



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

Case no: 569/06
NOT REPORTABLE

In the matter between:

RICHMAN SIZWE MLENZE

APPELLANT

and

THE STATE

RESPONDENT

Before: Cameron, Mlambo JJA et Theron AJA

Heard: 19 March 2007

Delivered: 28 March 2007

Summary: Criminal law – appeal against conviction and sentence – regional court considering all evidence before conviction – appellant’s version not reasonably possibly true – appeal dismissed.

Neutral citation: This judgment may be referred to as *Mlenze v The State* [2007] SCA 39 (RSA).

JUDGMENT

MLAMBO JA

[1] On 16 September 2003 the Fort Beaufort Regional court convicted the appellant of the murder of Mr Dumisani Mpapu (Dumisani). He was sentenced to ten years' imprisonment, it being the view of the regional court that there were substantial and compelling circumstances justifying a departure from the ordained minimum sentence of 15 years.

[2] The appellant's appeal against both conviction and sentence was dismissed by the Grahamstown High Court (Plasket J, Jennet J concurring) on 30 September 2004. That court however granted him leave to appeal to this court and his bail, granted by the regional court, was extended pending the appeal.

[3] The undisputed facts are that during the early hours of Sunday, 30 June 2002, at Nohashe Street in Fort Beaufort, the appellant shot Dumisani in the head. Dumisani was taken to the Fort Beaufort hospital but succumbed to his wounds three days later at the Mount Frere Hospital in East London. The post mortem report records the cause of death as a bullet wound to the head. It also records that the bullet entered through the nose and exited through the right parietal side of the head, lacerating the brain and leaving a 1.5 cm ragged wound with radiating fractures. The appellant admitted firing the shot but pleaded not guilty to murder and tendered a plea explanation of acting in private defence.

Evidence

[4] The state called Mr Mzwabantu Mpapu (Mzwabantu), Dumisani's cousin, who testified that he witnessed the shooting. His version was that in the early hours of Sunday morning 30 June 2002 he was walking home with Dumisani from Danqe's Tavern after a night's drinking which they initiated the previous

evening at the appellant's tavern. They had just parted company from Mr Xolisa Mbombe and were standing in the street when the appellant, carrying a firearm in one hand, approached them from Sabisa's yard, saying 'these are them'. Mzwabantu asked the appellant what he meant and the appellant said 'the white pants' pointing at the white pants worn by Dumisani. He asked the appellant, what about the white pants, which evoked no response: instead he heard a shot, followed by another and saw Dumisani, bleeding through the mouth, fall to the ground. He then ran away and jumped over the gate of Luyanda Phezisa's house and woke Luyanda up, informing him that Dumisani had been shot, and requested him to call an ambulance. He thereafter jumped over the gate again and ran to his own home.

[5] He stated that he was surprised by the appellant's conduct as he was aware of no grudges or quarrels between Dumisani and the appellant and because both he and Dumisani were very well known to the appellant, having worked for him in his businesses. His version was challenged in cross-examination by the appellant's legal representative. It was put to him that the shooting took place inside the appellant's yard and that he, Mzwabantu, was nowhere to be seen at the time. It was also put to him that the appellant shot Dumisani, whom he did not recognize, while he was stealing his fowls. Mzwabantu disputed these assertions, stating that he was with Dumisani at all times and had not seen him go to the appellant's yard and steal fowls. He conceded under cross-examination that he and Dumisani were drunk and that they held on to each other for balance. In response to a question by the magistrate he specified the place where the shooting took place as on the other side of the street in front of a yard next to Sabisa's yard which was not opposite the appellant's house.

[6] Mr Xolisa Mbombe did not add much to the evidence as he did not witness the shooting. He corroborated Mzwabantu's version about the previous

night's drinking spree. The contribution of another state witness, Luyanda Phezisa, was to deny that he was with Mzwabantu and Dumisani before the shooting. He confirmed however that he heard the two shots and was shortly thereafter woken up by Mzwabantu who, after informing him that Dumisani had been shot, requested him to call an ambulance.

[7] The investigating officer, detective sergeant Bonizwa Griffiths Veto, testified that when he arrived at the scene he found the appellant standing outside his gate and asked him what happened. The appellant stated that he had shot someone in his yard who was stealing his fowls. The appellant also showed him where Dumisani had fallen, which Veto estimated to be some 20 metres from the appellant's gate. He observed a clot of blood at that spot but observed no other blood droplets in the vicinity or inside the appellant's yard. Inside the appellant's fowl run he did however see two dead fowls. He stated that it was still very dark and he had to use his torch to make his observations. It was put to him that the two dead fowls were outside the fowl run and that their throats had been cut. He disputed this: as far as he could make out the two dead fowls were inside the fowl run and their throats were not cut, and he saw no blood next to them. His evidence that the appellant told him on his arrival at the scene that he had shot someone in his yard who was stealing his fowls was not challenged in cross-examination.

[8] The evidence of the district surgeon of East London, Dr Basil Wingreen, who performed the post mortem examination, was that the deceased was about 21 years of age, weighing some 60 kg, and 1.6 metres tall. The entrance wound was, as already stated, on the left nostril which had blackening around it. The exit wound was a ragged 1.5 cm bullet wound on the right parietal bone of the skull, with radiating fractures. The brain was lacerated with some haemorrhage consistent with the passage of a bullet.

[9] He stated that the blackening around the nose was caused by the fact that the gun was discharged at a distance where the gunpowder was actually in contact with the skin. He stated that the distance between the gun and the skin when the shot was fired was not more than 12-15 cm which amounted to almost a contact bullet wound. He stated that there were recorded cases in the textbooks of people being shot in that manner and walking a few paces before collapsing. Referring to this particular case – it was common cause that Dumisani died only three days later, on Wednesday 3 July – he stated that the fact that Dumisani did not die on the scene did not necessarily mean that he could have walked 20 metres after being shot. He stated that he would have expected ‘a person like this to have collapsed immediately’, without being able to run after being shot.

[10] The regional magistrate asked the doctor whether there would be external bleeding in such a case. He stated that he would not have expected immediate external bleeding because the bullet went up the nose with gases, and one would have expected the blood to have been shot to the back of the throat. On the other hand, he would have expected external bleeding if the head had fallen downwards. He stated in cross-examination that he would not have expected immediate external bleeding if the head did not fall forward since the blood would have gone to the back of the throat – and in this particular instance there was indeed congestion in the lung from the inhalation of blood.

[11] The appellant’s version was that he was woken up in the early hours of the morning by a noise from the fowl run. When he went to investigate he found his main gate and the fowl run entrance open. He closed them and went back to bed. He was hardly back in bed when the noise started again. He suspected someone was trying to rob him. Because all his businesses and his truck were in the yard he decided to take out his firearm and investigate further. He saw that

the main gate and fowl run entrance were once more open.

[12] He then saw two dead fowls, with their throats cut, outside the fowl run. As it was dark he could not see clearly but he heard a noise and when he looked up he saw a figure some 4-5 metres away from him holding a live white fowl close to his chest. It appeared to him as if the person was holding something else with the other hand and he shouted to the person 'why are you stealing my fowls'. The person retreated whereupon he fired a warning shot in the air. After he fired the warning shot the person rushed at him threateningly. As he could not see what the person had in his other hand he shot him and the person turned around and ran out of the yard. It was only then when he followed this person that he realized that he knew him. He stated that when he shot the person he was defending his property and himself as he feared that the intruder may have been armed with a dangerous weapon. His wife corroborated his evidence save for the shooting which she did not witness.

Regional Court's reasons

[13] The issue at this stage is whether the trial court erred in rejecting the appellant's version as false beyond reasonable doubt. In convicting the appellant the regional magistrate found that his version of the shooting could not reasonably possibly be true. The magistrate found that Mzwabantu, even though a single witness, was satisfactory and that his version was corroborated by two independent witnesses. The magistrate found that the shooting did not take place inside the appellant's yard, and that he was an unsatisfactory witness whose evidence was riddled with contradictions and improbabilities. In this regard the regional magistrate stated that the appellant was unsure whether he was defending himself or the fowl or both.

High Court judgment

[14] In dismissing the appellant's appeal, Plasket J in essence affirmed the regional magistrate's judgment that the appellant's version was improbable beyond reasonable doubt. He found, correctly, that the magistrate was 'alive to the need to find guarantees of the reliability of the evidence of [Mzwabantu] Mpapu', and that these were present in Mpapu's satisfactory evidence which was bolstered by Inspector Veto and Dr Wingreen. On this basis Plasket J concluded that the regional magistrate had committed no misdirection and that ruled out any basis of interfering with his factual findings.

Assessment

[15] Counsel for the appellant submitted in this court that the regional magistrate and the court *a quo* were wrong to reject the appellant's version and to prefer Mzwabantu's. He submitted that Mzwabantu was a very poor witness and that there were unexplained gaps in his evidence. Counsel submitted further that Mzwabantu was avowedly under the influence of alcohol at the time which meant that no reliance could be placed on his version. He also submitted that Mzwabantu was biased against the appellant and was clearly protective towards Dumisani as they were cousins.

[16] Counsel also alluded to the fact that it took Mzwabantu some 15 days after the event to make a statement to the police. In this regard he submitted that in all the circumstances the appellant's version was reasonably possibly true that he had shot Dumisani inside his yard and that Dumisani had staggered for some 20 metres before collapsing. He stated that this version was somewhat corroborated by the medical evidence from Dr Wingreen that a person shot in that manner would not bleed immediately hence no blood would have been

found in the appellant's yard or leading to the spot where Dumisani fell. He also submitted that the appellant's version that he first fired a warning shot and thereafter the fatal shot was corroborated by his wife as well as by Mzwabantu, who heard two shots.

[17] It is so that a trial court considering whether to convict or acquit an accused person is enjoined to consider all the evidence led in its totality. The purpose is to determine whether given all the evidence the state has succeeded in proving the guilt of the accused beyond reasonable doubt (*S v Van der Meyden* 1999 (1) SACR 447 (W) at 450b, approved in *S v Van Aswegen* 2001 (2) SACR 97 (SCA) at 101b-e).

[18] The essential features of the appellant's version are that he shot Dumisani, who was posing a threat to his life and property in his yard, that Dumisani ran some 20 metres before collapsing on the other side of the street, and that Mzwabantu was not on the scene. With regard to Mzwabantu's presence on the scene one looks no further than Luyanda Phezisa. Luyanda confirmed hearing two shots and being woken up shortly thereafter by Mzwabantu who informed him that Dumisani had been shot. Clearly Luyanda's testimony confirms Mzwabantu's presence on the scene or at least in the immediate vicinity of the shooting. This also disposes of the submission that we should not take account of Mzwabantu's version because he was under the influence of alcohol. He was on his own admission intoxicated but his observation of Dumisani being shot cannot be discounted – not merely because he was on all accounts there, but because he was also capable of vaulting perimeter barriers to go and summons help.

[19] There is a total lack of any corroborative evidence for the appellant's claim that he shot Dumisani inside his yard. A material improbability of this

account is that the appellant wants the court to accept: that the slightly built Dumisani – who was in fact unarmed and totally defenceless – having seen the armed appellant in his own yard and having heard a warning shot being fired, would charge at him in a threatening manner. It is also significant that when Veto arrived on the scene and asked the appellant what had happened, the appellant told him that he had shot someone who was stealing his fowls. Notable is the absence of any claim of self-defence or repulsion of attack against person or property. If the appellant's version were true there is no explanation why he did not immediately tell Veto – the first person in authority to arrive on the scene – that he had shot someone who was attacking him in his yard.

[20] The absence of blood inside the appellant's yard is also telling. It is incorrect to argue, as appellant's counsel did, that the absence of blood from the appellant's yard and in the vicinity of the place where Dumisani collapsed was supported by Dr Wingreen's medical exposition. Dr Wingreen did not exclude external bleeding entirely. He stated that there would be no external bleeding initially but if the head fell down then there would be external bleeding. That this is what happened is borne out by Mzwabantu's version that Dumisani collapsed at the spot where he was shot *bleeding through the mouth*. The appellant's version entails that Dumisani was shot some 4-5 metres inside his yard, that he ran that distance out of the yard – and then a further 20 metres without bleeding until he collapsed. This was discounted as a matter of probability by Dr Wingreen, who stated that he would have expected Dumisani to collapse immediately. The fact that Dr Wingreen's evidence does not exclude the reasonable possibility that the deceased may have run a few paces does not mean that we should exclude from our assessment of the appellant's version the doctor's testimony that he would not have expected this to happen.

[21] Furthermore the medical evidence is clear that the appellant was no more than 12-15 cm away from Dumisani when he fired the fatal shot. This constitutes further corroboration of Mzwabantu's version that the appellant was in very close proximity to Dumisani when he shot him.

[22] Mzwabantu described the place where Dumisani was shot as the yard next to Sabisa's yard. Clarity regarding the location emerged when, in response to questions by the regional magistrate, Mzwabantu said it was on the other side of the street and not directly opposite the appellant's yard. He clarified that the appellant's yard was opposite Sabisa's yard. The appellant also wants us to accept that Dumisani had a live fowl in his hand having killed two others. This on its own defies any logic as to why, if he intended to steal fowls, he would kill two, discard them and hold on to one live and noisy one as he exited from the appellant's yard.

[23] It must be stated that Mzwabantu's version is not entirely above criticism. In this regard he failed to tell Luyanda why Dumisani was shot when asked. It could well be that he was being protective towards his cousin. In addition, there is some merit in counsel's observation that there appears to be a gap in Mzwabantu's version: Luyanda, after all, went off to sleep before being awoken after the shooting, whereas Mzwabantu does not account for what happened in this time. There is also the question of the first shot, which does not appear to have struck the deceased. That a warning shot could have been fired at some prior point cannot be excluded. These deficiencies, in the light of all the evidence considered together, do not entail that the appellant's guilt was not established. The essential feature of Mzwabantu's account is that the appellant shot the deceased at point blank range, without warning or provocation, in a public place outside his yard. That account finds corroboration in the evidence of Luyanda, Veto and Windgreen. See the comments of Cameron JA in *S v M*

2006 (1) SACR 135 (SCA) at 183h-i in this regard that:

‘The point is that the totality of the 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.’

[24] I am satisfied, taking account of all the evidence that the guilt of the appellant was proven beyond reasonable doubt and that his version of shooting Dumisani inside his yard is not reasonably possibly true. It was therefore correctly rejected by the regional court and the court *a quo*. The only reasonable inference from all the evidence is that indeed the appellant’s fowls were interfered with and that the appellant then chased that person, wearing white pants, who may well have been Dumisani, as found by Plasket J, and when he emerged from Sabisa’s yard and encountered him he shot him. Under the circumstances the appeal against conviction must fail.

Appeal against sentence

[25] As to sentence the regional court imposed a ten year imprisonment sentence after finding that there were substantial and compelling circumstances justifying that sentence. Nothing was advanced on appeal to impeach this sentence which was clearly moderated by considerations of mercy. The appeal against sentence must also fail.

[26] The appeal against conviction and sentence is dismissed.

**D MLAMBO
JUDGE OF APPEAL**

CONCUR:

CAMERON JA

THERON AJA