THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Not Reportable
Case no: 741/13

In the matter between:

BIGBOY CYRIL NGOBENI **Appellant**

and

THE STATE **Respondent**

Neutral citation: *Ngobeni v S* (741/13) [2014] ZASCA 59 (2 May 2014)

Coram: Bosielo, Shongwe JJA and Mathopo AJA

Heard: **17 March 2014**

Delivered: **2 May 2014**

Summary: Criminal appeal – self-defence – road rage – two mutually destructive versions – proper approach – uncertainty in the medical report – s186 of the Criminal Procedure Act 51 of 1977 – when to be invoked.

ORDER

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

The appeal is upheld and the conviction is set aside.

JUDGMENT

Shongwe JA

[1] This appeal originates from a conviction by the regional court (Pretoria) which convicted the appellant of attempted murder and sentenced him to 4 years imprisonment in terms of s 276(1)*(i)* of the Criminal Procedure Act 51 of 1977 (the Act) on 11 June 2004. With the leave of the trial court, the appellant appealed against the conviction and sentence to the North Gauteng High Court (Pretoria). That appeal was dismissed on 29 January 2007. The appeal before us is with the leave of the court a quo on 12 September 2007.

[2] The factual background is that the complainant and the appellant were driving their respective vehicles from Pretoria City Centre towards Atteridgeville. A road rage of some sort developed between them. It appears, from the evidence that they overtook each other on several occasions until they reached Atteridgeville and parked at an Engen petrol station. The complainant alighted from his vehicle and approached the appellant who was seated in his vehicle, to enquire why the appellant drove in a manner dangerous to other road users. The complainant testified that the appellant said words to the effect that 'my son ek sal jou skiet' to which he responded that 'jy vat 'n kans' – that is

when the complainant turned and walked towards his vehicle when he was shot at from behind.

[3] Although the appellant confirms what happened on the road, he avers that at the Engen petrol station, the complainant together with two of his passengers approached him, forcefully opened the driver's side door and started assaulting him. He started bleeding. He then pulled his firearm and fired a shot in self-defence. He did not realise that he had shot someone. Two other State witnesses were called and to a large extent corroborated the complainant's version. Furthermore a medical report (J88) was handed in by consent and the defence formally admitted the contents thereof. It clearly indicates the entry wound as being on the right back near the buttocks of the complainant and the exit wound being on the right front next to the groin.

[4] Although there are some contradictions between the complainant's version and his witnesses these are minor and immaterial. Mokaba who was called by the State confirms that the complainant was shot on his back – Mokaba says:

'ek gevind dat hy was raak geskiet net hier agter'

This objective piece of evidence taken together with that of the complainant is sufficient to prove that the complainant was shot at the back. There are contradictions in the appellant's version as well and what was put to the witnesses differs from his evidence.

[5] It is common cause that the J88 indicates question marks under the rubric 'clinical findings', showing the entry and exit wounds. It is argued by the appellant that the State or the court should have called the doctor to clarify why he had put the question marks. The suggestion is that the doctor was not sure of whether these were indeed entry and exit wounds. It is trite that the State bears

the onus to prove beyond reasonable doubt that the appellant committed the offence with the necessary intention. The appellant therefore argues that the failure to call the doctor is crucial more so that the trial court found that the medical evidence corroborates the State's version. The appellant relied on *S v MM* 2012 (2) SACR 18 (SCA) para 15 and 24. I agree that the doctor should have been called to explain these question marks, as an expert. However, I am of the view that the failure to call the doctor is not fatal to the State's case as there is direct and corroborated evidence of the complainant.

[6] The court in *MM'*s case was correct in the approach it took because in rape cases penetration is a vital aspect of proving or disputing the offence. It is an important warning given by Wallis JA in *MM's* case which came long after the judgment in this case, unfortunately. In the present case there is direct evidence by the complainant and his witness Mokaba.

[7] The appellant also pointed at some contradictions in the complainant's evidence in that he first said he heard five shots and later reduced the shots heard to two. This court must warn itself from rejecting the evidence of the complainant simply because he contradicted himself. Nestadt JA observed in *S v Mkohle* 1990 (1) SACR 95 (A) at 98E-F that 'contradictions per se do not lead to the rejection of a witness' evidence. As Nicholas J, as he then was, observed in *S v Oosthuizen* 1982 (3) SA 571 (T) at 576B-C, they may simply be indicative of an error. And at 576G-H it is stated that not every error made by the witness affects his credibility; in each case the trier of facts has to make an evaluation; taking into account such matters as the nature of the contradictions, their number and importance and their bearing on the other parts of the witness's evidence'. In the present case the trial as well as the court a quo did exactly that. It was simply an honest mistake from an imperfect witness.

Therefore I cannot agree with the appellant's submission that the State failed to prove its case beyond reasonable doubts.

[8] The crucial aspect of this case is to be found in what the appellant did when he was confronted by the three persons. He said he was assaulted by the complainant then he 'drew a firearm and fired a shot whilst they were standing by the door'. To me this suggests that when he fired a shot his life was not in danger as the people 'were standing by the door', apparently after they had assaulted him. I concluded that it was not necessary to fire the shot in the manner he did as his warding off the attack was more harmful than it was necessary and it was not the only way to avert the attack. I am aware that one must warn himself against being an arm-chair critic in the coolness of the court-room after the fact, however there must be a reasonable relationship between the attack and the defensive act.

[9] The trial court preferred the State's version, rightly so in my view, to that of the appellants and rejected that of the appellant as highly improbable and therefore not reasonably possibly true. The appellant raised the defence of self-defence or private defence. On the factual findings of the trial court, this court should be slow and reluctant to interfere (see *R v Dhlumayo & another* 1948 (2) SA 677 (A) at 705) especially where there has been no misdirection on the facts.

[10] For the appellant to defend himself the unlawful attack must have commenced or imminently threatening (*S v Engelbrecht* 2005 (2) SACR 41 (W) para 228). In the present case the appellant alleged that the complainant and his passengers attacked him by slapping him on the face – but is unable to show any serious injuries save for a minor cut on his mouth. The court a quo concluded that even assuming that he was attacked by the complainant and

company - it is clear that the appellant over-reacted and exceeded the bounds of self-defence by a very considerable margin. It is trite that self-defence should not be out of proportion to the initial unlawful attack. There is absolutely no evidence that a warning shot was fired or that it was impossible to fire such a warning shot. Instead the complainant's evidence that the appellant responded by saying "my son ek sal jou skiet" was never disputed by the defence under cross-examination.

[11] It is trite that the onus rests on the State to prove beyond reasonable doubt that an accused acted unlawfully and that he realized or ought reasonably to have realized that he was exceeding the bounds of self-defence. (*See S v Motleleni* 1976 (1) SA 403 (A); *S v Goliath* 1972 (3) SA 1 (A) at 11 and *S v Ntuli* 1975 (1) SA 429 (A) at 436). I am unable to find any fault or misdirection by both the trial and court a quo in their conclusions based on the objective evidence adduced by both the State and the defence. In my view the appellant was correctly convicted therefore the appeal against the conviction must fail.

[12] I now turn to deal with sentence. It is trite that an appeal court may only interfere with the discretion of the trial court where the trial court misdirected itself when considering sentence. Alternatively where it can be shown that the sentence imposed is shockingly and disturbingly inappropriate. In the present case the trial as well as the court a quo took into consideration the triad as stated in the famous case of *S v Zinn* (1969 (2) SA 537 (A) at 540H) as well as the surrounding circumstances.

[13] It is clear that the tempers were high – both appellant and the complainant were angry. It is not far-fetched to conclude that the appellant felt that he had been provoked by this 'pesky youngster' – He expected the youngster to show some respect to an elder. If one considers this aspect one can conclude that the

trial and court a quo misdirected themselves in considering a custodial sentence. The trial court should have called for a pre-sentence report in order to determine the background of the appellant in view of the fact that he was a first offender and of advanced age. In view of the appellant's age and the fact that a custodial sentence would not have the desired effect, a wholly suspended sentence appears to be appropriate. However, attempted murder is a serious offence. The appellant must consider himself lucky that the bullet did not hit the complainant higher up on his body - because that could have struck the complainant on his spine and most probably caused more serious injuries or death. Therefore a suspended sentence would be an appropriate sentence.

[14] I must say something about this case taking so long to reach finality. It is said that the Registrar of the trial and court a quo delayed in the preparation of the record to be placed before the appeal court. It is highly undesirable and unacceptable to inordinately delay the preparation of a record. This kind of delay gives credence to the adage that justice delayed is justice denied. It must be avoided at all cost.

[15] One more issue I wish to comment on is the test applied by the trial court when granting leave to appeal. It said:

'I think I am known for being not judge in my own case. So in principle I really do not have a problem if an accused wishes to appeal against a sentence and conviction. So leave is granted'.

The test applied in granting leave to appeal to the high court was clearly incorrect. The test is whether there are reasonable prospects of success on appeal. (See *R v Ngubane* 1945 AD 185). What the test of reasonable prospects of success postulates is a dispassionate decision, based on the facts and the law. The question is whether a reasonable person, adopting a different line of reasoning – usually by attaching more weight to factors ignored or downplayed

in the judgment, or by attaching less weight to factors accentuated in the judgment, could come to a different conclusion. That there is a possibility of success, the fact that the case is arguable, or that it is not a hopeless case, do not constitute grounds for granting leave to appeal. (See also *S v Smith* 2012 (1) SACR 567 (SCA) para 7). In my view, had the trial court applied the correct test, it would, in all probability have refused leave.

[16] In the result I would dismiss the appeal.

J B Z SHONGWE
JUDGE OF APPEAL

BOSIELO JA dissenting (Mathopo AJA concurring)

[17] I have had the benefit of reading the judgment of my colleague Shongwe JA. I regret that for reasons that follow hereunder, I do not agree with him.

[18] To a great extent the background facts which led to this case have been set out in the judgment of Shongwe JA. However, there are some salient facts which have either been downplayed or not recounted in their correct perspective which I will refer to, to clarify my dissent.

[19] The main difference I have with my colleague's judgment commences with how the critical events unfolded at the Engen garage when the two vehicles

finally came to a standstill and whether in those circumstances it can be found that the appellant did not act in self-defence as Shongwe JA did. As Shongwe JA correctly pointed out, prior to this, the complainant and the appellant had been jostling for the road en route to Atteridgeville. It is clear from the description of their manner of driving that they were both angry and reckless. It is common cause that en route to Atteridgeville they drove past a police station before they stopped at the Engen garage.

[20] The complainant testified that upon arrival at the garage, he stopped his vehicle, alighted and walked to the appellant who was seated in his vehicle. He asked him to open the driver's door which he did. He then confronted him about his manner of driving whereupon the appellant replied that 'my son ek sal jou skiet'. He replied that 'jy vat `n kans'. Predictably this set the scene for the tragic event which then followed. The complainant's version is that he was not angry when he spoke to the appellant. He never threatened nor assaulted him. After speaking to the appellant he walked peacefully to his vehicle. There was no altercation. When he was about to open his vehicle, he heard a gunshot and the next thing he felt a bullet entering his body. He then fled and was taken to hospital later that night. He explained that the bullet entered his body, from behind and exited in front. He was hospitalised on 29 October 2002 and discharged the next day. At this stage, a medical report was accepted as 'exhibit A' by consent.

[21] In his evidence-in-chief the complainant had stated that the appellant fired five (5) shots. He changed this in cross-examination to only two shots. The complainant maintained that he was alone when he went to confront the appellant. Furthermore, he denied that he was in a fighting mood. His version is

that he asked the appellant in a calm manner why he was driving as he did. He vehemently denied assaulting the appellant in any manner.

[22] It is common cause that after his release from hospital on 30 October 2002, the complainant left for Polokwane without reporting the incident to the police. He only reported it when he returned on 14 February 2003, some 4 months later. On being asked why he failed to report the incident much earlier he said that he thought that the appellant would report it.

[23] The State then called Mr Isaac Mokaba (Mokaba). To a large extent, he corroborated the complainant. However, contrary to what the complainant stated, Mokaba testified that the appellant alighted from his vehicle and further that both the complainant and the appellant were shouting at each other whilst outside the appellant's vehicle. Furthermore, he testified that when the complainant approached the appellant he was angry. Of importance, Mokaba testified that the appellant pointed a firearm at him when he returned to the vehicle later. However, there is no evidence that he laid any charge against the appellant for unlawfully pointing at him with the firearm.

[24] Rivonia Mangena was the next state witness. Essentially her version was similar to that of the complainant except in the following respect. She testified that after the two spoke, the appellant alighted from his vehicle. She further testified that when the appellant shot the complainant, he was outside his vehicle. The State then closed its case.

[25] The appellant testified in his defence. He confirmed that there were problems with the complainant whilst driving to Attridgeville as testified by the complainant. His version is that he ultimately stopped at the Engen garage as one of his passengers wanted to buy a cold drink. Three men alighted from the vehicle which had been racing with him earlier and approached him whilst he was seated in his vehicle. Two of them came to his side whilst the third one went to the other side of the car. One of them pulled his drivers' door open whilst the complainant started to assault him with fists and kicks. He started to bleed and feared for his life. He then drew his firearm to defend himself. He fired one shot whereupon all three fled. The next day he went to report the incident to the police.

[26] One Letlhogonolo Kgobe (Kgobe) testified for the defence. As his evidence is similar to that of the appellant, there is no need to rehash it. Of importance is that he confirmed that the appellant was punched and kicked by the complainant as a result of which he bled, and further that a shot was fired during that fracas. His version was that the appellant was inside his vehicle when the assault and shooting took place.

[27] It is trite that the State bears the onus to prove the guilt of the accused beyond reasonable doubt. There is no obligation on an accused where the State bears the onus, to convince the court of the truthfulness of any explanation which he or she may tender. If his version is reasonably possibly true he is entitled to be acquitted even if his explanation might be improbable. *S v V* 2000 (1) SACR 453 (SCA) at 455a-b.

[28] The State's version must be evaluated against this salutary test. The legal question for determination in this appeal is whether the state has proved the guilt of the appellant beyond reasonable doubt.

[29] It is common cause that a problem erupted between the appellant and the complainant as they were driving that night from central Pretoria to Atteridgeville. It is not in dispute that they had engaged in some kind of a racing match until they both stopped at the Engen garage in Atteridgeville. The reckless manner in which they drove suggests that their tempers had flared. It required only a small spark to explode into a confrontation. This is where all the commonalities in their versions end.

[30] There were a number of contradictions which emerged from the complainant himself. Furthermore, there are other material contradictions in the complainant's evidence and that of his witnesses on crucial aspects of the case. First, the complainant denied that he was angry when he confronted the appellant. His own witness, Mokaba testified to the contrary. Secondly, the complainant testified that the appellant fired five shots. However, in cross-examination he reduced these to two. Thirdly, the complainant said that he spoke in a friendly tone to the appellant whereas Mokaba testified that the complainant and the appellant were screaming at each other. The complainant testified that the appellant shot him whilst still seated in his car but Mangena, his other witness testified to the contrary.

[31] I have gleaned the following unsatisfactory aspects from the complainant's version. He testified that as he was driving along to

Atteridgeville he realised that his life was in danger, presumably from the appellant, yet he passed a police station along the way. Instead, he decided to stop at the Engen garage. If he was in danger why pass a police station? Is the reason not that he wanted to confront the appellant? He claimed that he was the victim of an unlawful and unsolicited attack and that he sustained serious injuries. Yet, upon being released from hospital on 30 October 2002, he travelled to Polokwane without first reporting the matter to the police. He only returned and reported the matter in February 2003, four months after the incident. On being asked why the delay, he responded that he thought that the appellant would report the incident. This begs the question: why would the appellant, the alleged guilty party go and report himself?

[32] It is true that a medical report was introduced into the evidence by mutual consent of both parties. However, this medical report proved to be inconclusive. Under the heading 'clinical findings' where the doctor is required to indicate the entrance and exit points of the bullets, he made two question marks. The only reasonable inference to be drawn, absent any explanation, is that the doctor was unable to determine the entrance and exit wounds. However in the same medical report on the schematic drawing of the findings, he indicated the entrance wound as being on the upper right buttock and the exit wound on the right hip.

[33] It is clear that the regional magistrate relied on the medical evidence to reject the appellant's defence of self-evidence, the assumption being that the complainant was shot at the back whilst running or walking away from the appellant. The logical conclusion therefore being that the appellant was not in any danger which justified his shooting. I am of the view that the regional

magistrate erred in accepting and relying on such inconclusive medical evidence. The obligation was on the State to prove beyond reasonable doubt that the complainant was shot from behind. The medical report is of no assistance on this crucial aspect.

[34] Faced with such a glaring contradiction on such a crucial aspect of the case, the regional magistrate had a remedy. He should have called the medical doctor in terms of s 186 of the Criminal Procedure Act 51 of 1977 (CPA) to clarify this uncertainty. This is so particularly as this evidence was used as corroboration for the complainant's version that he was shot from the back.

[35] It is not in dispute that there is inherent contradiction in the medical report. My colleague Shongwe JA agrees that the medical doctor should have been called as an expert to explain this glaring contradiction. However he is of the view that the failure to call the doctor is not fatal to the State's case. I respectfully disagree with him. It suffices to state that in line with the dictum in *R v Difford* 1937 AD 370 and restated in *S v V* (above), the duty is on the state to prove the guilt of the accused beyond reasonable doubt. It follows therefore that there is no obligation on an accused person to make out a case for the State against himself. In any event this would be subversive to s 35(3)(*h*) and (*j*) of the Constitution to be presumed innocent, to remain silent and not to testify during proceedings nor to be compelled to give self-incriminating evidence. See *S v Legote en `n andere* 2001 (2) SACR 179 (SCA) paras 8 and 9.

[36] Particularly because of this serious uncertainty posed by the medical report, which is undeniably ambiguous and called for clarification, it is

important to remind judicial officers presiding over criminal trials that there are times when justice demands that, instead of remaining passive umpires, merely there to ensure that the rules of the game are observed, they have to be proactive, without compromising their impartiality, to call for the relevant evidence, particularly where they are of the view that such a course is necessary to ensure a just outcome. This is such a case. This is the *raison d' être* for s 186 of the Criminal Procedure Act 51 of 1977 which provides that:

'186 court may subpoena witness.

The court may at any stage of criminal proceedings subpoena or cause to be subpoenaed any person as a witness at such proceedings, and the court shall so subpoena a witness or so cause a witness to be subpoenaed if the evidence of such a witness appears to the court essential to the just decision of the case.'

[37] Some 86 years ago, this court described the function of a judge conducting a criminal trial succinctly as follows in *R v Hepworth* 1928 AD 265 at 277:

'A criminal trial is not a game where one side is entitled to claim the benefit of any omission or mistake made by the other side, and a judge's position in a criminal trial is not merely that of an umpire to see that the rules of the game are observed by both sides. A judge is an administrator of justice, he is not merely a figure head, he has not only to direct and control the proceedings according to recognised rules of procedure but to see that justice is done.'

[38] Undoubtedly this dictum salutary as it is, introduces an inquisitorial element to a fundamentally adversarial criminal justice system. However this is intended to avert the possibility of an injustice which might occur should a court remain supine in the face of a need to be proactive to obtain the necessary evidence. However, such a court must be astute to avoid creating the impression

that it has descended into the arena. This is impermissible as it will result in the court getting involved in the dust of conflict between the prosecution and the defence with the concomitant loss of its impartiality, an essential pre-requisite for a fair trial. See *S v Rall* 1982 (1) SA 828 (A); *S v Gerbers* 1997 (2) SACR 601 (SCA).

[39] Given the glaring uncertainty in the medical report, I am of the view that the regional magistrate erred in accepting it without any further investigations. Faced with a similar situation where there was some uncertainty in a medical report concerning the injuries allegedly sustained by a complainant, Wallis JA expressed the following warning in *S v MM* 2012 (2) SACR 18 (SCA) para 24 that 'It is most unsatisfactory to have to reach a conclusion on the basis of uncertainty concerning the meaning of the medical report… Certainly, wherever the implications of the doctor's observations are unclear, the doctor should be called to explain those observations and to guide the court in the correct inference to be drawn from them'. Regrettably the regional magistrate seemed to have relied on the fact that the medical report was accepted as an exhibit by consent. This begs the question: what did the appellant's legal representative consent to? Does his consent explain away the glaring uncertainty in the medical report? The simple answer is no.

[40] We are now left with the two conflicting versions to consider. In line with established authorities I have to consider the State's version and the appellant's version holistically and not on a piecemeal basis. This salutary approach was recently restated by this Court in *S v M* 2006 (1) SACR 135 (SCA) para 189 as follows: 'the point is that the totality of the evidence must be measured, not in isolation, but by assessing properly whether in the light of inherent strength, weaknesses, probabilities and

improbabilities on both sides the balance weighs so heavily in favour of the State that any reasonable doubt about the accused's guilt is excluded.'

[41] I have already pointed out the various contradictions and inconsistencies in the complainant's own version as well as his version in contradistinction to that of his witnesses. It is clear that the complainant was at pains to project himself as an innocent victim of an unprovoked attack by the appellant.

[42] In contradistinction to the State version, the appellant's version is corroborated by his witness, Kgobe that whilst he was seated in his vehicle at the Engen garage, the complainant confronted him angrily and interrogated him on his manner of driving. Although the complainant denied it, it appears to me to be probable, in the light of everyday human life experiences, in particular during road rage situations that tempers flared and the complainant was angry with the appellant because of his manner of driving earlier on, that when he stopped at the garage. The complainant went to confront him in his vehicle and an altercation ensued between them, in the process the complainant assaulted the appellant and the appellant produced his firearm and shot at the complainant to ward off this unlawful attack by the complainant. I furthermore found it probable that in this situation in which the appellant found himself trapped in his vehicle, he could not have had the luxury of time to choose where he was shooting. His life was in actual danger.

[43] It is noteworthy that after the complainant had received medical treatment, he never reported this near fatal incident which on his own version caused him serious bodily injuries, to the police. Instead he moved away to some remote place in Polokwane. He only reported this incident some four

months later during February 2003. On being asked for a reason, he responded that he had expected the appellant to report the incident to the police. The inference is irresistible that the complainant went away without reporting the incident because he knew that he was guilty as he initiated the altercation and he feared that the police might come for him. He needed a cooling off period at a remote area where he could not be traced by the police.

[44] In rejecting the appellant's version the regional magistrate relied on some discrepancies which emerged from the appellant's version and that of his witnesses. These discrepancies relate to the number of passengers in the appellant's motor vehicle and an indication on the sketch map of how the vehicles stood. Regrettably the regional magistrate does not explain how these discrepancies impact on the reliability and cogency of the appellant's version. Having read the record, I find that these discrepancies, given the general conspectus of the evidence are minor and have no bearing on the other parts of the appellant's version. To my mind this is to be expected from an imperfect witness. *S v Mkohle* 1990 (1) SACR 95 (A) at 98E-F. Absent any serious criticism against the appellant and his witness, the regional magistrate erred in rejecting his version as it could not be said that it was not reasonably possibly true. See *S v V* (above). It follows that this appeal must succeed.

[45] In the result the appeal is upheld and the conviction is set aside.

L O BOSIELO
JUDGE OF APPEAL

Appearances

For the Appellant:	H L Alberts
	Instructed by:
	Justice Centre, Pretoria
	Justice Centre, Bloemfontein
For the Respondent:	P Vorster
	Instructed by:
	Director of Public Prosecutions, Pretoria
	Director of Public Prosecutions, Bloemfontein