



**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

JUDGMENT

Not Reportable

Case no: A280/2024

In the matter between:

PHELELANI PENI

APPELLANT

and

THE STATE

RESPONDENT

Neutral citation: *Peni v The State* (Case no A280/2024) [2025] ZAWCHC 250 (20 JUNE 2025)

Coram: NUKU J and ROUX AJ

Heard: 6 June 2025

Delivered: 20 JUNE 2025

Summary: Criminal – Murder – Self-defence – appellant stabbed by the deceased with a knife – appellant also stabbed the deceased with a knife and the deceased died as a result of one of the stab wounds – appellant pleading self-defence – trial court

misdirected itself in convicting the appellant where the evidence led by the prosecution established that (a) it was the deceased who attacked the appellant first, (b) the appellant acted in self-defence when he stabbed the deceased, and in the absence of evidence to establish that the attack upon the deceased had ceased when the appellant stabbed the deceased or the appellant exceeded the bounds of self-defence – conviction and sentence set aside.

ORDER

- 1 The appeal is upheld.
- 2 The conviction and sentence are set aside.
- 3 The appellant is found not guilty and is accordingly acquitted.

JUDGMENT

NUKU, J (ROUX AJ concurring):

[1] The appellant was charged with one count of murder, it being alleged that on or about 29 November 2020 and at or near Bashe Street, Saldanha, Western Cape, he unlawfully and intentionally killed the late Tina Gcwabe (deceased) by stabbing him with a knife.

[2] The appellant appeared at the Vredenburg Regional Court (trial court) where he pleaded not guilty to the charge. He was convicted as charged on 23 July 2023. On 6 September 2023, he was sentenced to 12 years imprisonment. He was refused leave to appeal by the trial court. The appeal was brought with leave obtained from this court

(per Allie J and Van Leeve AJ) on petition. Leave to appeal was granted in respect of both conviction and sentence.

[3] The evidence on the basis of which the appellant was convicted comprised of the oral testimony of one eyewitness, the photographs of the crime scene, the post mortem report as well as photographs taken during the post mortem examination. The appellant also made certain formal admissions in terms of section 220 of the Criminal Procedure Act, 51 of 1977 (Criminal Procedure Act), admitting (a) the date and place where the deceased incident took place, (b) the identity of the deceased, (c) the correctness of the facts and conclusions as contained in the post mortem report, and (d) the cause of death as recorded in the post mortem report, namely that the deceased died as a result of a penetrating incised wound on the left chest anterior with hypovolemic shock.

[4] A brief plea explanation that was given on behalf of the appellant by his legal representative was to the effect that (a) the deceased entered the premises where the appellant was at, (b) the deceased had a knife with him, (c) the appellant acted in self-defence when he stabbed the deceased, and (d) the appellant was also stabbed by the deceased.

[5] The evidence of the eyewitness was that: on 29 November 2020 he was at his house with the appellant, Asavela and Ayanda where they started drinking some alcoholic beverages from about 15h30. At about 23h00 in the evening the four of them decided to go to a house situated in Ryland Street where they sat and continued with their consumption of the alcoholic beverages. The deceased, who was with Zibella at the time, arrived at this house in Ryland Street whilst the appellant and his company were still there. The deceased and Zibella wanted to help themselves to the alcoholic beverages that the appellant and his company had been consuming. This resulted in an argument after which the eyewitness, the appellant and their company left to go back to the house of the eyewitness where they had been sitting initially. Upon their return to his house, they closed the door and sat on the couch. Not long after their return the deceased came and kicked the door open. Upon his entering the house, the deceased

stabbed the appellant on the head with the knife he had in his possession. The appellant then in response stabbed the deceased with a knife that had been on a table in the house. The eyewitness could not say how many times the appellant stabbed the deceased. He explained, however, that the appellant stabbed the deceased on his front side of the chest as they were facing each other (that is the deceased and the appellant) at the time.

[6] The witnesses responded in the negative when asked by the state prosecutor whether there was a time when the deceased had his back towards the appellant. He also did not know anything about wounds that the deceased had on his left upper arm as well as on his back. The evidence was further that at some point in time the deceased ran out of the house and at that stage the witness closed the door again. Later on, the witness heard someone saying that the deceased was dying. He went out of his house and saw that the deceased was lying next to the gate. He took out his jersey and tried to close the wound that the deceased had. Both the deceased and the appellant were then taken to Vredenburg hospital for medical treatment.

[7] The prosecutions closed its case after leading the oral evidence referred to above whereafter the appellant applied for a discharge in terms of section 174 of the Criminal Procedure Act. The application was refused whereafter the case for the appellant was closed without leading evidence.

[8] The trial court gave a very short judgment where other than recounting the oral evidence it said the following:

‘The witness who testified for the state was clearly protecting his nephew, this is evident in all, in most of the concessions that he made inter alia whether the knife was on the table, in the drawer, how many times the accused was stabbed. He testified that he cleaned, he helped the accused with injuries but only testified with regards to one injury. When it was put to him that the accused had more injuries, he could not really answer that. The witness was not really clear, he was

more trying to protect his nephew, but the fact of the matter there is no justification for the stabbing.

During the plea explanation the accused offered the defence of self-defence or private defence, this was not followed up with the evidence so it could not be tested. If the Court then applies then *State v Boesak*, in that case the state's case was also undisputed as the defence had closed its case before putting, before having the accused testify. If the Court applies that case, then the state's case is undisputed. And the accused is therefore found guilty on the count of murder...'

[9] Before us it was submitted on behalf of the appellant that the trial court erred in not evaluating the evidence to establish whether the prosecution had proved its case beyond a reasonable doubt. In this regard, reference was made to the decisions of the Constitutional Court in ***S v Boesak***¹ (Boesak) and this Court in ***S v Van Den Berg and Another***² (Van Den Berg).

[10] It was submitted on behalf of the respondent that the appellant was correctly convicted because (a) the appellant failed to testify and the questions that were put to the witness cannot be regarded as his evidence, (b) the evidence established that the appellant exceeded the bounds of self- defence when considering the fact that the appellant only had only one stab wound on his head whereas the deceased had three stab wounds, and (c) it was unclear how the deceased sustained the other two stab wounds and the appellant failed to take the court into his confidence by explaining how the deceased sustained these injuries.

[11] There are a number of difficulties with the trial court's judgment on conviction. Firstly, the evidence was clear that it was the deceased who attacked the appellant who had been sitting at the home of his cousin, the witness. Unprovoked, the deceased stabbed the appellant. That the appellant stabbed the deceased is thus self-evident

¹ 2001 (1) SACR 1 (CC)

² 2009 (1) SACR 661 (C)

from the evidence presented by the prosecution. The judgment of the trial court does not engage with this aspect.

[12] The evidence by the prosecution having established that the deceased attacked the deceased who then stabbed the deceased, the only basis upon which the appellant could be convicted would be if the evidence established that either the attack had ceased by the time that the appellant inflicted the wound that resulted in the death of the deceased or he exceeded the bounds of self-defence. On my reading of the record no such evidence was presented. To the contrary, the trial court was critical of the only state witness that testified on the basis that the witnesses appeared to tailor his evidence in order to protect the appellant.

[13] Whilst there might be some merit in the trial court's criticism of the only state witness, that in itself presents a further difficulty for the prosecution's case in that there was no other clear evidence on the basis of which the court could justify that the appellant either attacked the deceased at a time when the appellant's life was no longer in danger or that the appellant exceeded the bounds of self-defence.

[14] The trial court clearly failed to do a proper evaluation of the evidence and in that regard, it misdirected itself. Had it done a proper evaluation of the evidence it would have realised that the state had failed to prove that there was no justification for the manner in which the appellant acted which unfortunately resulted in the death of the deceased.

[15] The court's reliance on the appellant's failure to testify as a basis of the conviction was also mistaken in the absence of evidence that called for an answer from the appellant. Conviction does not automatically follow from the failure of an accused person to testify, but will only follow where the prosecution has presented evidence establishing the guilt of an accused person. In my view, the conviction of the appellant is unsustainable, and the appeal should succeed. With the success of the appeal in respect of conviction, it follows that the sentence must fall away.

Order

[16] In the result I make the following order:

- 16.1 The appeal is upheld.
- 16.2 The conviction and sentence are set aside.
- 16.3 The appellant is found not guilty and is accordingly acquitted.

L G NUKU
JUDGE OF THE HIGH COURT

I agree

W ROUX
ACTING JUDGE OF THE HIGH COURT

Appearances

For appellant: Ms Levendal
Instructed by: Legal Aid South Africa, Cape Town

For respondent: Mr Koti
Instructed by: Director of Public Prosecutions, Cape Town