

IN THE HIGH COURT OF SOUTH AFRICA

(TRANSVAAL PROVINCIAL DIVISION)

10/02/2005

CASE NUMBER: A2973/2003

**NOT REPORTABLE**

In the matter between:

DYANTYI, KHUTHELE

Appellant

and

THE STATE

Respondent

JUDGEMENT

PATEL J et KEMP AJ  
HEARD ON 31 JANUARY 2005

INTRODUCTION:

[1] On 18 August 2003 the appellant was found guilty of murder in the Nigel Regional Court and on the same day he was sentenced to a sentence of 10 years imprisonment of which 5 years were suspended for a period of 5 years.

[2] Appellant appeals only the conviction and not the sentence.

BACKGROUND:

[3] On 29 September 2002 a number of people gathered at the house of Michael Nkotlo to watch soccer. It is common cause that they were drinking beer and that after the soccer had finished most of them moved to an adjacent room where they played cards on a bed.

At some stage there was a commotion which turned out to be an attack by the deceased to the accused. Apparently the accused ran from the house and eventually a confrontation took place which ultimately led to the death of the deceased. It is common cause that the accused stabbed the deceased a number of times and that the deceased died as a result of the stab wounds he received.

Although the report on a medico legal post mortem examination stated that the cause of death was "*skietwond aorta*", it was common cause that that was a mistake and was in fact a stab wound to the aorta. The report describes the wounds as follows:

- "1. *Twee wonde van 3½ cm elk oor die hoek van die Louie (sic).*
2. *Een wond van 3½ cm tussen tepel en sternum tepelhoogte links.*
3. *Twee wonde van 2½ cm regtervoorarm en elmboog."*

#### THE EVIDENCE:

[4] The first witness was Michael Nkotlo who testified that they were at his house watching soccer. He states that while they were watching TV, a young girl ("*meisiekind*") was chatting with the accused. The deceased called the girl but she ignored him. He then left the couple and subsequently overheard somebody shouting "*Hier steek 'n ander persoon die ander*". He states that when he left the room and entered the kitchen, he noted that the deceased had stabbed the appellant. He also testified that the appellant was bleeding at that stage from a wound in the centre of his chest. He further testified that a person called Armstrong (Armstrong B. Nako) stated that he (Armstrong) will not allow his brother-in-law to be stabbed. The evidence is that the accused left the house and was followed by the said Armstrong. It is stated that Armstrong and another person called Zola Funda

accompanied Armstrong. These two eventually caught up with the deceased and grabbed hold of him. A short while later the accused appeared on the scene and while the deceased was held by the said Armstrong and Zola Funda, the accused stabbed the deceased.

[5] During cross-examination Michael Nkotlo was confronted with a statement which he made to the police. He denied that he had made such a statement and denied that the signature which appeared on the statement was his. He offered to show the Court what his signature look like, but this offer was not taken up. This resulted in a trial within a trial in which Nicodemas Mosotho Moagi, a police inspector, testified that he had taken down the statement of Michael Nkotlo. The startling and disturbing evidence which was given by this police inspector shows that there was language problems between the policeman and Michael Nkotlo. The inspector also testified that after he had recorded the statement and it was signed, he took it to a fellow inspector, Insp. Moteki, who affixed his stamp to it and recorded the detail thereupon which indicated that he had in fact acted as a Commissioner of Oath.

In spite of these gross irregularities the Magistrate allowed the statement as evidence.

[6] The next witness was Diketso Johannes Moteka, the inspector who affixed his stamp to the abovementioned statement. He confirmed that the first statement of the witness was not taken by him but that he indeed affixed his stamp to the affidavit. The Magistrate admonished him and warned him never to do it again. The witness then testified that he had taken a second affidavit himself which was recorded in

English. He testified that he had spoken in Zulu to Michael Nkotlo in spite of the fact that Mr. Nkotlo is Xhosa speaking. At one stage the inspector admitted that there could have been a misunderstanding between him and Mr. Nkotlo.

[7] The next witness was Armstrong Busile Nako. He was warned in terms of s 204 of the Criminal Procedure Act. He testified that on the 29<sup>h</sup> September 2002 he was at the house of Michael Nkotlo when the incident took place. He confirmed that everybody present watched TV, drank beer and afterwards a number of them played cards in one of the rooms. He stated that at some time he heard a commotion and somebody shouted to him from outside that somebody was being killed. He stated that he left the house to go and investigate and by the time he got outside, the accused and the appellant had already stabbed each other. He denies that he saw the accused and the deceased stabbing each other. He also stated that when he and others went out to help, both the accused and the deceased had fallen. He denied the allegation that he had held the deceased while the accused was stabbing him.

[8] The next witness was Zola Funda. He also confirmed that he was present on the 29<sup>th</sup> September 2002, the group watching TV, consuming beer and playing cards after the soccer match had been completed. He testified that while they were playing cards, a girl entered the room and informed them that people were busying hurting each other on the outside. He then states that everybody in the house then left the house to go and see what happened. He states that when he left the house, the appellant came running in the direction of the house and collapsed at the side of the house in front of the door. He too then claims that he did not see the incident itself.

[9] The next witness was Sibusiso Solomon. He states that when he approached the house that afternoon of the 29<sup>th</sup> September 2002 to go and watch TV, he saw the deceased leave the house. He stated that shortly afterwards Armstrong Nako and Zola Funda followed the deceased. Armstrong and Zola eventually grabbed the deceased whereupon the accused arrived and stabbed the deceased while Armstrong Nako was holding the deceased. He states that Zola Funda was present and that the deceased was stabbed three times in the chest.

[10] The next witness was Nxokiswa Nqaba. She testified that she was at the house on the day when the incident happened. She stated that there was some fighting in the kitchen. She entered the kitchen and found the deceased with a knife and she noted that he had already stabbed the appellant. She stated that the appellant had a stab wound to the left side of his chest. At some later stage he noted the deceased was in the house and had collapsed next to the stove in the kitchen. She also noted appellant come into the house.

[11] Nqaba was extensively cross-examined and confronted with a statement which she had made. She denied that she had dictated the contents thereof and denied that it had been read to her after she had been requested to sign the statement.

[12] That was the evidence presented on behalf of the State.

[13] The next witness was the appellant Khuthule Dyantyi. He confirmed the date, the place where the incident happened, the TV watching, the drinking and the card playing. He stated that the deceased was about 2 or 3 cm taller than him and bigger.

He testified that he was speaking to a girl in the kitchen when the deceased entered and told him that he (the deceased) "*soek hierdie kind*". He was then stabbed by the deceased in the chest and stated that it was only he and the girl in the kitchen when the deceased entered, and denies that there were any further conversations after he had told the deceased there is no problem. He states that he ran out of the house after he was stabbed, with the deceased in pursuit. The deceased stabbed him again between the shoulder blades and while running he was also stabbed on the back of his head. He testified that there was a truck on the premises, that he tried to run around it and while doing so the deceased fell to the ground. The appellant states that at that time the deceased was about 2 metres behind him and when he saw the deceased falling, he stopped, took out his own knife and confronted the deceased. He was later asked why he did not run away any further and he stated that he was feeling weak after being stabbed himself and had decided that the only way to defend himself was to confront the deceased with his own knife. He then explains that a fight ensued between him and the deceased during which fight he stabbed the deceased. He also testified that this all happened in the evening at about 20h00. The appellant testified further that after he had stabbed the deceased for a third time, he turned and ran towards the house. When he got to the house, he collapsed at the door.

#### THE MAGISTRATE'S JUDGMENT:

[14] The Magistrate in his *ex tempore* judgment stated that as a result of pressure of time, he would not summarise the evidence but proceed directly to an evaluation of the totality of the evidence presented.

The Magistrate very correctly referred to the judgment in *S v Shabalala* 2003 (1) SA CR at 134 (SCA) where the Court stated:

*"The correct approach in evaluating evidence is to weigh up all the elements which point towards the guilt of an accused against all those which are indicative of his innocence taking proper account of inherent strength and weaknesses, probabilities and improbabilities on both sides and having done so to decide whether the balance weigh so 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 was decisive, but that can only be an ex post facto determination and the trial court should avoid the temptation to latch onto one obvious aspect without assessing it in the context of the full picture presented in evidence."*

[15] The Magistrate accepted the evidence of Michael Nkotlo in spite of the serious contradictions found in the two affidavits he deposed to. The Magistrate quoted the well-known decision in *S v Bruinders en Ander* 1998 (2) SACR at 432 where the learned Judge stated:

*"Dit was nie die doel van so 'n verklaring om die getuies se getuienis aan die hof vooruit te loop nie en was dit vergesog om van die getuie te verwag om in so 'n verklaring presies dieselfde weergawe te verskaf as wat hy in die ope hof sou getuig. "*

The Magistrate decided to accept the evidence of Michael Nkotlo and he found support for that evidence in the evidence delivered by Sibosiso Solomon and Ms. Nxokiswa Nqaba.

[16] The Magistrate rejected the evidence of Mr. Nako and Mr. Funda.

[17] The Magistrate stated:

*"Mnr Nkotlo, mnr Solomon en mej Nqaba het al drie insgelyks as eerlike en geloofwaardige getuienis [beindruk]. Hulle slaag daarin om die gebeure op 'n logiese en konsekwente wyse voor die hof te plaas. Hulle was onderwerp aan kruisvraging en het nie mekaar weerspreek met betrekking tot enige wesenlike aspekte nie. Hulle getuienis openbaar ook geen inherente onwaarskynlikhede nie."*

[18] It is notable that the Magistrate in his judgment stated the following:

*"Die ironie van hierdie hele saak is dat as die beskuldigde die oorledene gesteek het terwyl die oorledene hom steek, in daardie proses dit noodweer is. 'n Mens is geregtig om 'n ander persoon se lewe te neem ter beskerming van jou eie lewe."*

[19] The Magistrate found that the State had proven that the appellant had chased after the deceased and then subsequently stabbed him whilst the deceased was held by Mr. Nako and Mr. Funda. Consequently the Magistrate found that there was no self-defence and found the accused guilty of murder.

#### EVALUATION OF EVIDENCE:

[20] The Magistrate found that the differences and multitude of contradictions between the evidence given *viva voce* by Michael Nkotlo does not impact on his credibility because the statements made by Mr. Nkotlo were handled badly by the police inspectors. He failed to take the following into consideration:

- (a) Both Inspectors Moagi and Moteka testified that Mr. Nkotlo made the statement on the evening of the incident;



- (b) when he was confronted with this statement, Mr. Nkotlo denied that he was the author of the statement;
- (c) only after the inspectors had testified and after testing questions asked by the Magistrate, he admitted that he was the author of the statement;
- (d) shortly after making this admission, he testified that he did not make such statement; and
- (e) Mr. Nkotlo, on his own evidence, requested the police after some time to make a second statement apparently because the first one was not correct. This is denied by Insp. Moteka, who stated that he went to Mr. Nkotlo to obtain further information and took down the second statement. This evidence was never disputed.

The learned Magistrate never analysed the evidence of Solomon and Ms. Nqaba, but simply held that their evidence agreed with the evidence of Michael Nkotlo.

[21] Counsel for the appellant provided us with a comprehensive set of heads of argument for which we are grateful. In the heads he gives numerous examples of contradictions between the evidence of Michael, Solomon and Nqaba. We do not intend to repeat here all those contradictions, but it is clear that there were a multitude of contradictions between the evidence of these witnesses and it is clear that the Magistrate failed to give attention to all these contradictions. Indeed, these contradictions are so plentiful and obvious when one reads the record, that it is hard

to comprehend how the Magistrate, even considering the constraints of time within which he had to deliver his judgment, failed to evaluate this evidence properly. It is our opinion that the Magistrate should have rejected the evidence presented on behalf of the State.

APPELLANT'S OWN VERSION:

[22] What remains to be evaluated is whether the appellant's defence of self-defence is sustainable on his own version. It is common cause that the appellant was stabbed while he was still in the house and probably in the kitchen area. On his own version he fled the kitchen and was followed outside by the deceased, who managed to stab him between the shoulder blades and at the back of his head while they were running out of the house.

[23] However, the appellant stated that when he ran around the bus, the deceased slipped and fell. The question which arises immediately, is whether in those circumstances the appellant should have continued fleeing or perhaps should have returned to the house from which he had fled.

[24] At first glance it would appear that the appellant should have done so. Careful analysis of the evidence, however, shows that the circumstances were not that simple.

Firstly, the deceased was in close pursuit and had in fact already stabbed the appellant twice while the appellant was in the process of fleeing from him. Secondly,

according to the evidence of the appellant, the deceased, when he slipped, fell on his hands and knees and did not lose control over his knife. Thirdly, when asked specifically in cross-examination why he had not fled after the deceased had slipped, he testified that he was feeling weak and at a later stage that he was scared that he would not be able to flee.

[25] There is no evidence which indicates to what extent the accused had been injured, except that he stated he had to get stitches for the stab wound in his back. However, from his evidence that he collapsed at the house, which was only a short distance from where the fight took place, it would indeed appear that his condition was such that he could not properly function anymore. This supports his evidence that he felt weak and thought that he would not be able to get away.

[26] In those circumstances, although we do not have any detail, besides appellant's version, in regard to the fight which ensued, we are of the opinion that it cannot be held that the accused exceeded the bounds of self-defence. We are therefore of the opinion that the appellant's version is reasonably possibly true.

FINDING:

[27] We find that the appellant had acted in self-defence.

[28] The appellant's conviction on the murder charge and his sentence is set aside.

PATEL, J  
JUDGE OF THE HIGH COURT  
OF SOUTH AFRICA

KEMP, AJ  
ACTING JUDGE OF THE HIGH  
COURT OF SOUTH AFRICA

Pretoria,  
4 February 2005