



Reportable:	YES / <u>NO</u>
Circulate to Judges:	<u>YES</u> / NO
Circulate to Magistrates:	YES / <u>NO</u>
Circulate to Regional Magistrates:	YES / <u>NO</u>

**IN THE HIGH COURT OF SOUTH AFRICA
(Northern Cape High Court, Kimberley)**

HIGH COURT REF NO: **39/16**
CASE NO: **RC21/2015**
DATE DELIVERED: **16/11/2016**

In the matter between:

V., S.

Accused

and

THE STATE

Coram: Olivier J et Erasmus AJ

JUDGMENT

Olivier J:

[1.] The accused appeared in the Regional Court, Daniëlskuil, on charges of murder (count 1) and assault with intent to cause grievous bodily harm (count 2). He pleaded not guilty, but was convicted on the count of murder, and on count 2 he

was convicted of common assault. He had been 16 years old at the time of the incident, and he was 17 years old when he pleaded to these charges. The convictions were taken together for purposes of sentence and the accused was sentenced to compulsory residence for a period of 4 years in a Child and Youth Care Centre¹. The matter is now on automatic review. As will appear in due course the proceedings were not in accordance with justice, to put it mildly.

- [2.] The accused was represented by the attorney Ms Ilanga, apparently on behalf of Legal Aid South Africa. In respect of count 1 Ms Ilanga simply stated that the accused had acted in self-defence. No detail was at that stage furnished regarding this defence or the circumstances that had necessitated the killing of the deceased.

- [3.] Ms Ilanga, astonishingly, put it on record that she did not “*really*” have instructions from the accused on count 2. She nevertheless, equally astonishingly and without requesting an opportunity to obtain such instructions, informed the Regional Magistrate that the accused “*will elect*” not to furnish any plea-explanation in respect of count 2. I will in due course revert to the issue of the accused’s legal representation.

- [4.] The prosecutor presented the evidence of two witnesses, Mr Michael Barends and Mr John Ross, and the accused testified in his own defence.

- [5.] Although the Regional Magistrate asked introductory questions like whether they had any objection to taking the oath, the actual swearing in of all three these witnesses was for some reason conducted by the interpreter. This in itself constituted a fatal irregularity².

- [6.] It was common cause that the incident occurred on a farm at the houses of two farm labourers. Everybody concerned and present were farm labourers and/or

¹ In terms of section 76 of the **Child Justice Act**, 75 of 2008

² Compare **S v Machaba and Another** 2016 (1) SACR 1 (SCA)

lived on that farm or the adjacent farm. It appears that most of them were to some extent under the influence of alcohol.

- [7.] It was also common cause that the accused had stabbed both the deceased and the complainant in count 2, the said Mr Barends, with a knife.
- [8.] The version of Mr Barends was, very briefly, that there had been a fight between the deceased and a certain Mr Nico Kgetile over beer. During the fight the deceased threw a stone at Mr Kgetile, but apparently hit a certain Casper. While Mr Barends was trying to take the deceased aside and to calm him down, the accused approached the two of them and, without saying anything, attacked the deceased and stabbed him. When Mr Barends tried to intervene, the accused stabbed him too.
- [9.] The version of Mr Ross, on the other hand, was that the initial fight had been between the deceased and Casper. He denied having any knowledge of a fight between the deceased and Mr Kgetile. He also made no mention of Mr Barends having tried to intervene before he was stabbed. According to Mr Ross the accused, when attacking the deceased and Mr Barends, told them that he was stabbing them because they would not listen, whatever that meant.
- [10.] In cross-examination of Mr Barends, Ms Ilanga simply put it to Mr Barends that he and the deceased had assaulted the accused, and asked him to explain the fact that photograph 17³ depicted the accused with a bandaged foot. Mr Barends denied that they had assaulted the accused, but could not explain the bandaged foot and the injury to the accused. Ms Ilanga did not in cross-examination confront Mr Barends with any detail of the alleged attack on the accused, like how and with what the attack had been executed, or where.
- [11.] She did not in cross-examination of Mr Ross confront him at all with the accused's defence.

³ Of exhibit "D"

- [12.] When the accused was called he furnished a detailed version of the attack of the deceased and Mr Barends on him. He explained how the deceased had hit him with a brick, how he had fled into a house, followed by the deceased and Mr Barends, how the two of them had then assaulted him inside the house, *inter alia* with a brick and a piece of wood, how he had then armed himself with a knife that he had found inside the house, how he had warned the two of them that he would use it if they did not leave him alone and about how he had eventually stabbed them after they had nevertheless followed him out of the house, and while they were attacking him. He explained that his toe was injured when it was hit by a stone thrown by the deceased in the course of their attack on him.
- [13.] This detailed version makes it clear that Ms Ilanga's cross-examination of Mr Barends was extremely superficial and indeed inadequate, let alone that of Mr Ross.
- [14.] Ms Ilanga, with respect, apparently did not even properly understand the evidence of Mr Barends. When the prosecutor confronted the accused in cross-examination with the evidence⁴ that Casper had been hit by an object thrown by the deceased at Mr Kgetile, Ms Ilanga intervened and wanted to know who had testified to that effect.
- [15.] The Regional Magistrate, Mr Sulliman, for some reason then asked the prosecutor to rephrase the particular question. That had indeed been the evidence of Mr Barends, as already pointed out, and the question arises whether the Regional Magistrate himself had, with respect, properly followed and understood the evidence before him.
- [16.] In his judgment the Regional Magistrate found that Mr Ross had corroborated Mr Barends "*in all material respects*". This is simply incorrect and a serious misdirection. It is very clear, even from the brief summaries of their evidence

⁴ Of Mr Barends

above, that there were serious discrepancies between the versions of Mr Barends and Mr Ross.

- [17.] In rejecting the accused's defence, the Regional Magistrate claimed to have entertained "*the probabilities and improbabilities on both sides*", without however dealing with a single such probability or improbability.
- [18.] The Regional Magistrate found the defence of the accused to have been "*an afterthought and fabrication*", but failed to explain why.
- [19.] The Regional Magistrate did not even so much as mention the injured foot/toe of the accused, depicted on photographs taken on the very day that the incident had taken place.
- [20.] Even if there had been merit in the rejection of the accused's version, which there in the circumstances had probably not been, it is incomprehensible why the Regional Magistrate had, on the evidence of the prosecution then, not been prepared to find that the accused had intended to inflict grievous bodily harm when he stabbed Mr Barends twice, causing him to be taken to hospital, where 8 stitches were required to the one wound.
- [21.] In what can unfortunately only be described as a sequence to the comedy of errors that had led to the convictions, the Regional Magistrate considered sentence on the two counts as if he had on count 2 convicted the accused as charged, in other words of assault with intent to cause grievous bodily harm, apparently losing sight of the fact that he had in fact on that charge convicted the accused of only common assault.
- [22.] The charge sheet (J15) reflects the conviction on count 2 as "*Aanranding GBH*". The abbreviation "*GBH*" would presumably be a reference to "*grievous bodily harm*", but if this English abbreviation had indeed been recorded at the same time as the Afrikaans word "*Aanranding*", this would be irreconcilable with the

findings of the Regional Magistrate in his judgment⁵ that *“there was no evidence by the State that the complainant was assaulted with intention to do grievous bodily harm”* and that the accused was therefore on that count *“guilty of assault”*. It would appear that the Regional Magistrate may have been misled by the prosecutor’s remark, in his address on sentence, that the accused had on that count been convicted of assault with intent to cause grievous bodily harm. Ms Ilanga was, according to the record, then also not given the opportunity of reply.

[23.] The Regional Magistrate laboured under the impression that the social worker had recommended a sentence of compulsory residence in terms of the Child Justice Act. The social worker had actually recommended a sentence *“in terms of section 276(1)(i) of the Criminal Procedure Act 51 of 1977 with an option of Correctional Supervision”*. The social worker in fact expressed the opinion that, because the accused would within 2 to 3 years from then reach the age of 21 years, a sentence of compulsory residence as intended in the Child Justice Act *“would not serve its intended purpose”*.

[24.] In view of the conclusion regarding the convictions it is not, however, necessary to deal with the issue of sentence in any further detail. In the premises the following order is made:

THE CONVICTIONS AND SENTENCES ON BOTH COUNTS 1 AND 2 ARE SET ASIDE.

C J OLIVIER

⁵ See page 51 of the transcribed record

**JUDGE
NORTHERN CAPE DIVISION**

I concur.

**S L ERASMUS
ACTING JUDGE
NORTHERN CAPE DIVISION**