IN THE KWAZULU-NATAL HIGH COURT, PIETERMARITZBURG

REPUBLIC OF SOUTH AFRICA

CASE NO. AR 365/10

In the matter between:

BYRON GARRY BENNETT APPELLANT

and

THE STATE RESPONDENT

APPEAL JUDGMENT Delivered on 11 June 2010

SWAIN J

[1] The appellant, with the leave of the Regional Court of Eshowe, appeals against his conviction of the murder of Zama Mkhize on 28 October 2005 at Eshowe, as well as the sentence of ten years' imprisonment imposed upon him.

[2] In support of his plea of not guilty the appellant in his statement in terms of Section 115 of Act 51 of 1977, advanced a plea of self defence, averring that the deceased attacked him with an iron bar and in defending himself, he produced a knife and struck a single blow at the deceased, thereby stabbing him.

[3] He admitted that the deceased died as a result of a penetrating wound as detailed in the post mortem report. Dr. Baldasini, who conducted the post mortem,

described the wound in question as a 21 x 9 mm penetrating incised wound of the chest, which penetrated deeply through the fifth rib and sternum, entering the right ventricle of the heart. Dr. Baldasini described other wounds which the deceased had suffered, which I will deal with in due course.

[4] The crucial issue for determination therefore, was whether the appellant caused the death of the deceased, whilst defending himself against an unlawful attack by the deceased. In defining this aspect as the crucial issue for determination, I am mindful of the other requirements to establish the defence of private defence, but this aspect becomes of paramount importance on the facts of this case, because of the allegation by the State, that the deceased was killed during an attempt to rob the deceased and his companion, by the appellant, accused No. 2 as well as two Section 204 witnesses, namely K[...] L[...] and B[...] K[...].

[5] Clearly, if the deceased attacked the appellant out of necessity, whilst the appellant was attempting to rob him, the attack upon the appellant would not have been unlawful and the defence of self defence could not succeed. In this regard, the appellant in his Section 115 statement denied that he had played any part in the planning of the robbery and denied that he acted in concert with these other parties, when the robbery was committed.

[6] In this regard Mr. Collingwood, who appeared for the appellant, conceded that the probabilities were that the appellant appreciated and understood, that there was to be a robbery perpetrated against the deceased, but what was in doubt was the role, if any, that was to be played by the appellant.

[7] The main thrust of the argument of Mr. Collingwood, was that because of the unreliability of the evidence of the appellant's companions, as well as the paucity of the evidence, it would be unsafe to draw any conclusion about the appellant's role in the robbery, other than to hold he was present at the time. By reference to the decision in

State v Mgedezi & Others

1989 (1) SA 687 at 705 I – 706 B

he submitted that the mere presence of the appellant at the commission of the offence, on the evidence, did not constitute proof of a common purpose with his companions to rob the deceased.

[8] Mr. Collingwood then submitted that the appellant ought not to have been convicted of murder, because his belief that the deceased was about to attack him, even if improbable, cannot be rejected out of hand as being false beyond a reasonable doubt.

[9] It is true that apart from the evidence of the companion of the deceased, Renice Samuels, evidence which contradicts that of the accused as to how the deceased was stabbed is that of the Section 204 witnesses, as well as the appellant's co-accused.

[10] It is of course true that the evidence of accomplices must be approached with caution. It is also true that the evidence of a co-accused given on his behalf is, when considered against a co-accused, the evidence of an accomplice and subject to the same objections which can be made to accomplice evidence. The cautionary rule applicable to accomplices is therefore equally applicable to the evidence of a co-accused

The South African Law of Evidence – Zeffertt *et al* pg 677

[11] Corroboration of an accomplice's evidence in material respects implicating the accused, is one of the ways in which the cautionary rule is observed. In addition, depending upon the facts of the case, corroboration may be found in the evidence of another accomplice

State v Hlapezula 1965 (4) SA 439 (A)

At the end of the day however, it is not expected of the evidence of an accomplice that it be wholly consistent, wholly reliable or even wholly truthful. The ultimate test, after applying the cautionary rule, is whether the Court is satisfied beyond reasonable doubt, that the story told is in its essential true.

State v Francis 1991 (1) SACR 198 (A)

Zeffertt *supra* at pg 804

[12] It is clear that there are contradictions and inconsistencies in the evidence of the Section 204 witnesses, K[...] L[...] and B[...] K[...] and accused No. 2, as to what transpired. It is also apparent that both of the Section 204 witnesses sought to minimise their roles in the robbery. Accused No. 2 however did not seek to minimise his role in the robbery to the same extent.

[13] In assessing the weight to be attached to the evidence of these witnesses, it is important to examine the evidence of Renice Samuels, the companion of the deceased.

[14] The salient points of her evidence are as follows:

[14.1] There was group of boys walking ahead of them who then hid behind bushes at the side of the road.

[14.2] She asked the deceased if he was aware of the boys, who were hiding and his response was to ask her if she was scared. She said she was and the deceased responded that she shouldn't worry and they continued walking past where they were hidden. She said the deceased did not take her concern seriously because he was drunk. The deceased was carrying a small broomstick with him which was made out of wood.

[14.3] After they had passed where they were hiding, they emerged one by one and started following them.

[14.4] She and the deceased then crossed a bridge and she told the deceased to walk faster but he did not do this, so she left him behind as they completed crossing the bridge.

[14.5] The boys then came running down the steps from the bridge and she heard what she thought was the sound of an iron pole striking the railing at the steps.

[14.6] She told the deceased to run but he refused and she then saw “the four guys” surrounding the deceased who uttered the word “what”.

[14.7] One of them then came after her and she started running. She said she was absolutely sure that she was only chased by one person. When the pursuer was about to grab hold of her jacket she started screaming and her cell phone fell from her jacket. She then continued running to her aunt’s house.

[14.8] She then saw a friend of hers, Nathan Pottier, an off duty policeman in his vehicle. She flagged him down and told him what had happened. She climbed into his vehicle and they then came across four individuals who she identified by their clothing as the individuals who had pursued the deceased and her.

[15] Her evidence that all four of the individuals (being both accused and the Section 204 witnesses) hid behind the bushes is consistent with the evidence of both Section 204 witnesses and the appellant’s co-accused. However, the appellant maintained that he never hid behind any bush although he saw the Section 204 witnesses emerge from hiding behind bushes.

[16] B[...] K[...], one of the Section 204 witnesses said that when the appellant saw the deceased and his companion, he said “there was a luck” meaning that here was an opportunity to gain something by robbing them. The appellant’s co-accused said that the appellant had said there is “nombolo” meaning “there is a luck” in slang. In other words there was an opportunity for them. According to K[...] L[...] however, he was walking with the other three individuals, when they hid behind a bush and he did likewise. He then said it was clear to him that they were going to rob the deceased and his companion.

[17] What happened thereafter according to L[...], was that they emerged from the bushes and the appellant and his co-accused rushed for the couple. It was at this

stage that he said he noticed and saw for a split second the deceased pulling out a stick, it appeared, from under his jacket. He also rather curiously said that B[...] K[...] had told him that he (that is K[...] L[...]) was carrying a pipe which he dropped at this stage and that K[...] L[...] then picked it up. When asked by the Magistrate whether he had a pipe in his possession, his strange reply was that he was not too sure because everything happened fast. At this stage the lady was chased by himself and B[...] K[...], and both accused remained with the deceased. The lady started screaming and she dropped something, at which stage both he and B[...] K[...] returned to where both accused were with the deceased, who was lying on the ground with blood coming from his head. Both accused were searching his pockets. The deceased managed to get up and he tried to run but the witness grabbed the deceased's pants to prevent him from getting away. Both accused then came from behind and grabbed the deceased so he let him go. He then shouted to them to go and he left and went to the bridge. Both accused however stayed there searching the deceased's pockets, but he did not see them do anything else. Both accused then came to the bridge and B[...] K[...] went back and looked at the deceased and then rejoined them. Appellant then said "he poked the guy" and "he wouldn't have done it if he didn't do what he'd done". B[...] K[...] then said the deceased didn't look like he was going to make it. Shortly thereafter Nathan Pottier arrived in his car with a lady who was shouting that the one wearing the hat had chased her.

[18] K[...] confirms the evidence of L[...] that all four of them hid behind the bushes and that both accused ran towards the deceased and that he and L[...] chased after the lady. He maintained however, that he did not know why he was chasing after her. He did see that the deceased was carrying a stick of some sorts which was not very big, or very long. The lady started screaming and he heard the sound of a bottle breaking and he stopped chasing her. As he walked back both accused, together with L[...], were with the deceased who was sitting upright on his buttocks with no shirt on. He saw the appellant kicking the deceased on his side, whilst the deceased was lying on his side, on the ground. When they were walking away from the scene he heard accused No. 2 say to the appellant that the appellant had stabbed the deceased. He then asked the appellant where he had stabbed the deceased, to which the appellant replied he was not sure, although he thought it was in the chest. He saw blood on the appellant's jacket and as a result the appellant

asked his co-accused for his coat, which he understood was in order to hide the blood on his jacket. He never saw the deceased attack anybody, although he remembered the deceased was carrying a stick but he never saw the deceased use the stick to defend himself. After the incident he saw the appellant carrying a knife, which looked as though it was an Okapi knife.

[19] The version of events by the appellant's co-accused was as follows. All four of them hid behind the bushes and waited for the deceased and his companion to pass. They then emerged and followed the deceased and his companion across the bridge. The female then started running and L[...] and K[...] ran after her. Shortly thereafter the appellant and he ran after the deceased who had started to run. The appellant caught up with the deceased and ankle tapped the deceased, which caused him to stumble to his hands and knees, but then he got up. The co-accused then caught up to the deceased and kicked him, causing him to fall down. The co-accused then cornered the deceased so he could not escape. The appellant then asked the deceased what did he have. The deceased responded by emptying his pockets in which there was nothing. The appellant then asked him again "what do you have". In response the deceased took off his shirt, threw it on the floor and said to the appellant you can even have my shirt because "I have got nothing". The appellant then asked the deceased again "Hey what do you have" and that is when the deceased produced "something like a pole or a stick or something" which he estimated to be about half a metre in length. A fight then broke out between the deceased and the appellant. He disputed the contention of the appellant that the fight was over in a second or two and said the fight got out of hand, very quickly, because as he put it the appellant "got stuck into" the deceased. He told the appellant to leave the deceased alone, but he did not listen and continued fighting with the deceased. He then left and walked back to the bridge, at which stage the two Section 204 witnesses returned and joined in the assault upon the deceased. K[...] L[...] kicked the deceased and B[...] K[...] punched the deceased, at which stage the appellant stopped assaulting the deceased. Thereafter the appellant joined him, followed by K[...] L[...] and B[...] K[...]. B[...] K[...] then said the deceased would not make it and that the deceased had been stabbed by the appellant. He then asked the appellant why he had stabbed the deceased, to which the appellant replied "he wouldn't have done it if he never did what he did". He denied the

appellant's version that after the two Section 204 witnesses chased after the woman, the deceased turned around and attacked the appellant, adding why would a small man (the deceased) try and attack a guy almost his size (the appellant) and a bigger person (himself) and not try and run away? He maintained that apart from kicking the deceased and preventing the deceased from escaping, he did not assault the deceased in any way. He also denied the evidence of L[...] that the appellant and he were searching the deceased's pockets.

[20] Contrary to the above evidence, the salient features of the appellant's evidence were as follows:

[20.1] He denied ever saying that there was "a luck" or ever hiding behind any bushes. He denied that there was even any plan to rob the deceased and his companion.

[20.2] B[...] K[...] and K[...] L[...] chased after the female, but he never chased the deceased, because he did not know what was happening.

[20.3] After these persons chased after the female the deceased turned around and came towards his co-accused and himself and tried to hit the appellant with an iron bar. He then quickly took out the knife he was carrying and stabbed the deceased once. He was not certain what the deceased was carrying but he assumed that it was an iron bar. The deceased tried to strike him only once and the appellant did not do anything else to ward off the attack, besides take out his knife and stab the deceased. He agreed that despite the fact that he had a friend to assist him, he decided to stab the deceased.

[20.4] The deceased never injured the appellant in this attack upon him and he did not know how the deceased sustained the injuries described by the doctor, because when he saw that he had stabbed the deceased, he walked away.

[20.5] He denied the evidence of his co-accused that his co-accused was the first to leave the scene, and maintained that he was the first to leave to scene.

[20.6] He said he threw away the knife and did not make a report to the police about being attacked, because he was confused and the time to do so before he was arrested was short.

[20.7] He denied asking the deceased to empty his pockets and maintained that the deceased took off his shirt after he had stabbed him, in order to examine his wound.

[20.8] He agreed that accused No. 2 who was with him, was a very big man and maintained that he did nothing to cause the deceased to attack him.

[20.9] He maintained that he never saw his co-accused, or the Section 204 witnesses, do anything to the deceased.

[20.10] He agreed that accused No. 2 asked him whether he had stabbed the deceased and he replied that “he wouldn’t have done that if he hadn’t done what he did”. What he meant by this was that if the deceased had not attacked him, he would not have stabbed him.

[20.11] Appellant was unable to explain why accused No. 2 would admit to assaulting the deceased, when according to the appellant, accused No. 2 did nothing.

[20.12] He believed the injury he had inflicted upon the deceased was a grave one, he knew that what he had done was wrong, but he was unable to explain why he did not ask Nathan Pottier to assist the deceased.

[20.13] He admitted that there was blood on his jacket, that he had thrown the jacket away because he did not want blood on it, and not because he wanted to conceal what he had done. He also threw the knife away for the reason that it had blood on it and it was in the jacket. He said that the blood of the deceased had got onto his jacket, because the body of the deceased touched his, but denied that he had ever fought with the deceased.

[21] As I have said it is clear that both B[...] K[...], as well as K[...] L[...], sought to minimise the role they played in the attack upon the deceased. From the evidence of Dr. Baldisini it is clear that apart from the fatal stab wound, the deceased suffered an incised wound of his scalp, a lacerated wound of his left eye with a contusion and abrasion of his left cheek. There was also an abrasion on the deceased's right hip and knee, as well as a circular abrasion with a penetrating puncture wound of the left lower leg. He stated that the incised scalp wound was caused by a sharp object, but that the wounds to the eyebrow and cheek were caused by a blunt form of injury. This could possibly have been caused by a kick. He found no injuries to the deceased's forearms, hands or shoulders, consistent with the type of injuries the deceased would sustain whilst defending himself.

[22] The wounds sustained by the deceased are quite obviously inconsistent with the appellant's evidence that he only inflicted a stab wound to the deceased's chest and did not see any of the others do anything to the deceased. In addition, the presence of the deceased's blood on the appellant's jacket is also inconsistent with the appellant's version that he stabbed the deceased and then walked away. As conceded by the appellant, the body of the deceased must have come into contact with his body which is consistent with the evidence of his co-accused that the appellant fought with the deceased.

[23] The evidence of the appellant, his co-accused as well as B[...] K[...] and K[...] L[...], is all to the effect that the latter two witnesses chased Renice Samuels. Although she stated that only one person chased her, it is quite probable that in all of the circumstances, she did not notice a second pursuer. I find it grossly improbable that these two witnesses would independently pursue her and ignore the deceased, unless they were part of a plan, to which they all subscribed, to rob the deceased and his companion. In this regard the evidence of B[...] K[...] that he did not know why he was chasing her, is obviously so improbable that it falls to be rejected. In this regard the appellant's evidence that he saw the other three emerge from behind the bushes, but that he never hid behind the bushes, I find to be grossly improbable, because there would have been no point in the others concealing themselves from the deceased and his companion if he did not also do so. That all four of them hid behind the bushes is apparent from the evidence of Renice Samuels. In addition,

B[...] K[...] and the appellant's co-accused, both said that when the appellant saw the deceased and his companion he had said "there was a luck" meaning there was an opportunity to rob them. Appellant's co-accused said the words uttered by the appellant were that "there is nombolo" meaning "there is a luck" in slang. The appellant, although denying that he said these words, agreed with the slang meaning attributed to the word "nombolo". I find it grossly improbable that both of these witnesses would concoct what the appellant said to indicate that they should rob the deceased and his companion in such a way. In my view, the manner in which they describe what the appellant said has the ring of truth to it.

[24] Considering all of the evidence and approaching the evidence of B[...] K[...], K[...] L[...] and the appellant's co-accused, with the necessary caution, I am satisfied that the appellant and these three witnesses were all party to a common purpose to rob the deceased and his companion.

[25] This finding, together with the medical evidence referred to above, supports the evidence of the appellant's co-accused that the appellant and he, together chased the deceased and that the appellant fought with the deceased. Of significance in this regard is the evidence of the appellant that his co-accused did not do anything to the deceased. It is of course grossly improbable that the appellant's co-accused would admit to chasing the deceased, kicking him and then preventing the deceased's escape to enable the appellant to rob him, if this was not the case. The probabilities on all the evidence contradict the appellant's version that the deceased, for no apparent reason, attacked the appellant. On the appellant's version, the deceased was in no danger and it would have been obvious to the deceased that his companion was however in danger, as she was being chased by two individuals. I find it grossly improbable that the deceased would simply attack the appellant and not chase after his companion to defend her from attack. The obvious reason why he was unable to do so was because, as attested to by all of the witnesses, he was under attack by the appellant and his co-accused.

[25] In addition, the conduct of the appellant after the event in disposing of the jacket and knife, not telling Nathan Pottier that he had been attacked and that his attacker was gravely wounded and needing assistance, is inconsistent with an

innocent state of mind.

[26] I am accordingly satisfied that the State established beyond a reasonable doubt that the appellant stabbed the deceased in the chest with a knife during the course of a planned attempt to rob the deceased. Mr. Collingwood argued that the State had not proved beyond a reasonable doubt, that the appellant had the necessary intent for the crime of murder. Although conceding that the appellant must have been aware that the plan was to rob the deceased and his companion, he submitted that all that the evidence established was the crime of culpable homicide. As I understood his argument, it was that the accused did not subjectively foresee the death of the deceased, as a result of stabbing the deceased in his chest once with the knife, but he was negligent in doing so. I disagree. It is trite that intention in the form of *dolus eventualis* exists "when the accused does not mean to bring about the unlawful consequence which follows from his or her conduct, but foresees the possibility of the circumstance existing, or the consequence ensuing and proceeds with his or her conduct".

South African Criminal Law and Procedure - Vol 1
General Principles of Criminal Law – pg 223

In my view, when regard is had to the nature and location of the stab wound, the appellant must have foreseen and therefore by inference did foresee, the possibility that stabbing the deceased in his chest could possibly cause his death, but did so reckless as to whether the deceased's death ensued or not. On all the evidence the appellant's version that he acted in self-defence could not reasonably possibly be true.

[27] In coming to this conclusion I do not overlook the possibility that the deceased may have attempted to defend himself, with the broomstick he had in his possession. Assuming this to be the case, in favour of the appellant, this would not assist the appellant for the simple reason that any attack by the deceased upon the appellant, would not be unlawful as it was dictated by necessity.

[28] I am therefore satisfied that the Magistrate was correct in convicting the

appellant of murder.

[29] As regards the sentence of ten years' imprisonment imposed by the Magistrate, Mr. Collingwood submitted that a more appropriate sentence would be one of correctional supervision, in terms of Section 276 (1) (H), or alternatively imprisonment from which the appellant could be placed under correctional supervision in the discretion of the Commissioner, in terms of Section 276 (1) (I). I disagree. In my view, the appellant was indeed fortunate that the Magistrate found substantial and compelling circumstances allowing him to deviate from the minimum sentence of fifteen years' imprisonment.

The order I therefore make is the following:

The appeal against conviction and sentence is dismissed.

SWAIN J

I agree

MADONDO J

Appearances /

Appearances:

For the Appellant : Mr. A. Collingwood

Instructed by	:	Goodrickes Attorneys C/o J Leslie Smith & Company
For the State	:	M/s D. Barnard
Instructed by	:	Director of Public Prosecutions
Date of Hearing	:	08 June 2010
Date of Judgment	:	11 June 2010