THE SUPREME COURT OF APPEAL
OF SOUTH AFRICA

Not Reportable
CASE NO. 47/06

In the matter between:

KUMAREN GOVENDER **Appellant**

and

THE STATE **Respondent**

CORAM: **NUGENT, MAYA JJA et CACHALIA AJA**
HEARD: **7 NOVEMBER 2006**
DELIVERED: **15 DECEMBER 2006**

Summary: Murder – appeal against conviction and sentence - appellant found to have shot at deceased in self-defence – thereafter fired further shot at deceased that was not justified – evidence does not establish that the deceased was still alive at time that shot was fired - appellant guilty of attempted murder – sentence altered accordingly.

Neutral Citation: **Govender v The State [2006] SCA 175 (RSA)**

JUDGMENT

MAYA JA
MAYA JA

[1] The appellant was arraigned on a charge of murder in the Verulam Regional Court. He pleaded private defence. The regional magistrate rejected his defence and convicted him of murder. He was sentenced to ten years' imprisonment. His appeal to the Natal Provincial Division against both conviction and sentence was unsuccessful. This appeal, with special leave of this court, is against conviction and sentence.

[2] The background facts may be stated briefly. In the early hours of the morning of 23 November 1996 at Phoenix, near Durban, the deceased was fatally shot by the appellant. The incident occurred in a public street outside a house that was used for gambling. The appellant was the operator of the gambling house. The deceased and a group of friends, which included two of the State's key witnesses, Mr Sandragasen Govender and Mr Stanley Adinarain, arrived there in the deceased's vehicle at about midnight. The deceased, who had been drinking, gambled heavily and lost. He requested the appellant to give him what the witnesses termed a 'free call', in an attempt to recoup his losses but this was refused by the appellant and the deceased and his friends left the house.

[3] The deceased was outside the house, alongside his vehicle with his friends, Govender, Adinarain and others, chatting to Mr Moonsamy Chetty, when the gambling house closed and the appellant left it. In the street outside the house the appellant encountered the deceased and an exchange occurred, the details of which are in dispute, in the course of which the appellant shot the deceased repeatedly and the deceased died on the scene.

[4] The post mortem examination performed by a forensic pathologist, Dr Govender, who testified, revealed that the deceased sustained a horizontal deep

abrasion on the anterior of the left shoulder and five other injuries: (1) A bullet entered the left lower chest anteriorly (accompanied by surrounding abrasion and tattooing), penetrating the lower lobe of the left lung, and lodged in the lower back. (2) A bullet entered the right cheek (accompanied by surrounding abrasion and burn) and exited the left upper neck laterally. (3) A bullet entered the right axilla anteriorly (accompanied by surrounding burn and blackening) and lodged in the right side of the neck. (4) A bullet entered the left shoulder posteriorly, penetrated the upper lobe of the left lung, and lodged in the front of the left chest. (5) A bullet entered the mouth (accompanied by blackening of the whole of the front of the mouth) lacerating the upper lip and tongue, broke and dislodged two upper incisors, and lacerated the brain before exiting the left upper occipital scalp. According to Dr Govender each of the injuries, except that to the left shoulder, which he believed was caused by a bullet fired from a distance of about a metre away, was potentially fatal.

[5] Dr Govender explained that tattooing occurs when a firearm is discharged from about three to four centimetres from the target and the powder from the barrel of the firearm then ‘disperses and leaves black spots around the entry wound’. He explained that blackening occurs ‘when the whole discharge from the barrel of a firearm enters a wound, including the powder…that causes the blackening, but it’s so concentrated, it’s not tattooing now…because the whole powder does not have a chance to spread out’. In his opinion the shot to the mouth of the deceased was fired from a distance of no more than a centimetre or two.

[6] It is unfortunate that the court hurried Dr Govender through his evidence, as if it was merely a formality, without any exploration of the likely effect of each separate injury. Ultimately, when asked ‘which wound caused death? Is there any one particular one or was it a combination of all the wounds?, his

answer was ‘A combination of wounds.’ The significance of this lack of precision as to the cause of death will emerge later in this judgment.

[7] As previously indicated, Govender and Adinarain testified for the State. According to Govender the appellant walked up to the deceased, who was standing alongside his vehicle, and simply said to him ‘I’m tired of you’ and then took out his firearm and commenced firing at the deceased until he ran out of ammunition and the deceased fell on the road. He said that the appellant then took the deceased’s firearm from the deceased (who by then was lying on the road) and fired a shot with it into the deceased’s mouth. Govender testified further that after shooting the deceased in the mouth, the appellant turned to him and searched him for a firearm. When he did not find one he fired a shot towards his face but, miraculously, Govender fell and the bullet missed. On rising, Govender fled the scene.

[8] Adinarain, on the other hand, who was sitting in the deceased’s car at the time, testified that he heard nothing being said before the shooting started. He said that the appellant simply walked up to the deceased and shot him. After the deceased had fallen, the appellant turned him slightly, removed his (the deceased’s) firearm, and shot him in the mouth with it. The appellant then turned to Govender and asked him if he (Govender) had a firearm. When Govender replied in the negative the appellant began firing at him and Govender as they fled.

[9] One more witness testified for the State, Sgt Padayachee, the first police officer at the scene. Nothing much turned on his brief evidence. He did however state that he knew the deceased to be a gang leader and drug dealer who constantly had runs-in with the local police. He found a crowd gathered around

the deceased's body, which was covered with a blanket, and recovered a projectile and two 9mm spent cartridges next to it.

[10] The appellant testified that he had been friends with the deceased at some stage but terminated the friendship when his family expressed its disapproval because the deceased was a notorious gangster and drug dealer. He said that when he left the gambling house he saw the deceased standing alongside his vehicle in the company of others. The deceased called to him and he approached the deceased. The deceased then angrily remonstrated with him for not allowing him (the deceased) a 'free call'. He said that the deceased, who he knew to be predisposed to violence, then drew his firearm. In response the appellant drew his own firearm and began firing at the deceased. He said that the deceased fell to the ground, and his (the deceased's) firearm also fell to the ground. The appellant said that he picked the deceased's firearm up and started firing at the deceased's friends, who at that time had started shooting at him as they fled. He said that had he not shot the deceased he was certain that he would have been killed by the deceased.

[11] The defence called Chetty as a witness. He had previously made a written statement to the police which seemed to favour the appellant's case. He testified that he encountered the deceased on the roadside outside the gambling house on the morning in question. The deceased complained to him that the appellant had refused him a free call. Later, the appellant emerged from the gambling house and joined them. The appellant and the deceased discussed the latter's complaint. He left them chatting amicably to join the deceased's friends who sat in the deceased's vehicle. He suddenly heard gunshots and took cover behind the vehicle. When he emerged later, the deceased was lying on the road, shot. He did not see who fired the shots and did not know if the deceased owned a firearm or carried one that day.

[12] Certain material aspects of this testimony were at variance with the written statement that Chetty made to the police soon after the incident. There, he said:

'Ronald [the deceased] and I got into a conversation on Elfbrook Road. After a while I noticed Piggies [the appellant] coming from the gambling school. When Ronald saw Piggies he stated "How come you never give me a call in the gambling school". *Ronald then reached for his firearm which was tucked in his pants. Before he could pull out the firearm Piggies pulled out his firearm and shot at Ronald.* I did not want to get shot in the crossfire so I ran to the place where the gambling school was. I heard a few shots after that but I did not see who was shooting. When I returned after a while I noticed Ronald lying dead on the road. The police then arrived after a while and took over. *I am aware that Ronald is a firearm owner and he always carries a gun.'* Emphasis added.

Because Chetty's statement was inconsistent with his oral testimony, the trial court declared him to be a hostile witness. Sgt Naidoo, who recorded his statement, was called to prove it.[1] He confirmed that it reflected what was narrated to him by Chetty and that it had been properly attested.

[13] The trial court accepted the evidence of the State witnesses who, it said, 'testified in a manner which the Court cannot severely criticise', and whose evidence was said to be largely corroborated by the defence version, and rejected that of the appellant where it differed. On appeal, the court below stated that 'the magistrate did not misdirect herself in her findings of fact' but nonetheless concluded that 'the appellant's allegations on the actions of the deceased cannot be dismissed as improbable, as it cannot be said that he fired at the deceased for no apparent reason'. Accepting, as it seems to have done, the appellant's account of what occurred, the court below concluded that 'the totality of the evidence did not justify [the appellant] firing further shots, apart

[1] In terms of s 190(2) read with s 222 (incorporating Part VI of the Civil Proceedings Evidence Act 25 of 1965) of the Criminal Procedure Act 51 of 1977, which allows a party to ask about his witness's prior written inconsistent statement and prove its terms.

from the first one which apparently, paralysed the deceased from firing at the appellant'. On that basis it found, so it seems, that the appellant's life was no longer in imminent danger when he fired further shots at the deceased, and that the magistrate had correctly convicted him.

[14] In *S v Shackell*[2] Brand AJA reiterated that:

'It is a trite principle that in criminal proceedings the prosecution must prove its case beyond reasonable doubt and that a mere preponderance of probabilities is not enough. Equally trite is the observation 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.'

[15] In my view it is most improbable that the appellant, for no apparent reason, simply walked up to the deceased and shot him, as the State witnesses would have it. I find nothing improbable in the appellant's evidence that the deceased, no doubt aggrieved by the fact that the appellant had not allowed him a 'free call', took out his firearm in the course of remonstrating with the appellant. Moreover, his evidence in that respect is corroborated by the statement that Chetty made to the police, albeit that he later recanted, unconvincingly, when he gave evidence. In my view it cannot be said that the evidence of the appellant on this issue cannot reasonably be true. On the contrary, it is probable that the deceased indeed drew a firearm in the course of remonstrating with the appellant, which prompted the appellant in turn to draw his own firearm and fire at the deceased.

[2]2001 (2) SACR 185 (SCA) para 30; see also S v V 2000 (1) SACR 453 (SCA) para 3.

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[16] The mere act of drawing a firearm in those circumstances was sufficient to justify the appellant's response,[3] which was to shoot at the deceased in the knowledge that he was bound to kill him. I do not think the appellant could be expected in the circumstances to have waited for the deceased to attempt to shoot at him before he responded, nor to have taken any lesser measures to avoid the danger of being killed, and counsel for the State did not argue to the contrary. Moreover, there is no evidence to support the finding of the court below that the first shot paralysed the deceased, with the result that the appellant was not justified in firing further shots. Once the appellant was justified in shooting the deceased fatally, which in my view he was, the fact that he fired shots in quick succession does not detract from the lawfulness of his act.

[17] But that does not end the enquiry. For the evidence of the two State witnesses was that once the deceased had fallen to the ground, and the appellant's firearm had been emptied, the appellant picked up the deceased's firearm and fired a final shot into the deceased's mouth. If that is indeed what occurred, then clearly that shot was not justified, for by then the deceased was clearly incapacitated and posed no further danger at all. The appellant, on the other hand, denies that that occurred. On his version the shot that struck the deceased in the mouth was one of those that he fired in the initial volley, though he could not say in what sequence the injuries were inflicted.

[18] While I do not accept the evidence of the State witnesses as to the manner in which the shooting was initiated that does not mean that their evidence on that further issue is similarly to be rejected. Undoubtedly, the evidence of a witness who has been found to be untruthful or unreliable on a

[3] *S v Ntuli* 1975 (1) SA 429 (A); *S v De Oliveira* 1993 (2) SACR 59 (A) at p 63h-j.

material issue should be approached thereafter with considerable caution but it does not fall to be rejected for that reason alone.

[19] If the evidence of the two State witnesses on that issue is untrue it must mean that they conspired together to invent the occurrence, for it is most unlikely that they could each have invented such a bizarre occurrence independently, nor is it a matter upon which they might both be mistaken. I can see no reason why they would have conspired together to invent that occurrence. If it was their intention to secure the conviction of the appellant their evidence was in any event sufficient (if it were to be believed) for that purpose without gratuitously adding this further bizarre event. Apart from the fact that there is no apparent reason for them to have conspired to invent that evidence, it is corroborated by the post-mortem examination. I have already pointed out that the blackening that accompanied this shot led Dr Govender to conclude that the shot must have been fired while the tip of the barrel was no more than a centimetre or two from the deceased's mouth. It is also difficult to see how that injury occurred otherwise that in the manner attested to by the State witnesses. While the appellant denied having shot the deceased in the mouth as they described he could not adequately explain the injury. According to the appellant he fired the first shot in the direction of the deceased's body and the remainder were fired while the deceased was staggering backwards and it seems unlikely in those circumstances that one of the shots could have been fired while the tip of the barrel was barely centimetres from the deceased's mouth. Indeed, the appellant could not but have been aware of firing a shot that close to the deceased's mouth, and in my view his prevarication on that issue I think adds support to the state's case. In my view the objective evidence, corroborating that of two State witnesses on this issue, leaves no reasonable doubt that the shot to the mouth was the final shot fired by the appellant, after

the deceased had collapsed to the ground. Clearly there was no justification for firing that shot.

[20] The difficulty for the State, however, is that the evidence is insufficient to establish whether that shot caused, or even hastened, the death of the deceased, bearing in mind that by the time it was fired the deceased had already collapsed to the ground with four injuries, each of which, according to Dr Govender, was itself capable of killing the deceased. That being so his conclusion that 'a combination of shots' killed the deceased ought to be approached with some circumspection, for it does not assist in determining whether that shot was an essential component of the 'combination'. Without evidence that the death of the deceased was brought about by lacerations to the brain – which the evidence does not establish – it cannot be said with any certainty that the deceased was still alive when that final shot was fired. The only evidence that suggests that he might not have been dead was a statement by Govender that after the deceased fell to the ground he was 'taking out blood, spewing'. I do not think that reliance can be placed on that evidence alone, which was given by a lay observer who had little proper opportunity to carefully observe what was occurring at the critical time.

[21] In my view the State failed to establish that the appellant's final shot – which was the only shot that was not legally justified – caused or hastened the death of the deceased. Clearly, however, the appellant fired that shot intending to kill the deceased, and there is no suggestion in his evidence that he believed him to be dead at the time. In those circumstances he is guilty of attempted murder.[4]

[4] *R v Davies* 1956 (3) SA 52 (A); *S v Ndlovu* 1984 (3) SA 23 (A).

[22] That finding calls for sentence to be imposed afresh. The appellant's relevant personal circumstances are the following. He was 25 years old at the time and lived with his parents. His highest standard of education is matric. He was in gainful employment. Although single, he was in a stable relationship. He had previous convictions for possession of Mandrax and dealing in liquor. There were clearly strong mitigating factors in his favour. I must accept for purposes of sentence that the death of the deceased was brought about in legitimate self-defence and not by the act for which the appellant has been convicted. At the time the appellant fired the shot that has resulted in his conviction he was clearly in a state of considerable anger and anxiety that was brought about by the conduct of the deceased. Nonetheless, a sentence is required that will bring home to the appellant the seriousness of using firearms in circumstances that the law does not condone. Having regard to all the circumstances, it seems to me that a conditionally suspended custodial sentence would adequately serve that purpose.

[23] The appeal is upheld. The conviction and sentence are set aside and the following orders are substituted for those of the trial court:

'The accused is found guilty of attempted murder and is sentenced to two years imprisonment, which is suspended for a period of five years on condition that the accused is not convicted of an offence involving the use of violence against another person committed during the period of suspension.

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M.M.L. MAYA
JUDGE OF APPEAL

CONCUR:

NUGENT JA
CACHALIA AJA