



**IN THE HIGH COURT OF SOUTH AFRICA**

**(NORTH GAUTENG DIVISION)**

**NOT REPORTABLE**

**DATE: 8 DECEMBER 2009**

**CASE NO: A113/09**

**High Court Ref no: 67**

**Magistrate s Serial No: 22/2008 (NKOWANKOWA)**

**Review case no: C308/2008**

**In the matter between:**

**THE STATE**

**and**

**GN MUSHWANA**

**REVIEW JUDGMENT**

**RABIE J:**

- 1 The accused was convicted on 3 December 2008 on a charge of assault with the intent to do grievous bodily harm and sentenced to 12 months imprisonment.

2. When the matter came on review, the learned reviewing Judge made certain enquiries relating to the question whether the accused was properly convicted and more particularly with reference to the probabilities of the case and to the reason for rejecting the evidence of the witness testifying on behalf of the accused.
3. The magistrate responded to the query and submitted that the conviction was in order.
4. The evidence on behalf of the prosecution was that on the night in question the accused was sitting in the Mojebo's tavern drinking liquor when the accused, the owner of the tavern, suddenly and without reason attacked the complainant, throttled him and stabbed him several times on the head with a knife. The complainant was the only witness on behalf of the prosecution
5. The accused had quite a different story to tell regarding the events of this particular night. He testified, inter alia, that at some point when he went into the tavern, he saw the complainant who was quite intoxicated at the time, chasing another person around the snooker table and smashing other people's beer bottles in the process. The complainant was in an aggressive mood. The accused confronted him and reprimanded him for

fighting in the tavern. The complainant did not take kindly to this and waved the knife which he had in his hands, at the accused. The accused grabbed for the knife and a struggle ensued Both of them fell to the ground and at some point the accused succeeded in disarming the complainant. At some point they got to their feet again with the accused holding the complainant by his T-shirt The accused saw blood on the complainant. The next moment the complainant broke free and ran away. The accused picked up the knife and threw it away. The accused's version was that he wanted to disarm the complainant and that he never intended to stab the complainant.

6. Mr Papitjie Morasetla testified on behalf of the accused and corroborated the version of the accused.
- 6 The Magistrate found that Mr Morasetla did not corroborate the version of the accused "in a material sense" and that there were material contradictions in their evidence. He furthermore found that Mr Morasetla "was coached as to what he was to testify about". The magistrate then made the finding that the evidence of the Morasetla was not true and that the evidence of the accused was not reasonably possibly true.
8. I respectfully disagree with the views held by the Magistrate.

The reasons given by the magistrate at the time as well as in his recent response have no foundation and cannot be upheld. The suggestion that the witness was unduly influenced by the accused to give the evidence which he did, similarly has no foundation whatsoever and should be rejected.

9. The accused and his witness corroborated each other in respect of all material aspects and there is simply no reason to reject that version. The probabilities are in any event in favour of the version of the accused. The sudden and unprovoked attack by the owner of a tavern on an unsuspecting and well- behaved guest, as the complainant would have it, appears to be rather improbable.

10 Having regard to all the evidence I am of the view that the version of the accused and his witness cannot be rejected, that the accused's version is reasonably possibly true and that consequently he should not have been convicted

11 In the result I make the following order

1 The conviction and sentence are set aside and replaced by the following "The accused is found not guilty".

**C.P.RABIE**  
**JUDGE OF THE HIGH COURT**

**I agree**

**G. WEBSTER**  
**JUDGE OF THE HIGH COURT**