

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

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

**Case No: K/S/ 38/09
Delivered: 16-09-2009**

THE STATE

V

RICHARD ABERTOOL

JUDGMENT

MJALI AJ:

[1] The accused, a 19 year old man, is charged with the murder of Lesley Milo. It is alleged that on the evening of 14 July 2006, the accused unlawfully and intentionally stabbed the deceased with a knife and thereby caused his death.

[2] He pleaded not guilty to the charge. In amplification of his plea of not guilty the accused gave the following explanation. The deceased

attacked him with a sharp object and he stabbed him in self defence. Further, in terms of section 220 of the Criminal Procedure Act No. 51 of 1977 the accused admitted the following.

2.1 That the deceased is Lesley Milo.

2.2 That he stabbed the deceased once with a knife.

2.3 That the deceased died as a result of the stab wound inflicted by him on the deceased.

[3] His written plea explanation statement was handed in and admitted as exhibit A. The post mortem report as well as the photo album and plan were handed in by consent between the parties and admitted as exhibits B and C respectively. The chief post mortem findings were one stab wound on the left side of the neck and laceration on the left carotid. The cause of death was hypovolemic shock.

[4] Thus the only issue that remains to be determined is whether or not the accused acted in self defence when he stabbed the deceased on the evening of 14 July 2006. Three witnesses testified for the state namely Elmarie Botha (Elmarie), Elvicious Botha (Elvicious) and Inspector Edmund Block. The accused testified in his defence. As best as can be discerned from the contradicting evidence adduced by

three state witnesses as well as that of the accused, the salient facts are essentially as follows. At 23hoo on 14 July 2006 the accused, deceased, Elmarie and Elvicious were together at Blesbok Street when the deceased asked for a puff from the cigarette smoked by Elvicious. According to Elmarie, she as well as the accused also asked for a puff from Elvicious and a quarrel ensued between the deceased and the accused as to who should smoke first. This quarrel culminated in the accused retreating and stabbing the deceased once on the neck. At the time of the stabbing, the deceased was standing and had not physically attacked the accused in any manner. Elvicious's version differs from Elmarie's. According to him prior to the incident he had been drinking with the accused and some other friends inside a certain room. At a certain stage they decided to go outside to watch people making noise in the street. As they were standing outside with the accused, the deceased appeared and asked for a puff from him, the accused simply stabbed the deceased for no reason at all (without any quarrel and any attack by the deceased). Neither the accused nor Elmarie did at any stage ask for a puff from his cigarette nor was there any quarrel between the accused and the deceased regarding who should smoke first.

The two (Elmarie and Elvicious) are however ad idem about the fact that the deceased had no weapon in his possession and had not

attacked the accused prior to the stabbing. After being stabbed the deceased ran and fell at a spot, 69,6m away from the scene. The accused also ran to his home. The police were summoned. They found the deceased still alive but his pulse was very low and summoned an ambulance. The deceased was later certified dead on the spot by the ambulance personnel. No weapon was found in the deceased's possession and on the spot where he fell. Inspector Block is one of the policemen that were summoned to the scene. They found the deceased at the spot where he fell. According to him no sharp object was found in the deceased's possession and at the spot where he fell. The police did not go to the spot where the stabbing took place.

[5] After the deceased was removed to the mortuary, Inspector Block and his crew went searching for the accused. They found him at his home with his hand full of blood. The accused gave them the knife he used to stab the deceased. He had a cut on his finger which according to inspector Block looked like a stab wound. They took the accused to the hospital for treatment and then detained him. In inspector Block's observation the accused smelled strongly of alcohol and was drunk.

[6] The accused testified that prior to him stabbing the deceased, a

quarrel ensued between him and the deceased. This was caused by the fact that the deceased grabbed a cigarette that Elvicious gave him. The deceased refused to give the cigarette to him. The quarrel progressed to the stage where they shouted and swore at each other. The deceased advanced and made a stabbing motion at him. He warded off the blow with his hand. He did not see any weapon in his possession but assumes from the cut he sustained on his finger after warding off the blow that the deceased was armed with a sharp object. The deceased continued advancing towards him. At some stage he had to hold onto the fence and pull himself up from a kneeling position. It is then that he took out an okapi knife from his pocket with one hand, opened it using his mouth and stabbed the deceased once on the neck. When he stabbed he did not aim at any particular part of the deceased's body. According to him the whole incident happened fast.

[7] The remarks of Brand AJA in *S v Shackell* 2001 (2) SACR 185 @194g-i, are particularly apposite in evaluating the evidence in this matter:

“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."

[8] It is trite that there is no obligation upon an accused person, where the State bears the onus, "to convince the court". If his version is reasonably possibly true he is entitled to his acquittal even though his explanation is improbable.

[9] It is not necessary for a court to believe the version of an accused person, nor is it required that a court believes the details of such a version. This is trite in our law. See inter alia: **S v Jaffer 1988 (2) SA 84 (C) at 89D–E. S v Mhlongo 1991 (2) SACR 207 (A) at 210d.**

[10] What is required in a matter such as this is a holistic analysis of all the evidence, the weighing-up of those elements which point to the guilt of the accused as against those which point towards his innocence, while having regard to inherent strengths and weaknesses, probabilities and improbabilities on both sides and, having completed this exercise, to take a decision as to whether the balance weighs so heavily in favour of the State as to exclude any reasonable doubt about an accused person's guilt. See in this regard ***S v Chabalala 2003 (1) SACR 134 (SCA) at 139I–140A.***

[11] Moreover, a trier of fact should also examine independently verifiable evidence, if any, to determine whether it supports any of the evidence tendered. See in this regard ***S v Trainor 5 2003 (1) SACR 35 (SCA) at 41D–C*** whereat Navsa JA states the following:

“A conspectus of all the evidence is required. Evidence that is reliable should be weighed alongside such evidence as may be found to be false. Independently verifiable evidence, if any, should be weighed to see if it supports any of the evidence tendered. In considering whether evidence is reliable, the quality of that evidence must of necessity be evaluated, as must corroborative evidence, if any. Evidence, of course, must be evaluated against the onus on any

particular issue or in respect of the case in its entirety. The compartmentalised and fragmented approach of the magistrate is illogical and wrong.”

[12] Mr Mashuga for the State has argued for the conviction of the accused. In support of that contention he argued that the mere fact that no weapon was found in deceased's possession and at the place where the deceased fell proves that the deceased was unarmed. He further relies on the evidence of the two state witnesses as well as on the fact that the accused himself did not see any weapon in the deceased's possession. He argued further that a period of time elapsed between the stabbing of the deceased and the arrest and that the accused could have sustained the injury on his finger subsequent to the stabbing of the deceased and before his arrest.

[13] In my view this argument cannot stand for the following reasons:

13.1 The objective evidence that the accused sustained a stab wound when he warded off the blow is totally at odds with Elmarie's and Elvicious' evidence that the deceased was unarmed.

13.2 The differing versions of the state witnesses as to how the events unfolded on the night in question.

13.3 The police did not search the spot where the deceased was stabbed for any weapon. No reliance can be placed on Elmarie's

evidence that there was no weapon on the murder scene as she left the scene immediately after the stabbing to summon an ambulance.

13.4 It was never the State's case that subsequent to the stabbing of the deceased and after leaving the scene the accused sustained an injury on his finger.

13.5 The accused's evidence as to how he sustained the injury on his finger went unchallenged. The two eye witnesses did not see it happen. Elmarie stated that it could have happened but she did not see it and later changed to say it never happened. This casts some doubt about her reliability. Elvicious saw the injury when the accused was released from custody.

13.6 There is no evidence that the accused sustained the injury other than he has testified. Mr Mashuga's submission that the accused might have sustained the injury subsequent to the stabbing of the deceased but prior to his arrest amounts to asking this court to embark into the field of conjecture. It is common cause that when the police arrived at the accused's place they found him injured and took him to hospital before detaining him. It was never put to the appellant that he sustained the injury otherwise than he has testified and that he showed it to the police so as to dupe them into believing that he acted in

self defence.

13.7 On the State's description of events the accused behaved like a lunatic, stabbing the deceased without reason. It is improbable that the accused would behave in this most blatantly murderous fashion in full view of witnesses and immediately thereafter hand over the knife and report to the police that the deceased injured him, well-knowing that his version was false and would probably be contradicted. This is particularly so, if one considers that, on the State's version of events, there appears to have been no apparent trigger for the accused's alleged behaviour.

[14]Having considered all the evidence in this matter, I am not convinced that the accused's version is not reasonably possibly true. Not only do the state witnesses contradict each other materially, but a conspectus of all the evidence does not persuade me that the appellant's version can be said to be false beyond reasonable doubt. In fact Elmarie's evidence that there was an altercation between the accused and the deceased as to who should smoke first, lends credence to the accused's version of the quarrel over a cigarette. Further, Elmarie's testimony that the accused first retreated before he stabbed the deceased negates the state's version that the deceased was simply standing when

the accused stabbed him. Independently verifiable evidence in this matter of Inspector Block that the accused sustained an injury on his finger on the night in question. All these facts lead to a conclusion that this is one matter where it cannot be said that the balance weighs so heavily in favour of the State as to exclude any reasonable doubt about the accused person's guilt.

It is a well-established value in our law that in search for the truth it is better for a guilty person to go free than for one innocent victim to be convicted. On this basis the accused is given the benefit of doubt and must walk.

[15] In the result;

The accused is found not guilty and discharged.

G N MJALI
ACTING JUDGE

On behalf of the State	Adv. Mashuga
Instructed by	The Director of Public Prosecutions
For the defence	Adv. Van Tonder
Instructed by	The Legal Aid Board

