

REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, JOHANNESBURG)

Case No: SS074/2022

- (1) Reportable: NO
(2) Of interest to other judges: NO
(3) Revised.

26 April 2023

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MHE Ismail

In the matter between: -

THE STATE

and

MASIMOLA SILAS

Neutral Citation: *The State v Masemola Silas* (Case No: SS074/20220) [2023]
ZAGPJHC 460 (26 April 2023)

J U D G M E N T

Ismail J:

- [1] The accused a member of the SAPS was charged with the crime of murder in that, it was alleged that he shot and killed his girl-friend on 4 April 2022. The murder was allegedly pre-meditated and it was in contravention of section 51 (1) of Act 105 of 1997.
- [2] The accused pleaded not guilty to the charge against him. He was represented by Mr. Musekwa from the Legal Aid Board Johannesburg.
- [3] At the outset of the proceedings the accused was informed of the penal provisions of the CLAA if he were found to be guilty. He was also informed of the competent verdicts.
- [4] A plea explanation was tendered in terms of section 115 of the Criminal Procedure Act to the effect that the accused was placing his firearm in the holster when a shot was accidentally discharged. The shot which was accidentally discharged killed the deceased. The accused denied that he had the intent to fire the gun or to kill the deceased.
- [5] Certain admissions were made in terms of section 220 of the Act which were read into the record. I do not propose to repeat the admissions as they are on record.

Prosecution's case

- [6] Prior to leading any evidence the state advocate made it known, that the state

was going to rely on hearsay evidence, thereby giving the defense notice of the fact.

[7] The prosecution led the evidence of six witnesses. Two of the witnesses testified regarding the accused telling them what happened to the deceased. These witnesses were Thato Gumede an employee at a clinic, and Lt Col Petrus van Der Merwe who was the accused commanding officer at Johannesburg Central precinct.

[8] Captain van Rensburg, a ballistic expert, also testified concerning the test that he conducted on the firearm and the spent cartridge case and spent bullet which was retrieved from the deceased body. He took the court through his report which was handed in as an exhibit, marked E. I would deal with his evidence in detail further on in the judgment.

[9] The deceased's two cousins also testified regarding what the deceased told them, namely the hearsay evidence. This evidence was accepted in terms of the Admission of Hearsay Evidence s3 of Act 45 of 1988.

[10] The prosecution intended to have what the deceased told her cousins during a conversation they had amongst them, to be admitted as evidence in terms of s3 of the Hearsay Evidence Act, as it would be in the interest of justice to admit such evidence. The evidence sought to be admitted was to the effect that the

deceased told them that the accused threatened to kill her if she were to leave him.

[11] Hearsay evidence may be admitted in terms of the Act under certain Circumstances. Section 3 stipulates the circumstances when it may be admitted. Prejudice in admitting such evidence is an important consideration, especially as the person who made the statement cannot be cross examined. The court allowed the hearsay evidence to be admitted in the interest of justice. See: *S v Ndhlovu and Others* 2002 (2) SACR 326 (SCA), *S v Molimi and Another* 2008 (2) SACR 76 (CC) and *S v Ramavhale* 1996 (1) SACR 639 (A)). In *Molimi* at paragraphs [35] - [38] the court held:

“that the precondition laid down in the Act was designed to ensure that such evidence was received only if the interest of justice required its reception”

See also: *Keys v Attorney General, Cape Provincial Division* 1996 (2) SACR 113 (CC) para [13] 120g-121b

[12] Reverting to the evidence of captain van Rensburg’s the accused version of how the shot was accidentally discharged was put to him? Captain van Rensburg explained how the safety features of the gun operated and he was adamant that the accused version was unacceptable in the light of the inbuilt safety mechanism of the particular firearm. He expressed the view that it was not possible that the firearm was discharged as suggested by the accused. He stated

that the trigger of the firearm would have had to be pulled the entire distance for a bullet to be emitted. The force required to pull the trigger would have had to have been at least 3kg for the bullet to have been fired.

[13] Captain van Rensburg's evidence was not any way or form challenged apart from the accused version which was put to him for comment. His evidence in my view uncontroverted and it was accepted by the court as being reliable.

[14] The accused testified and he was questioned about his initial version that the deceased shot herself. He testified that he realized it was his firearm which was used and he was scared and shocked at the stage and for that reason he gave that account. It was put to the accused that the deceased could not have been shot in the bathroom if the gun accidentally went off whilst he was standing between the washing basket and the television facing the wall at the end of the bed as depicted on photograph 6 of exhibit E. The accused was asked in cross examination whether he pulled the trigger whilst endeavoring to place the firearm in the holster and his reply was that he does not remember pulling the trigger. One must remember van Rensburg's evidence that the trigger has to be squeezed all the way which would require at least 3 kg of force. This would therefore signify a conscious pulling of the trigger as opposed to the mere touching of the trigger.

Evaluation of the evidence

[15] In a criminal trial the onus rest on the state to prove its case beyond reasonable doubt. See *R v Difford* 1937 AD 370 and *S v Chabalala* 2003 (1) (SCA) SACR 134 ...

“Where an accused gives an explanation and his explanation is reasonably possibly true he would be entitled to an acquittal”.

See *S v van der Meyden* 1999 (1) SACR 447 (W) at 449j – 450b.

[16] In this matter the accused gave a false version of what happened to the deceased to his commanding officer and the personnel at the clinic. During cross examination he pertinently asked whether anyone threatened him or forced him to say anything and his response was no. He was confronted with an extract from the bail proceedings exhibit G. At line 9 the following extract appears:

“The part that I also regret is when a lot of police officers came to me at the scene of the hospital. They manhandled me. They were very rude and mean to me and threatened me with violence. I got scared to (sic) them and told, I got scared to tell them the truth, and just lied that the deceased shot herself”.

It appears that the accused gave a false version because he was threatened and scared, however he testified that no one threatened or forced him to make a statement. The accused gave a false version and when he realized the folly of his version he spun a yarn by adjusting his version to one of an accidental discharge which was negated by the expert. Apart from how the deceased was

shot the evidence of Busisiwe Bester and Thandeka Mnene that the deceased told them that the accused threatened to kill her is relevant, hence the acceptance of the hearsay evidence.

[17] On the totality of the conspectus of evidence there is no doubt that the accused carried out the threat which the deceased spoke about and I find that he killed the deceased by shooting her whilst she was in the bathroom. His version that the shot went off accidentally is rejected by this court as being false beyond doubt.

[18] The accused is accordingly convicted of murder in contravention of section 51 (1) of the Act

MHE ISMAIL

JUDGE OF THE HIGH COURT

GAUTENG DIVISION, JOHANNESBURG

26 APRIL 2023

APPEARANCES:

For the State: Adv M Maleleka from the office of the Director of Public Prosecutions, Johannesburg.

For accused: Adv Musekwa instructed by Legal Aid Johannesburg.

Date of trial: 11 and 12 April 2023.

Judgment delivered: 26 April 2023.