

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: SS12/2019

DATE: 2022-11-17

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES / NO.

(2) OF INTEREST TO OTHER JUDGES: YES / NO.

(3) REVISED.

DATE

SIGNATURE

10 In the matter between

STATE

Plaintiff

LLOYD JERMAINE DAVIDS

Defendant

J U D G M E N T

STRYDOM J: This is now the judgment on this application for leave to appeal. This is an application for leave to appeal against the conviction only, filed by the erstwhile accused 1, the applicant in this matter.

20 The test is whether there is a reasonable prospect that another court would come to a different conclusion, than the decision of this Court. In the application for leave to appeal, various points were raised relating to factual findings made by this Court. It was argued that there were incorrect factual findings made and it was raised that the Court could not have rejected the alibi of the applicant. A more general approach was raised and adopted that

the totality of evidence did not point to the fact that accused 1 in fact, was responsible for firing the shots that killed the deceased and injured other people.

Now the Court will first consider the allege misdirection on factual issues. The first point which was raised, was raised on the basis of the transcribed record where it was typed on a question whether the state witness had a firearm in his possession asked by the state prosecutor Ms Peck as follows, and I quote:

“Ms Peck: I am not asking the type of gun, I am asking did you see him with
10 a firearm?”

Ms Adams: Yes.

Ms: Peck: How many firearms did you see on that day?

Ms Adams: Two.

Ms Peck: Two. In whose possession did you see these firearms? Who were the people that possesses these firearms?

Ms Adams: Otties and Ray.

Ms Peck: Did Lebato have a firearm (*Lebato will be a reference to Levert*).

Ms Adams: Not that I have seen.

Ms Peck: Did Shaheez Esau have a firearm?

20 Ms Adams: Ja”

Now if one read the contexts of the questions and answers, previously it was stated that two people had firearms, and these two people were identified as the two accused. Later then the question is asked whether the witness Shaheez Ezzo (*Shaez Moolgie*), had a firearm. Then the answer was ‘Ja’. This answer came out of context because that would have placed

three firearms on the scene. The Court can also mention that would have been a material fact which would have been developed further during cross-examination, during argument and all that and this did not happen. So, the Court was uncertain whether that answer 'Ja' was correctly transcribed.

The Court then went ahead to listen to the best evidence, which is the audio recording. Then the Court could clearly hear that the answer was 'No' and not 'Ja'. The transcribers were informed about this, they again listened to the recording and typed the correct version which was later provided to the Court. As far as the relevant portion is concerned, it now reads and I quote
10 the relevant portion:

"Prosecutor: Did Levart have a firearm?

Witness: Not that I see, I never saw he had one.

Prosecutor: Did she Shaez Izo have a firearm?

Witness: No."

Thus the previous transcribed answer changed from "Ja" to "No". This is unfortunate but as I say the best evidence is the audio, original audio recording and according to that there was a wrong answer typed.

This would mean that this was not a misdirection on the facts as far as the Court is concerned. At the stage when the judgment was provided the
20 Court did not consider the full context of the record. If it was available at that stage already, I am a bit uncertain of, but according to my own notes, as well, the answer should have been 'no'. Be that as it may, this is not a misdirection and does not affect the outcome of this Court's ultimate decision.

Then the next point which was raised relates to whether the state

witness, Mr Moolgie, was part of the Varados gang. The Court made a finding that he was according to the evidence not part of the Varados gang. If one considers the evidence at some stage it was admitted by the witness, Mr Levert May that Moolgie was part of Varados, but he said that there were various Varados groups and that Moolgie was not part of the Tamboekiehof group but of another group which operate in Coronationville. There is some merit in the fact that the finding was not precise in this regard. In my view it is not a material aspect and it did certainly not affect the ultimate finding of this Court.

10 The same applies to the third ground which was mentioned, indicating a wrong factual finding. This related to the issue of the name Valentino which it was argued, according to the evidence, was another name for Bitsy, which again was another name for Levert May. It was argued that the Court should have found that accused 1, in his statement also mentioned Valentino, therefore that Levert May was involved in the shooting of Marvin Constance. This is a collateral issue and certainly is not a material issue and had no impact on the finding of this Court. Moreover, according to the evidence accused 1 denied that he mentioned Valentino in his statement and he suggested that this name Valentino was filled in by the police officer that took
20 his statement. So, certainly this point or this alleged wrong factual finding is immaterial, as far as this matter is concerned.

The next point raised, was that the Court should not have rejected the accused's alibi, and the witness that testified about this alibi, as that this version was reasonably possibly true. The Court considered the evidence and in my view another Court would not come to a conclusion that this

evidence should have been accepted.

The last point which was raised, was that the state did not prove beyond reasonable doubt that accused 1 fired a shot, which ultimately killed the deceased and injured other people. Now, I have dealt fully with this issue in my judgment. The Court found that the two accused acted in concert. There was evidence that they fired the shots, and the intension was to shoot and kill the two state witnesses, Levert May and Moolgie. As a result of these shots being fired they killed Heather Peterson and injured a child.

10 Now in my view no other court will conclude that there was insufficient evidence that pointed to the fact that either of the two accused shot the deceased. The fact is, the Court found on the basis of *dolus eventualis* that accused 1 must have foreseen the possibility, if he had the intention to shoot other people that he could have killed innocent bystanders. This is exactly what happened in this matter.

Considering the application for leave to appeal in totality, the Court is of the view that there is no reasonable prospects of success on appeal to overturn this Court's judgment.

20 The application for leave to appeal against the conviction by the applicant Mr Lloyd Jermaine Davids is dismissed.

**RÉAN STRYDOM
JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION
JOHANNESBURG**

Date of hearing:

17 November 2022

Date of judgment on Leave to Appeal:

17 November 2022

Appearances:

On behalf of the Plaintiff:

Adv. S. Maluleke

On behalf of the Defendant:

Adv. Z. Peck