

**IN THE HIGH COURT OF SOUTH AFRICA**  
**(ORANGE FREE STATE PROVINCIAL DIVISION)**

Appeal No. : A410/07

In the appeal between:

**NKOSANA SUNDAY MOKOENA**

Appellant

and

**THE STATE**

Respondent

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**CORAM:** EBRAHIM J *et* MOLOI AJ

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**JUDGMENT BY:** MOLOI AJ

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**HEARD ON:** 20 OCTOBER 2008

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**DELIVERED ON:** 30 OCTOBER 2008

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[1] The appellant was charged with murder in the Regional Court at Welkom in that on or about 18 November 2005 and at Thabong in the Regional Division of the Free State, he unlawfully and intentionally assaulted one Sonwabile Mzephe by stabbing him with a knife on his head and thereby fatally wounding him. He was, however, convicted of culpable homicide having been found to have exceeded the bounds of self defence.

[2] The following are common cause in this matter: that both the appellant and the deceased, together with many other people, were drinking liquor at a tavern in Thabong on the 18<sup>th</sup> November 2005; that the appellant lent his jacket to the deceased's girlfriend after she complained of feeling cold; that the deceased became incensed when he realised that his girlfriend is wearing the appellant's jacket and became aggressive towards the appellant; that the deceased and his friends at a stage chased the appellant armed with bottles; that the appellant stabbed the deceased with a knife on the left side of his forehead and that the deceased died from this injury later in hospital.

[3] The first state witness, Oupa Gift Martins, testified he was drinking at the tavern when he realised an argument had developed between the appellant and the deceased over the jacket the appellant lent to the deceased's girlfriend. He noticed the deceased and his friend, one Nqidisi, armed with bottles, chasing the appellant out of the tavern and the appellant turning back in the doorway and from behind the deceased stabbing him with an Okapi knife on the left hand side of his (deceased's) forehead as a result of which the

deceased fell down. He conceded he was about ten (10) metres away from the doorway and that there were many people in the tavern.

[4] The next state witness, Mncedisi Livingstone Mabuya, confirmed having noticed the argument between the deceased and the appellant regarding the jacket; having seen the appellant and his friend, Kenneth, leaving the tavern unarmed and followed by the deceased; and having seen the deceased coming back into the tavern already injured. He confirmed that the argument was caused by the deceased.

[5] The appellant's version was that, having realised the deceased wanted to fight him over the jacket he lent to the deceased's girlfriend, he wanted to leave the tavern and go home in order to avoid further quarrels with the deceased. As he was leaving, he was charged on by the deceased with some of his friends wielding empty bottles and one, a knife. He managed to snatch the knife and as the deceased was poised to hit him with the bottle, he swung his hand towards the deceased in front of him and in the process caused him

an injury to his forehead. He did so because, according to him,

“... as I retreated, the deceased is the one that approached me with a bottle ... bottles were coming my direction.”

though he did not notice what the deceased’s friends were doing. He had no intention of stabbing the deceased. He ran away still terrified he could be followed by his attackers.

[6] The court below accepted the evidence of the first state witness as free of contradictions or improbabilities though the witness had not stated how the appellant, who was behind the deceased, managed to inflict the wound on the left side of the deceased’s forehead. The court below further found the evidence of the second state witness different from that of the first and declared it unsatisfactory without making a finding of contradictory versions in the evidence of the state witnesses. The court below treated the evidence of the first state witness as that of a single witness on which it could base a finding despite the improbability pointed out above.

[7] In dealing with the evidence of the appellant, the court below found it to be flawed with contradictions and improbabilities

in that he initially and during cross-examination of witnesses agreed to having stabbed the deceased. In cross-examination the appellant testified that when he was attacked he dispossessed one assailant of the knife and simply swung it as the deceased approached him with a bottle lifted and in the process, inflicted the fatal wound on the forehead when the deceased was in front of him. He had neither in plea-explanation nor in cross-examination of state witnesses described how the stabbing took place. Fact is there was a stabbing of the deceased. I cannot find a contradiction when he later describes how the stabbing occurred. His description of how it took place, is more consistent with the location of the wound than with direct stabbing which would normally be directed to the upper body and not necessarily the head.

- [8] Another improbability noted by the court below is why the appellant disarmed the person who was a threat to him but directed the blow at the deceased instead of the person threatening to stab him. I am of the view that the attacker was now rendered harmless after he was disarmed and the appellant would have no justification to stab him then as the

danger had been averted. The person holding danger for the appellant was then the deceased as he had lifted the empty bottle ready to strike. There is on record sufficient evidence that the deceased was enraged and was the aggressor assisted by his friends armed with bottles. There is no evidence even from the first state witness that the deceased's rage and aggression had abated when he was stabbed.

[10] In view of the finding I make hereunder I do not deem it necessary to deal with the question of a conviction on the competent verdict of culpable homicide on the grounds of "ought reasonably to have foreseen; that he might exceed the bounds of self defence and that he might kill his aggressor".

[11] I am satisfied that the appellant has discharged the onus on him of proving that he acted in self defence when he stabbed the deceased, neither can his version be said not to be reasonably possibly true.

[12] Consequently the conviction is set aside.

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**K.J. MOLOI, AJ**

I concur.

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**S. EBRAHIM, J**

On behalf of appellant:

Mr. S. Kruger  
Instructed by:  
Bloemfontein Justice Centre  
BLOEMFONTEIN

On behalf of respondent:

Adv. R. Hoffman  
Instructed by:  
Director Public Prosecutions  
BLOEMFONTEIN

/sp