REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE DIVISION, BHISHO)

In the matter between: Case No: 1111/2014

MLUNGISI ERIC PAPU

FEZEKILE ERIC MASETI

ZUKILE ZINTO **Appellants**

And

THE STATE **Respondent**

Coram: **Chetty, Roberson and Mjali JJJ**

Heard: **17 October 2014**

Delivered: **5 November 2014**

Summary: ***Appeal*** *– Against conviction and sentence – Murder – Criminal Law – Private defence – Putative private defence – Requirements of – Common purpose – Obedience to orders – Whether established – Appeal dismissed – Sentence – No misdirection – Sentence confirmed*

JUDGMENT

CHETTY J: -

[1] During the early hours of 14 May 2006, Mr *V. S. N.* (the deceased) was shot and killed outside the dwelling on his farm, Hill Crest, in the district of Seymour. It is common cause that his death was caused by a high velocity gunshot wound to the head, which, on the uncontroverted evidence adduced from the forensic pathologist, Dr G. *Perumal*, had been fired from either an R4 or R5 rifle. It is furthermore not in dispute that the three appellants, all seasoned policemen, armed with R5 assault rifles, had fired shots in the general direction of the farmhouse whence the cadaver was discovered by them shortly after discharging their rifles.

[2] Following upon investigation by the then independent complaints directorate, the appellants[1] were arraigned for trial before Van Zyl J, on a charge of murdering the deceased. They pleaded not guilty and elected not to tender a plea explanation but, as the trial progressed, in conformity with the ambivalent defence proffered to the state witnesses under cross-examination by their counsel, testified that they had acted in self-defence and had resorted to reasonable force to repel an unlawful, life threatening attack directed at them. In its judgment, the trial court, upon a conspectus of the evidence adduced, held that the state had discharged the onus of proving that the appellants had not acted in either private defence or putative private defence and convicted them of murder.

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[1]At the inception of the appeal we were informed of the first appellant's demise. In confirmation thereof, his death certificate was handed in from the bar.

[3] It is apposite, given the conflation of the defences raised, i.e. private defence and putative private defence, both in the court *a quo*, and before us on appeal, to emphasize their disparateness. The distinction between the two defences was articulated by Smalberger J.A, in ***S v De Oliveira***[2], as: -

> **"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. 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."**

[2] 1993 (2) SACR 59 (A) at 63-4

[4] The appellants' reliance on private defence was rejected by the trial court after an holistic examination and appraisal of the evidence concerning the sequence of events which preceded the exchange of gunfire between them and the deceased. The *ratio* for that finding is encapsulated in the following passage[3] from the judgment, where the learned judge reasoned as follows: -

> "Even if the version of the Accused persons are to accepted, I am still not convinced in the circumstances it can be said that objectively, they acted in self defence. Leaving aside any conclusion that, for the reason stated earlier they were not authorised by law to enter the farm of the deceased and to conduct a warrantless search, in other words, an attack on them was not unlawful, I am of the view that in the circumstances the action taken was not necessary and it was not the only way to avert an attack on them. After the first shot was fired the Accused persons were able to take cover. It is clear from the photographs taken from the area around the farmhouse that there was sufficient place for them to take cover. It must be considered that it was dark according to the Accused persons, visibility was not good so that any person shooting at them was in no better position than they were. If it is also not a situation where they were trapped with no way out and with no other options. Except for taking cover they were able to retreat in the direction from where they came, a warning shot or shots may have been fired after they had taken cover. As stated the deceased or for that matter anyone else on the farm would quite clearly have been outnumbered and outgunned. I am accordingly satisfied that the State had discharged the onus with regard to the unlawfulness of the Accused actions and that they were not acting in self defence."

[3]Page 483, line 20 to page 484, line 19 of the transcript.

[5] The trial court's rejection of the defence based upon private defence has evoked a barrage of criticism and ushered in the appeal. In order to test the validity of the submissions advanced hereanent the enquiry into whether the state discharged the onus of proving the unlawfulness of the appellants' conduct must perforce commence with an analysis of the evidence of the occupants of the farmhouse, to wit, the deceased's wife, Mrs *N. M. (Mrs M.)*, his son, *S. M.* (*S.*) and his cousin, *L. N.* (*L.*). I shall henceforth refer to them either by name or collectively as the occupants. In its assessment and evaluation of their testimony, the trial court accepted that they were honest and reliable witnesses. That finding was arrived at after a thorough analysis of the evidence, cognisant of, and with due regard to the contradictions in their narrative, *inter se*, and the inconsistencies between the versions deposed to in court and the content of their statements which they admittedly made to the police. These features, counsel proclaimed, pointed to their dishonesty and warranted a rejection of their testimony as palpably false. The generalised submission is untenable. The correct approach, extrapolated from the judgment of Olivier J.A in ***S v Mafaladiso and Another***[4] appears, in condensed form, in the headnote, thus,: -

> "The juridical approach to contradictions between two witnesses and contradictions between the versions of the same witness (such as, inter alia, between her or his viva voce evidence and a previous statement) is, in principle (even if not in degree), identical. Indeed, in neither case is the aim to prove which of the versions is correct, but to satisfy oneself that the witness could err,

[4] 2003 (1) SACR 583 (SCA)

either because of a defective recollection or because of dishonesty. The mere fact that it is evident that there are self-contradictions must be approached with caution by a court. Firstly, it must be carefully determined what the witnesses actually meant to say on each occasion, in order to determine whether there is an actual contradiction and what is the precise nature thereof. In this regard the adjudicator of fact must keep in mind that a previous statement is not taken down by means of cross-examination, that there may be language and cultural differences between the witness and the person taking down the statement which can stand in the way of what precisely was meant, and that the person giving the statement is seldom, if ever, asked by the police officer to explain their statement in detail. Secondly, it must be kept in mind that not every error by a witness and not every contradiction or deviation affects the credibility of a witness. Non-material deviations are not necessarily relevant. Thirdly, the contradictory versions must be considered and evaluated on a holistic basis. The circumstances under which the versions were made, the proven reasons for the contradictions, the actual effect of the contradictions with regard to the reliability and credibility of the witness, the question whether the witness was given a sufficient opportunity to explain the contradictions - and the quality of the explanations - and the connection between the contradictions and the rest of the witness' evidence, amongst other factors, to be taken into consideration and weighed up. Lastly, there is the final task of the trial Judge, namely to weigh up the previous statement against the viva voce evidence, to consider all the evidence and to decide whether it is reliable or not and to decide whether the truth has been told, despite any shortcomings."

[6] It is evident from the trial court's reasoning that it was alive to the shortcomings in the evidence of the occupants of the farmhouse. The cautious approach in evaluating their testimony is amply demonstrated by the trial court's reluctance to find that, as a fact, the deceased had not fired a shot. The process of reasoning underlying the trial court's finding that the deceased had in all probability fired the first shot, and which, in fact, affords corroboration for the appellants' version, cannot be faulted. Such finding does however not impact deleteriously upon the veracity of the occupants of the farmhouse and the reliability of their evidence. The uncontroverted facts were that the farmhouse was situate in an isolated area. When *L.* and *S.* emerged from the house in the company of the deceased they were enveloped in darkness, the only source of light being the moon. The barking of the dogs and their movement towards the carport indicated something amiss and precipitated their, i.e. the deceased, *L.* and *S.'s*, ambulation thence. The trial court accepted their testimony that the torch had not been switched on and that the deceased's exhortation to those lurking in the shadows to announce their presence was met with silence. As adumbrated hereinbefore, the trial court found that the deceased had then fired a shot.

[7] The trial court's finding that the state had discharged the onus proving the unlawfulness of the appellants' conduct was not arrived at capriciously. It conducted a thorough analysis of the train of events from the time the first appellant received a request from Captain *Zixesha* to command the operation to apprehend the suspect

until the exchange of gunfire. The judgment emphasizes the unsatisfactory features of their testimony and a reading of the transcript vouchsafes the judge's categorisation of their narrative of events as disturbing. It is abundantly clear, as the trial court correctly found, that none of the appellants could have entertained a reasonable suspicion that their quarry was on the farm. To thus proceed, under cover of darkness, to a remote farm, armed with a battery of artillery and, with a contingency plan foremost in their minds to shoot, if shot at, was not only unreasonable, but foolhardy in the extreme.

[8] The conduct of the first appellant, who by his own admission was the commander of the posse, demonstrates a level of ineptitude of epic proportions. It is obvious from his testimony that notwithstanding a briefing by him, the second and third appellants, other members of the posse and their superiors, no proper planning whatsoever precipitated their intrusion onto the farm. It is inconceivable that during the briefing, particulars of the intended location, the identity of the occupants and the general terrain would not have been divulged to all and sundry. Consequently, the second appellant's denial that whilst they were at the police station, he had no inkling of their destination is nonsensical and so too, his further testimony that although the intention was to defer the operation given the lateness of the hour, it was nonetheless proceeded with by reason of the third appellant's persistence. It is common cause that the second appellant and the deceased were well acquainted. According to Mrs *M.* he had visited the farm on a previous occasion and their home in Fort Beaufort several times. He would therefore at the very least, on arrival at the farm, have realised that it belonged to the deceased who resided there with his family.

[9] The aforementioned factors no doubt contributed to the trial court's categorisation of their conduct as disturbing. What subsequently ensued however was bizarre and validates the finding that their conduct was unreasonable in the extreme, particularly in the light of the appellants' evidence that their avowed purpose, on reaching the farmhouse, was to proceed to the front door, knock, and make known their intention, i.e. the search for the suspect. The untruthfulness of that version is underscored by their silence to the deceased's exhortation to reveal their identity.

[10] The trial court's reservation concerning their veracity is accentuated when regard is had to the objective factors. They readily conceded that in all probability there would be dogs on the farm who, alerted to their presence would react by barking. The natural consequence, given the isolation of the farm and the reality of criminal activity on farmland, would have led to the occupants investigating the cause of the barking. The third appellant's admission that visibility was restricted to shadows would inevitably have alerted the deceased to the presence of unknown persons in proximity to him and his family. It is self-evident that in those circumstances, the deceased's actions in firing a shot at what he believed to be intruders on his property, was clearly not unlawful.

[11] The criticism directed at the trial court's finding that the return of fire by the appellants was an overreaction which militated against it being construed as a

defensive act, is unwarranted and ignores crucial aspects of the first appellant's testimony. He readily admitted under cross-examination that the **"contingency plan"** on being shot at, was to return fire. It is clear from the appellants' testimony that their foolhardy conduct had placed them in a situation where panic, instead of a measured response, held sway. The first appellant's admission that he fired after he and the posse had taken cover behind the trailer refutes any suggestion that they had acted in private defence.

[12] The trial court's further finding that the appellants' reliance on putative private defence was equally misplaced is, upon an objective appraisal of the evidence adduced, undoubtedly correct. The appellants, and, a fortiori their contingent, were all armed with assault rifles. When the deceased fired the first shot, the appellants, by their own admission, took cover behind the trailer before returning fire. The area was enveloped in darkness, they lay prone on the ground and, could have retreated whilst in a prone position. On the application of the test formulated in **De Oliveira**, they could thus not honestly have believed that their lives were in imminent danger. Being shrouded in darkness and invisible to the perceived threat, they were in comparative safety and it is inconceivable that they could, under those circumstances, have believed that they were entitled to fire into the darkness, directly at a would-be attacker, in defence of their lives, without even a warning shot. The trial court's finding that the state had proved beyond a reasonable doubt that the appellants' subjectively had the requisite intent to found a conviction for murder is undoubtedly correct.

[13] Mr *Bloem* furthermore submitted that the appellants were in any event entitled to an acquittal by virtue of the prosecutions' failure to exclude the reasonable possibility that the fatal shot which struck the deceased could have been fired by either Sergeant *Soci* or Inspector *Bastille* both of whom, it is common cause, formed part of the posse. I interpolate to say that it was common cause that the appellants, *Soci* and *Bastille* were all armed with R5 assault rifles and, as adumbrated hereinbefore, the cause of death was a high velocity gunshot wound of the head. In rejecting the aforesaid submission advanced on behalf of the appellants, the trial judge reasoned as follows: -

> "[28] In my view the submission made in this regard cannot be sustained. As stated earlier the Accused persons as well as the other Policemen who accompanied them to the farm were issued with R5 rifles at the Seymour Police Station. They were accordingly aware that each of them were armed with firearms. It is further evidenced from the evidence that they believed the suspect to be on the farm and that he was also armed with firearms. Their decision to arm themselves not only with 9mm pistols but also with high calibre rifles must quite clearly be seen against the background of the incident that took place the previous day when the suspect allegedly fired shots at a Police vehicle. The Accused persons and those who went with them quite clearly expected trouble. That was the picture which they were at pains to create in their evidence.
>
> [29] Having armed themselves in that manner and expecting a shooting they were quite clearly ready to use the firearms. The question that must be answered in these circumstances is whether

> the Accused persons subjectively foresaw that possibility that one or more of the number may discharge their firearms and that someone may be fatally shot. In my view, having regard to the evidence and the circumstances, which I will highlight more fully hereunder, the Accused persons had the required subjective foresight. To this extent I am mindful that the question is not whether objectively the Accused ought to reasonably have foreseen such possibilities. That is not sufficient when on a charge of murder where intention is an element. The distinction must be observed between what actually went on in the mind of the Accused and what would have gone on in the mind of the *bonus pater familias* in the position of the Accused. In other words, the distinction between the subjective foresight and objective foreseeability must not become blurred. The *Factum probandum* is *dolis*, not culpa. Like any other issue, subjective foresight may be proved by inference."

[14] The juridical validity of the trial court's reasoning has however evoked a caustic response. On appeal before us, Mr *Bloem*, whilst expressly acknowledging that the appellants' conviction was based upon the trial court's application of the doctrine of common purpose, submitted that ". . . ***The state failed to prove that, at any stage prior to the shooting, the appellants planned (intended) to engage in criminal activity."*** The critique directed at the trial court's reasoning fails to appreciate that not only *dolus directus*, but *dolus eventualis*, may constitute the fault

component for liability based upon common purpose, succinctly set out in ***S v Mgedezi and Others***[5] as follows: -

> In the absence of proof of a prior agreement, accused No 6, who was not shown to have contributed causally to the killing or wounding of the occupants of room 12, can be held liable for those events, on the basis of the decision in S v Safatsa and Others1988 (1) SA 868 (A), only if certain prerequisites are satisfied. In the first place, he must have been present at the scene where the violence was being committed. Secondly, he must have been aware of the assault on the inmates of room 12. Thirdly, he must have intended to make common cause with those who were actually perpetrating the assault. Fourthly, he must have manifested his sharing of a common purpose with the perpetrators of the assault by himself performing some act of association with the conduct of the others. Fifthly, he must have had the requisite mens rea;"

[15] By their own admission, the appellants knew that the farm was inhabited and that their unsolicited arrival, under cover of darkness, would inevitably invite reaction from dogs on the property and investigation by the occupants. Their exiguous intelligence, albeit hearsay, was that their quarry was armed and not averse to discharging his firearm. The first appellant's candid riposte to the question posed under cross-examination:-

[5] 1989 (1) SA 687 (AD) at 705I-706B

> "In your planning, what was your contingency plan in case you were shot at",
>
> to wit
>
> "If you have been shot at you return fire."

ineluctably compels the inference that he, and a fortiori the second and third appellants must have, and did indeed foresee that someone could have been killed in the course of their foolhardy mission and reconciled themselves therewith. Under these circumstances the prerequisites to found a conviction upon application of the doctrine of common purpose were clearly established by the prosecution.

[16] The transcript of the proceedings validates the trial court's rejection of the appellants' testimony and renders nugatory a regurgitation of both their evidence and the underlying reasoning in this judgment, save for two aspects which exemplify their untruthfulness – the first, the alleged warning uttered by the first appellant to the effect that they were the police, and the second, relating to the cadaver clutching the firearm. I interpolate to say that as regards the first issue, the appellants, in contradistinction to the state witnesses, steadfastly maintained that visibility was virtually impossible, the only source of light being emitted, that from the torch.

[17] Their version that the torch shone and was switched off immediately prior to the firing of the first shot was denied by *L.* and *S.*. The trial court's acceptance of their evidence that the torch had not been used and that the first shot had been fired by reason of non-responsiveness to the deceased's exhortations to the invisible

intruders to identify themselves was based upon its credibility findings, their reliability and the probabilities. I have in the course of this judgment elaborated upon the reasons why the trial court's findings on credibility and reliability are unimpeachable. The probabilities reinforce the trial court's findings.

[18] The appellants' testimony that their pronouncement that they were the police elicited gunfire is improbable in the extreme for two reasons – firstly, if it had been uttered, the deceased's fears that there were marauders on his farm would have been assuaged and, secondly, as the court *a quo* correctly found, if the torch holder was in fact their quarry, he would have turned coat and fled into the darkness to avoid apprehension.

The gun in the deceased's hand

[19] Whilst the trial court correctly found that the deceased had in all probability fired the first shot, the medical evidence adduced established the deceptive character of photograph 9 of exhibit "C" which depicts the deceased holding the firearm. During cross-examination, Dr *Perumal*, in response to the question: -

> "Exhibit "C". In your opinion would you expect the firearm to have remained in the hand in the manner depicted there? ---"

stated the following: -

> ". . ., the answer to that question is no I do not expect it to be there and the reason for that is if we just consider two

> mechanisms of tissue destruction in this case the shockwaves being one created by the bullet and the other is temporary cavity created which would cause massive and extensive destruction of tissue brain tissue here it would have caused this deceased to fall immediately with no residual muscular activity. The firearm is a heavy instrument it will fall of the hand of the person before he reaches the ground. Even if he did have residual which is not likely if not impossible here any person who does have residual muscle activity when the firearm strikes the ground as seen in photos five, six and eight and nine would dislodge from the hand."

[20] The firearm could therefor only have been placed in the deceased's hand after the shooting and the inference is inescapable that it had been so planted by the appellants or other members of their posse and invites the question, why? Although the trial court omitted any reference to this factor in its assessment of the appellants' evidence, this act of deception, must, by its very nature, impact deleteriously on their honesty.

Obedience to orders

[21] In argument before us, Mr *Bloem*, finding succour in various passages in the transcript, wherein the first and second appellants' narrated the circumstances of their involvement in the apprehension of their quarry, raised obedience to orders as a further defence. I interpolate to say that this defence was neither proffered at the trial nor was it raised in the notice of appeal. The submission advanced that the appellants are entitled to raise the defence on appeal for the first time inasmuch as it

involves a question of law is spurious. The question whether an act is justified by a defence of obedience to orders is essentially a question of fact, and however much one scours the appellants' testimony for traces of such a defence, it remains illusory. But, even assuming that their testimony, liberally interpreted, discloses such a defence, its requirements have clearly not been fulfilled. See ***S v Banda***[6].

Sentence

[22] The appellants were sentenced to direct imprisonment pursuant to the provisions of s 276(1)(i) of the ***Criminal Procedure Act***[7]. The first appellant, for five years and the second and third appellants, to four years respectively. The gravamen of the attack on the sentence imposed relates to the alleged overemphasis of, not only the deterrent component of the sentencing regime but the offence itself. Quintessentially, the appellants contend that the imposition of a custodial sentence, albeit in the terms imposed, was entirely inappropriate. To repeat what is trite - sentence is pre-eminently a matter in the discretion of the sentencing court. Absent recognised grounds warranting interference, the sentence stands.

[23] In developing the argument for the substitution of the sentence imposed by one in terms of s 276(1)(h), Mr *Bloem*, with reference to the appellants' personal circumstances, the manner in which the deceased was killed and a plethora of case

[6]1990 (3) SA 466 (B) at 480 et seq.
[7]Act No 51 of 1977

law, submitted that the trial court clearly misdirected itself. The misdirection contended for is misplaced. It is apparent from the judgment that the trial court gave careful consideration to all factors relevant to sentence and the sentencing options. At the conclusion of that exercise it imposed the sentence which it considered appropriate. Interference therewith is unwarranted. In the result the following order will issue: -

The appeal is dismissed.

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D.CHETTY

JUDGE OF THE HIGH COURT

Roberson J,

I agree.

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J.M. ROBERSON

JUDGE OF THE HIGH COURT

Mjali J,

I agree.

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G.N.Z. Mjali

JUDGE OF THE HIGH COURT

Obo the Appellant:	Adv G.H. Bloem SC
Instructed by	State Attorneys, 3rd Floor, Permanent Building, C/O Oxford and Terminus Streets, East London
	Ref: Mr Nabela
	Tel: 082 355 0297
Obo the Respondent:	Adv F. Kruger
	Deputy Director of Public Prosecutions
	Independence Avenue, Bhisho