

**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, MTHATHA)**

CASE NO: CA&R 37/11

**Date Heard: 16 October 2015
Delivered On: 05 April 2016**

In the matter between:

MZUKISI MTSHA

Appellant

and

THE STATE

Respondent

JUDGMENT

MAKAULA J:

A. Introduction:

[1] The appellant was convicted of murder and sentenced to undergo 10 years imprisonment by the Regional Court for the division of the Eastern Cape sitting at Lady Frere. The appeal is against both the conviction and sentence and it is with the leave of the court *a quo*.

[2] On 6 August 2008, at a taxi rank in Lady Frere, the appellant and the deceased were involved in an altercation. During the altercation the appellant stabbed the deceased twice; this led to the death of the deceased. It is common cause between the parties that the appellant stabbed the deceased and that the stab wounds caused the death of the deceased. In this court the appellant argues that he should have been found guilty of culpable homicide because he acted in private defence when he stabbed the deceased.

[3] The appellant submitted that there were two issues for determination by the court *a quo* and which remain to be adjudicated upon by this court, namely:

- 3.1 whether or not the appellant had, factually, acted in private defence;
- 3.2 if the court accepted the appellant's version of events as reasonably possibly true, whether his version is sufficient to meet the legal requirements of the defence of private defence.

[4] The appellant's argument was that the version of events as told by him before the trial court, are reasonably possibly true and prove that the appellant acted in private defence in order to incapacitate the deceased from utilizing a fire-arm against him. That is fortified by the fact that the appellant left the scene on realizing that he was no longer in danger and did not continue to stab the deceased, submitted the appellant. It is further argued that the actions of the appellant were reasonable under the circumstances as he did not exceed the bounds of self defence.

[5] The appellant in his supplementary heads of argument submitted that if the appeal against the conviction is upheld and is altered to one of culpable homicide, a wholly suspended sentence would be justified.

[6] In the alternative, the appellant submits that in the event the conviction is confirmed, interference with the sentence of 10 years is justified because of the personal circumstances of the accused and what had been submitted in the court below.

B. Appellant's case

[7] The appellant submitted that the court a quo did not get beyond the first leg of the enquiry in that it accepted the evidence of the state witnesses and rejected the version of the appellant as not reasonably possibly true. The appellant conceded that

the court a quo made credibility findings in respect of both witnesses in that the trial court described Mthetheleli as *'an honest witness who was speaking from the heart'*. Lulama was found to have been an honest witness who had taken the court *'into his confidence'*.

[8] Mr McChonachie, for the appellant, argued that the grounds of appeal advanced on behalf of the appellant do not relate to the credibility of the state witnesses but to the reliability of their observations. He submitted that a witness may be honest but not necessarily reliable. Reliability affects the weight to be attached to their evidence, so argued the appellant. The appellant submitted that in evaluating the evidence of the state witnesses, the court a quo accepted that what they had heard being said between the appellant and the deceased may have been different, but the court a quo determined that the reason for this must have been because they were viewing and hearing events at different points in time, with Lulama viewing events from an earlier stage to Mthetheleli.

[9] In criticizing this finding by the court, the appellant argued that the court a quo erred in drawing this conclusion regarding the evidence of the two state witnesses. It is submitted that the evidence of the state witnesses makes it clear that they both witnessed events from different vantage points. It is submitted further that there was no evidence before the court a quo regarding the length of time for which each witness watched the events unfolding. It is also unclear, whether Lulama had indeed witnessed

events from an earlier stage than Mthetheleli did, because Lulama's evidence did not incorporate that which Matshabisa had testified about hearing (*i.e. the appellant saying to the deceased 'what did I say'*), so argue the appellant.

[10] The appellant argued further that both witnesses admitted under cross-examination that they did not see everything that had occurred between the appellant and the deceased as their attention initially had been elsewhere. Therefore, the appellant contended that the version of events testified to by the state witnesses cannot be considered as reliable regarding what exactly took place between the appellant and the deceased. The evidence of Lulama corroborates the version of the appellant to the extent that he confirmed that the deceased was advancing towards the appellant when the appellant drew his knife, so submitted the appellant. This must be viewed in the context that Lulama provided contradictory evidence regarding who advanced and who retreated after the first assault, so argued the appellant.

[11] The appellant averred that his contention that the state witnesses did not see much is confirmed by the post mortem findings. Both state witnesses referred to the deceased as being stabbed in the '*chest*' whilst the post mortem report refers to an abdominal wound. Furthermore Lulama referred to a stab wound to the deceased's left arm, which is not mentioned in the post mortem report. The appellant contended that the court a quo erred in ultimately deciding to accept the version of Lulama in regard to

who started the altercation between the appellant and the deceased (*i.e. who clapped who first*).

[12] The appellant argued that the court a quo erred in rejecting the appellant's version of events with regard to the deceased being in possession of a fire-arm especially that the court a quo accepted the evidence of Fenakwe that he had seen the fire-arm.

[13] Mr McConachie, submitted that the evidence before court as to what happened before the stabbing is that of the appellant and remained uncontested, save for what was testified to by the two state witnesses.

C. Respondent's case:

[14] The state's submissions were very brief and I am not sure whether they were of assistance to this court. However, I shall refer to the respondent's submissions as they appear in the respondent's heads of argument:

“Submissions

9.1 The court deals with two mutually destructive versions, that of the prosecution and that of the appellant. (sic)

9.2 If the court accepts the prosecution's version, which it should, then the appellant was the aggressor, who took the law into his own hand, did not act in private defence;

9.3 If the court accepts the version of the appellant as reasonably possibly true, it should not be, the respondent argues the following;

9.3.1 the appellant's old version he objectively failed to act in private defence, alternatively

9.3.2 he exceeded the limits of private defence.

It is submitted that the appellant acted unlawfully and that the appeal against conviction should be dismissed." (Sic)

[15] In respect of sentence the respondent's heads of argument read:

"10.1 The appellant reverted to self-help and took the law into his own hands;

10.2 The sentence imposed fails to create any sense of shock and is appropriate.

The appeal against sentence should be dismissed."

D. Witnesses' Testimony

[16] Mthetheli Mtshabisa (*Mthetheleli*) testified that he knew both the deceased and the accused as they were all working in the taxi rank at Lady Frere. On 6 August 2008 he was in his car at the taxi rank. The deceased arrived and parked next to him. At that time the appellant's vehicle was parked in a petrol station which was nearby. The

appellant drove away from the petrol station and parked on the left hand side of the road. He heard the appellant saying '*what did I say*' referring to the deceased. He lifted his eyes and looked at the direction of the appellant and the deceased. He saw the appellant drawing out a knife and stabbing the deceased on the chest. The deceased turned away from the appellant. The appellant again stabbed the deceased on the left shoulder. The appellant got to his vehicle and drove away. At the time the deceased was approaching Mthetheleli. The deceased asked from him whether he saw what the appellant had done to him. Mthetheleli instructed a certain young man to take the deceased to hospital. He testified that it was at 9h00 when the deceased was stabbed by the appellant. The deceased and the appellant were 30 paces away from him.

[17] Under cross-examination Mthetheleli stated that he did not know what happened between the deceased and the appellant before the stabbing occurred.

[18] Lulama Ngcongolo (*Lulama*) testified that on 6 August 2008 he was working at the taxi rank washing the car of the deceased. He saw the appellant and the deceased. He knew both of them as they were working at the taxi rank. After a short while appellant arrived and talked to the deceased. He heard the appellant enquiring from the deceased's about when he was going to give him his money. He did not hear what the deceased response was. He further heard the appellant calling the deceased an initiate. The appellant assaulted the deceased with an open hand. When the deceased was taking a step backwards the appellant took out a knife and stabbed the deceased

on the chest. The deceased turned and the appellant stabbed him on the back of the left shoulder. Thereafter the appellant got into his car and drove off. The deceased was taken to hospital. He did not see the deceased attacking the appellant and the deceased was not armed with any weapon. He testified that he was about 10 paces away from where the deceased and the appellant were.

[19] Under cross-examination, Lulama testified he did not hear the deceased saying anything to the appellant. At the time they were talking, they were standing on his right side as he was washing the deceased's car. He further testified under cross-examination that had the deceased been armed he would have seen that not unless the deceased would have been hiding whatever weapon he had. He reiterated under cross-examination that *'the accused person was advancing towards him and he was also advancing slightly advancing towards the accused.'* (sic) He testified that at the time he could see the deceased's hands as they were visible. The deceased was not carrying anything. This witness remained adamant that he only saw the appellant assaulting the deceased with an open hand and not the other way round. He insisted that there was only one clapping incident that took place. He said *'when the deceased after the deceased retaliated back and he approached the accused person, the accused drew out his knife and advance towards the deceased person.'*(sic). As they were advancing towards each other the appellant was the first person to reach and stab the deceased, so testified Lulama. He further testified that he did not see the deceased wearing a fire-arm on his waist. Furthermore, the deceased did not touch his waist after he was clapped by the appellant.

[20] The appellant testified that he knew the deceased. There was a quarrel between him and the deceased the previous week when they were in Cape Town. They met again on 6 August 2008 at Lady Frere taxi rank. He was telephoned by the deceased saying that he wanted to see him. Indeed, he went to meet the deceased next to the taxi rank. The deceased confronted him about what the appellant had said to the deceased's girlfriend. He admitted having talked to the deceased's girlfriend because he wanted to make amends about what occurred in Cape Town. There was an exchange of words between them. The deceased assaulted him on the face with an open hand. He told the deceased not to do that again. The deceased slapped him again. He retaliated by slapping the deceased. After slapping the deceased on the face, he noticed the deceased moving his hand towards his waist. He thought that the deceased was taking out a fire-arm because he knew that the deceased had one as he used to see him carrying it in his waist. In fact he had seen the fire-arm before stabbing the deceased. He drew out a knife and stabbed the deceased. That occurred at the spare of a moment fearing that the deceased would shoot him. He later testified under cross-examination that he did not see the fire-arm but saw the holster. He stabbed the deceased again for the same reason. He testified that he could not run away because his car was far away.

[21] The appellant called the evidence of Enro Lunga Venakwe who testified that he saw the appellant and the deceased on the day in question in town. The deceased was

on the side of the road waiting for his car which was being washed. He could see that the deceased had a fire-arm as it was showing on his waist. He did know whether the fire-arm was in the holster or not but he is certain that it was tucked in the deceased's waist. He left and came back later only to get a report that the deceased had been stabbed.

E. Analysis:

[22] I now turn to deal with the private defence argument raised by the appellant. Our law recognizes two forms of private defence, namely: private defence and putative private defence. With regard to the distinction between the two, the Supreme Court of Appeal in *De Oliveira*¹ held:

“The test for private defence is objective – would a reasonable man in the position of the accused have acted in the same way. In putative private defence it is not lawfulness that is in issue but culpability ('skuld'). If an accused honestly believes his life or property to be in danger, but objectively viewed they are not, the defensive steps he takes cannot constitute private defence. If in those circumstances he kills someone his conduct is unlawful. His erroneous belief that his life or property was in danger may well (depending upon the precise circumstances) exclude *dolus* in which case liability for the person's death based on intention will also be excluded; at worst for him he can then be convicted of culpable homicide.” (Case citations omitted.)

¹ *S v De Oliveira* 1993 (2) SACR 59 (A) at 63I–64A. See also *S v Joshua* 2003 (1) SACR 1 (SCA) at para [29] and *S v Pakane and others* 2008 (1) SACR 518 (SCA) at para [19]

[23] The appellant argued that he only stabbed the deceased because he feared for his life and that he stopped stabbing the deceased immediately on realizing that he was not in danger. I fail to understand how the appellant concluded that the deceased no longer posed a threat to him because the evidence of both witnesses and that of the appellant is that when the deceased turned after the first stab wound was inflicted, the appellant stabbed the deceased at the back and left for his car and drove away. There is no evidence that the deceased fell or showed any signs of being incapacitated at the time the appellant left for his car. The evidence of Mthetheleli is that the deceased walked towards him and asked whether he saw what the deceased did to him. If the deceased, as believed by the appellant, was reaching for his fire-arm, why did the deceased not produce it or reach for it especially because he had the strength of walking away from the appellant to Mthetheleli who was thirty metres away and talk to him.

[24] The evidence of both Mthetheli and Lulama indicates that the appellant was the aggressor. Mthetheli testified that he saw the appellant move his car and parking it next to the deceased's car which was being washed. He heard the appellant asking the deceased 'what did I say'. He lifted his eyes and saw the appellant drawing out a knife and stabbing the deceased. The deceased turned away from the appellant. The appellant again stabbed him on the left shoulder.

[22] Lulama testified that he heard the appellant enquiring from deceased about the appellant's money. The appellant called the deceased an initiate. To call a man of 44 years an initiate is an insult. An initiate is a boy who has just been circumcised. He did not hear the response from the deceased but saw the appellant assaulting the deceased with an open hand. When the deceased was taking a step backward, the appellant took out a knife and stabbed the deceased. The deceased turned and the appellant stabbed him at his back on the left shoulder.

[23] I do not see any contradiction in this evidence of the two witnesses in this regard. They witnessed the same event and did not contradict each other. Their evidence as regards to what took place at the time of the stabbing is not contradictory at all. The deceased did not pose any danger to the appellant at that stage. Both witnesses did not see the deceased reach for his waist especially Lulama who testified that he saw both hands of the deceased at that juncture.

[24] The criticism that their evidence is not supported by the post mortem report does not take the matter any further. They both witnessed the appellant stab the deceased twice both frontally and at the back. The appellant did not dispute that he stabbed the deceased on the front and back of his body. The post mortem report especially the diagrams attached to it reveal a stab wound on the front in the abdomen and another on the left shoulder. Whether the witnesses, when the appellant stabbed the deceased in the front part of the body, thought, wrongly so, that he was stabbing him on the chest is

neither here nor there. The appellant did not dispute that he stabbed the deceased twice as stated by the witnesses. There is no merit therefore in this submission.

[26] It is trite that a court of appeal cannot upset credibility findings made by the trial court except in exceptional circumstances. There are no such circumstances in this matter. I am unable to find any misdirection on the part of the magistrate. The evidence of the state witnesses destroys the Appellant's version that he was under attack by the deceased thus ruling out both private defence and putative private defence. The Appellant's version was correctly found not to be reasonably possibly true. the Magistrate accordingly correctly convicted the Appellant.

[27] In respect of sentence, Mr McChonachie submitted that if the appeal is dismissed, this court should find that the magistrate erred in not considering other sentencing options especially a non-custodial sentence. He further submitted that the matter should be remitted to the magistrate to obtain a pre-sentence and probation officer's reports and re-consider an appropriate sentence.

[28] It should be appreciated that the furnishing of pre-sentence reports and probation officer's reports is not peremptory before sentence can be passed. Each case depends on its merits. Such reports may be called for by the state, the defence or the court *mero moto* especially in instances where a court feels the need to be better informed about the character and the possible future of the offender, the impact an offence had on the

victim, his family and the community at large. That action would be necessary to enable a court in assessing and deciding on an appropriate sentence.²

[29] A trial court's failure to call for pre-sentence reports cannot cause prejudice if all the relevant facts were placed before court.³ In *Le Roux*, Mlambo JA had the following to say:

“‘The role of pre-sentence reports must . . . not be confused with the obligation of a trial court to impose an appropriate sentence in the first place . . . In itself the refusal to allow a postponement for purposes of a pre-sentence report is not a misdirection. It is clear . . . that all the appellants’ personal circumstances were considered by the trial court before it imposed sentence.’ It should be noted that in this case all the appellants were adults.”⁴

[30] In the instant matter, the accused was represented by a competent attorney, who placed before court all the mitigating factors which enabled the magistrate to arrive at an appropriate sentence. The mitigating factors placed before the court a quo amply deal with the personal circumstances of the appellant, the age, marital status, that the appellant was a first offender with dependants, the circumstances under which the offence was committed especially that there was bad blood between the deceased and the appellant emanating from an incident that occurred in Cape Town. The court a quo

² See *S v Magano* 2014 (2) SACR 423 at para [9].

³ *S v Le Roux & Others* 2010 (2) SACR 11 SCA (*Le Roux*) at para [38].

⁴ *Ibid* at para [35] as referred to in Du Toit, *et al*, Commentary on the Criminal Procedure Act; JUTA at 28-6D.

referred to these factors and took them into account when dealing with the sentence it imposed.

[31] Holmes JA⁵ said:

- “1. In every appeal against sentence, whether imposed by a magistrate or a Judge, the Court hearing the appeal –
 - (a) should be guided by the principle that punishment is “pre-eminently a matter for the discretion of the trial Court”; and
 - (b) should be careful not to erode such discretion: hence the further principle that the sentence should only be altered if the discretion has not been “judicially and properly exercised”.
2. The test under (b) is whether the sentence is vitiated by irregularity or misdirection or is disturbingly inappropriate.”

[32] In the instant matter I find no misdirection and none has been pointed out to me, which would merit an interference with the sentence.

In the result I make the following order:

(a) The appeal against both conviction and sentence is dismissed.

⁵ *S v Rabie* 1975 (4) SA 855 (A) at 857D-E.

M MAKAULA
JUDGE OF THE HIGH COURT

I agree and it is so ordered.

F DAWOOD
JUDGE OF THE HIGH COURT

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