

**IN THE HIGH COURT OF SOUTH AFRICA  
(EASTERN CAPE, BHISHO)**

**CASE NO: CC12/2010**

**Heard: 10/ 11/ 12/ 17/ & 18/08/10**

**Delivered: 18 August 2010**

In the matter between:

**THE STATE**

and

**MABHUTI MURHALI DYONASE**

**ACCUSED**

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**J U D G M E N T**

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**SWARTBOOI AJ:**

**INTRODUCTION**

[1] The accused, Mabhuti Murhali, a 23 year old male person, residing at Phakamisa Location, Seymour (“the accused”) was charged with the crimes of:

Murder

In that on or about the 6<sup>th</sup> day of December 2009, and at or near Old Location, Seymour, in the district of Seymour, the accused did unlawfully and intentionally kill Siyabonga Fani, an adult male person.

Housebreaking with intent to commit malicious injury to property and malicious injury to property.

In that on or about the 6<sup>th</sup> day of December 2009, and at or near Old Location, Seymour, in the district of Seymour, the accused did unlawfully and intentionally break and enter into the house of Siyabonga Fani with intent to maliciously injure property and did then and there unlawfully and intentionally damage blankets and a portable radio the property or lawful possession of Siyabonga Fani with intent to injure him in his property.

- [2] The accused pleaded not guilty and no plea explanation was tendered.
- [3] The state led the evidence of four witnesses, Ntsikelelo Meta, Sivuyile Dyonase, Mzwandile Mokoena and Nosibusiso Mlamla. The defence led the evidence of the accused only.

- [4] The following exhibits were handed in by consent between state and defence:

Exhibit “A”	Formal admissions in terms of section 220 of the Criminal Procedure Act, Act 51 of 1997.
Exhibit “B”	The Post Mortem Report.
Exhibit “C”	Photograph album of the deceased and the scene.
Exhibit “D”	Photograph album in relation to Count 2.

### **THE STATE’S CASE**

- [5] The state led the evidence of Ntsikelelo Meta (Meta), whose evidence is that on the 06<sup>th</sup> December 2009 at about 04h00 he was asleep when the deceased arrived at his home at Old Location, Seymour, and awoke him. He asked the deceased to accompany him to Joe Slovo to buy some liquor. They did so but did not get liquor at Joe Slovo as the shebeen was closed. They returned to Old Location.

- [6] On their return as they approached a corner (later described as a T-junction) they met the accused who pointed at the deceased and said: “Here is the person I have been looking for, for some time.” The deceased ran away and the accused chased him. The accused was carrying a knife. As the deceased ran he tripped and fell and landed on his stomach. The accused caught up with the deceased whilst he lay on his stomach, sat on the back of his waist and stabbed the

deceased a number of times on the back and on the neck and commented that he wanted to slit the deceased's throat. The accused stabbed the deceased a number of times repeatedly although Meta does not know exactly how many times.

[7] Meta, tried to restrain the accused by pulling him by his clothes from the back. Meta asked the accused: "What are you doing?" The accused continued stabbing thereafter he stood up and advanced in a threatening manner with the knife in his hand towards Meta who ran away. Meta raised the alarm and woke up the neighbours who converged at the scene where the deceased lay.

[8] Meta states that it was about 04h00 and there were street lights in the area where the deceased was stabbed.

[9] The state called Sivuyile Dyonase (Sivuyile), whose evidence is that the accused is his elder brother and they reside in the same homestead. The accused has his own dwelling away from the main house at the back of the yard.

[10] On the night of the 05<sup>th</sup> December 2009 Sivuyile was asleep at his home when the deceased woke him and instructed him to accompany

him. The time was before 00h00 and although he was not told where they were going he realised that they were proceeding in the direction of the deceased's home. He did not know why they were going to the deceased's home. When they arrived at the deceased's home, the accused entered the yard through a hole in the fence and Sivuyile remained at the hole outside the yard. He did not see the accused till he (the accused) returned with a blanket that did not belong to him. They proceeded for a short distance and the accused set the blanket alight. Sivuyile then left to go home and he slept. He did not return home with the accused.

[11] Whilst Sivuyile waited for the accused at the hole in the fence of the deceased home he heard noises that he thought was a door banging. He did not see the accused at a door. He referred to "a noise from inside" as well. What this means exactly is not clear and was not pursued by the parties any further.

[12] The next day the accused was arrested by member of the community. The accused did not resist but went on his own accord.

- [13] Sivuyile confirms that there are street lights at the place where the deceased lay. As pointed out by Meta on the photo album Exhibit "C".
- [14] The state led the evidence of Mzwandile Mokoena (Mokoena) whose evidence is that he knows the accused well as he grew up in front of him and they are close family relatives.
- [15] At about 04h00 on the 06<sup>th</sup> December 2009, he was awoken by his cell phone ringing and told that the deceased has been stabbed. He thinks that he was awoken as he is on various committees in Seymour and a community leader.
- [16] On arrival on the scene he noticed that many people had gathered there. He was informed by Meta that it was the accused who had stabbed the deceased. He then asked three people present to accompany him to the accused's home and they did so.
- [17] On arrival at the accused home Mokoena went to the accused's backroom and found the accused asleep. Mokoena said to the accused that they were there to fetch him. The accused did not resist, put on his shoes and a T-shirt and left with them. The accused's

Grandmother told Mokoena to take the accused away as she did not want police at her premises.

[18] They proceeded to the scene and Mokoena asked the accused what had happened. He replied: "Uncle, I quarrelled with Soldaat yesterday." Mokoena further probed: "And what did you do?" Accused replied: "I met him in the morning and he was in the company of Ntsikelelo Meta." Mokoena further asked: "Why is he lying there?" Accused replied: "No, I stabbed him." The accused furthermore produced a knife and said: "Here is the knife I stabbed him with."

[19] When the police arrived Mr Mokoena handed the accused and the knife over to the police.

[20] The state led the evidence of Nosibusiso Mlamla (Mlamla) who testified that after she had heard that the deceased had died. That day on the 06<sup>th</sup> December 2009 she went to the deceased's room.

[21] She found the door broken. She observed that it was broken at the lock. The bolt that was used to lock the door was still intact but the

door was opened with the lock and bolt still attached to the door frame. The door was damaged.

- [22] She further saw that the headboard and radio were broken and there were no blankets on the bed. She knew the deceased had three blankets that she described and that those blankets had been bought by her mother.

### **THE DEFENCE CASE**

- [23] The accused gave evidence in his own defence. His evidence is that in the evening of Saturday 05<sup>th</sup> December 2009 at about 11h00, he was crossing a bridge, near the railway line on his way from the hotel, when he felt someone striking him on the back of his head with an empty bottle. He saw that it was the deceased and he asked the deceased what he was doing. The deceased did not answer but instead swore at him. He turned to face the deceased who struck him with the bottle on the forehead. His forehead bled and he staggered and fell on his back and the deceased stepped on his chest and produced a knife and stabbed him on the mouth in the middle of the lower lip. A vehicle with its lights on came in their direction and the deceased made good his escape.



- [24] The accused went to the police station but he was not assisted by the police instead he was chased away and insulted by the police officer that he met.
- [25] The accused went home and reported to his grandmother. At his homestead the windows were broken, his room door had been kicked down, two panes from the back window were broken, his music was scattered on the floor. His bed was in disarray and his blanket was missing.
- [26] His grandmother had told him it was the deceased who had come there to cause havoc and was responsible for the destruction at his home.
- [27] The accused woke up his younger brother and they proceeded to the deceased home. It was his intention to claim his blanket and report the deceased at his house. When he arrived at the deceased's homestead the light were out at the main house, however he noticed that a flat in the yard had a light that was burning inside. The flat door was closed but not locked, he knocked and the door opened on its own. He pushed the door. He thought there was someone inside the room ignoring him. There was no one. He saw his blanket and took it with him. After he rejoined his brother they walked a short distance and he burnt the blanket as "I did not know what he had done with it."

[28] The accused then left and met up with the deceased and Meta. He heard the deceased boasting about what he (the deceased) had done to him. The deceased said that if he had missed him he would get him again. Whilst boasting the deceased and Meta did not see the accused and were surprised when they saw him. The accused asked the deceased why he attacked him. The deceased did not reply instead he produced a knife from his back pocket. The accused tried to turn to escape but realised that the deceased was too near. The deceased raised his right hand to stab the accused. The accused approached the deceased and ducked under his right hand and held onto the knife and a struggle ensued. The deceased was stabbed on the waist. They both fell but the deceased got up, the accused tried to get up but the deceased advanced with the knife. The accused held the deceased's hand with the knife, they struggled, the deceased grabbed his left leg and cut him on the lower leg. The accused grabbed the hand holding the knife and kicked the deceased on his chest and the deceased fell on his behind. The deceased stood up. The accused also tried to stand up. The accused picked up the knife as he did not want the deceased to get to the knife to stab him again. The accused ran away. The deceased chased him. The accused went to his home and slept.

[29] When confronted with Mokoena's evidence by defence counsel that he admitted that he stabbed deceased, the accused stated that Mokoena was lying. The accused said that, he said to Mokoena that the deceased had stabbed him. The accused stated that Mokoena and the men who came to his house threatened to beat him up. The accused was asked by his counsel: "Who stabbed the deceased?" He denied he stabbed the deceased instead saying that throughout the struggle the knife was in the deceased's hands. The question was repeated and he responded by saying: "I was the one who took his hand to his back." The question was repeated once more and he responded by saying: "I do not know who stabbed him there."

### **THE STATE'S SUBMISSIONS**

[30] The state has asked the Court to accept the evidence of the state witnesses and reject the evidence of the accused as false, furthermore that the state has proved its case beyond reasonable doubt and that the accused is guilty as charged on both counts.

### **THE DEFENCE SUBMISSIONS**

[31] The defence argues that the state has not provided adequate evidence to sustain a conviction on count 2. In relation to count 1 the defence submits that the accused was acting in self-defence and at most could

be guilty of culpable homicide for exceeding the bounds of self-defence.

## **ASSESSMENT OF EVIDENCE AND WITNESSES**

### **NTSIKELELO META**

[32] Meta gave me the impression that he was telling the truth. In his evidence-in-chief he gave a detailed account of the accused's conduct. This evidence was not shaken despite the cross-examination by the defence counsel. He admitted that he was in a state of shock that day due to what he witnessed, but was still able to make observations. He was able to observe the entire incident because of the street lights that lit up the scene where in close proximity. He knew both the deceased and accused well. Counsel for the defence suggested that the deceased had some injuries when he woke up Meta. Meta denied this. He stated that he and the deceased were close friends and the deceased would have told him if he had any injuries. Furthermore, he and the deceased had walked a distance to Joe Slovo and back and the deceased did not limp nor did he complain of any injuries. All in all this witness came across as credible and I accept his evidence.

### **SIVUYILE DYONASE**

[33] He gave me the impression that he spoke the truth. This witness did not observe the accused when he entered the room at the deceased's home, he can only speculate and interpret the noises he heard. Sivuyile is adamant that the blanket burnt did not belong to the accused. This evidence as well as the interpretation of the sounds he heard tend to implicate the accused on count 2 despite the close relationship that he has with the accused. I accept this witness' evidence as far as what he observed. I do not give any weight to his evidence regarding what he thinks he heard i.e. the banging of the door and the noise inside the room.

**MZWANDILE MOKOENA**

[34] Mr Mokoena left a good impression on me and I believe that he was telling the truth. His evidence was clear and did not contain any contradictions. He is a respected member of the community and is well acquainted with the accused's family and the accused.

[35] It is notable that when he gets to the accused's home to detain the accused the grandmother does not make a report regarding the havoc that the deceased is alleged to have caused in her yard, nor does the accused do so at that moment. Surely, the grandmother would report to such a close relative. Mokoena was responsible for the accused's

pre-circumcision ritual of imbeleko. Instead the grandmother tells Mokoena that she does not want policemen at her place. This is surprising for an elderly citizen who had been allegedly sworn at by the deceased and had her house vandalised as the accused says. The accused is co-operative when Mokoena arrives at his home and this is not surprising as the relationship between the accused and Mokoena is good.

### **NOSIBUSISO MLAMLA**

[36] Her testimony deals with her observations of the deceased room. She did not observe who smashed the room. It is put to her in cross-examination that in the statement she made to the police she did not mention the damages to the headboard, the door and the radio she described in court. She retorted no comment. This witness is also closely related to the deceased. She does not implicate the accused as the one who caused the damages. I am cautious of accepting her evidence due to the material difference between her statement made to the police and her evidence in court.

### **THE POST MORTEM REPORT**

[37] The post mortem report describes the post-mortem finding as “multiple penetrating wounds”. Wound tracks through lung, heart and

right kidney” and “pale organs”. The cause of death being sharp force. Significant on the description of the external appearance of the body is “Multiple (+/- 20) wounds lower limbs, back, lateral chest, neck and head, 20mm to 60mm in size. Photos 8, 9, 10, 11 and 12 of Exhibit “C” the photo album of the deceased support these findings.

## **THE ACCUSED**

[38] The accused gave me the impression that he was not telling the truth. When confronted with questions that he did not want to answer his voice trailed away and he spoke softly. On occasion he gave answers that did not address the question asked or were simply nonsensical.

[39] The defence counsel put it to Meta that the accused and the deceased had a fight the previous day at a shebeen. No further mention was made of this by the accused in both his evidence-in-chief and cross-examination.

[40] Certain aspects of the accused’s version were not put to the state witnesses.

40.1 Namely, that the deceased had an altercation with him three years ago whilst he was undergoing initiation.

40.2 That the deceased had gone to his home the night of the 05<sup>th</sup> December, insulted his grandmother, broke some window panes, broke into his backroom and caused havoc in the room.

40.3 That he was threatened by Mokoena and others when they went to fetch him from his home.

[41] Certain contradictions were from the accused's evidence-in-chief and cross-examination.

41.1 In his evidence in chief he stated that he was threatened with sticks at his home by the people who had come to fetch him. Under cross examination he claimed that the threats were made near a railway when he was escorted to the crime scene and not at his home.

41.2 He added the following under cross examination to the fight scene he described in his evidence in chief.



41.2.1 At the time the knife struck the deceased on his waist, the deceased had said to the accused, “Do you know that the knife has injured me.”

41.2.2 The deceased overpowered him by grabbing him at his neck.

41.2.3 He pushed the deceased on his chest and then kicked him on his chest.

41.3 The accused said in his evidence-in-chief, that after this second fight with the deceased (Morning of 06 December 2009) that he went home. When asked by his counsel if he reported the incident to anyone, he said the lights were already off at his home. He said later during cross examination, although to a question from the Court in clarification as to whether he reported the incident to the police after the second fight, stated that he did not report the incident to the police as they were far away but he reported the incident to his grandmother.”

[42] A further issue that arises is that the accused’s grandmother was brought to court for the defence and the defence counsel did consult

with her but then closed his case without calling her. The state has submitted in its address that the only presumption to be drawn is that she would have contradicted the accused's version. In my opinion this presumption is fortified by the fact Sivuyile did not make any mention of any havoc caused by the deceased at his home. In fact he went on to say he did not know why he and the accused went to the deceased's home. Furthermore the grandmother did not make a report of such havoc to Mr Mokoena. There is no onus on the accused however, he has a duty to rebut incriminating evidence that is before the court.

[43] In looking at the totality of the evidence the following aspects of the accused's version are unlikely.

43.1 The fact that the deceased was the aggressor and that the accused acted in self-defence. It is common cause that the deceased and the accused had a scuffle the previous evening where the accused was assaulted by the deceased. The question remains why would the accused approach someone who had assaulted him earlier when that person is in the company of a close friend. Clearly it would be more logical to run away unless the accused was armed and better prepared for the fight.

43.2 The position of the wounds as depicted in the post mortem report are more inline with Meta's version.

43.3 Meta's version is further in line with the evidence of Mokoena, that the accused had told him he stabbed the deceased and handed over the knife he had used to stab the deceased to Mokoena.

[44] When confronted with some of these contradictions in his evidence the accused claimed that he did not have ample opportunity to address his counsel. In that regard I refer to *Small v Smith* 1954 (3) SA 434 (SWA):

“It is, in my opinion, elementary and standard practice for a party to put to each opposing witness so much of his own case or defence as concerns that witness and if need be to inform him, if he has not been given notice thereof, that other witnesses will contradict him, so as to give him fair warning and an opportunity of explaining the contradiction and defending his own character. It is grossly unfair and improper to let a witness's evidence go unchallenged in cross-examination and afterwards argue that he must be disbelieved.

Once a witness's evidence on a point in dispute has been deliberately left unchallenged in cross-examination and particularly by a legal practitioner, the party calling that witness is normally entitled to assume in the absence of notice to the contrary that the witness's testimony is accepted as correct. More particularly is this the case if the witness is corroborated by

several others, unless the testimony is so manifestly absurd, fantastic or of so romancing a character that no reasonable person can attach any credence to it whatsoever.”

## **CONCLUSION**

[45] When looking at the evidence of the accused after considering all the evidence, I reject his version as false and not reasonably possibly true.

[46] On the charge of housebreaking with intent to commit malicious injury to property and malicious injury to property I am not convinced that the state has provided adequate evidence to discharge its onus of proof beyond reasonable doubt.

[47] On the murder charge the Court is faced with the evidence of Mr Meta against that of the accused. In terms of section 208 of the Criminal Procedure Act it is possible for an accused person to be convicted on the single evidence of a competent witness, provided that the single witness is good enough to amount to proof beyond reasonable doubt. Mr Meta’s evidence passes the test of being clear and satisfactory in every material aspect and is sufficient for proof beyond reasonable doubt. In addition there is the evidence of Mr Mokoena, Sivuyile and the post mortem report and the false evidence of the accused that reduces the risk of a wrong reliance on Meta’s evidence.

[48] On consideration of all the evidence, the state has established beyond reasonable doubt that the accused stabbed the deceased to death and that he did so without provocation or in self-defence. The very nature of the attack indicates that he must have been aware of the possibility that he would kill the deceased, if that was not his direct intention. The fact that he exclaimed, “here is the person who I have been looking for, for a long time”, indicates to me that he had intended to attack the accused. It is common cause that the injuries he inflicted on the deceased by stabbing him did in fact kill him. In the circumstances the Court finds the accused guilty as charged in count 1 and not guilty in count 2.

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**SJ SWARTBOOI**  
**ACTING JUDGE OF THE HIGH COURT**

Appearances:

For the State : Mr Jairam

For the accused : Mr Magqabi