IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE PROVINCIAL DIVISION

Reportable:	**YES/NO**
Of interest to other Judges:	**YES/NO**
Circulate to Magistrates:	**YES/NO**

Case No.: A133/2021
Court *a quo* case no.: SHW 39/2020

In the matter between:

THAPELO THIBAKGOANA Appellant

and

THE STATE Respondent

Coram: Naidoo, J *et* Opperman, J

Date for hearing: 14 March 2022. Counsel for both parties agreed that the matter may be decided on the papers and it was ordered in terms of section 19(a) of the Superior Court Act 10 of 2013 that the appeal be disposed of without hearing oral argument.

Delivered: 15 March 2022. The judgment was handed down in court and electronically by circulation to the parties' legal representatives by email and release to SAFLII on 15 March 2022. The date and time for hand-down is deemed to be 15 March 2022 at 15h00.

Judgment by: Naidoo, J *et* Opperman, J

Summary: Appeal – private defence

JUDGMENT

[1] The Appellant was convicted and sentenced in the Regional Court, Wesselsbron, Free State on 28 April 2021 on a charge of murder. He was sentenced to 10 years imprisonment. An application for leave to appeal was granted on 28 July 2021.

[2] In their Heads of Argument, the State conceded and agreed that after careful reading of the record as well as the Appellant's Heads of Argument they must declare that the conviction cannot be supported.

[3] The point of contention is whether the Appellant acted in the course of defending himself.

[4] The Prosecutor during his address *a quo* submitted the following to the Presiding Officer:[1]

> ADDRESS BY PROSECUTOR ON THE MERITS: Your worship the state indeed called witnesses before this honourable court. Your worship the witnesses the state called in respect of this matter all gave an indication of what transpired but however the evidence was very inconsistent with each other and contradictory in some facts, however your worship the evidence that was given all led up to an incident where the deceased was stabbed.
>
> Your worship it is very clear before this honourable court that the evidence before the court that the deceased was given a knife, the deceased had his friends around when the incident occurred and accused person was alone.

[1] Pages 110 to 112 of the transcribed record.

Your worship as to how the deceased acted, your worship, him stabbing, trying to stab the accused person your worship it is before this honourable court. It is mentioned that the deceased tried to stab the accused. That is when he was also stabbed with a knife.

Your worship when one looks at self-defence one looks at the – there was a threat and indeed there was a threat as the accused person was very consistent with the fact that your worship there were friends of the accused that were coming behind him which were also mentioned by the state witnesses that they were there.

Your worship the threat to that was also there with the mere fact that there was a knife that the deceased had in his hand and your worship he was also using it to strike t= (sic) to stab the accused person before this honourable court.

Your worship when one also looks at self-defence, we also look it (sic) was imminent. Your worship there was never as (sic) sequence in between where we would say that when he was being stabbed, he walked away very far and then came back or other things intervened in between before the deceased was stabbed.

Your worship therefor indeed the state fails to prove the case beyond reasonable doubt and you worship it's very clear that the accused person before this honourable court acted in self-defence.

[5] The submissions of the prosecutor after reading of the record and ponderance of the evidence by us, are beyond any doubt correct.[2] The evaluation of the evidence by the magistrate clearly did not take account of the prosecutor's submissions. We will deal further with this aspect later.

[6] The law is summarised in *S v Trainor* 2003 (1) SACR 35 SCA at paragraph [13]:

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[2] Walker S, *Determining reasonable force in cases of private defence: a comment on the approach in S v Steyn 2010 (1) SACR 411 (SCA)*, South African Journal of Criminal Justice, Citation: (2012) 25 SACR 84, S.A. Cases Cited: *S v Trainor* 2003 (1) SACR 35 (SCA), *S v Steyn* 2010 (1) SACR 411 (SCA), *S v Engelbrecht* 2005 (2) SACR 41 (W); Subject: Private defence: Unlawful attack. Also see Snyman, CR in Criminal Law, the fifth edition at page 104 to 113.

At page 109 the learned author[3] states:

'It is submitted that the furthest one is entitled to generalise, is to require that there should be a reasonable relationship between the attack and the defensive act, in the light of the particular circumstances in which the events take place. In order to decide whether there was such a reasonable relationship between attack and defence, the relative strength of the parties, their sex and age, the means they have at their disposal, the nature of the threat, the value of the interest threatened, and the persistence of the attack are all factors (among others) which must be taken into consideration. One must consider the possible means or methods which the defending party had at her disposal at the crucial moment. If she could have averted the attack by resorting to conduct which was less harmful than that actually employed by her, and if she inflicted injury or harm to the attacker which was unnecessary to overcome the threat, her conduct does not comply with this requirement for private defence.'

[7] The bias of the State's witnesses cannot be overlooked. Their endeavours to favour the deceased in their evidence caused them to fault and contradict each other. Counsel for the Appellant is correct in her submissions that the contradictions and the improbabilities located within the evidence of the witnesses of the State are grave and may not be overlooked. The deceased not only attacked the Appellant, but did so in what appears to be a great deal of rage. The first State witness did indeed testify that although the Appellant had a knife in his possession, he did not attempt to use it. The second witness for the State corroborated the Appellant's version that he acted in self-defence against the attack upon him by the deceased. The following extract from his evidence described how:[4]

MR J M SAGOPA: That is where I observed the deceased's hand being up with the accused on the other hand stabbing him.

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3 With reference to Snyman *supra.*

4 Record at page 43 from line 1 and further.

PROSECUTOR: When the deceased's hand was up what was he doing?
MR J M SAGOPA: I – that's where I see that he was actually trying to stab the accused.
PROSECUTOR: Was the deceased in possession of a weapon?
MR J M SAGOPA: Yes.
COURT: Yes?
PROSECUTOR: And what weapon did he have?
MR J M SAGOPA: He was in possession of a knife.
PROSECUTOR: Between – can you tell me when – when did you notice that the deceased had a knife with him?
MR J M SAGOPA: Actually, the deceased came to me and asked for that knife which is – of which that was at the stage when they were already having – already having this altercation with the accused person which caused them giving chase to one another and the deceased came to us for a knife, from me at the stage where the knife, which was being in the possession of the accused was open.

And further:

PROSECUTOR: Before he was stabbed, the deceased was stabbed, did he ever assault the accused person?
COURT: Hm?
PROSECUTOR: Did he ever try to stab the accused person?
MR JM SEGOPA: Yes, I will say so but he was actually trying to stab the accused.
PROSECUTOR: You mentioned that the accused person had a knife, before he was given the knife, the deceased was given a knife. Can you tell me the reason why the deceased wanted to stab the accused person before he stabbed him? You mentioned that the deceased lift up his hand when he was stabbing. That is what you said.
MR JM SEGOPA: Yes.[5]

[8] It is indeed so that the first State witness testified that the deceased and Appellant walked together after they left the tavern. They now had an

[5] Record page 44 at line 5 and further.

altercation. The Appellant ran away from the deceased.[6] The deceased's life was not in danger when he wanted the knife and the first witness contradicted himself severely on this issue.[7] Counsel for the Appellant correctly points to the fact that the knife in the possession of the Appellant was closed until they reached the Church. On the probabilities the Appellant must receive the benefit of the doubt that he only had reason to use the knife when the deceased wanted to stab him.

[9] A court of appeal may only interfere with the findings of the trial court where it is satisfied that the trial court misdirected itself or where it is convinced that the trial court was wrong. (See *R v Dhlumayo & another* 1948 (2) SA 677 (A) at 705-706). The powers to evaluate and appraise evidence belong to a trial court and its conclusions cannot be interfered with simply because a court of appeal would have come to a different finding or conclusion. The trial court has the advantage of seeing and hearing witnesses, which places it in a better position to assess the evidence than a court of appeal, and such assessment must take precedence unless there is a clear and demonstrable misdirection. The Supreme Court of Appeal held as follows in *S v Pistorius* 2014 (2) SACR 315 (SCA) par 30:

> It is a time-honoured principle that once a trial court has made credibility findings, an appeal court should be deferential and slow to interfere therewith unless it is convinced on a conspectus of the evidence that the trial court was clearly wrong. R v Dhlumayo and Another **1948 (2) SA 677** (A) at 706; S v Kebana **2010 (1) All SA 310** (SCA) para 12…. As the saying goes, he was steeped in the atmosphere of the trial. Absent any positive finding that he was wrong, this court is not at liberty to interfere with his findings.

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6 Record page 16 at line 18 to 20, page 24 at line 1 to 5 and page 55 at line 17 to page 56 at line 8.
7 Record page 25 at line 23 and further.

[10] The court *a quo* in this matter failed to deal meaningfully with the contradictions in the evidence of the State witnesses and particularly with the effect of the evidence of the second State witness on the version of the accused. This in spite of the concession by the prosecutor that the State had failed to prove its case beyond reasonable doubt and that the Appellant appeared to have acted in self-defence. The court concentrated rather on the Appellant's powers of observation in the tavern in connection with the movements of the deceased and his companions. The court also, in expressing its disbelief of the Appellant's version, commented that he was "lucky" that the bottles and stones that were thrown at him did not injure him at all. The court lost sight of the fact that the Appellant and his pursuers were in motion and that all of them had been consuming alcohol for some hours prior to this incident. This could very well have played a role in the inaccurate aim of those throwing the bottles and stones. It is our view, that the interference of this court is warranted in this matter.

[11] It is the law that the onus is on the State to prove the guilt of the accused beyond a reasonable doubt. If the accused version is reasonably possibly true, he is entitled to his acquittal. Compliance with this principle must result in the release of the Appellant on the charge against him and the conviction and the sentence must be set aside. It is clear that the version of the Appellant in this matter is reasonably possibly true. In the circumstances, the following order is made:

ORDER

The conviction and the sentence are set aside.

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S NAIDOO, J

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M OPPERMAN, J

APPEARANCES

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