

**IN THE HIGH COURT OF SOUTH AFRICA
(BISHO)**

CASE NO: 38/2006

THE STATE

versus

BONISILE GREY

Accused

JUDGMENT

EBRAHIM J:

Introduction

[1] The accused, Bonisile Grey, who is charged with the crimes of murder and attempting to defeat the ends of justice pleaded not guilty to both offences. On behalf of the accused Mr Hole submitted a written statement, in terms of s115(1) of the Criminal Procedure Act 51 of 1977 ('CPA'), disclosing the basis of the accused's defence on the charge of murder. The accused admitted he stabbed the deceased, Simphiwe Pathuxolo Mgoduso, in the chest and arm but said this was in self-defence. He admitted further that he inflicted three further stab wounds on the deceased's legs and in respect of thereof tendered a plea of guilty to the offence of assault with intent to do grievous bodily harm. These pleas were rejected by Mr Walters, who appeared for the State.

State case

[2] Mr Walters then proceeded to adduce evidence. By consent, Exhibit 'B', was admitted in evidence and set out admissions by the accused in terms of s220 of the CPA which confirmed the deceased's identity, the cause of death and the findings of the post-mortem examination. Also by consent, the post-mortem report, Exhibit 'C', and an album of photographs, Exhibit 'D', were admitted in evidence.

[3] Ms Naniwe Mshumpela was the first witness to testify for the State. She stated that her cousin, Noncwaka, and she attended a relative's funeral on 16 July 2005. After the burial, they joined other mourners at NU7, Mdantsane for a meal. They met Boniswa Qaga, fetched their food and stood next to a friend's car. Suddenly people screamed and dispersed and she saw the accused stabbing the deceased who was queuing for food. The deceased ran towards the house followed by the accused who continued stabbing him. At the door of the house the deceased turned, stumbled, and fell. The accused stood over the deceased, who was screaming and kicking helplessly, and continued stabbing him. She used her handbag to strike the accused and he looked up and dropped the knife and she put her foot on it. She picked it up and placed it in a plastic bag, later handing it to the police. The accused did not have any injuries and retreated when chairs were thrown at him.

[4] During cross-examination, she confirmed there were many people at the funeral. She did not see how the incident started but saw people disperse.

The deceased was fetching food and was unarmed. He was not a violent person and did not have a knife. It was the accused who had a knife and when he ran after the deceased, it appeared he was stabbing the deceased in the back. After the deceased fell, the accused was astride him and continued stabbing but she could not recall how many times he stabbed. She disputed the accused had used a clasp knife with the blade folding into the handle. It was the knife in the photograph shown to her during her testimony. She reiterated that she did not see any injuries on the accused. She also did not hear them trade insults or the accused say, '*Why are you licking the jar?*' She denied there had been a fight and that the deceased had stabbed the accused below his heart.

[5] The next witness, Blackie Mazibuko, said he knew the accused and his daughter had been in a love relationship with him. On 16 July 2005, he and other mourners went from the graveyard to the house to partake of a meal. He queued for food and the deceased was standing in front of him. The deceased collected his food and a drink and was on his way to the house when the accused stabbed him. The deceased dropped the food and fell to the ground. The accused was on top of the deceased, who was kicking, and continued stabbing him. He could not bear to watch and walked away. The deceased and the accused had not exchanged words nor was the deceased in possession of a knife.

[6] Much of the cross-examination was not relevant to the stabbing incident. Mr Mazibuko confirmed he testified at the accused's previous trial in which

the presiding judge recused himself. He denied he was dependent on financial support from his daughter Boniswa Qaga. He was not committing perjury in relation to his testimony at the previous trial. In his previous testimony he had not said where exactly the accused had stabbed the deceased on his body but only that it was on the front part thereof. After he collected his food, the deceased walked a short distance before the accused stabbed him. Although there were many people at the funeral he had seen what had happened. The accused had not been molested by anyone.

[7] He could not say if the attack commenced at the front of the house but the accused had stabbed the deceased near the front door. He did not see the deceased run from the gate towards the entrance of the house in an attempt to escape the accused. The accused must have stabbed the deceased in the back as the deceased had run away. When put to him that the post-mortem report did not reveal stab wounds to the deceased's back, he replied that the accused could only have stabbed him in the back. It was then put to him that if he was at the funeral he did not see the accused stab the deceased but he disputed this. He denied the deceased had attacked the accused or fought with him. He reiterated that the deceased was carrying his food when the accused attacked him. When the accused stabbed the deceased in the chest and arm he was not acting in self-defence.

[8] Replying to the Court's questions Mr Mazibuko said the deceased was in front of him in the queue. If the deceased had stabbed the accused, he would have seen this. He was unsure if the deceased was wounded when the accused stabbed at him as they ran.

[9] Mkhululi Nzwana Cweba testified he met the deceased through his friendship with Boniswa Qaga. On 16 July 2005 they attended a funeral and from the cemetery went to the house at NU7 for a meal. The deceased fetched food and drinks while he joined friends at the vehicle. A little later people came running out, screaming. It was difficult to get into the yard but he saw the accused stabbing someone whom he recognised as the deceased when he got nearer. The accused jumped over a fence and ran away leaving behind the knife with which he had stabbed the deceased. It had a wooden handle with a blade sharpened on both sides. It was the one in photograph no. 6 in Exhibit 'D'. He arranged to transport the deceased to hospital and telephoned the police. Individuals had chased the accused, brought him back and he said, '*This dog is sleeping with my wife*'. There was no blood on the clothes of the accused nor was he injured or in pain.

[10] Mr Hole's cross-examination, once more, focussed largely on irrelevant issues and events that occurred years prior to the stabbing. Mr Cweba expressed surprise that Boniswa Qaga had a husband or been married for eighteen years. He did not know of an incident at Scenery Park where the deceased assaulted Boniswa Qaga's mother. At the house, the deceased was lying on his back on the ground while the accused stood over him.

When the accused stabbed at his upper body, the deceased kicked at the accused. There were many people but he could see what was happening. However, he could not say how many times the accused stabbed the deceased. Prior to the commotion, he did not hear anything.

[11]Questioned about his statement to the police he admitted he had not said that Noqwaga told him Bonisle Grey had stabbed Simphiwe Mgoduso. He never told the police that the accused had said the deceased was sleeping with his wife. The deceased was lying on his back on the ground and the accused did not act in self-defence. He was certain there was a wound in the deceased's back. When put to him that the accused would testify that the deceased stabbed him twice on the left side of the chest, he replied he had not seen any blood on the accused. People had assaulted the accused with chairs until he ran away. Many people saw the accused being brought back to the house.

[12]Ms Mandisa Muba testified she attended the funeral at No. 3294, Mdantsane. She and her friend Dudu Boniswa Spargs were sitting on chairs having a meal. A man came rushing past carrying two containers with food. He dropped the containers and fell to the ground on his back. Another man stood over him, bent down and stabbed him in the chest a number of times. She was unable to look and screamed. The assailant jumped up and ran away when women attacked him with chairs. She did not hear the assailant say anything and it was he, not the deceased, who had the knife.

[13]During cross-examination, she said the deceased was walking very quickly carrying the food and did not run. It was only after the deceased fell to the ground that she saw the man stabbing him. Asked about her statement to the police, she denied saying the deceased was stabbed repeatedly while rushing in her direction. When she made the statement, she was very nervous because of what she had seen. The statement was not read to her before she signed but then said it was read to her. However, she was unsure of the first portion and her testimony was the truth. She did not know how the stabbing started and was shocked when she saw one man standing over the other stabbing him.

[14]Noncwaka Marilyn Mafola said she knew the accused from the 80's. She did not know the deceased. On 16 July 2005 she attended a funeral at NU7. She was being handed food when she heard a woman scream. It was about 2:15pm and she went to investigate. The accused was on top of the deceased, who was lying on the ground, and stabbed him more than three times on his body. But, she could not see where on his body he was being stabbed. The deceased did not fight back and did not have anything in his possession. People attacked the accused with chairs and he jumped over the fence into the yard next door. When someone asked the accused what he was doing he had replied, '*This dog is eating my wife*'. There was blood on the front of his shirt but she did not see anyone stab him. She had told the police a young man stabbed the accused but this was not included in her statement as she could not identify the person.

[15]During cross-examination, she insisted her testimony was the truth. She disputed the accused had run away, jumped over the fence, and been chased by a crowd of people and brought back. She did not notice blood on the accused when he moved away from the deceased. Questioned about her statement to Inspector Manlara she said he did not record the deceased had been stabbed as she said she could not identify the person. She admitted the accused's remark, '*This dog is eating my wife*', was not in her statement.

[16]Replying to questions from the Court, Ms Mafola clarified who she was referring to in the sentence reading: '*While I was busy having my dinner plate I heard a noise of a female who was screaming. I then got up and saw the ex-boyfriend of my eldest sister stabbing the boyfriend of my sister*'. The ex-boyfriend was the accused, her eldest sister was Boniswa Qaga, and the boyfriend was the deceased. To her knowledge, the accused and her sister lived together but never married.

[17]Brenda Beatrice Spargs testified that she met the accused through Boniswa Qaga during the 80's. During May 2005 she met the deceased. On 16 July 2005, she and her friend Mandisa Muba attended the funeral at house No. 3294, NU7, Mdantsane. They were seated outside the house close to a window when she heard people screaming. The deceased fell down in front of them and the accused stood over him stabbing him in the

chest. People attacked the accused with chairs forcing him to run away. She did not hear the accused say anything to the deceased.

[18]Cross-examined by Mr Hole she confirmed she was aware that there had been difficulties in the relationship between the deceased and Boniswa Qaga. There were a great number of people both inside and outside the yard when the stabbing occurred. She did not see the deceased being chased but saw him falling and the accused stab him in the chest. She did not watch further and did not notice whether the accused stabbed the deceased in his legs. She could not say whether the blood was on the upper part of the body of the deceased, or not, as everything had happened very quickly. She was shocked and ran away as the deceased was covered in blood. She could not comment on whether there was any blood on the accused. The accused was not brought back to the house after he had run away. She was not aware if the accused was admitted to the Intensive Care Unit at St Dominics hospital. She could also not remember if Nocwaka had told her at the police station that someone stabbed the accused.

[19]In reply to questions from the Court, she said that the screams made her look up and she then saw the accused falling nearby. The knife used by the accused was huge and appeared to be made of brass. Nana picked up the knife and took it to the hospital.

[20]The next witness was Boniswa Qaga. She testified that she previously had a relationship with the accused. They stayed together for about fourteen years and had two children, aged 18 and 14 years, born of the relationship. They had met towards the end of 1987 and the relationship ended during January 2005. They never married and did not enter into a civil or customary marriage. After her relationship with the accused ended, she had to obtain a court order to prevent him from abusing her further.

[21]In May 2005 she met the deceased and their friendship developed into an intimate one. They were staying at his parental home and attended the funeral on 16 July 2005. She was with Naniwe Mshumpela and Noncwaka Mafola close to where food was being cooked. People were queuing for food and she heard a commotion. She thought someone had fainted and people called her. She went to them and saw a knife going up and down. On looking closely she saw the accused stabbing the deceased who was lying on his back. She could not say on which part of the body the deceased was being stabbed. The accused was standing over the deceased, who was kicking helplessly underneath him, and was facing his head. People threw chairs and containers of food at the accused to stop him stabbing the deceased. The accused jumped over a fence and shouted as he ran away, *'I have stabbed this dog who is eating my wife'*. Individuals chased the accused but she concentrated on transporting the deceased to hospital.

[22]The deceased did not have a knife. Naniwe had taken possession of the knife, Exhibit no. 1, which the accused used to stab the deceased. *En route* to the police station at NU1 Naniwe placed the knife in a plastic bag and handed it to a police officer.

[23]Mr Hole commenced cross-examination by asking the witness if she regarded herself as a person who had supernatural powers. She replied she was not God and that only God had supernatural powers. Mr Hole then asked if she was a person who spoke to spirits and those who did not live in our world. The Court thereupon enquired into the relevance of these questions. Mr Hole's reply was that if a person had a tendency to hallucinate and had seen a murder, the Court had to be extra-cautious with such evidence. The Court then ruled that this line of questioning could not be pursued unless Mr Hole could convince the Court of its relevance.

[24]Mr Hole then asked the witness why she was not attending school now. When the Court would not permit this question Mr Hole challenged the ruling, precipitating an exchange between him and the Court. Eventually, Mr Hole sought an adjournment as he wanted to consult his fellow legal practitioners. The adjournment was granted.

[25]On resumption of the trial on 1 December 2006, Mr Hole applied for the Court to permit him to withdraw as the legal representative for the accused. In an *ex tempore* judgment the Court held that the decision

whether Mr Hole continued as the accused's legal representative was one to be made by the accused and him and not the Court. Mr Hole thereupon withdrew as the legal representative for the accused necessitating a postponement of the trial.

[26]On 16 May 2007 Mr Jozana appeared for the accused and conveyed that he had instructions to apply for the presiding judge to recuse himself. However, he was not in a position to bring the application now and sought a postponement to enable him to prepare. This was granted.

[27]On 10 September 2007, following further postponements, the accused was represented by Mr Ndunyana instead of Mr Jozana and Mr Mbusi appeared for the state. Mr Ndunyana informed the Court that he had been unable to study the record of the trial proceedings and needed time to do so before he could be in a position to defend the accused. A postponement was then granted.

[28]On 25 September 2007 Mr Ndunyana brought an application that I, as the presiding judge, should recuse myself as the accused had a reasonable suspicion that I was biased. In an *ex tempore* judgment the Court held the application for recusal was without merit and refused it.

[29]In the preliminary stages of his cross-examination of Boniswa Qaga, Mr Ndunyana focussed on various issues that were not relevant to the charge against the accused. Ms Qaga conceded the children's surname

was Grey but denied that the accused and she ever married. When put to her that she had hidden her relationship with the deceased from the accused she replied that in June 2005 the accused followed them at the administrative block at Rhodes University in East London. On 28 May 2005 he did so again.

[30]Questioned on relevant issues she denied the deceased was armed with a knife. She conceded she could not be sure if the deceased had gone to the shop to buy a knife while waiting at the car when she was in church. The deceased was watching her car as she feared the accused would steal it. She had to obtain a court order against the accused as he was capable of violence. She disputed that the deceased had attacked the accused and said it was the accused who had attacked the deceased. She did not hear them quarrel. She was unsure on which part of his body the accused stabbed the deceased when he lay on the ground. There was no indication that the accused had been stabbed.

[31]Dr Claude Hannah testified that on 19 July 2005 he carried out a post-mortem examination on the deceased and prepared a report. His examination revealed that the cause of death was a stab wound to the chest which penetrated the heart and the abdomen into the liver.

[32]During cross-examination Dr Hannah said that he was unable to say whether the deceased was standing or lying down when the fatal wound was inflicted. There was a wound on the deceased's right lower arm but

no wounds on his back. Dr Hannah was also asked to comment on a medical report regarding the accused's injury and asked to clarify what was involved with a laparotomy and an intercostal drain.

[33]In reply to questions from the Court Dr Hannah said that the knife that inflicted the fatal wound must have been fairly long and not too thick. The wound was up to 4cm wide with a depth of 15 to 20cm. It was possible that the wound could have been caused by a pocket knife but the blade would have had to be at least 15cm in length. This concluded the state case.

[34]Mr Ndunyana then applied in terms of s174 of the Criminal Procedure Act for the discharge of the accused on count 2, namely attempting to defeat the ends of justice, as the evidence failed to make out a *prima facie* case against the accused. Mr Mbusi did not oppose the application. The accused was thereupon found not guilty and discharged on count 2.

[35]Testifying in his defence the accused stated that he married Boniswa Qaga by Xhosa custom on 1 July 1987 and they had two children aged 19yrs and 5yrs. They lived together until the morning of 18 May 2005 when she did not return after he had taken her to school. He expressed amazement that she denied they were married. She had given interviews to the news media, television and radio, under the name of Boniswa Qaga Grey.

[36]He attended the funeral of Mrs Mbonga on 16 July 2005 and went to NU7, Mdantsane to partake of a meal. He was sitting and eating when a tall man, whom he did not know, approached and insulted him, uttering words to the effect, '*How long are you going to continue licking the jar?*' He interpreted this to mean the person was having a sexual relationship with his estranged wife. He tried to restrain himself as he did not want to spoil the occasion.

[37]The person then kicked him on the lower part of his legs and things got out of hand. They exchanged angry words which embarrassed him in front his children and in-laws. Many other people in the community held him in high regard and he tried to avoid becoming involved. He did not succeed as the person was standing and he was seated. He got up but fell and the person produced a knife (Exhibit no. 1), lunged at him, and stabbed him on the left-hand side of his chest in a very sensitive area. He realised he had to do something quickly and attempted to run away. With this people dispersed. He grabbed a knife from a dish of meat and he and the person fought man to man. As it was an unlawful attack and his life was in danger he stabbed the person in self-defence.

[38]When asked by the Court to clarify if he had used the knife with which he was eating he said it was a 'clutch' knife - that is a folding knife. When it was pointed out he had said it was an eating knife he said he had meant a folding knife.

[39]He sustained a further wound on the left hand side of his chest very close to his heart as the fight ensued. He stabbed the deceased but did not aim at a particular area. He was very angry as the deceased had kicked him and stabbed the deceased in that leg. When the deceased lay on the ground he was facing the deceased's feet and not his face.

[40]Weakened by his wounds he went to his car at the front gate where the individuals who were with him took him to St Dominic's hospital for emergency treatment. The medical report detailing the treatment he received was handed in as Exhibit 'K'. He denied running away from the scene and that he was brought back. He also denied uttering any words to the deceased.

[41]During cross-examination by Mr Mbusi, Mr Grey objected to questions concerning his marriage to Ms Qaga and said he did not come to Court to answer these questions. When Mr Mbusi pointed out he had raised the issue of their marriage he still refused to answer. It was put to him that he had never married Ms Qaga but he denied this. Prior to the day of the funeral he only knew the deceased from what he had read in newspapers. He could not recall if he had seen his face previously. He did not know if the deceased went to buy a knife and said only Ms Qaga could answer this. He then said that if someone was looking after something that person would only do so if he had a weapon.

[42]The accused was a distance of two metres from him when he asked why he was continuing to drink on the same jug. He understood this to mean the deceased was having a relationship with Ms Qaga and also meant his wife had left him. This was his first meeting with the deceased and he did not know of any connection between him and Ms Qaga as she had never told him what she was doing. It was pointed out that previously he had said the deceased asked whether he was going to continue licking the jar. His reply was that he wanted to correct the interpreter as she used the words 'licking the jar'. The deceased had repeated this comment as he approached him but he could not recall how many times he did so. Some of the people could have heard this but he could not answer for them.

[43]As the deceased approached he drew the knife from inside his jacket and kicked him. They argued and he tried to question what the deceased was doing. He had taken two steps before he took the knife from the dish of meat and took it to try and save himself. The deceased tried to stab him but he ducked and the deceased missed. He then retaliated. He thought that the deceased would think twice if he noticed that he also had a knife. The deceased stabbed him close to his heart twice and had stabbed him as he was running away. The knife the accused used was Exhibit no. 1 and the knife he used was taken from the dish of meat.

[44]When asked to clarify the sequence of events he said he tried to run away but fell down and could not continue as he injured his knee. There was a

second attempt on his life and he took the knife from the dish and tried to repel the attacks. After he took the knife they began to fight.

[45]He noticed it was the intention of the deceased to kill him but warded off the knife. He could not remember whether he stabbed the deceased on the upper or lower part of his body but later said that after the deceased stabbed him close to his heart he lost control and stabbed the deceased several times on the upper part of his body. They were fighting and when he fell down he stabbed the deceased on his legs as it was closest to him. He fell down before the deceased.

[46]His food was in a disposable container and on the ground in front of him and the others, a little distance away from him, was a dish of meat with knives in it. He had to crawl to get to the dish. Everything happened very quickly and people were screaming and were shocked by what had occurred. They were scared of the deceased as he had a knife in his possession and this was unusual at a funeral. When confronted with why it was not put to witnesses that the deceased had chased him with a big knife and people were screaming and running away he claimed this was done. When confronted with why it was never put to witnesses that he had been kicked on his leg he said that he had not expected the witnesses to know about this. He had told Mr Hole that the deceased kicked him.

[47]He told Mr Hole that he used the knife taken from the dish from which he was eating. When asked if he had told Mr Hole that it was an Okapi knife

he said he had told him it was a folded knife. He could not recall if Mr Hole had indicated to the witnesses that he had grabbed a knife from the dish.

[48]Mr Mazibuko's evidence, he said, could not be trusted as he was a liar. He lied when he said he was queuing for food. He could not have seen what had happened as he put his hand over his face and ran away. According to him Mr Mazibuko gave three different versions. It was a lie that he met the deceased while the latter was standing in the queue waiting for food. He did not know why it was not put to witnesses that he was sitting when the deceased approached him. He saw Mandisa Muba and Boniswa Spargs for the first time when they testified in court as there were many people at the funeral. He could not say if they were sitting outside the house at the door. His children or family members might have heard what had happened but he did not want his children brought into it. They were at the funeral but not present when the events occurred and were sitting in the car.

[49] He disputed the version his legal representative, Mr Jakavula, put to witnesses in the first trial. He never told Mr Jakavula that he struggled with the deceased for control of a knife. He also never told him that the deceased was injured during the course of this struggle and could not say where Mr Jakavula obtained this version. He claimed it was put to witnesses that he had fallen down. He had not acted out of revenge when he stabbed the deceased in the leg with which he had kicked him.

[50]He disputed the evidence of Naniwe Mshumpela that she had picked up the knife which she said he had dropped. She was lying. He also denied, as was put in the previous trial, that the knife used in the stabbing was the same knife he had used when eating his meal. He disputed the evidence of witnesses that he jumped over a fence and ran away after stabbing the deceased. He said they had provided four different versions. He could not recall who assisted him after he fell down and took him to hospital as he was dazed at the time. When asked why six state witnesses did not see blood on him or any bleeding he said Ms Qaga influenced them to give false evidence. They had not seen what they conveyed to the Court and contradicted each other. He denied he had attacked the deceased when he was carrying food. He did not stab him with the intention of killing him. It was untrue that the deceased had not provoked or attacked him at any time.

[51]Replying to questions from the Court he said that he was facing the deceased's feet after the deceased fell down. The deceased was not a threat to him then. The witnesses who claimed he was facing the deceased's face were implicating him falsely. He agreed that he and the state witnesses were speaking about the same event. When asked to comment on the testimony of the witnesses that they only saw him stabbing and attacking the deceased and not the deceased stab him, he replied that in the first trial they testified he had stabbed the deceased in the back yet the deceased had no such injuries. Their evidence was false as none of them had seen how the fight started. He professed respect for

others, but when asked why he referred to Mr Blackie Mazibuko, who was his father-in-law, by his first name he responded by attacking the character of Mr Mazibuko.

[52]Dr Neil Gregory Comley, testifying for the defence, said that on 16 July 2005 he treated the accused who had been referred from the Trauma Unit of St Dominic's hospital. There was a stab wound to the lower left-hand side of his chest and the abdomen and the diaphragm was lacerated. The report of his observations and treatment is exhibit 'K'. He operated as the wound was potentially life threatening and repaired the laceration. In his opinion the blade which inflicted the wound would have been at least ten centimetres long and could have been Exhibit no. 1.

[53]During cross-examination Dr Comley said it was possible that the wound could have been caused by any other knife. Most of the bleeding would have taken place internally along the track of the knife but there would have been some external bleeding. The accused would have retained his strength for an indefinite period but his ability to run, jump and defend himself would have been diminished.

[54]Replying to questions from the Court, Dr Comley said it was a deep penetrating wound and it was highly unlikely it was self-inflicted. His opinion was based on the fact that he had never encountered a situation where a patient had inflicted a wound of this nature on himself. He was

told the patient had been stabbed at a funeral and succumbed in a knife fight. This concluded the case for the defence.

Argument on the merits

[55]Both the state and the defence presented argument on the merits. I do not intend detailing their submissions as the salient aspects thereof should become apparent in the course of the analysis of the evidence, save to say that, in his submissions, Mr Ndunyana did not attack the credibility of any of the state witnesses.

Analysis of the evidence

[56]On 16 July 2005 mourners attended the funeral of the late Mrs Bonga and gathered at house No. 3294, NU 7, Mdantsane to partake of food as is customary at funerals. It is common cause that the incident culminating in the death of the deceased Simphiwe Pathuxolo Mgoduso occurred while people were eating. The state witnesses were among the mourners and in their testimony described what they had seen from their respective vantage points.

[57]The evidence reveals that the deceased had stood in a queue to collect food. While walking away, holding two containers in his hands, the accused attacked him with a knife. Mourners shouted and dispersed. As he tried to escape the attack the deceased dropped the containers, stumbled, and fell on his back. The accused then straddled the deceased

and stabbed him on various parts of his body, inflicting a number of wounds.

[58]Dr Claude Hannah, who conducted the post-mortem examination, found six stab wounds and described the fatal injury as '*a penetrating stab wound laceration, left anterior thoracic-cage, through 5th intercostal - space and penetrating through left hemidiaphragm*'. In non-medical terms, the stab wound penetrated the deceased's chest, heart, abdomen and liver.

[59]In his plea explanation the accused stated: 'I admit that I delivered stabbing blows on the chest and arm of Simphiwe Mgoduso, the deceased in count one. The said blows were necessary and in defence of myself. I further admit that over and above the blows alluded to above I inflicted three further stabbing injuries on the legs of the said Simphiwe Mgoduso. I admit that those blows and the resultant injuries were not necessary for the defence of my person. At that stage the attack by the deceased had ceased and he was no longer a danger to me. The said blows were inflicted in a state of extreme anger.'

[60]It is the state's case that exhibit no. 1 was used by the accused to stab the deceased. From my observation it is more appropriate to describe exhibit no.1 as a dagger instead of a knife. The accused claimed that exhibit no. 1 was used by the deceased to stab him and that he used an Okapi knife, one where the blade folds into the handle, to stab the deceased. However, it is only during the accused's testimony that it emerged that the Okapi knife was one of a number provided for mourners to cut the meat.

[61]Mr Ndunyana submitted that there was no evidence that anyone witnessed how the incident started. This submission is clearly misconceived. It is evident he has failed to take account of the evidence of Mr Mazibuko who was standing behind the deceased in the queue to collect food. He clearly witnessed what had happened from the beginning. He described that the deceased had collected containers of food when the accused approached the deceased and attacked him with a knife. The attack was entirely unprovoked and the deceased tried to get away, dropping the containers in the process, with the accused in pursuit. Of all the witnesses Mr Mazibuko was best placed to see not only how the incident started but also that the deceased was unarmed and did not attack the accused in any manner or say anything that necessitated the accused having to defend himself. It is precisely this attack that caused mourners to shout and disperse in all directions.

[62]Mr Mazibuko, who was 71 years old, was subjected to probing and, often, hostile cross-examination in which Mr Hole attacked his integrity and character in an unwarranted manner. He was accused of being the pawn of Ms Boniswa Qaga and of committing perjury and presenting false testimony as he was financially dependent on her. There was even an insinuation that he might not have been at the funeral. Finally, Mr Hole delved into his personal life and that he was divorced some forty years earlier. In spite of cross-examination that lasted a few hours, Mr Hole

failed to show that his account of what occurred was untrue and that his observations were unreliable.

[63]During cross-examination Mr Hole suggested that Mr Mazibuko was lying when he said that the accused had stabbed the deceased in the back as he was running away. However, while he initially said this he later conceded he could not be sure if the accused had indeed inflicted any stab wounds on the back of the deceased. It is obvious to me that he was not untruthful on this issue but erred in drawing the conclusion that when the accused wielded the knife he actually made contact and inflicted stab wounds on the back of the deceased. This misguided conclusion on his part does not, in my view, adversely affect his credibility as a witness.

[64]I am not surprised that Mr Ndunyana did not attempt to suggest that the testimony of Mr Mazibuko should not be accepted. He impressed as a witness. In the face of gruelling and lengthy cross-examination he did not deviate from his version or contradict himself in any material manner. He emerged as an honest and credible witness. I find his testimony reliable and accept that it is a truthful account of what occurred.

[65]Ms Naniwe Mshumpela and Ms Noncwaka Mafola were together after fetching their food. Ms Mshumpela saw the deceased queuing for food and people then screamed and dispersed. The deceased was being stabbed and ran towards the house, stumbled and fell. His attacker was astride him, facing towards his face, and was stabbing him while he kicked

helplessly. She approached them and struck the assailant over the head with her handbag. The person was the accused, whom she knew. He looked up and dropped the knife. She disputed it was a clasp knife with the blade folding into the handle. It was the same knife as that in the photograph shown to her during her testimony which she had picked up and later handed to the police. The deceased was unarmed and she did not see any blood on the accused.

[66]It is evident that Ms Mshumpela erred in concluding that the deceased was stabbed while he was running. However, her testimony was otherwise reliable. She was a credible witness and did not contradict herself in any material respect. I accept she furnished a truthful account of what occurred.

[67]Noncwaka Mafola's evidence corroborates that of Ms Mshumpela that the accused, whom she knew, stabbed the deceased a number of times when he was lying on the ground. Her testimony also corroborates that of other witnesses that the deceased did not have a knife. She also testified that someone asked the accused what he was doing to which he replied, '*This dog is eating my wife*'. Further, after the assault the accused jumped over the fence and stood in an adjoining yard. She then saw blood on the front of his shirt. The accused, she said, had been stabbed by a member of the family of the deceased person whose funeral they were attending.

[68]Ms Mafola's evidence of the accused's stabbing was not corroborated by any other witness and I shall therefore disregard it. She was nevertheless a credible witness and I accept the reliability of her evidence that the accused stabbed the deceased while he lay on the ground. This was corroborated by other witnesses and by the accused himself except that he maintained that he stabbed the deceased only in the legs.

[69]Ms Mandisa Muba and Ms Boniswa Spargs were sitting outside the house enjoying their meal when a man came rushing past carrying two containers of food. Ms Muba's evidence corroborates that of Ms Mshumpela that the deceased fell onto his back on the ground. She also corroborates the evidence of Ms Mafola that the accused stabbed him a number of times. The first blow was administered to his chest but thereafter she could not look. She corroborates Mshumpela and Muba that the accused, and not the deceased, was armed with a knife. She also testified that women attacked the accused with chairs and he then ran away.

[70]Ms Muba did not know either the deceased or the accused. She was an independent, honest and credible witness. Her testimony was reliable and I accept her description of what happened as a true account of events.

[71]The evidence of Boniswa Beatrice Spargs, who sat next to Mandisa Muba, substantiates that mourners screamed and dispersed as the deceased was being chased. She corroborates the evidence of the

witnesses Muba, Mshumpela, and Mafola that he dropped the containers of food, slipped and fell on his back. This occurred right next to her. Ms Spargs also corroborates the evidence of Muba that the accused stood over the deceased and stabbed him in the chest. Further, that the deceased was unarmed and did not fight back. She corroborates that the knife that the accused used was picked up by Ms Mshumpela. She also testified that women attacked the accused with chairs and he then ran away.

[72]Ms Spargs knew the deceased and the accused but did not exhibit any bias in favour of either. She was a truthful witness and her account of what happened is an honest one.

[73]Mr Mkhululi Cweba's evidence substantiates that people were running and screaming. He corroborates other witnesses that the accused stabbed the deceased in the chest a number of times. He also confirms some people assaulted the accused with chairs. The accused then jumped over a fence, leaving the knife, but was brought back. The knife he identified as the one in photograph no. 6 in Exhibit 'D'. He said there was no blood on the clothes of the accused nor was he injured or in pain. He also testified that the accused said, '*This dog is sleeping with my wife*'.

[74]Mr Cweba was not without his faults as a witness. Nevertheless the essential features of his version are corroborated by the other witnesses. I accept therefore he has told the truth regarding the events he witnessed.

[75] Ms Boniswa Qaga was with Ms Mshumpela and Ms Mafola when she heard a commotion. She thought someone had fainted and heard people calling her. Her testimony substantiates those of the others that the accused was standing over the deceased and stabbing him while he lay on his back kicking helplessly. Although she could not say on which part of the body the deceased was stabbed she does say that the accused was facing his head. She also corroborates that people threw chairs as well as containers of food at the accused in an effort to stop him from continuing to stab the deceased. The accused then jumped over the fence and shouted, *'I have stabbed this dog who is eating my wife'*. She also confirms people had chased him.

[76]It became very apparent during the trial that the relationship between Ms Qaga and the accused was a very hostile one. On a number of occasions Mr Hole's cross-examination of witnesses centred more on issues that had given rise to friction between the parties than on those relevant to the charges against the accused. I have borne in mind, therefore, the potential for bias on the part of Ms Qaga when evaluating her testimony.

[77]Her account of what occurred is corroborated by the other witnesses. She did not provide a biased view, or exaggerate the actions of the accused. She was a truthful witness and I am satisfied that she honestly related what she observed.

The accused's defence

[78]In his testimony, the accused's version of the stabbing of the deceased differed in material respects from that presented in the trial presided over by Nyangiwe AJ (in which he recused himself upon application of the accused) as well as the version Mr Hole put to witnesses in the present trial.

[79]In the first trial Mr Jakavula, who appeared for the accused, stated that the deceased may have been injured when there was a fierce struggle for acquisition of the knife.

[80]In the present trial, Mr Hole put a different version to most witnesses. This was that the accused met the deceased at the front door of the house and the deceased asked him, '*When are you going to stop licking the jar?*' or used words to that effect. The deceased attacked the accused who retaliated and they fought. The deceased landed on the ground and the accused sat on his stomach facing his feet and stabbed him in the legs. During the fight the deceased stabbed the accused twice in the chest and the accused then stabbed the deceased in the chest and arm in self-defence. However, the accused did not chase the deceased.

[81]When the accused testified he furnished a third version. This was that he was sitting on a chair eating his food when the deceased approached uttering insulting remarks. The deceased drew a knife, (Exhibit no. 1), kicked the lower parts of his legs and attempted to stab him. Angry words were exchanged and he had to take evasive action by ducking. He tried to

get away but fell and the deceased stabbed him on the left side of his chest. People dispersed when he ran. He then grabbed a knife from a dish of meat and he and the deceased fought man to man. The deceased's attack was unlawful and he stabbed the deceased in self-defence as his life was in danger. He also claimed that he used an Okapi knife which was one of a number supplied to mourners to cut the meat they were eating.

[82]It is important to note that the witnesses testified of a single incident. The accused also confirmed, in response to questions from the Court, that there was only one incident. It is common cause that during the course thereof the deceased was stabbed. The accused has asserted, however, that the deceased stabbed him in the same incident.

[83]There is no indication, as claimed by the accused, that the witnesses conspired and were influenced by Ms Boniswa Qaga to lie. There are no material contradictions in their description of events. Any differences are inconsequential and not of any substance and are indicative of persons viewing events from different vantage points. Differences in observations are to be expected in the face of large numbers of people shouting and rushing around. It is also clear they were shocked and distressed by the events.

[84]It is apparent from their evidence that the first indication of something untoward is when mourners shouted and dispersed. They immediately

tried to establish the cause of the commotion and then saw the accused either in the process of pursuing the deceased carrying containers of food or on top of him stabbing him as he lay on the ground. They are *ad idem* that the accused and not the deceased was armed with a knife and that the accused was the aggressor. They are adamant furthermore that the deceased never attacked the accused or presented any threat to him.

[85]The accused was an unconvincing witness. In his testimony he gave a confusing account of events. During cross-examination his replies were often long rambling statements and did not provide clear intelligible answers to pertinent issues. On occasions he refused to answer questions in respect of matters he had raised and became aggressive and argumentative when pressed for answers by Mr Mbusi. He also attacked the integrity of witnesses, in particular that of Mr Mazibuko. Questioned on the sequence of events of the alleged fight between him and the deceased he provided inconsistent versions. It was apparent he was adjusting details in an attempt to clarify inconsistencies. It is important to note that none of the witnesses in the present trial were confronted with the version that Mr Jakavula put forward in the first trial. This version was to the effect that the deceased may have been injured when there was a fierce struggle for the knife.

[86]It emerged during cross-examination that it was not put to any witness that the accused defended himself with one of the knives had mourners used to cut the meat. It was also not put that he took it from a dish of meat and

that the deceased was the first to draw a knife. It was not put to witnesses either that the accused was sitting on a chair and was busy eating when the deceased approached him uttering insulting remarks and kicked him against his legs. It was also not put to witnesses that he ran, and so did other people, when the deceased attacked him. Nor was it put that when the deceased approached the accused he did not have containers of food in his hands.

Conclusions

[87]The accused was an untruthful witness. It is evident he has furnished contradictory accounts of the circumstances resulting in the fatal stabbing of the deceased. There is no evidence, of any kind, that supports the substance of his version. I find his story not reasonably possibly true. On the contrary, it is palpably false and I therefore reject same.

[88]The evidence presented by the state establishes beyond a reasonable doubt that the deceased did not attack the accused. It is clear further that the deceased did not do anything that justified the accused having to defend his person. The evidence also does not substantiate the accused's claim that the stab wounds that he sustained were inflicted by the deceased. The evidence points to the accused having sustained these wounds subsequent to his attack on the deceased. I am satisfied, therefore, that the state has proved that the accused did not act in self-defence when he stabbed the deceased.

[89]The evidence also establishes beyond a reasonable doubt that the accused stabbed the deceased in the chest, arm and legs with the knife exhibit no. 1 as he lay defenceless on his back on the ground. In the process he inflicted the fatal wound to the chest which penetrated the heart, abdomen and liver. The only reasonable inference to be drawn from the manner and the circumstances in which accused stabbed the deceased is that the murder was premeditated.

Verdict

[90]In the result, the accused is found guilty of the murder of the deceased, Simphiwe Pathuxolo Mgoduso.

Y EBRAHIM
JUDGE OF THE HIGH COURT, BISHO

19 NOVEMBER 2007