IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, JOHANNESBURG)

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: NO.
(2) OF INTEREST TO OTHER JUDGES: NO.
(3) REVISED. YES

19 NOVEMBER
2021 **.....**
DATE **SIGNATURE**

Case No. A08/2021

In the matter between:

SCHALKWYK, BRUCE ALISTAIR **APPELLANT**

and

THE STATE **RESPONDENT**

JUDGMENT

MILLAR, A J

1. On 14 November 2017, the appellant, a 31-year-old security officer, was convicted in the High Court of murder and attempted murder. On 22 November 2017, he was sentenced to 12 years in prison for the murder and to 7 years for the attempted murder, both of which were to be served concurrently. He was not declared unfit to possess a firearm and no order was made in terms of the Firearms Control Act[1] declaring him unfit to possess a firearm[2] notwithstanding that the offence for which he had been convicted and sentenced had involved the use of a firearm.

2. The appeal before this court is against both convictions, leave having been granted by the court *a quo*. The central issue in this appeal is whether, the court *a quo* being faced with two mutually destructive versions, was correct in preferring the evidence of the state witnesses over that of the appellant.

3. The incident that gave rise to the conviction of the appellant arose out of "road rage" – an occurrence that has become increasingly common place. Such occurrences are by their very nature emotionally highly charged and happen in a very short space of time while those involved were otherwise going about their daily business[3].

4. It was common cause or not disputed that on the evening of 28 October 2016, and at approximately 20h00 and moving from the N1 freeway offramp onto New Road in Midrand, a BMW motor vehicle with four occupants and a Corsa utility van with one occupant became involved in what developed into a road rage incident. The occupants of the BMW, two males and two females, were on their way from their employer's year-end

[1] 60 of 2000

[2] In terms of section 103(1)

[3] See for example S v Eadie 2002 (3) SA 719 (SCA); Ntshasa v S 2011 (2) SACR 269 (FB); S v Baloyi (SS14/2020) [2021] ZAGPJHC 126 (17 May 2021)

function to go and fetch the fiancée of the driver at her place of employment in Midrand. The driver of the Corsa, the appellant, was a security officer who was on his way to work in Midrand to commence his shift. Both vehicles were moving parallel to each other. From this point onwards, the evidence diverged.

5. At some point the Corsa was alleged to have moved in front of the BMW "cutting it off" and this was the beginning of the incident. The appellant testified that he had wanted to change lanes so as to go to a nearby garage to make some purchases from the shop for his forthcoming shift. The BMW had accelerated and prevented him from doing so.

6. Both vehicles then made a U-turn to travel back in the direction from which they had come. The appellant's evidence was that he had done so as that was the direction to his place of employment. The driver of the BMW's evidence was that he had done so in order to take another longer and more circuitous route to his fiancée's workplace in order to avoid a confrontation with the appellant.

7. After the vehicles had made a U-turn and were now travelling in the same direction, a short while later, the BMW moved in front of the Corsa and stopped. The reason for doing this according to the driver of the BMW was that there had been further aggressive behavior through driving – accelerating and braking, by the Corsa and that he could not continue because his passengers were becoming panicky.

8. The appellant's evidence was that the BMW had come to a stop in front of him at an angle and in such a way that he was compelled to stop his vehicle. His evidence was to the effect that he had been cut off and that there was a short distance between the front of his Corsa and the BMW.

9. The driver of the BMW and two of the occupants (who testified) said that the BMW had not

come to a stop in a manner that blocked the Corsa and furthermore, that the distance between the back of the BMW and front of the Corsa was some meters as evidenced by the subsequent recordal of the positions of the vehicles by the police.

10. On this aspect, the appellant was adamant that the BMW had subsequently been moved and that what the police had recorded did not reflect the position of the vehicles at the time of the incident. The relative positions of the vehicles once they had come to a stop has no bearing on what subsequently transpired.

11. Once the BMW came to a halt, the driver and two passengers exited the vehicle. One of the passengers, a male co-worker, admitted in his evidence that he was under the influence of liquor – the second, a female co-worker.

12. The evidence of the driver of the BMW was that he had gone towards the Corsa with his hands out in front of him in a questioning gesture – wanting to know what the appellant was doing. When he reached the Corsa, the appellant appeared to want to get out of his vehicle, so he then pushed the door to close it and stood against it to prevent the appellant from exiting the vehicle. He testified that he had done this as he did not want the appellant to get out of his vehicle as he feared that he may wish to fight with him.

13. The appellant managed to get the door of the Corsa open and at that point, when he tried to get out, the driver of the BMW had grabbed him by his wrists to try and restrain him and had tried to push him back into the car.

14. It was at this point that the appellant had begun to search with his right hand behind the driver's seat and when it came out, he had a firearm in it. When the driver of the BMW saw the firearm, he looked up and saw the male co-worker near the BMW and shouted to

him that there was a firearm and he had then run back to the BMW. While in the process of getting in had heard a gunshot.

15. The appellant testified that the driver of the BMW had approached him but had opened the door of the Corsa and attacked him by grabbing him by his arms, corroborated by marks on his arms observed and recorded by the Magistrate when he had first appeared in court. The driver of the BMW was pushing him and trying to throttle him. He noticed a woman coming towards him and screaming that they should stop fighting.

16. His evidence was that as part of his employment, he carried a firearm and that it was properly and safely holstered in a "tactical" holster on his right thigh. He testified that he did not reach behind his seat but that rather the driver of the BMW had seen his firearm in the holster and had grabbed for it and that the scuffle that took place in the vehicle, was in fact for possession of the firearm. It was during this scuffle that the firearm had discharged and that the driver of the BMW had then run back to his car.

17. In consequence of the discharge of the firearm, the woman was fatally wounded.

18. The evidence of the male passenger in the BMW, was that he had got out of the BMW and seen his driver holding the door of the Corsa. He had then seen the Corsa door open and witnessed the scuffle. He had seen the appellant's left hand going behind the seat and had then heard the shout that there was a firearm. Afterwards he saw the deceased lying on the road between the two vehicles.

19. The second female passenger in the BMW testified that from the time the BMW came to a halt, she had sat in the vehicle and had not exited it until the police arrived on the scene. Her evidence was that the driver exited followed by the male passenger. She was unable to say when the deceased had exited the vehicle.

20. All the witnesses who testified gave evidence about what transpired after the deceased had been shot. It is not necessary for purposes of this appeal to traverse that evidence. What is clear on a conspectus of all the evidence and from both versions, is that the incident was an emotionally driven one which was exacerbated by the fatal shooting of the deceased.

21. When regard is had to the self-admitted state of intoxication of the male passenger, his evidence is at best corroborative of only certain aspects of the evidence of the driver of the BMW. This together with the version of the female passenger that throughout the incident, that she remained seated in the BMW, in my view, lends no additional weight to the version of the driver of the BMW.[4]

22. On the version of the driver of the BMW, the appellant was at all times the aggressor. It was the appellant who cut him off and thus started the chain of events. Notwithstanding this however, even on his version, he made a U-turn to go in the same direction as the appellant, then stopped his vehicle in front of the appellant's vehicle and then together with two passengers exited his vehicle and went towards the appellant's vehicle.

23. On this version, before the appellant had even exited his vehicle, or for that matter even reached for his firearm, the driver of the BMW kept the appellant's door closed and once opened then wrestled with the appellant to keep him inside the Corsa. It was only after he had wrestled with the appellant to keep the appellant in his vehicle that he is alleged to have reached behind the seat for his firearm.

24. In summary, the version proffered in support of the state's case, was that the appellant having now located his firearm behind the seat and having drawn it, notwithstanding the

[4] S v Mbuli 2003 (1) SACR 97 (SCA)

driver of the BMW having fled, fired at the deceased killing her.

25. The version of the appellant was that the firearm had discharged in the scuffle for control of it and that it was unknown who had pulled the trigger.

26. Faced with these two mutually destructive and irreconcilable versions, which is to be preferred and has the respondent discharged the onus upon it?

27. In regard to onus, it is trite that in a criminal trial, the state is required to prove its case beyond a reasonable doubt[5] and *"… the totality of evidence must be measured, not in isolation, but by assessing properly whether in the light of the inherent strengths, 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"* [6]

28. The court *a quo* found that the evidence of the driver of the BMW and his passengers were credible and reliable and rejected the evidence of the appellant as false. The underlying premise for this finding was that the appellant had been the aggressor.

29. Objectively considered however, the conduct of the driver of the BMW and his witnesses in firstly stopping their vehicle and then exiting it and going back to confront the appellant – reaching his vehicle before he could exit it (and even on their version before the firearm had even been sought by him from behind the seat of his vehicle) does not point to the appellant as being the aggressor. This is an improbability in the version presented by the state and in considering it, regard must be had to the version of the appellant.

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[5] S v Alex Carriers (Pty) Ltd and Others 1985 (3) SA 79 (T)

[6] S v M 2006 (1) SACR 135 (SCA) paragraph 18

30. In this regard, and apposite to the present appeal, Brand AJA in S v Shakell[7] found that *"…in view of this standard of proof in a criminal case, a court does not have to be convinced that every detail of an accused's version is true. If the accused's version is reasonably possibly true in substance, the court must decide the matter on the acceptance of that version. Of course, it is permissible to test the accused's version against the inherent probabilities. But it cannot be rejected merely because it is improbable; it can only be rejected on the basis of inherent probabilities if it can be said to be so improbable that it cannot reasonably possibly be true. On my reading of the judgment of the Court a quo its reasoning lacks this final and crucial step. On this final enquiry I consider the answer to be that, notwithstanding certain improbabilities in the appellants version, the reasonable possibility remains that the substance thereof may be true. This conclusion is strengthened by the absence of any apparent reason why the appellant would, without any motive, decide to brutally murder the deceased by shooting him in the mouth at point blank range. As a consequence the matter must be decided on the appellants version. According to the appellant's version he never intended to fire a shot. On acceptance of that version there is no room for a finding of dolus in any of its recognized forms. It follows that the conviction of murder cannot stand."*

31. On consideration of the evidence, the appellant found himself in his vehicle facing three persons approaching him. He did not exit his vehicle but was trapped in it and thereafter a scuffle ensued. Faced with this predicament there was no luxury of time[8] and yet even on the state's evidence he failed to immediately brandish his firearm. The court a quo's unqualified acceptance of the version of the State witnesses and finding that the version of the appellant was false is for this reason incapable of fair-minded support. I find on the

[7] S v Shakell 2001 (4) SA 1 (SCA) at paragraph 30

[8] See Ngobeni v S (741/13) [2014] ZASCA 59 (2 May 2014) at paragraph [42]

probabilities that the version of the appellant is reasonably possibly true, and that accordingly the appeal must succeed.

32. In the circumstances, I propose the following order:

32.1 The appeal is upheld.

32.2 The convictions for murder and attempted murder are set aside.

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A MILLAR

ACTING JUDGE OF THE HIGH COURT

I AGREE AND IT IS SO ORDERED

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R STRYDOM

JUDGE OF THE HIGH COURT

I AGREE

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W KARAM

ACTING JUDGE OF THE HIGH COURT

HEARD ON:	15 NOVEMBER 2021
JUDGMENT DELIVERED ON:	19 NOVEMBER 2021
COUNSEL FOR THE APPELLANT:	MR JC KRUGER
INSTRUCTED BY:	BDK ATTORNEYS DAVID BOTHA, DU PLESSIS & KRUGER INC.
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INSTRUCTED BY:	THE STATE ATTORNEY
REFERENCE:	SS 24/2017