

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

Appeal No.: 430/2003

In the appeal between:

JAMES MALEKE

Appellant

and

THE STATE

Respondent

CORAM: **RAMPAI *et* EBRAHIM, JJ**

HEARD ON: **10 MAY 2004**

JUDGMENT BY: **EBRAHIM, J**

DELIVERED ON: **13 MAY 2004**

[1] The appellant was convicted in the Regional Court on a charge of murder and sentenced to a term of 15 years imprisonment. He appeals against both his conviction and his sentence. During the trial the appellant raised a plea of necessity as a defence, and explained that the deceased had insulted him. As a result he attacked the deceased by stabbing the deceased on his forehead.

- [2] The State called the evidence of a single witness, Thamsanqa Mlakalaka, who testified that whilst the appellant was busy playing snooker he, Thamsanqa, happened to accidentally bump the appellant's snooker stick. He apologised, but the appellant then hit out at him with a fist, twice. At that point the deceased intervened and stopped any further fighting between the appellant and the witness. The witness then left the particular room and went to the toilet. He alleges, however, that the appellant also left the room at that point. When he returned from the toilet he heard screams. He went into the room where the appellant had been playing snooker and he saw the appellant going up to the deceased. The appellant was in possession of a knife and the witness saw the appellant stabbing the deceased. The witness was vague as to exactly what position the deceased and the appellant were in when the actual stabbing took place. He also said that he did not see precisely where the deceased was stabbed, but that he saw the deceased's face and head were full of blood.
- [3] It was argued by counsel for the appellant that Thamsanqa's evidence ought to be rejected as being wholly unreliable in view of

the fact that he testified that the appellant had been standing behind the deceased at the point when he stabbed him. It was argued by Mrs Coetzee that this evidence was wholly inconsistent with the medical evidence which showed that the deceased had been stabbed on his forehead and that he had died as a result of a haematoma in the left cerebral hemisphere which was caused by a two centimetre long stab wound to the left front of his head. This was the only stab wound that the deceased sustained.

- [4] I cannot agree with the submissions of Mrs Coetzee in that it was the appellant's own plea explanation that he did stab the deceased. The only issue which needs to be addressed is whether the appellant did in fact act out of a sense of necessity. On an assessment and examination of the evidence of Thamsanqa it is quite clear that he was an excellent witness and that the trial Magistrate found him to be so after having applied the necessary cautionary approach to an assessment of his evidence. He answered questions that were put to him spontaneously and without hesitation. He gave his evidence in a systematic manner. There were no material contradictions in the evidence which he gave in

chief and under cross-examination. I can see no reason to discard the evidence of Thamsanqa because his evidence was that the appellant was standing behind the deceased when he stabbed him. This, according to Mrs Coetzee, taints the entire veracity of Thamsanqa's evidence. An examination of the *post-mortem* report and more particularly the sketch attached to the *post-mortem* report indicates the position of the wound as being at the top left front of the forehead, and it would seem to me quite possible that if the appellant was standing behind the deceased and more to the left of the deceased, that he could have, using his left hand, reached around the deceased from behind, lifted up that hand and stabbed the deceased at exactly the position indicated on the sketch. There was no evidence and nor was Thamsanqa questioned in cross-examination about the exact manner in which the appellant, being behind the deceased, was able to stab the deceased on the left front side of his head. And without Thamsanqa having been challenged on this aspect, I am loath to find that his evidence is improbable because of it.

The trial Magistrate properly examined the evidence of Thamsanqa

in its entirety and after proper consideration came to the conclusion that he was an honest and reliable witness on whose evidence it was safe to convict the appellant because it was satisfactory in every material respect. I can find no reason to upset that finding of the learned Magistrate.

- [5] I turn now to the second ground of challenge, that is the fact that the trial Magistrate drew a negative and adverse inference against the appellant for failing to testify in his own defence. I have gone through the judgment of the learned Magistrate and I have not been able to find any reference in that judgment to the fact that any adverse inference was drawn by him against the appellant for his silence. In fact, on the contrary, the court *a quo* stressed that because the appellant had not availed himself of the opportunity of testifying in his own defence, the court had to make a finding based exclusively on the evidence tendered by the State. I have not been able to find any reference whatsoever in the judgment that the appellant was penalised for his silence. In this regard it appears quite clear to me that the court *a quo* was conscious of every accused person's right to a fair trial which included the right to

remain silent and not to testify during proceedings. (See S v THEBUS AND ANOTHER 2003 (6) SA 505 (CC)).

In my view, in coming to a conclusion in the case, the learned trial Magistrate adopted the correct approach in having regard exclusively to the evidence tendered by the State, in concluding that the State had proved its case beyond a reasonable doubt and in convicting the appellant.

I would accordingly confirm the conviction.

- [6] As regards the appeal against the sentence, Mrs Coetzee urged this Court to find that the fact that the learned trial Magistrate found that the appellant had the intention in the form of *dolus eventualis* rather than *dolus directus*, the appellant was a relatively young man and a first offender, that there was no premeditation on his part and that at the date of his sentence he had already spent nine months awaiting trial, cumulatively amounted to a substantial and compelling circumstance which the court ought to have found justified a departure from the prescribed minimum sentence. She

therefore requests this Court to interfere and impose a lighter sentence. With this submission I must agree. The factors I have mentioned do redound to the benefit of the appellant and do serve to distinguish him from the hardened criminal.

In the circumstances I would order the sentence of 15 years imprisonment be altered to one of 12 years imprisonment.

The order I would therefore make is that:

1. The appeal against the conviction is dismissed and the conviction is confirmed.
2. The appeal against the sentence succeeds to the extent that the sentence of 15 years imprisonment is set aside and substituted with a sentence of 12 years imprisonment.

S. EBRAHIM, J

I CONCUR

M.H. RAMPAL, J

On behalf of Appellant:

Adv. G. Coetzee
instructed by
Coetzees Attorneys

On behalf of Respondent:

Adv. D.J. Pretorius
instructed by
Director: Public Prosecutions

/scd