IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL DIVISION, PIETERMARITZBURG

CASE NO: AR679/2014

In the matter between:

SUNNYBOY SPHAMANDLA MAPHUMULO **APPELLANT**

and

THE STATE **RESPONDENT**

ORDER

On appeal from the Inkhanyezi Regional Court, Magistrate H. J. Meyer, sitting as a court of first instance, it is ordered:

[1] The appeal against the conviction is dismissed.

[2] The appeal against the sentence imposed by the court a *quo* is dismissed.

JUDGMENT

HENRIQUES J (SISHI J concurring)

Introduction

[1] The appellant was charged in the Inkhanyezi Regional Court with two (2) counts of murder, count one in respect of the deceased Philani Ntaka and count two in respect of the deceased Bheki Shandu. In the court a *quo,* the appellant raised the defence of self-defence. The court a *quo* accepted he acted in self-defence in respect of count two and acquitted him of such charge. In respect of count one, the court a *quo* was of the view that the appellant exceeded the bounds of self-defence and convicted him of murder of the deceased, Philani Ntaka on the basis of *dolus eventualis*.

[2] The appellant appeals against his conviction and sentence of twelve (12) years imprisonment on count one with leave of the court a *quo.* He appeals against his conviction on the basis that the court a *quo* erred in rejecting his version of the facts and his defence of self-defence. Insofar as the sentence imposed is concerned, the appellant submits that the court a *quo* erred in disregarding the time he spent awaiting trial, over-emphasized the seriousness of the offence and consequently, given the mitigating factors, the sentence is strikingly inappropriate.

Issues

[3] The issues before us on appeal are the following:

[3.1] whether the court a *quo* correctly found on the facts presented, that the appellant exceeded the bounds of self-defence and correctly convicted him of murder;

[3.2] whether the court a *quo* erred when imposing sentence in that it failed to consider the time the appellant had spent awaiting trial and whether it over-emphasized the seriousness of the offence.

Ad conviction

[4] It is trite that the respondent bears the onus to prove the guilt of the appellant beyond a reasonable doubt. In support of the conviction the respondent led the following evidence in the court a *quo*.

[5] Zwelonke Bongani Dludla ("Dludla") testified that on the evening of 28 April 2013 he was in Dark City location, Sundumbili with the deceased Bheki Shandu ("Bheki") and Philani Ntaka ("Philani"). At the time, they were in a motor vehicle driven by Bheki returning from lobola negotiations for Philani. He was seated in the front passenger seat and Philani was in the rear passenger seat behind the driver (Bheki). They had given a lady a lift to her home in the area. Philani alighted from the vehicle and accompanied the lady to her home. He and Bheki remained in the vehicle but when it became evident that Philani was taking long to return, they drove around the area in the motor vehicle trying to find him.

[6] Bheki stopped the vehicle they were travelling in near a green container and

two (2) women approached the vehicle. Bheki began chatting up one (1) of the ladies when another male emerged to chat to the other lady in her company. Bheki got into an argument with the male whom Dludla subsequently learnt was the appellant. They began to argue and fight about chatting up the ladies. Dludla realised that the argument was escalating and could possibly lead to violence. Philani had by now returned and climbed into the motor vehicle. Bheki was still arguing with the appellant when Dludla intervened to try and calm the situation down. This did not occur and both Philani and Bheki alighted from the motor vehicle.

[7] All three of their voices were now raised and they were arguing. Dludla then alighted from the vehicle and attempted to calm all of them down. He described the appellant as being light in complexion without much of a beard. When he realised that he was unsuccessful in his attempt to calm the situation down, Dludla moved away from the vehicle and stood approximately five (5) paces away from the vehicle. He then noticed the appellant reach for something near his waist and saw him stab Bheki once in his chest. Bheki ran away, at which stage the appellant turned to Philani and stabbed him twice in the chest. Philani bent over and walked around the vehicle towards the boot of the motor vehicle.

[8] The appellant then chased after Bheki. After a while, Dludla saw the appellant return and walk to where Philani was bent over. He observed the appellant stab Philani but did not take note of the number of times the appellant stabbed Philani as he ran away. Prior to him running away, Dludla removed a firearm which was on the floor of the motor vehicle and took it with to the homestead where he hid it. On his return to the scene, the police had arrived and Bheki was approximately one

hundred (100) to one hundred and twenty (120) metres away from the vehicle. He had succumbed to his injuries and passed on. Philani was found away from the motor vehicle in a bushy area approximately thirty five (35) paces away from the vehicle. He too had succumbed to his injuries.

[9] Dludla indicated that he did not see what object the appellant had used to stab Philani or Bheki but confirmed that both deceased were not armed. It is common cause that Philani was a security officer and Bheki was a member of the South African Police Services (SAPS) and had been issued with a licensed firearm. Dludla disputed the appellant's version that the argument escalated to one where Bheki and Philani alighted from the vehicle in order to attack the appellant. He further disputed that Philani and Bheki told him to move away from the vehicle as they were going to shoot the appellant. More importantly, he disputed the appellant's version that at the time of the stabbing, the two (2) deceased were moving towards him about to attack him. He further denied hearing Bheki saying to Philani that they must shoot at him (the appellant) and that that was the reason why the appellant first stabbed Bheki. Dludla was emphatic in denying that Bheki was stabbed after the appellant heard him (Bheki) talk about shooting at him. In addition, he denied that Philani was stabbed as a result of the appellant noticing a gun in Philani's hand. Dludla was adamant that he did not see either Bheki or Philani handling a firearm. He denied that Bheki returned to the car to remove the firearm which had been placed under the driver's seat as he confirmed that he removed the firearm when the appellant was chasing Bheki down the road.

[10] Busisiwe Dlamini ("Dlamini") testified that on 28 April 2013 she was walking to

Manda Farm accompanied by her sister Nokuzola Dlamini. En route to Manda Farm, a vehicle parked next to them on the road. Dlamini and her sister noticed Dludla and the driver of the vehicle, Bheki. Bheki spoke to her sister Nokuzola and asked for her telephone number. Whilst they were conversing with the occupants of the vehicle, the appellant, his girlfriend and a lady companion approached and the appellant asked to speak to Dlamini. She refused and told him that he should come to her home the following day. The appellant, however, insisted on talking to her, at which time Bheki intervened and asked the appellant why he was insisting on talking to them.

[11] As this was taking place, Philani, who was walking, approached and exchanged greetings and climbed into the back seat of the vehicle. He asked Bheki if there was a problem and Dlamini heard Bheki respond to Philani that the appellant was refusing to move away from the vehicle. Both Bheki and Philani climbed out of the vehicle and stood next to the door of the vehicle. Dlamini heard them ask the appellant what the problem was and why he was refusing to move away from the vehicle as Dlamini had told the appellant that she would speak to him the following day.

[12] Dlamini testified that as this exchange was taking place the appellant took off his sandals and threw them to his girlfriend. He then took out a knife and stabbed both Philani and Bheki. At the time of the stabbing, Philani and Bheki were standing on the same side of the vehicle, close to each other. Dludla was seated inside the vehicle. Dlamini corroborated Dludla's evidence that the appellant removed the knife from his right-hand side. She confirmed that the appellant stabbed both Philani and

Bheki but her evidence differed from Dludla in that she testified that Philani was stabbed repeatedly and thereafter Bheki, the driver of the vehicle, was stabbed.

[13] In addition, Dlamini testified that both persons were stabbed in their chest. Whilst the stabbing was taking place both she and Nokuzola ran away. She appeared to be confused regarding the identity of Dludla and Bheki but testified that Dludla alighted from the vehicle and did nothing whilst the other two (2) occupants were being stabbed and then he ran away. She was adamant that the first person to be stabbed was the passenger, Philani and she did not see any firearm.

[14] Nokuzola Dlamini corroborated her sister, Busisiwe's evidence. She testified she was standing closer to the appellant whilst conversing with Bheki. Bheki directed a question to her as to why the appellant and Busisiwe could not move away from his vehicle. Even though the question was directed at her, the appellant responded and repeatedly told Bheki not to tell them to move away from his vehicle as he was not conversing with the driver and was not inside the driver's vehicle. Nokuzola confirmed that the appellant and Bheki were arguing and that Bheki accused the appellant of being rude. She heard a person inside the vehicle say to both the driver and the appellant to stop as the arguing was not getting them anywhere and suggested to Bheki that they drive away from the area and fetch the gentleman whom they were waiting for. As Bheki started the vehicle, a third person (Philani) arrived and climbed into the vehicle and asked Bheki what was going on. Bheki responded to Philani saying that the appellant was being insolent and rude.

[15] At this stage, the appellant asked them whether they were talking to him. As

the argument continued, Philani and Bheki alighted from the vehicle but Dludla remained in the vehicle. Whilst they were arguing with the appellant, questioning him as to why he was being insolent and rude, the appellant stabbed them. Nokuzola noticed the appellant put his hand in his right-hand side pocket, remove a knife and stab the driver repeatedly in his chest. After he had been stabbed, the driver ran away. Philani was stabbed after the driver (Bheki) and whilst being stabbed, walked around the vehicle. It was at this stage that Nokuzola ran away. Prior to her and Busisiwe running away, she observed Dludla, who had been seated in the vehicle, climb out of the vehicle and run away.

[16] During cross-examination, Nokuzola testified that there was an argument and that Philani and Bheki alighted from the vehicle and moved towards the appellant and that all three (3) of them were standing next to the vehicle. She did not observe that Philani or Bheki were about to attack the appellant when they alighted from the vehicle. It was suggested to her during cross-examination to comment as to what she would assume would happen if she was told she was being rude and an argument ensued and someone walked straight to her. She indicated that she would have thought that the person wanted to assault her or attack her.

[17] She denied that Bheki and Philani were about to attack the appellant or that they uttered the words ‘shoot this dog’. She confirmed that there was a quarrel between the appellant and the two (2) deceased and that the appellant did not just stab the deceased for no apparent reason. She also denied seeing any firearm.

[18] Nombulelo Mchunu (“Mchunu”), the former girlfriend of the appellant, testified

that on the day in question, the appellant was conversing with Busisiwe next to a vehicle. She observed the occupants of the vehicle and a third person quarrelling with the appellant but could not hear what the quarrel was about. She observed the appellant take out a knife and injure one (1) of them. Mchunu left and did not observe who the appellant stabbed first, how many persons he stabbed or where the appellant had removed the knife from. She confirmed that no one apart from the appellant was armed and it appeared that the driver of the vehicle, Bheki, told the appellant he was a 'young boy' and was being rude. She testified that she did not hear the occupants of the vehicle threaten the appellant in any way.

[19] During cross-examination, the statement which Mchunu made on the day following the incident was put to her and it was pointed out to her that her evidence in court differed from what she had said in her statement. Her statement confirmed that a passenger of the vehicle put his hand inside his pocket as if to attack the appellant, and that the appellant stabbed both the passenger and driver of the vehicle as they had wanted to attack him. Her statement also mentioned that she had heard the occupants of the vehicle saying that the appellant was misbehaving and should be beaten. That then was the respondent's case.

[20] The appellant testified that he and Mchunu were walking home when they encountered a motor vehicle parked near a container. He recognised Busisiwe and Nokuzola Dlamini who were standing close to the vehicle and appeared to be conversing with the occupants. He approached Busisiwe and asked to speak to her. She told him that he should come to her house the next day so that they could talk. Whilst conversing with her, the occupants of the vehicle called him a 'boy' and asked

him why he was interrupting them whilst they were having a conversation with the ladies. After apologising to the driver of the vehicle, the driver calmed down.

[21] That is when the appellant noticed Philani approach and climb into the vehicle and ask the driver what was happening. The driver responded by saying that the appellant wanted to attack or assault him. He became annoyed as the driver was once again calling him a boy and he had asked him not to do so. The persons then alighted from the vehicle and when they did, it appeared to him as though they wanted to attack him. He testified he heard the driver say to the passenger ‘shoot him, assault him’.

[22] When he confronted Philani and Bheki and asked how they could assault him or shoot him, he noticed that the driver was approaching him with his hands in the air and Philani, the deceased in count two was immediately behind him. He noticed that Philani appeared to be removing something from his body and that is when he took out the knife from his back pocket. The driver then advanced towards him and he, the appellant, stabbed him once and stepped back. Philani then advanced and he stabbed him twice. Philani then turned and went towards the back of the vehicle and that is when he stabbed him twice on his back.

[23] The appellant testified that he acted in self-defence when he stabbed the deceased, as when the deceased alighted from the vehicle, the driver indicated to the passenger that the appellant should be assaulted or shot. He stabbed them as a result of this, as he was scared and feared for his life. It is only at that stage that he realised that they were in possession of firearms. The appellant testified that the

driver of the vehicle had said he should be shot or assaulted on two (2) occasions and he also noticed something tucked in the shirt Philani was wearing. It was this that made him assume they were armed and were going to attack him.

[24] Notably in his evidence, the appellant was asked:

> 'Ok. Mr Maphumulo, did you intend to kill these two people, was it your intention?. . . No.
>
> What was your intention?. . .I had no intention. I was defending myself under the circumstances. It was not my intention to stab them to death, it was just a mistake.'[1]

[25] The appellant confirmed that he did not see Dludla during the argument and subsequent stabbing, but only noticed him when Dludla was leaving for the Gumede homestead. He acknowledged that Dludla may have spoken to the occupants of the vehicle and he, the appellant, may not have heard it.

The judgment of the court a *quo*

[26] In evaluating the evidence, the court a *quo* acknowledged the contradiction between the evidence of the other State witnesses and that of Busisiwe Dlamini as to who was stabbed first. The magistrate however, indicated that she was going to accept the evidence of the other State witnesses as correct in respect of who was stabbed first as opposed to Busisiwe's.[2]

[27] In evaluating the totality of the evidence, the court a *quo* found the following

[1] Page 82 of the transcript, lines 13-17.
[2] Page 110 of the transcript, line 23 to line 4 of page 111 of the transcript.

facts to have been proved, namely, that there was a quarrel between the driver (Bheki) and the appellant before Philani arrived. The quarrel arose as a result of the appellant interrupting Bheki's conversation with the ladies. When Philani arrived at the scene, he climbed into the vehicle and asked about the quarrel. Thereafter, both Philani and Bheki alighted from the vehicle and approached the appellant. Mr Dludla admonished Bheki initially and then admonished both Bheki and Philani after they alighted. Dludla retreated from the scene because he realised that there was trouble brewing. Both deceased advanced towards the appellant. The appellant took off his sandals and then stabbed Bheki once in the chest. The appellant then turned to Philani and stabbed him. Bheki ran away and the appellant chased after him. Philani in the meantime moved to the rear of the vehicle. The appellant returned from chasing Bheki and went to Philani and stabbed him in his back.[3]

[28] In dealing with the presence of the firearm at the scene, the court a *quo* referred to the evidence of Dludla and the appellant. Dludla indicated that he had removed the firearm from the scene after he had found it in the car under the seat. The court a *quo* commented as follows:

> 'Court finds his version of how he got hold of the gun, strange because he was already outside of the car and retreating because of according to him, the violence in the arguments and then he returned to the car and took the gun out from under the seat.'[4]

In respect of the appellant, the court said the following:

> 'The accused, Mr Maphumulo, also saw a gun at the scene, however, he contradicted himself about the gun and it is difficult to make a finding on where, according to him, the gun was. The finding that the Court is going to make is that

[3] Page 111 of the transcript, line 13 to line 2, page 112 of the transcript.
[4] Page 112 of the transcript, lines 6-9.

> there was a gun at the scene but the Court cannot find or cannot say who had the gun.'[5]

[29] The court accepted that both deceased had alighted from the vehicle and approached the appellant. The court further accepted that according to Dludla, the actions of both the deceased indicated to him that violence was going to erupt so he retreated.[6] In addition, the court *a quo* accepted that 'the accused had reasonable grounds for thinking that he was in danger of death or serious injury from these two persons advancing towards him'.[7]

[30] In relation to Bheki, the court a *quo* was of the view that the appellant acted in self-defence and that the means of violence used was not excessive. However, in relation to Philani, the court a *quo* was of the view 'that the means the appellant used to defend himself against Philani was excessive and that the injury he inflicted was unnecessary to overcome the threat'.[8] It found that the evidence showed that Philani was stabbed twice by the appellant who, on his return from chasing Bheki, stabbed him twice in the back. The court a *quo* in convicting him of murder found the following:

> 'With regard to Philani then, the Court also finds that he acted with *dolus eventualis* he knew that by stabbing the deceased more than once, that death could ensure but he nevertheless proceeded.'[9]

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[5] Page 112 of the transcript, lines 11-14.
[6] Page 113 of the transcript, lines 4-9.
[7] Page 113 of the transcript, lines 9-11.
[8] Page 114 of the transcript, lines 2-5.
[9] Page 114 of the transcript, lines 9-12.

Submission of the parties

[31] Mr *Singh* who appeared for the appellant, submitted that this court can on appeal interfere with the factual findings of the court a *quo*,[10] given the disparity in the evidence of the State witnesses Busisiwe and Nokuzola Dlamini when compared with that of Dludla. This court must therefore disregard the finding that the appellant pursued Bheki, thereafter returning to the motor vehicle where he stabbed Philani in the back and decide the matter on the appellant's version.

[32] Should the appeal court decide the matter on the basis of the appellant's version, then at best, the appellant ought to be acquitted on count one as well, at worst, he ought to be found guilty of culpable homicide applying the guidelines set out in *S v Steyn.*[11]

[33] Advocate *Ngwabi* for the respondent, submitted in her heads of argument, that the contradictions in the evidence of the State witnesses were not material, and in determining whether the guilt of the appellant had been established beyond reasonable doubt, individual aspects of the evidence must not be viewed in isolation, but must be evaluated with all other available evidence, that is, to 'consider the mosaic as a whole'.[12] In doing so, this court too would conclude the appellant exceeded the bounds of self-defence and dismiss the appeal in respect of the conviction.

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[10] *S v Monyane & others* 2008 (1) SACR 543 (SCA) para 15; *S v Pistorius* 2014 (2) SACR 314 (SCA) para 30.
[11] 2010 (1) SACR 411 (SCA) para 19.
[12] *S v Hadebe & others* 1997 (2) SACR 641 (SCA) at 645I–646A.

Analysis

[34] Murder is defined as the unlawful and intentional causing of the death of another human being, whereas culpable homicide is the unlawful negligent causing of the death of another human being. The difference in the two offences lies in the form of culpability, negligence being required for culpable homicide and intention for murder.[13] Self-defence or private defence is where a person uses force to repel an unlawful attack which has commenced or is imminently threatening upon their life, bodily integrity, property or other interest which deserves to be protected, provided that the act is necessary to protect the person or interest from the attacker and is reasonably proportionate to the attack.[14] Putative private defence implies rational but mistaken thought – it relates to the mental state of an accused person.[15]

[35] The leading authority which sets out the test to distinguish between private defence and putative private defence is the decision in *S v De Oliveira*[16] in which Smalberger JA deals with the difference as follows:

> 'From a juristic point of view the difference between these two defences is significant. A person who acts in private defence acts lawfully, provided his conduct satisfies the requirements laid down for such a defence and does not exceed its limits. The test for private defence is objective – would a reasonable man in the position of the accused have acted in the same way (*S v Ntuli* 1975 (1) SA 429 (A) at 436E). In putative private defence it is not lawfulness that is in issue but culpability ('skuld'). If an accused honestly believes his life or property to be in danger, but objectively viewed they are not, the defensive steps he takes cannot

[13] C R Snyman *Criminal Law* 6 ed (2014).
[14] Snyman *Criminal Law.*
[15] See *Director of Public Prosecutions, Gauteng v Pistorius* 2016 (2) SA 317 (SCA).
See further S Maharaj 'Fight back and you might be found guilty: Putative self-defence' August 2015 *De Rebus* 138.
[16] 1993 (2) SACR 59 (A) at 63H-64A.

> constitute private defence. If in those circumstances he kills someone his conduct is unlawful. His erroneous belief that his life or property was in danger may well (depending upon the precise circumstances) exclude *dolus in which case liability for the person's death based on* intention will also be excluded; at worst for him he can then be convicted of culpable homicide.'

[36] The distinction between private defence and putative private defence therefore seems to turn on the question of lawfulness and culpability. On reading the record it appears that there are a number of contradictions in the evidence of the State witnesses but more importantly, in the appellant's evidence. To my mind the contradictions in the evidence of the State witnesses is not so serious as to warrant a rejection of such evidence. In any event, the fact that Busisiwe Dlamini's evidence differed from the other State witnesses was not material as it only related to the sequence of who was stabbed first.

[37] However, the same cannot be said about the contradictions in the appellant's evidence. In *S v Mkohle*[17] it was held by Nestadt JA that:

> 'Contradictions *per se* do not lead to the rejection of a witness' evidence. As Nicholas J, as he then was, observed in *S v Oosthuizen* 1982 (3) SA 571 (T) at 576B-C, they may simply be indicative of an error. And (at 576G-H) it is stated that not every error made by a witness affects his credibility; in each case the trier of fact has to make an evaluation; taking into account such matters as the nature of the contradictions, their number and importance, and their bearing on other parts of the witness' evidence. Williamson J obviously did this. In my view, no fault can be found with his conclusion that what inconsistencies and differences there were, were "of a relatively minor nature and the sort of thing to be expected from honest but imperfect recollection, observation and reconstruction". One could add that, if anything, the contradictions point away from the conspiracy relied on.'[18]

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[17] 1990 (1) SACR 95 (A).
[18] At 98F-G.

[38] The courts appear to be forgiving of minor discrepancies or inconsistencies in the evidence of witnesses. However, in this case, there were a number of discrepancies in the appellant's evidence. Therefore, in considering the appellant's evidence and version of events, the court must consider the nature of the contradictions, as their number and importance have a bearing, in my view, on the witnesses' evidence and his defence and are crucial in determining the lawfulness of the appellant's actions.

[39] The appellant maintains that he acted in self-defence at all times. The correctness of the appellant's conviction must accordingly be judged in the light of his evidence, what emerged during cross-examination and his state of mind at the time of the stabbing.

[40] In my view the evidence of the State witnesses as to whom was stabbed first and the contradiction in relation thereto is not significant. What needs to be considered are the following aspects raised by the appellant namely, whether the deceased threatened to shoot or assault the appellant, whether the deceased pointed a firearm at the appellant and under what circumstances the appellant acted in self-defence.

[41] I propose to consider these having regard to certain aspects of the appellant's evidence. Insofar as the issue of the firearm is concerned, the evidence proceeds as follows. The appellant says he 'was not aware what weapons and what they had in

their possessions'.[19] He thought that one of the deceased was taking out a firearm.[20] He then goes on to say that he did not remember which one of the persons who died had a firearm and pointed it at him.[21]

[42] When asked pertinently whether he saw a firearm his response was the following:

> 'The reason why I thought there was a firearm within the vicinity, it's because one of them had told the other to shoot this person and the other person pretended to be taking something out of the pocket, that's when I thought these people had firearms. . . .'[22]

[43] Further on he is asked whether he saw the firearm:

> '"Did you see the firearm that day?"
>
> "I can't say I saw it. . .I heard on the following day that there was a firearm there, I do not know as to how it was recovered, how it got to the police, I don't know".[23]
>
> "During the incident, sir, did you see a gun, that is the question?"
>
> "I did not see the gun up to the incident".'[24]

[44] Later on during the evidence he is pertinently asked regarding the firearm and his response is that he did not see a firearm on the day at the time. He is asked:

> '"Now sir, please listen. You have told this Court that you never saw a firearm that day at that time."---"No, what I meant when I made mention of that was that I did not know what type of a firearm it was but however, when he pulled it, I could see that it

[19] Page 80 of the transcript, lines 21-24.
[20] Page 81 of the transcript, lines 13-14.
[21] Page 92 of the transcript, lines 6-8.
[22] Page 92 of the transcript, line 11.
[23] Page 92 of the transcript, line 16.
[24] Page 92 of the transcript, lines 11, 16 and 21.

was an object that looked like a firearm but however, I did not know what type or kind of firearm it was." "Do you remember the last question that you were asked before the Court adjourned last time?" … "The last question… did you see a firearm that day, that time and the answer was no, that is what you said."---"No, I cannot recall correctly but however, I am of the opinion that I was trying to explain to Court that I saw the firearm but however, I did not know the type of firearm it was."'[25]

[45] During further questioning it is clear that the appellant tailored his evidence in regard to seeing the firearm and the manner in which he was 'attacked'. This is clear if one has regard to his evidence.

'"So the one that was stabbed first, after stabbing him, what did you do?---He retreated.

"To where"—He retreated towards the front of the vehicle in question.

"He never shot you?—The driver was not carrying anything.

"So at that time you could see that the person was not armed?---Yes, I was aware at that stage that the driver was not armed but however, I was also aware that I was both-or rather, they were both fighting me and I was defending myself against both of them."[26]

…"I then came across this person now that was advancing towards me, carrying a firearm in his hand."'[27]

[46] In respect of the attack and the stabbing the following is put to him by the prosecutor.

'"…And all in all, sir, both the deceased, you stabbed the first one, he ran away, you

[25] Page 95 of the transcript, lines 6-19.
[26] Page 96 of the transcript, lines 14-25.
[27] Page 98 of the transcript, lines 20-21.

stabbed the second one, he turned away from you and retreated, so none of them were approaching you when you stabbed them.---- Well, I agree with you but I wouldn't have stabbed them if none of them were advancing towards me."[28]

"..And at all times you never saw the firearm that day, is that correct?---I did see a firearm when the-or rather right after the utterance was made that I must be shot at and this person now was reaching for it underneath his shirt."[29]

"Did he point a firearm at you?---No he just held a firearm with his hand…"[30]

"Did he point the firearm at you?---"I would say yes because of how he was holding this firearm. . . ."'[31]

[47] A further aspect of his evidence relates to the issue of running away and the apparent attack by his assailants. He was asked:

'"Did you have an option to run away?"--"When Nombulelo called me or shouted my name as I was leaving, they then called me forcefully."[32]

"…I turned to leave as I was-I turned wanting, to leave and they then called me violently, they called me backed violently."[33]

"I proceeded towards the direction that I had initially been travelling towards but what happened was that I was then dragged forcefully by one of them".'[34]

[48] It appears that this evidence was never canvassed with any of the State witnesses and testified too by the appellant only during the course of cross-examination and had never been canvassed in his evidence in chief. He was questioned:

'What did they do, did they call you forcefully or they dragged you, pulled you

[28] Page 99 of the transcript, lines 8-12.
[29] Page 100 of the transcript, lines 9-12.
[30] Page 101 of the transcript, lines 23-25.
[31] Page 102 of the transcript, lines 2-6.
[32] Page 83 of the transcript, lines 13-15.
[33] Page 90 of the transcript, lines 3-5.
[34] Page 93 of the transcript, lines 23-24.

> physically there towards … ?"---"They did both. I was called and pulled forcefully." "And that crucial information, you never raised it when the first witness was there and even when you were testifying before Court that you were dragged by these two people."[35]
>
> "And you are aware that when you testified last time, you never said you were physically dragged or called by one of these people?" ---"I think I did make mention of that". "You did not, this is news to us, we never heard that. We are only hearing for the first time now."---"I think I mentioned that."'[36]

[49] In my view, this evidence and the contradiction specifically in relation to the conduct of his two attackers, as well as the issue in relation to the firearm are crucial to the appellant's defence. The appellant had an opportunity to run away before the altercation took place but did not do so. His evidence was contradictory and conflicting on more than one occasion. What was the intention of the appellant? Did he intend to kill or was he merely trying to stop an alleged attack? More importantly, was there an attack? Such attack and the issue of the firearm or being dragged was never testified to by any of the State witnesses. These witnesses had a clear view of what transpired.

[50] Given the number of inconsistencies with the appellant's evidence, it appears that he was tailoring his evidence, specifically in relation to the issue of an attack, the threat of the firearm and being dragged by the two deceased. In addition, the words he uttered as to whether or not he intended to kill the deceased do not per se establish an absence of intent. These words must be seen in their proper context. These were said during the course of evidence at the trial and must not be elevated to the status of a proved fact. These words must be considered in the light of the

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[35] Page 94 of the transcript, lines 6-11.
[36] Page 94 of the transcript, lines 20-24.

evidence as a whole and specifically the appellant's evidence.[37]

[51] In light of the number of inconsistencies with the appellant's evidence and the fact that he stabbed Philani more than once when he had turned away, indicates in my view, that his actions were disproportionate to an alleged attack. The deceased did nothing further after he was stabbed. There was nothing to indicate that Philani, after he was first stabbed by the appellant, was still a threat to the appellant. Furthermore by stabbing the deceased more than once, the appellant must have foreseen that the deceased would die. The appellant knew what he was doing by stabbing the deceased more than once, both in the chest and in the back when he had turned away. The only reasonable inference that can be drawn is that the appellant must have foreseen the possibility that the deceased would die and cannot be said to have acted negligently as he stabbed Philani again after the threat had been averted. His actions are not consistent with the plea of self-defence or with culpable homicide. The only reasonable inference on the evidence is that the appellant must have foreseen the possibility of death ensuing, reconciled himself to it and exceeded the bounds of self-defence. Consequently, the court a *quo* was correct in convicting the appellant for killing the deceased in the form of *dolus eventualis*. In the circumstances, the appeal against the conviction cannot succeed.

Sentence

[52] This then brings me to the appropriate sentence. Given the circumstances under which the offence was committed and having regard to the personal

[37] *S v De Oliveira* at 65.

circumstances of the appellant, in my view, a sentence of twelve (12) years imprisonment may be excessive. However, the test on appeal is not what sentence we as an appeal court would impose, but rather whether or not there is anything to vitiate the sentence imposed by the court a *quo*.

[53] The court a *quo* found substantial and compelling circumstances to deviate from the prescribed minimum sentence of 15 years. In doing so it considered the triad of *Zinn*[38] and the factors placed before the court. I am of the view that there has been no misdirection or irregularity by the court a *quo* in imposing the sentence of twelve (12) years imprisonment nor can it be said that such sentence is disturbingly or startlingly inappropriate warranting interference on appeal. Likewise too then, the appeal against sentence cannot succeed.

Conclusion

[54] In the result, the orders I propose are the following:

[54.1] The appeal against the conviction is dismissed.

[54.2] The appeal against the sentence imposed by the court a *quo* is dismissed.

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HENRIQUES J

[38] *S v Zinn* 1969 (2) SA 537 (A

I AGREE

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SISHI J

Case Information

Date of argument	:	18 August 2015
Date of judgment	:	30 August 2016

Appearances

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