

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
LIMPOPO DIVISION, POLOKWANE

CASE NO: A06/2024

(1) REPORTABLE: YES/NO

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

(3) REVISED.

DATE 30/07/2025

SIGNATURE:

In the matter between:

MAHLANYA MAMAKONYA SIMON

APPELLANT

And

THE STATE

RESPONDENT

JUDGMENT

KGANYAGO J

- [1] The appellant was arraigned in the regional court sitting at Senwabarwana before regional magistrate C Nchabeleng sitting with two lay assessors on one count of murder read with the provisions of section 51(2) of the *Criminal*

*Law Amendment Act*¹ (CLAA) as amended. The appellant had pleaded not guilty and raised the defence of private defence. At the end of the case, the regional magistrate was of the view that the appellant should be found not guilty and discharged, whilst the two lay assessors were of the view that the appellant should be found guilty as charged. Based on the majority decision, the appellant was found guilty as charged and sentenced to 12 years imprisonment. The appellant is appealing against conviction only with the leave of the court *a quo*.

- [2] The background facts are briefly as follows. At the commencement of the trial, the appellant through his counsel made the following admission in terms of section 220 of the *Criminal Procedure Act*² (Act) as amended. The appellant admitted the identity of the deceased; that he and the deceased met on the date in question as stated in the charge sheet; that he had stabbed the deceased with a knife once on the chest; that the deceased died as a result of the stab wound on the chest; and the post mortem report was not placed in dispute. The appellant in his plea explanation stated that he was acting in private defence as he was under direct attack by the deceased. The chain evidence was admitted by agreement between the respondent and the defence, and the affidavits of the said witnesses were read into record.
- [3] The respondent's first witness to testify was Mamoloko Makhura. He testified that on 5th October 2019 he was at a tavern seated on a crate on the stoep facing the gate of the tavern and was smoking hubbly. As he was seated, Matome (deceased) came to him and told him that it was late at night, and that they must leave as the following day they were going to the soccer tournament. The witness was seated alone as other people have already left the tavern. Before the deceased came to him, he saw the deceased just dancing. The deceased leaned against the witness. As the deceased was leaning against the witness, Simon (appellant) arrived to where the two were and gave the deceased a pat on his shoulders. The deceased turned around and the appellant without saying a word stabbed the deceased.

¹ 105 of 1997

² 51 of 1977

- [4] After being stabbed, the deceased pushed the appellant away, ran into the building and fell to the ground. When the witness stood up, the appellant drew on the ground with his knife and told the witness that whoever wanted to entertain the issue of the deceased, he should come and face him. The witness went into the building and found the deceased lying on the ground. The witness called the deceased who tried to stand up, but he again fell to the ground. The witness ran to neighbours to try and find transport for the deceased. When the witness returned to the scene he found other people already gathered there, and they told him that the deceased had passed away. On hearing that, the witness left the scene and went to his homestead. At the tavern there was a lot of light illuminating to the extent that the witness could see an object that was far.
- [5] The witness was cross-examined by counsel for the appellant and he stated that on the night of the incident he did not consume alcohol, but was only smoking hubbly which does not make him intoxicated. The defence wanted to cross-examine the witness on his written police statement. In trying to lay the basis by counsel for the respondent, the witness stated that he did not read the written statement, the police officer who took it did not read it back to him, and was just told to sign. The witness conceded that in preparation of the case, the prosecution had read back the statement to him. He fully agreed with the contents of the statement as it was been read back to him by the prosecution, but he did not see his signature on that statement. The prosecution did not have a problem with the defence cross-examining the witness of his written police statement, and the court *a quo* allowed that despite there been some deficiencies of properly laying the basis. Thereafter the defence went on cross-examining showing the witness the contradictions in his *viva voce* evidence and his written police statement.
- [6] The version that was put to the witness was that the appellant on the night in question was seated on a crate busy drinking alcohol, when the deceased took the appellant's beer bottle. When the appellant asked the deceased why he was taking his beer without first asking, the deceased slapped the

appellant with an open hand and also took out a knife with the intention of stabbing the appellant. The appellant took a crate and threw it at the deceased and the knife fell to the ground. The appellant picked up the knife, but the deceased still charged at the appellant with the intention of hitting him with fists. When the deceased tried to hit the appellant with fists, the appellant ducked and the deceased missed. That is when the appellant stabbed the deceased once with the knife, and thereafter ran away. The witness disputed this version and stated that it was a lie.

[7] The respondent's second witness to testify was Phiny Mfofya. He testified that on the night of the incident he was seated at Maleseja tavern in the company of Mamoloko and the deceased. The deceased was standing and smoking hubbly. The appellant came and tapped the deceased on the shoulder without uttering a word. When the deceased turned, the appellant stabbed him with a knife and the deceased ran into the lounge. The witness got frightened and ran outside. When the witness returned back into the lounge, he found the deceased dying. The witness went to the deceased and made him to face up, but he was already dead. The witness became scared and he fled to his homestead. The witness stated that he and the deceased were sober.

[8] The witness was cross-examined and he stated that he and the first state witness were smoking hubbly on the night of the incident, and not drinking alcohol. The witness further stated that on night in question the first respondent's witness was just seated at the tavern, but was not drinking alcohol. The witness stated that at the time the appellant stabbed the deceased, he (witness) was standing next to his chair. The witness stated that on the night of the incident he never saw the deceased dancing. The witness stated that it was possible that one can become tipsy because of smoking hubbly, but it will not be that much. The witness further stated that on the night of the incident he was a little bit tipsy because of smoking the hubbly.

[9] The witness further stated that at the time of the incident there were no many people in the tavern, even though they might have been more than 10 but he was not sure whether they were more than 20. The witness disputed the

version put to him that on the night of the incident the deceased took the appellant's beer without his permission and started drinking it, and that when the appellant asked the deceased what he was doing, the deceased slapped appellant and also produced a knife which the appellant was able hit it with a grate and it fell down to the ground, and thereafter the appellant picked up that knife, but the deceased still persisted in trying to hit the appellant with fists, and that is when the appellant stabbed the deceased once on the chest and thereafter the appellant ran away. That concluded the respondent's evidence and it closed its case.

[10] The appellant through his counsel applied for discharge in terms of section 174 of the Act which application was refused by the court *a quo*. The appellant took the witness stand and testified under oath. He testified that on the night of the incident he was at the tavern seated on a grate with his beer bottle in front of him. The deceased came to him and took that beer bottle and started drinking it without asking for permission from him. The appellant stood up from the grate and asked the deceased why he took his beer without his permission. The deceased responded by assaulting the appellant with open hands, and thereafter took out a knife. The appellant picked up the grate and threw it at the deceased hands. The grate hit both of the deceased hands and the knife fell down to the ground.

[11] After the knife fell down, the appellant picked up that knife, but the deceased charged at the appellant throwing some punches. The appellant ducked those punches, stabbed the deceased once with that knife. After stabbing the deceased, the appellant threw the knife down to ground and fled the scene. The reason he had stabbed the deceased was that there were lot of people in the lounge, and that should he flee and fell down, the appellant was going to catch him. He had also realised that there were lot of bottles lying on the ground which the appellant could have used had he fell down and got caught by the appellant.

[12] The appellant was cross-examined and he stated that before the incident he did not know the deceased, but he knew the respondent's two witnesses. The

appellant stated that he did not see the two respondent's witnesses on the night of the incident. When the deceased was attacking him, no one who was present in the tavern tried to intervene, hence he ended up fleeing the scene after the fight. The appellant disputed that he had tapped the deceased on the shoulder and stabbed him without saying a word, and that he is a normal in his mind, and will not just find a person whom he did not know seated and just stabbed him. The appellant denied that he had drawn on the ground with a knife and said any boss from Magaleng who wanted to entertain that matter must come to him. Further that a sane person will not go to the tavern full of other people and started drawing on the ground. The appellant disputed that the knife that he had used to stab the deceased belonged to him. That concluded the evidence of the appellant and he closed his case.

[13] The appellant's appeal is directed against conviction only. The appellant in his heads of argument had also challenged the appointment of the lay assessors in this matter, that their appointment was not in accordance with section 145 of the Act and section 93ter of the *Magistrates Courts' Act*³ in that the record of the proceedings does not indicate any compliance. However, this issue was never raised as a ground of appeal, and the appellant's notice of appeal was at no stage amended to include that issue as a ground of appeal. The appellant must stand and fall by its papers, and this court will therefore not entertain the issue whether the lay assessors were properly appointed or not. Even if this court was to entertain that issue, the respondent had submitted from the bar oath of office affidavits signed by the assessors which the respondent alleges that were signed by the assessors in the presiding officer's office, and that will not take the appellant's argument any further.

[14] What this court must determine, is whether in the light of the evidence adduced at trial, the guilt of the appellant was established beyond reasonable doubt on the murder count that he was facing. The test in a criminal case is whether the evidence establishes the guilt of the accused beyond reasonable doubt. The corollary is that an accused person is entitled to be acquitted if

³ 32 of 1944

there is a reasonable possibility that an innocent explanation which he had proffered might be true. These are not two independent tests but rather the statement of test, viewed from two perspectives. In order to convict, there must be no reasonable doubt that the evidence implicating the accused is true, which can only be so if there is at the same time no reasonable possibility that the evidence exculpating him is not true. The two conclusions go hand in hand, each one being the corollary of the other. Thus in order for there to be a reasonable possibility that an innocent explanation which had been proffered by the accused might be true, there must at the same time be a reasonable possibility that the evidence which implicates him might be false or mistaken. (See *S v Sithole*⁴).

[15] A court in a criminal case does not have to be convinced that every detail in an accused version is true. If the accused version is reasonably possibly true in substance, the court must decide the matter on the acceptance of that version. An accused person is not compelled to testify, but if he elects to testify, what the court must determine is whether the version presented by the accused is reasonably possibly true.

[16] The correct approach to the evaluation of evidence in a criminal case was formulated in *S v Chabalala*⁵ where Heher AJA said:

“The trial court’s approach to the case was, however, holistic and in this was undoubtedly right: *S v Van Aswegen* 2001 (2) SACR 97 (SCA). The correct approach is to weigh up all the elements which point towards the guilt of the accused against all those which are indicative of his innocence, taking proper account of inherent strengths and weaknesses, probabilities and improbabilities on both sides and, having done so, to decide whether the balance weigh heavily in favour of the State as to exclude any reasonable doubt about the accused’s guilt. The result may prove that one scrap of evidence or one defect in the case for either party (such as the failure to call a material witness concerning an identity parade) was decisive but that can only

⁴ 1999 (1) SACR 585 (W) at 590f-j

⁵ 2003 (1) SACR 134 (SCA) at para 15

be an *ex post facto* determination and a trial court (and counsel) should avoid the temptation to latch on to one (apparently) obvious aspect without assessing it in the context of the full picture presented in evidence. Once that approach is applied to the evidence in the present matter the solution becomes clear”.

- [17] The appellant had raised private defence as his defence to his actions. It is trite that for the appellant to succeed with his 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 TS*⁶).
- [18] 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 acts in private defence acts lawfully, provided his conduct satisfies the requirements laid down for such defence and does not exceed its limits. (See *S v De Oliveira*⁷).
- [19] The respondent's two witnesses have testified that the appellant had approached the deceased, tapped him on the shoulder, and when the deceased turned to look at the appellant, the appellant stabbed the deceased once with knife without saying a word. Thereafter, the deceased ran into lounge and collapsed. Intensive cross-examination could not crack the two witnesses on this aspect. The contradictions in the evidence of the respondent's two witnesses was in relation to whether they were seated together and both were smoking hubbly, as the first witness testified that he was sitting alone and smoking hubbly alone, whilst the second witness testified that they were seated together and both smoking hubbly. Further contradiction was in relation to whether the deceased was at any stage

⁶ 2015 (1) SACR 489 (WCC) at para 29

⁷ 1993 (2) SACR 59 (A)

dancing. In my view, these contradictions are immaterial and did not in any way affect how the two witnesses had witnessed the manner in which the deceased was stabbed by the appellant. The two witnesses have corroborated each other on the key issue of how the deceased was stabbed by the appellant, and their evidence was credible and reliable.

[20] With regard to the contradictions in the *viva voce* evidence and written police statement of the first witness for the respondent, the court *a quo* had erred in allowing the defence to cross-examine that witness regarding his written police statement. The defence had failed to lay the basis for him to cross-examine the witness on his written police statement. The witness has testified that he did not read the statement, it was not read back to him, and was just made to sign it. What the witness and the prosecution did in preparation for trial was immaterial, as the prosecutor who was reading that statement to the witness was not the author of that statement. Further the witness has testified that he did not see his signature on the statement that was read to him by the prosecutor. So, it is not clear whether the prosecutor was reading the witness's written police statement or his own written notes if there was no signature. The basis must be laid with regard to the author of the written police statement.

[21] Even if this court was to accept that the appellant had stabbed the deceased whilst the deceased was charging at him with the intention of hitting with fists, I have difficulties in the appellant's reliance on private defence. The defensive act of stabbing the deceased was not necessary under the circumstances. The appellant had already succeeded in disarming the deceased of a dangerous weapon. The appellant had failed to explain why he did not use another crate as from record there seems to have been more than one crate where the incident happened. At the time the appellant stabbed the deceased, his life was no longer in danger like when the deceased was still in possession of a knife. There was no evidence that was led with regard to the physical appearance of both the appellant and the deceased. Therefore, there is no reasonable relationship between the attack and the appellant's

defensive act. The appellant's conduct does not satisfies the requirements of private defence, and had exceeded its limits.

[22] Taking into consideration the evidence and arguments presented in its totality, there is no reason to fault the majority decision by the lay assessors in convicting the appellant in this matter. It follows that the appeal stands to fail.

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

23.1 The appellant's appeal on conviction is dismissed.

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

I AGREE

DIAMOND AJ
ACTING JUDGE OF THE HIGH OF SOUTH AFRICA,
LIMPOPO DIVISION, POLOKWANE

APPEARANCES:

Counsel for the appellant : LO Mathebula
Instructed by : Legal Aid SA Polokwane Office

Counsel for the respondent : Adv SM Mawasha
Instructed by : DPP Polokwane Office

Date heard : 28th March 2025

Electronically circulated on

: 30th July 2025

POLOKWANE HIGH COURT