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REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
LIMPOPO DIVISION, POLOKWANE**

Review case No: 149/2024

(1) REPORTABLE: YES/NO

(2) OF INTEREST TO THE JUDGES: YES/NO

(3) REVISED

DATE: 20/11/2024

SIGNATURE:

In the matter between:

THE STATE

And

TAM

CHILD OFFENDER

JUDGEMENT

KGANYAGO J

- [1] The child offender was charged with one count of murder read with the provisions of section 258 of the *Criminal Procedure Act*¹ (the Act). At the time of the alleged commission of the offence, the child offender was 17 years of age. The court *a quo* was constituted as a child justice court as the accused was still a minor and regarded as a child offender. The child offender was legally represented throughout the proceeding. The child offender had pleaded not guilty to the charge, and raised self-defence as his defence. Despite his plea, the child offender was convicted of culpable homicide and was sentenced to 4 years imprisonment wholly suspended for a period of 5 years on condition that the child offender is not convicted of culpable homicide involving assault, assault GBH or attempted murder committed during the period of suspension.
- [2] Since the court *a quo* was sitting as a child justice court when the child offender was convicted and sentenced, the matter was brought on special review before this court. I have requested the opinion of the Deputy Director of Public Prosecutions (DDPP) relating to whether from the evidence presented in the court *a quo*, can it be said that the child offender had exceeded the bounds of self-defence. The DDPP have furnished me with a helpful opinion and I am indebted to them. The DDPP is of the opinion that the child offender did not act outside the legal bounds of self-defence, the proceedings are not in accordance with justice, and the conviction by the court *a quo* should be set aside.
- [3] The facts of the case are briefly as follows. The first State witness was sergeant Lesedi Given Makhafola the police officer who attended the scene of the incident on 20th September 2023. He testified that he got a call from the hospital informing him about a person who had passed away. He went to the hospital, and on arrival at the hospital he found a young man (deceased) who had passed away lying on a bed. It was reported to him that the deceased was stabbed on the chest with an object which resulted in him passing away. Makhafola was also informed of the person who had stabbed the deceased

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and where he stays. On checking the deceased, he observed an open wound on his chest.

- [4] Makhafola went to the child offender's homestead and found the child offender's grandfather and explained to him the reasons for their visit. The child offender's grandfather told Makhafola that he was aware of the incident and that the child offender had fled. He was not involved in the arrest of the child offender. The witness was not cross-examined by the defence counsel.
- [5] The second State witness to testify was Joseph Mosehla. The witness testified that he was attending the same school with the child offender. The whole incident started at school when they were queueing for food when the child offender insulted the witness by referring to his testicles. The witness hit back by also insulting the child offender. The child offender pushed the witness, and the witness pushed back the child offender. When this incident happened at school, the deceased and one Obakeng were present but were not involved in the squabble.
- [6] Later that day they were at the zama-zama shop when the witness saw the deceased and Obakeng pushing the child offender. The child offender headbutted the deceased and after that the child offender started retreating. When the witness saw the child offender retreating, he ran away and went to his homestead. He did not see any of the three being in possession of any object. The witness was cross-examined and he stated that when the child offender was threatened he was not there. The witness further denied that he was part of the group that told the child offender at school that they were going to deal with him after school.
- [7] The third State witness to testify was Obakeng Molekwa. He testified that the whole incident started at school when there was a fight over a plate. After school the witness in the company of the deceased and other learners boarded a bus and went home, whilst the child offender and his group remained at school. Whilst in the bus one Priven Mosehla told them that the child offender and his group were insulting the witness and his group by

referring to their testicles. The child offender and his group were staying at Malahleng section, whilst the witness and his group were staying at Moyeding section. In the past there were rumours that the witness and his group were not welcomed at Malahleng section.

- [8] On arrival at home the witness and his group went to the soccer field to play soccer. After playing soccer at about 19h00 the witness in the company of the deceased, Dadi and Jacob went to an Indian shop called zama-zama. Later the child offender also arrived at the Indian shop. On arrival of the child offender, Priven told them that the child offender was the person who was referring to the witness by his testicles. The child offender entered the shop and the witness followed him. The deceased also came and told the child offender that they must go outside the shop so that the child offender can tell them why he was saying that the deceased and his group should not go to Malahleng section.
- [9] The deceased pulled the child offender and the child offender headbutted the deceased several times and he did not count. As the child offender was headbutting the deceased, the deceased told the child offender that he was not fighting him. The deceased did not fight back when the child offender was headbutting him. The witness went to them and slapped the child offender with an open hand as the witness was angered by the child offender who had headbutted the deceased, despite the deceased telling him that he was not fighting.
- [10] The witness started regretting what he did to the child offender as the child offender was not fighting with him. One Fundi approached the witness and the witness started running away. As the witness was running away, Fundi tripped him and the witness fell to the ground. When the witness was lying on the ground, Fundi started kicking the witness. Fundi stopped kicking the witness, and the witness stood up and tried to walk away. The reason why Fundi tripped and kicked him, he was trying to separate them from fighting with the child offender. As the witness was walking away, he saw the deceased holding his chest and bleeding.

- [11] The witness went to the deceased and tried to stop the bleeding with their t-shirts, but were unable to do so. The witness went to the neighbouring house to seek transport to take the deceased to the clinic, but was not successful. The witness went to the deceased homestead to notify them that the deceased has been stabbed at zama-zama shop. A vehicle was arranged and the deceased was taken to Jakkalskuil clinic. On arrival at the clinic they found the gate closed, and were told that the clinic was not operating during the night. The deceased was taken to George Masebe hospital. The deceased was admitted at the hospital, and after a while they were told by the hospital officials that the deceased had passed away.
- [12] The witness was cross-examined and when asked why he wanted to have a conversation with the child offender outside the zama-zama shop, the witness stated that they wanted to interrogate him outside the shop as inside the shop there were other people. The witness stated that the deceased was pulling the child offender to go outside whilst the child offender was refusing to go outside. The witness denied that when Fundi intervened, he (witness) and the deceased were busy assaulting the child offender. The witness stated that at the zama-zama shop there were lot of people, but they did not intervene when the fight was taking place.
- [13] L[...] P[...] testified as the State fourth witness. She testified that the deceased is her last-born child. On the date in question at about 19h00 she was at home with her daughter E[...] P[...] when Obakeng arrived at their homestead crying. Obakeng told them that the deceased had been stabbed at zama-zama shop. They arranged a transport and went to zama-zama shop.
- [14] On arrival at the shop they found the deceased lying on the ground bleeding. They took the deceased to the hospital where he was admitted. Later the nurses at the hospital told her that the deceased had passed away. Obakeng had told them that the deceased had been stabbed by the child offender. However, when they arrive at the scene the child offender was not there.

- [15] The witness was cross-examined and she stated that Obakeng told her that he saw the deceased when he was stabbed. The State thereafter with the consent of the defence led chain evidence by reading the 212 statements by several witnesses, identification of the body affidavit, post-mortem report, and the photo album of when the post-mortem was being conducted into record.
- [16] The State called Wilson Kelebogile Mosehla as its fifth witness and last witness. He testified that the child offender is known to him from their home village. On 20th September 2023 the witness was seated with Tebatso and Priven at zama-zama shop. As Tebatso was leaving to go home, the child offender arrived at the shop. On arrival the child offender bought whatever he wanted to buy and went to sit next to the wall and the witness was seated next to the gate of the shop.
- [17] After the child offender had sat down, the deceased and Obakeng entered the shop and went straight to where the child offender was seated. The deceased stood in front of the child offender, whilst Obakeng stood behind the child offender. The deceased told the child offender to go outside the shop, but the child offender refused to do so. When the deceased was busy talking to the child offender, Obakeng started assaulting the child offender on his back with open hands. The deceased also joined in assaulting the child offender with open hands and fists. The child offender got angry, pulled out a knife and stabbed the deceased once on his chest.
- [18] When Obakeng saw the deceased pulling out a knife he ran away. The witness tried to separate them, but he was late as the child offender had already stabbed the deceased. After the deceased was stabbed, he ran out of the premises for a while and collapsed on the street. The witness decided to run to Monyeki's homestead to seek for help. The child offender left the scene after stabbing the deceased.
- [19] On arrival at Monyeki's homestead the witness told Tebatso that his boy had stabbed the deceased with a knife and that the child offender's grandfather should arrange a vehicle to take the deceased to hospital. Tebatso told the

witness that their vehicle did not have petrol. The witness sent Paris to go to Denga's homestead to ask for a vehicle to transport the deceased to hospital. Paris succeeded at Denga's homestead and the deceased was taken to hospital.

[20] The witness was cross-examined and he stated that the child offender was assaulted for about 5 minutes before he pulled out a knife. The witness denied that he had chased and tripped Obakeng. Except for the stabbing, the child offender did not do anything to the deceased. The witness conceded that when the child offender stabbed the deceased, he was acting in self-defence. The witness further stated that he saw the deceased headbutting the child offender around the nose and mouth area, and that is what had angered the child offender. The witness denied that the child offender had headbutted the deceased. The witness denied that the child offender is his friend. That concluded the evidence of the State and it closed its case.

[21] The child offender took the witness stand and testified under oath. He testified that on the date of the incident whilst still at school, during break time he joined a queue to be served with food. Whilst on the queue he saw an altercation between Sello and Joseph Mosehla. He went to them, intervened by talking them, and was able to end their altercation. Suddenly the deceased, Obakeng, Benji Mosehla and three others emerged and started insulting the child offender, grabbed the child offender by the collar and pushed him to the side. The plate of the food that child offender was having fell to the ground and broke as a result of been pushed.

[22] The deceased and his group were telling the child offender that he is disrespectful. The child offender alleges that he was respecting his school uniform and therefore did not have the intention of fighting them whilst wearing that uniform. The child offender avoided the deceased and his group by going to sit on the other side, and after break he went back into the classroom. That it was on a Wednesday which was sports day. When they went to the sports ground, Priven Mosehla came to where the child offender

was and told him that the deceased and his group says that there was going to be a fight.

- [23] From school to their respective homes the learners were travelling in two buses which was ferrying grade 8 to 12 learners. As the child offender was already informed that there was going to be a fight, he decided not to alight the bus from his usual bus stop but at another bus stop. On arrival at his homestead he did his normal chores. Later he left his homestead to go and play soccer. When he left his homestead he took an orange and knife which he used to peel off the orange.
- [24] After playing soccer whilst preparing to go home, the child offender saw a group of boys walking past the soccer field going to zama-zama shop which is next door to the child offender's homestead. The child offender decided to walk to his homestead. He did not reach his homestead as he saw a group of those boys leaning against the fence which was next door to the shop. When the child offender saw that, he decided to enter into the shop. Inside the shop he found his brother and thought that those boys will not fight him whilst his brother was there. The child offender bought something and sat down inside the shop.
- [25] As the child offender was sitting down, Obakeng and the deceased emerged and came to him and told him to go outside the yard into the street where they wanted to fight with him. The child offender ignored them and continued sitting down. The two started shoving the child offender around, but the child offender continued sitting down. When the child offender stood up, the deceased stood in front of him whilst Obakeng stood behind him. The two started assaulting the child offender and the deceased headbutted the child offender. The child offender was begging with the two to stop assaulting him. When the deceased headbutted the child offender, that is when the child offender saw that the fight was serious, and that the two were really fighting him, and he took out a knife and stabbed the deceased once in order to free himself from them.

- [26] Before stabbing the deceased he could not run away from the scene as he saw that outside the shop there were still other 4 boys who were part of the group of the deceased and Obakeng. It did not cross his mind to use other means than stabbing the deceased in order to free himself from them. He was angry, and that Fundi only intervened when he saw that the other 4 boys were advancing at him. He had stabbed the deceased whilst the deceased was still in front of him. He is not sure how long it took the two when assaulting him.
- [27] The child offender was cross-examined and he denied that he had insulted Joseph. The child offender denied that on the day in question it was him and his group who wanted to fight the deceased and his group. The child offender stated that before stabbing the deceased there was nowhere he could have run to as the other 4 boys were seated at the gate which was near to the shop. The child offender stated that he went to soccer field carrying a knife as on the way to the soccer field he was using that knife to peel off an orange. The child offender stated that when he took the knife, he did not think that something would happen on the street. He denied that he took the knife as he knew that there was going to be fight which will not end well. The child offender conceded that he knew that there was an intent to fight him, but he did not know as to when that would happen.
- [28] The child offender stated that he took out the knife that he used to stab the deceased from his pocket. The child offender stated that the deceased had headbutted him on his forehead. The child offender stated that he could not fight back the two with open hands as he is not a fighter, and further that it was impossible as the two were ganging against him. The child offender stated that he had used a knife in defending himself. The child offender stated that he was in possession of an ordinary kitchen knife. The child offender stated that he was frightened and could not tell how he had stabbed the deceased. That concluded the evidence of the child offender and he closed his case. Both parties have addressed the court *a quo* on the merits of the case.

- [29] The court *a quo* in analysing the evidence and submissions by both parties found that all the witnesses were in agreement that the deceased and Obakeng were the ones who had confronted the child offender first. However, the court *a quo* found that the mere fact that the child offender has been attacked by the deceased and Obakeng with open hands, fists and even headbutted, was not reasonable of the child offender to have stabbed the deceased with a knife in warding off the attack. Therefore, as per the court *a quo* the child offender had exceeded the bounds of self-defence. Further that the child offender did not realise that he was exceeding the bounds of self-defence, and had also not realised that the deceased will die as a result of the stabbing, whereas a reasonable person in his position should have realised. Based on that the child offender was found guilty of culpable homicide.
- [30] What this court must determine is whether the conviction of the child offender of the offence of culpable homicide as it appear to me to be in accordance with justice. The child offender is not disputing that he had stabbed the deceased with a knife, and that the deceased died as a result of the injury which he sustained when he stabbed him. The child offender had raised self-defence in justifying his actions.
- [31] It is trite that for an accused to succeed with the defence of this nature, he must show that (i) he was acting in response to an uncompleted unlawful attack on an interest deserving of legal protection, and the response must be directed at the attacker; (ii) the defensive act was necessary to protect the interest in question; (iii) there was a reasonable relationship between the attack and the defensive act; (iv) and that the appellant was aware of the fact that he was acting in private defence. (See *S v T²*).
- [32] The test for private defence is objective, would a reasonable person in the position of the accused have acted in the same way. A person who act in private defence acts lawfully, provided his conduct satisfies the requirements

² 2015 (1) SACR 489 (WCC) at para 29

laid down for such a defence and does not exceed its limits. (See *S v De Olivereira*³).

- [33] The undisputed evidence is that the deceased and Obakeng were the aggressors on the day in question. The whole incident started at school which the deceased, Obakeng and the child offender were attending. The child offender from school had been trying to avoid a fight to the extent that he had to alight the school bus at another bus stop, and not his usual bus stop. When he was from the soccer practice, he had to again avoid the deceased and his group who were hanging on the fence next to the shop, by entering into the shop.
- [34] It seems when the deceased and his group were hanging on the fence, they were waiting for the child offender, as when he entered into the shop two from the group followed him. However, the court *a quo* found that when the child offender entered the shop he presented himself to a dangerous situation, and that by entering the shop the child offender's confidence was boosted by the presence of his brother and also the fact the he was in possession of a knife. The court *a quo* further found that the child offender foresaw and anticipated to be confronted that day, in which he was eventually confronted.
- [35] The child offender knew that the deceased and his group were after him, and he did everything in his power to avoid a confrontation with them. His life could not have been expected to come to a standstill because the deceased and his group who were longing for a fight with him and were also after him. It is therefore not correct that when the child offender entered the shop he presented himself to a dangerous situation, but was trying to avoid a fight as there were many people in the shop which he thought would discourage the deceased and his group to continue with their mission. The child offender would not have known that the people in the shop would not have come to his rescue should a fight ensue.

³ 1993 (2) SACR 59 (A)

- [36] The deceased and his group were hanging on the fence next door to the shop, and by entering the shop as per the child offender's version he was avoiding contact with the deceased and his group which might have resulted in a confrontation since it was clear that the deceased and his grouping were itching for a fight. The child offender had explained the circumstances under which he came to be possession of the knife which he used to stab the deceased.
- [37] It is not the duty of the court to believe the version of the child offender, but what the court must determine is whether his version of how he came into possession of the knife was reasonably possibly true. There is no evidence which has been presented by the State to rebut the version how the child offender came to be in possession of the knife. On the facts as it stands the child's offender's version of how he came to be in possession of the knife in my view, is reasonably possibly true.
- [38] The deceased and Obakeng have attacked the child offender without any provocation, despite the child offender trying to avoid any confrontation with them. There was no justification in the deceased and Obakeng attacking the deceased in the manner in which they did. The child offender did not immediately stab the deceased at the commencement of the attack, but he tried to talk to them to stop what they were doing to him to no avail. The child offender stabbed the deceased after he was headbutted by the deceased when he realised that attack was now becoming severe. The stabbing occurred at the time when the attack was still continuing and was directed at the deceased who was taking the lead in attacking the child offender. In my view, the 1st requirement for self-defence has been satisfied.
- [39] At the time the child offender stabbed the deceased, the assault had developed from light to severe. There was no duty on the child offender for him to wait to be injured before he is permitted to act in order to save himself from the attack. The child offender was attacked by two people who have sandwiched him from behind and front. The attack by the deceased and Obakeng was happening at the same time. The child offender had explained

that he was unable to fight with his hands as he is not a fighting person. He could not fight with his hands, but had act swiftly as the attack had developed to be severe, and despite there been other people in the shop who were observing what was happening, but no one showed any interest to come to his rescue. The only object he could use to protect himself from the ongoing attack, was to use a knife which was in his pocket. In my view, the child offender had satisfied the 2nd requirement for self-defence.

[40] When the child offender took the knife from his homestead, he wanted to use it to peel off the orange he was eating, and not to use it to attack anyone. As he was eating the orange whilst on the way to the soccer field, it could not have been expected of him to go back home and return the knife after he had finished eating the orange. He therefore had not at any stage when he left his homestead to have planned to attack anyone with that knife. Even when he was walking back home when he saw the group that wanted to attack him, he did not confront them or wanted to fight with them because he was armed with a knife. Instead he wanted to avoid them by entering into the shop where he thought that he will be safe as there were other people inside the shop. It is not correct that he entered the shop knowing that he was putting himself in a dangerous situation as found by the court *a quo*.

[41] When the child offender stabbed the deceased, the attack was severe and he had been sandwiched by two people. The 2 who were attacking the child offender were from a group of 6 of which 4 of those members were waiting outside. The deceased started attacking the child offender when he refused to go outside. The only inference to be drawn is that the deceased and Obakeng have approached the child offender in order to lure him to go outside where they were going to be joined by the remainder of the group and deal with him decisively.

[42] The child offender stabbed the deceased once on the chest in warding off the attack. By stabbing the deceased on the chest shows that the deceased was attacking the child offender from the front. Further, by stabbing the deceased once also shows that the child offender was not fighting, but was warding off

the deceased and his companion. It is unfortunate that the child offender had used a knife, and the stabbing was fatal. The knife was the only object at his disposal to ward the ongoing attack on him.

[43] There is no evidence that the child offender had aimed and intended to stab the deceased where the knife landed. The child offender was merely trying save himself from the two attackers. By pulling out the knife was the only option he thought of in trying to save his life. The child offender could not have been expected to leave the two to have attacked him until they were satisfied because he could not use his hands to fight them back. The child offender had to make a decision in a split second and cannot be blamed for the decision he had taken, taking into consideration that the situation he was in, was not out of his own making. Everyone regards his/her life as been more important than that of the next person. In my view, the child offender had satisfied the 3rd requirement.

[44] As I have pointed out above, the child offender did not stab the deceased immediately at the commencement of the attack, but only did so when the attack was continuing, had become severe and there was no one coming to his rescue. Even the State's last witness has testified that initially he was just watching them, but decided to intervene when he saw that the fight had become serious but it was too late. This version corroborates the child offender's version that when he stabbed the deceased the attack was serious. When the child offender took out the knife his intention was to defend himself from the ongoing attack and did not foresee that his actions may have fatal consequences. His intention was to protect himself from the ongoing attack and was therefore aware that he was acting in self-defence. The child offender had therefore satisfied the 4th requirement for self-defence.

[45] Taking into consideration the evidence and arguments presented in its totality, a reasonable person in the position of the child offender faced with the same situation would have acted in the same way that the child offender did. The child offender did not exceed the bounds of self-defence or acted negligently in stabbing the deceased. The court *a quo* has misdirected itself in convicting

the child offender of culpable homicide. The proceedings in this case appear to me to be not in accordance with justice, and stand to be reviewed and set aside.

[46] In the result the following order is made:

46.1 The conviction of the child offender of culpable homicide is reviewed and set aside.

46.2 The order of the court *a quo* is substituted with the following:

“The child offender is acquitted of the offence charged”.

KGANYAGO J
JUDGE OF THE HIGH COURT OF SOUTH AFRICA,
LIMPOPO DIVISION, POLOKWANE

I AGREE

PILLAY AJ
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA,
LIMPOPO DISIVION, POLOKWANE

APPEARANCES:

Electronically circulated on

: 20th November 2024