



Reportable:	YES / NO
Circulate to Judges:	YES / NO
Circulate to Magistrates:	YES / NO
Circulate to Regional Magistrates:	YES / NO

**THE HIGH COURT OF SOUTH AFRICA
(NORTHERN CAPE HIGH COURT, KIMBERLEY)**

Case No: KS 26/09

Delivered: 06-08-09

In the matter between:

THE STATE

V

ROMANO DE BESCH

JUDGMENT

MJALI A J:

1. The accused is charged with the murder of Desmond Alfred Solomon. It is alleged that on or about 7 November 2008 at Delta Street, Kimberley, the accused unlawfully and intentionally killed the deceased by stabbing him with a knife.
2. The accused pleaded guilty and in his statement in terms of section 112 of the Criminal Procedure Act gave his version of how the murder took place and further confirmed that the implications of section 51 of Act No. 105 of 1997 were explained to him and that he understands

them.

3. The crux of the accused's version briefly summarised is as follows, at the crucial time, the deceased provoked him by swearing at him, smoking and finishing his cigarette that he had given to Candice to light for him and further grabbing him with his collar and slapping him with an open hand. This prompted the accused to take out his knife and stab the deceased several times without aiming at a particular part of his body. He foresaw the possibility that the deceased might suffer serious injuries which can also result in his death. Despite this possibility he continued stabbing him.
4. The state rejected the plea and applied that a plea of not guilty be entered. Accordingly a plea of not guilty was entered. Before the state proceeded, counsel for the accused made certain admissions in terms of section 220 of the Criminal Procedure Act 51 of 1977 (CPA).
5. The admissions made in terms of section 220 of the CPA were the following,
 - all the admissions made in the statement made in terms of section 112. (That statement was handed in as exhibit A.)
 - the identity of the deceased,
 - the fact that the deceased sustained no further injuries from the scene of crime until a post mortem examination was conducted on his body,
 - the contents and findings of the post mortem. (The post mortem report was handed in by consent as Exhibit B).
 - the photo album and its contents as well as the plan . (This was handed in as Exhibit C). Exhibit D is the statement of

admissions in terms of 220 of the CPA.

6. The evidence is largely common cause. The only issue here is whether the accused had the actual intention to kill Desmond Alfred Solomon when he attacked and stabbed him or whether he only realised that he might die and persisted with his attack upon him notwithstanding his appreciation of that risk. In an attempt to prove its case, the state led the evidence of two witnesses, namely, one Candice Matio and Richard Januarie.
7. The accused's version of provocation by the deceased is in conflict with that of Candice who is the only witness pertaining to the crucial time prior to the stabbing of the deceased. Richard was still inside watching TV. According to Candice the accused who was standing in the corner outside his father's premises, called her. She refused to go to him. At that time she was chatting to the deceased.
8. The accused entered the yard with a knife and stabbed the deceased on both sides of the neck as well as on the head. At the time he was stabbed, the deceased enquired from the accused as to why he was stabbing him. At some stage the accused left the premises and later returned and stabbed the deceased on the back. As to how many times altogether the accused stabbed the deceased, Candice testified that she was not certain but only saw four times.
9. According to her the deceased had not provoked the accused at all prior to the stabbing. Cross examined by the defence Candice denied any issue about a cigarette and the swearing by the deceased. She mentioned that the deceased did not smoke. She further denied that the deceased grabbed and slapped the accused. There was no bad

blood or a grudge between the accused and the deceased and also between the accused and the state witnesses. Infact the accused used to ask for a lighter to illuminate his cigarettes. Candice further mentioned that it is the deceased and not the accused who mentioned the word “poes” to her.

10. Richard could neither confirm nor deny that the deceased swore at the accused, smoked the accused's cigarette and further grabbed and slapped him as at the crucial time he was watching TV. He had asked the deceased to wait for the programme he was watching on TV to finish and before he would meet him outside as per the deceased's request. The deceased went and stood outside with Candice.
11. He could hear them chatting as the door of the “voorhuis” wherein he was watching TV was open.
12. Approximately five minutes after the deceased left the house, he heard a strange voice. Not long thereafter the deceased jumped inside the house with blood oozing and closed the door. He noticed that somebody was pushing the door from outside. He later realised that it was the accused as the door opened and the accused entered and stabbed the deceased on the head. He could not say with certainty how many times the accused stabbed the deceased on the head (he said it could have been once or twice).
13. Thereafter the accused left the premises. Richard tied a towel around the neck of the deceased to stop bleeding and assisted the deceased to go outside to get fresh air. He laid him down on the stoep on his side facing the wall and proceeded towards the gate in an attempt to summon help for the ambulance and the police. It is at this stage that

the accused returned and went straight to the deceased who was already subdued and stabbed him on the back with a knife.

14. The accused denied pushing the door open and entering and stabbing the deceased inside. According to him, when he stabbed the deceased, the deceased held him and they both fell on the spot marked C on photo No. 2 in the album. He further denied that after leaving the premises, he returned to inflict a stab wound at the back of the deceased.

15. After the defence case, the court called the photographer of Exhibit C, one constable Morakanele. His evidence is that he noticed blood inside the house and it was not just drops of blood but a pool of blood inside.

16. In this particular matter it is necessary to refer to the State's burden of proof and the way in which a court should approach the evidence where a court is faced with two conflicting, in some instances, mutually destructive versions.

17. In ***S v Ntsele 1998 (2) SACR 178 (SCA) [also reported at [1998] 3 All SA 517 (A)]*** At **182b–f** the Supreme Court of Appeal dealing with the onus of proof on the State, the adequacy of proof and the trial court's evaluation of evidence. Eksteen JA says the following:

“Die bewyslas wat in ‘n strafsak op die Staat rus is om die skuld van die aangeklaagde bo redelike twyfel te bewys – nie bo elke sweempie van twyfel nie”.

18. In ***Miller v Minister of Pensions [1947] 2 All ER 372 op 373H*** –

Denning R dealing with a similar question stated:

‘It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence ‘of course it is possible, but not in the least probable’, the case is proved beyond reasonable doubt.’

19. In **S v Singh 1975 (1) SA 227 (N)** the court discussed the approach of a court where there is a conflict of fact. The learned Judge says the following at 228F–H:

“it would perhaps be wise to repeat once again how a court ought to approach a criminal case on fact where there is a conflict of fact between the evidence of the State witnesses and that of an accused. It is quite impermissible to approach such a case thus: because the court is satisfied as to the reliability and the credibility of the State witnesses that, therefore, the defence witnesses, including the accused, must be rejected. The proper approach in a case such as this is for the court to apply its mind not only to the merits and the demerits of the State and the defence witnesses but also to the probabilities of the case. It is only after so applying its mind that a court would be justified in reaching a conclusion as to whether the guilt of an accused has been established beyond all reasonable doubt.”

20. An extremely helpful summary also appears in the headnote of the

judgment in **S v Radebe 1991 (2) SACR 166 (T) at 167j–168h**. The summary reads thus:

“A criminal court does not judge an accused’s version in a vacuum as if only a charge-sheet has been presented. The State case, taking account of its strengths and weaknesses, must be put into the scale together with the defence case and its strengths and weaknesses. It is perfectly correct that the State case cannot be determined first and if found acceptable regarded as decisive. The State case, if it is the only evidentiary material before the court, must in all cases be examined first in order to determine whether there is sufficient evidentiary material in respect of all the elements of the offence and whether there is not perhaps in any event a reasonable possible alternative hypothesis appearing therefrom. Precisely the same approach is applicable if the defence puts forward a version. Taking into account the State case, once again it must be established whether the defence case does not establish a reasonable alternative hypothesis. That alternative hypothesis does not have to be the strongest of the various possibilities (that is, the most probable) as that would amount to ignoring the degree and content of the State’s onus. The State’s case must also not be weighed up as an independent entity against the defence case as that is not how facts are to be evaluated. Merely because the State presents its case first does not mean that a criminal court has two separate cases which must be weighed up against one another on opposite sides of the scale. The presentation of the two cases in that sequence is the result of considerations of policy and effectivity. The criminal court ultimately has a conglomerate of evidentiary material before it

which is indicative of facts against or in favour of the innocence of the accused. Some exculpatory facts may appear from the State case whilst incriminating facts might appear from the defence case, for example admissions made during cross-examination. The correct approach is that the criminal court must not be blinded by where the various components come from but rather attempt to arrange the facts, properly evaluated, particularly with regard to the burden of proof, in a mosaic in order to determine whether the alleged proof indeed goes beyond reasonable doubt or whether it falls short and thus falls within the area of a reasonable alternative hypothesis. In so doing, the criminal court does not weigh one 'case' against another but strives for a conclusion (whether the guilt of the accused has been proved beyond a reasonable doubt) during which process it is obliged, depending on the circumstances, to determine at the end of the case: (1) where the defence has not presented any evidence, whether the State, taking into account the onus, has presented a prima facie case which supports conclusively the State's proffered conclusion; (2) where the defence has presented evidence, whether the totality of the evidentiary material, taking into account the onus, supports the State's proffered conclusion. Where there is a direct dispute in respect of the facts essential for a conclusion of guilt it must not be approached: (a) by finding that the State's version is acceptable and that therefore the defence version must be rejected; (b) by weighing up the State case against the defence case as independent masses of evidence; or (c) by ignoring the State case and looking at the defence case in isolation."

21. The proper test is that an accused is bound to be convicted if the evidence establishes his guilt beyond reasonable doubt, and the logical corollary is that he must be acquitted if it is reasonably possible that he might be innocent.
22. The process of reasoning which is appropriate to the application of that test in any particular case will depend on the nature of the evidence which the court has before it. What must be borne in mind, however, is that the conclusion which is reached (whether it be to convict or to acquit) must account for all the evidence. Some of the evidence might be found to be false; some of it might be found to be unreliable; and some of it might be found to be only possibly false or unreliable; but none of it may simply be ignored.” (See also *S v Trainor* 2003 (1) SACR 35 (SCA) at 40h–41a; *S v Van Aswegen* 2001 (2) SACR 97 (SCA) at 101b.)
23. From the foregoing it must at this stage already be clear that there is no onus on an accused to convince a court of any of the propositions advanced by him. It is for the State to prove the propositions false beyond reasonable doubt.
24. With regard to the question of provocation, it must be said from the very onset that given the pleasant circumstances existing between the parties, it is improbable that the accused would simply pounce at the deceased without a reason. It is probable that he was provoked on the day of the incident.
25. The crucial question remains, i.e whether the State has proved beyond reasonable doubt that the accused had a direct intention to kill the deceased when he stabbed him.

26. Dolus being a subjective state of mind, the several thought processes attributed to an accused must be established beyond any reasonable doubt, having due regard to the particular circumstances of the case (see *S v Ngubane* 1985 (3) SA 677 (A) at 685A–F; *S v Stigling en 'n ander* 1989 (3) SA 720 (A) at 723C–D; *S v Bradshaw* 1977 (1) PH H 60 (A); *S v Sigwahla* 1967 (4) SA 566 (A) at 570A; *S v Sephuti* 1985 (1) SA 9 (A) at 121; *S v Maritz* (supra) at 417b–e; *S v Mamba* 1990 (1) SACR 227 (A) at 236j–237e).

27. In **S v Sigwahla 1967 (4) SA 566 (AD) at 569–570A** it was stated as follows:

"Stabbing cases are usually a matter of degree and intention must not be inferred by hindsight from the fact of death. The part of the body injured is relevant."

28. From the evaluation of the evidence as a whole the objective facts support the state's version. Importantly, the number of injuries inflicted on the deceased as well as their position as reflected in the post mortem report accords with the evidence given by the two state witnesses. The pool of blood inside the house lends credence to the evidence Richard that the deceased jumped inside the house during the attack and that he was bleeding extensively. That deceased bled extensively is clear from the pictures as well as the pale internal organs noted during the post mortem examination.

29. On the other hand the defence version is totally at odds with the objective facts. According to the accused the deceased held him when he stabbed and they both fell on the spot marked C on photograph No.2 in the photo album. The deceased according to the

accused never entered the house after being stabbed. As mentioned earlier this version is negated by the pool of blood that was found in the house. Further having regard to the position of all the injuries sustained by the deceased (all being on upper part of his body) as well the position of the spot on which the deceased (according to the accused) fell it is improbable that the blood would spill inside the house to the extent of forming a pool.

30. Further in all the photos in the album the deceased was clearly bleeding profusely. The accused whose version is that the deceased hugged him has a clean shirt on the top part with only spots of blood in the bottom part.

31. Apart from the objective facts, the state witnesses corroborate each other on the following facts

- That the Richard wrapped a towel around the deceased's neck to stop bleeding.
- That the accused returned and stabbed the deceased on the back.
- When this wound was inflicted the deceased was already subdued.
- The position at the back of the deceased tallies with the version of the witnesses.

32. So much has been made about the contradictions in the state's evidence. Such contradictions relate to the fact that Candice never mentioned that she screamed when the deceased was stabbed yet Richard mentions this in his evidence. It suffices to say this contradiction is not material at all. A further contradiction was in the

fact that Candice never mentioned that the deceased ran into the house when the accused stabbed him. She also did not mention the issue of the pushing of the door. This in my view has been dealt with abundantly when I dealt with the objective facts. Another contradiction relates to the lighting in the scene. This again in my view is not material as the witnesses could see what was happening and also what they corroborate each other on what they saw. Further what they saw tallies with the objective evidence.

33. I am satisfied that upon a conspectus of the evidence in particular the fact that the accused forced his way into the house and further stabbed the deceased further returned to the premises and inflicted a further wound at the back of the deceased coupled with the number, site and the nature of the injuries¹ the only reasonable inference, is that the accused had a direct intent to kill the deceased.

34. Accordingly the accused is found guilty of murder with *dolus directus*.

35. I come now to the issue of sentence.

36. Section 51(2), read with Part II of Schedule 2, of the Act requires the imposition of a minimum sentence of 15 years' imprisonment unless

“substantial and compelling circumstances exist which justify the imposition of a lesser sentence”.

¹ 1,5 cm diagonally aligned penetrating wound over the right side of the neck. The tract of this wound passes from right to left in an inferior and medial direction. It incises through the musculature of the neck and partially severs the internal carotid artery. It terminates posterior to the artery.

1cm diagonally aligned penetrating incised wound over the left side of the neck. The tract of this wound passes from left to right in an inferior and medial direction. It incises through the musculature of the neck and partially severs both the internal jugular vein and the vertebral artery at its origin. It terminates within the surrounding musculature. A 0,5 cm incised wound over the left scalp. The wound does not penetrate the skull and is not fatal.

A 2cm horizontally aligned incised wound over the top of the scalp. This wound does not penetrate the skull and are not fatal.

37. The meaning of the term “substantial and compelling circumstances” justifying the imposition of a lesser sentence was set out in court in ***S v Malgas 2001 (1) SACR 469 SCA***. In brief, the court held that in determining whether there are substantial and compelling circumstances, a court must be conscious that the legislature has ordained a sentence that should ordinarily be imposed for the crime specified, and that there should be truly convincing reasons for a different response.
38. But it is for the court imposing sentence to decide whether the particular circumstances call for the imposition of a lesser sentence.
39. The circumstances envisaged by the expression “substantial and compelling circumstances”, need not be exceptional but must provide truly convincing reasons or weighty justification for imposing less than the prescribed sentence, or they must induce the conclusion that the prescribed sentence would in the particular case be unjust or disproportionate to the crime, the offender and the legitimate needs of society.
40. Such circumstances include those factors traditionally taken into account in sentencing – mitigating factors. Of course these must be weighed together with aggravating factors.
41. When deciding whether there are substantial and compelling circumstances the court is enjoined to consider all of the above factors, including the personal circumstances of the accused, the interests of society and the gravity of the offence and to give due recognition to the fact that when “considering sentence the emphasis

was to be shifted to the objective gravity of the type of crime and the public's need for effective sanctions against it.

42. The factors advanced on behalf of the accused as substantial and compelling circumstances are that

- The accused was 23 years of age at the time of the commission of the offence; the accused was born on 23 June 1985.
- He pleaded guilty although the plea was later changed to that of not guilty;
- He stated in his statement in terms of section 112 of the Criminal Procedure Act that he is sorry for what he did;
- He has been in custody from 7 November 2008 to date (06 August 2009).
- At a very tender age he witnessed the killing of his mother (being stabbed in 1992) by his very own father.
- He has had a dysfunctional background in that his father gave knives to him and his two brothers to stab each other. He went up to standard 6 at school.
- His aunt in whose custody he was from 1995 despite numerous requests, could not get any assistance from the social workers pertaining to the counselling of the accused and his two brothers.
-

43. I take it in the accused's favour that there was some amount of provocation by the deceased on that day.

44. I turn to consider the question whether the above factors amount to substantial and compelling circumstances which justify the imposition of a lesser sentence as contemplated in section 51(2) of the Criminal Law Amendment Act.

45. In my view the above factors cannot be considered in vacuo, but due weight must be given to them in the context of the given case and together with all of the other factors before the court, such as the aggravating features of the case and the interests of the community.
46. The accused is not new to crime involving violence. The suspended sentence that was imposed on him when convicted with Assault GBH did not deter him from committing violence against other people.
47. Murders are all too common. Society requires protection from those who use violence and dangerous weapons to resolve their problems.
48. The sentence imposed must send a deterrent message to those who seek solutions to their problems in violence.
49. Taking all these factors into account, i.e. His unfortunate background, his relative youthfulness, the fact that he was provoked, he pleaded guilty and has expressed remorse, the fact that he has been in custody for more than nine months. the seriousness of the offence with which he has been convicted as well as the savage manner in which this murder was committed, I am satisfied that although the accused should be given a lengthy sentence of imprisonment, a sentence of 15 years would be unjust.
50. There are substantial and compelling circumstances justifying the deviation from the prescribed minimum sentence.
51. In my view a sentence of 10 years' imprisonment would send a

strong deterrent message to the community, but would also take account of the very difficult personal circumstances of the appellant.

52. In the result the accused is sentenced to 10 years imprisonment.

MJALI A

ACTING JUDGE