamber until all rounds are fired.[1] Thus the appellant could not have paused in between the shots to deliberately and intentionally shoot the deceased.

[10] Medical evidence led by the State established that the deceased sustained three gunshot wounds (a) two perforating gunshot wounds on the chest, one which shows features of intermediate range, with lacerations of the heart and both lungs, (b) a perforating gunshot wound of the left thigh; (c) generalised visceral pallor; and (d) subendocardial haemorrhage in the heart. According to the specialist forensic pathologist, Dr Kirk, the special features of (i) the wound on the left lateral aspect of the chest were consistent with an entry gunshot wound. The direction of the wound track which perforates the chest, lacerating the lungs and heart, is from left to right and forwards; (ii) the wound on the left upper back were consistent with entry gunshot wound of intermediate range. The direction of the wound track, which perforates the chest lacerating the lungs and heart, is from left to right and forwards; and (iii) the wound on the anterior aspect of the proximal left thigh, 910 mm above the heel, the features are consistent with an entry gunshot wound. The direction of the wound track, which perforates the left thigh lateral to the femur, is backwards. Each entry wound had features which are consistent with exit gunshot wounds.

[11] The trial court found that the appellant shot the deceased out of revenge taking into account the gunshot wound on his back, from which it inferred that it struck the deceased after he turned his back to flee. The court a quo found that the trial court could not be faulted on this finding.

[12] Before us, it was contended that the regional magistrate and the court a quo erred in (a) concluding that the only inference it could draw from the

[1] Report by J Steyl, exhibit 'H', record at 533.

circumstances of the case was that the appellant intentionally and unlawfully killed the deceased and (b) rejecting the appellant's contention that the worst he could be guilty of on the evidence is culpable homicide.

[13] To secure a conviction, the State had to prove beyond a reasonable doubt that the appellant unlawfully and intentionally killed the deceased. The State must show that he did not act in private defence or in terms of a putative private defence. The distinction between the two defences has been accepted by our courts. In *S v De Oliveira*[2] this court said the following:

'The test for private defence is objective - would a reasonable man in the position of the accused have acted in the same way (*S v Ntuli* 1975 (1) SA 429 (A) at 436E). In putative private defence it is not lawfulness that is in issue but culpability ("skuld"). If an accused honestly believes his life or property to be in danger, but objectively viewed they are not, the defensive steps he takes cannot constitute private defence. If in those circumstances he kills someone his conduct is unlawful. His erroneous belief that his life or property was in danger may well (depending upon the precise circumstances) exclude *dolus* in which case liability for the person's death based on intention will also be excluded; at worst for him he can then be convicted of culpable homicide.'

[14] The approach to be adopted by a court of appeal when it deals with the factual findings of a trial court is trite. A court of appeal will not disturb the factual findings of a trial court unless the latter had committed a material misdirection. Where there has been no misdirection on fact by the trial Judge, the presumption is that his conclusion is correct. The appeal court will only reverse it where it is convinced that it is wrong. In such a case, if the appeal court is merely left in doubt as to the correctness of the conclusion, then it will uphold it.[3] This court in *S v Naidoo & others*[4] reiterated this principle as follows:

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[2] *S v De Oliveira* 1993 (2) SACR 59 (A) at 63I-64A. See also S *v Joshua* 2003 (1) SACR 1 (SCA) para 29; *S v Pakane & others* 2008 (1) SACR 518 (SCA) para 19.

[3] *R v Dhlumayo and another* 1948 (2) SA 677 (A) at 689-690.

[4] *S v Naidoo & others* 2003 (1) SACR 347; [2002] 4 All SA 710 (SCA) para 26. See also *S v Makgatho* 2013 (2) SACR 13 (SCA) para 17.

'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.'

[15] The test that applies, and what was required to be shown by the appellant in order to avoid a conviction on culpable homicide is that a reasonable person in the same circumstances in which he found himself would have believed that his life was in danger and would have acted as he did.[5] The only issue was whether the State had proved beyond reasonable doubt that the appellant did not, subjectively, entertain an honest belief that his life was in danger and thus not justified to act in putative private defence.

[16] Counsel for the appellant submitted that the appellant was confronted by a set of circumstances which gave him reasonable grounds for believing that his life was in danger. Those circumstances were that: (a) The deceased and Dennis were the aggressors and rowdy from the moment they came into the bar that night; (b) they assaulted the security guard on duty and then turned their aggression on him when he tried to intervene in the fracas; (c) the deceased was approaching him with his hand in his pocket uttering the words 'let us kill the bastard', which he genuinely believed the two would carry out; (d) although he did not know for a fact what the deceased was armed with, the threat to his life had not ceased but was still continuing; and (e) he was under the influence of liquor and had sustained a severe assault.

[17] The trial court committed several material misdirections which, to my mind, led to the wrong conclusion that the appellant was guilty of murder. These misdirections were, furthermore, completely overlooked by the court a quo. Both the trial court and the court a quo found Mbanjwa to be a neutral, reliable witness. As stated above, his evidence was that the assault on the appellant did not stop; he merely freed himself from his assailants. He stated further that the appellant shot the deceased at close range, within three to four metres, indicating that the deceased was right in front of the appellant.

[5] See *Coetzee v Fourie & another* 2005 (1) SACR 382 (SCA) para 7.

This was corroborated by Steyl's uncontradicted expert evidence that, judging from the gun powder residue on the deceased's body; the gunshots were at close range. This was supported by the doctor's findings in the post mortem report that the gunshots were intermediate. Both Steyl's and the doctor's findings corroborated the appellant's version that the deceased was within very close range to him as he turned his back to flee. This is contrary to what both the trial court and the court a quo found, that the deceased was at the bar counter when he was shot.

[18] The court a quo also inferred that the fact that the deceased still had a cigarette between his fingers corroborated Brenda's evidence that the deceased was at the counter and had taken out a cigarette to smoke when the appellant shot him. The issue of the cigarette is an unresolved mystery in this case. In my view, however, the accepted evidence and the probabilities do not support the court a quo's inference. One simply cannot be sure how it came to be where it was found, hours after the deceased's death. And even if one accepts that it was in the hand of the deceased at the time that the deceased was killed, this does not justify the conclusion that the appellant was guilty of murder.

[19] A further aspect that remains for determination is whether, despite the appellant's subjective belief that if he did not react as he did he would have been killed, it was necessary for him to shoot the deceased three times. The first shot would, in all probability, have had the desired effect to ward off the unlawful attack on him. In my view, the appellant, especially as a long serving police officer with considerable experience in handling firearms, ought to reasonably have realised that he was using excessive force beyond the legitimate bounds of private defence. In the circumstances, he should have been convicted of culpable homicide. Counsel for the State fairly and correctly conceded that the evidence viewed in its totality, failed to establish that the appellant had the requisite intention to kill the deceased. The appeal against the conviction ought, for the aforesaid reasons, to succeed.

[20] The alteration of the conviction from murder to culpable homicide places this court at large to consider sentencing afresh. The appellant was a first offender;[6] he is a widower with young children[7] and is the sole breadwinner of his extended family, being his unemployed mother and sister; and he was in a stable employment as is evidenced by his employment record and his superior's report to the social worker that he was dedicated and committed to his work.[8] When this incident occurred, the appellant was inebriated and had been subjected to a severe assault, which included being kicked in the head and left him incapacitated for three weeks. In addition, this incident has had a devastating effect on his personal life since he lost his employment.[9] The deceased and his uncle were the authors of the tragic incident. Over and above the seriousness of the offence, the appellant's blameworthiness in the circumstances must also be taken into account.[10]

[21] In my view, correctional supervision, which was recommended by the probation officer, although appropriate even in cases of murder[11] in the right circumstances, would not be appropriate in this case. The incident occurred some ten years ago. Thus, its rehabilitative element of punishment is no longer relevant and would not serve any purpose. A sentence based on principles of restorative justice, supported by Brenda who asked the court to consider compensation for the death of her husband, was also suggested. But much as it has been lauded and accepted in South Africa, albeit at a slow pace, to consider it under the circumstances of this case, where a life has been lost, in a country where the level of violence is so high would send the wrong message to society.[12] Furthermore, it would be hollow as the appellant

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[6] See *S v Humphreys* 2013 (2) SACR 1 (SCA) para 25.
[7] *S v Shackell* 2001 (2) SACR 185 (SCA) para 32; *S v Humphreys* above para 25.
[8] *S v Shackell* above para 32.
[9] See *S v Dougherty* 2003 (4) SA 229 (W) para 42.
[10] SS Terblanche *The Guide to Sentencing in South Africa* 2 ed (2007*) at 150*, writes that: 'The modern view of the seriousness of crime generally also refers to the blameworthiness of the offender . . . [T]he seriousness of the offence is affected by the extent to which the offender can be blamed or held accountable for the harm caused or risked by the [offence] . . . .'
[11] See section 276(1)(*h*) of the Criminal Procedure Act 51 of 1977, as explained in Du Toit et al *Commentary on the Criminal Procedure Act* (2013) from 28-9*.* See also *S v R* 1993 (1) SACR 209 (A).
[12] See *S v Maluleke* 2008 (1) SACR 567 (SCA). Compare with *Director of Public Prosecutions, North Gauteng v Thabethe* 2011 (2) SACR 567 (SCA).

is unemployed.

[22] Taking into account all the mitigating factors enumerated above, a term of imprisonment, wholly suspended on appropriate conditions will adequately serve the interests of justice. It will serve as a deterrent on the appellant and hang over him like a sword of Damocles.[13]

[23] In the result the following order is granted:

1 The appeal is upheld.

2 The order of the court a quo is aside and replaced with the following:

'(a) The appellant is found guilty of culpable homicide.

(b) The appellant is sentenced to five years' imprisonment wholly suspended for five years on condition that he is not convicted of culpable homicide or any competent verdict of culpable homicide, and for which he is sentenced to a term of imprisonment without the option of a fine, committed during the period of suspension.

(c) The sentence imposed is antedated to 19 January 2009.'

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B C MOCUMIE

ACTING JUDGE OF APPEAL

[13] See *Persadh v R* 1944 NPD 357 at 358; *S v Scheepers* 2006 (1) SACR 72 (SCA) para 11.

APPEARANCES:

For Appellant:	J E Howse Instructed by: Mbele, Dube & Partners, UMzimkhulu Mthembu & Van Vuuren, Bloemfontein
For Respondent:	Ms Dyasi Instructed by: The Director of Public Prosecutions, Pietermaritzburg Deputy Director of Public Prosecutions, Bloemfontein