



Reportable:	YES / <u>NO</u>
Circulate to Judges:	<u>YES</u> / NO
Circulate to Magistrates:	YES / <u>NO</u>
Circulate to Regional Magistrates:	YES / <u>NO</u>

**IN THE HIGH COURT OF SOUTH AFRICA
(Northern Cape High Court, Kimberley)**

CASE NO: **CA&R 138/2016**
DATE HEARD: **27/02/2017**
DATE DELIVERED: **03/03/2017**

In the matter between:

MOSS, WAYNE JOSEPH

Appellant

and

THE STATE

Respondent

Coram: Olivier J et Snyders AJ

JUDGMENT

Olivier J:

[1.] The appellant, Mr Wayne Joseph Moss, appeared in the Regional Court, Kimberley, on charges of assault (count 1) and murder (count 2). In count 1 it was alleged that the appellant had on 1 January 2013 assaulted Ms Simone Papier by pulling her and hitting her with fists. In count 2 it was alleged that the appellant had, on the same date, murdered Mr David Verby, a 20 year old male. The appellant pleaded guilty on the first count, but on the second count he pleaded not guilty and explained that he had acted in self-defense.

[2.] The appellant was convicted on both counts. On count 1 he was sentenced to 12 months imprisonment, conditionally suspended for a period of 5 years. On count

2 he was sentenced to 15 years imprisonment. This appeal is directed at the conviction of murder (count 2) and at the sentence of 15 years imprisonment on that count.

[3.] The appellant and Ms Papier had been involved in a relationship. One child had been born of it. Ms Papier was pregnant with their second child when they broke up. At the time of these events Ms Papier was involved in a relationship with Mr Michael Shan Foster.

[4.] On New Year's Eve the appellant confronted Ms Papier at a party about leaving their child without proper care and forcibly attempted to take her away from the party. In the process he hit her with his fist¹. The appellant was then confronted by Mr Foster and the deceased, Mr Verby, who was at the time armed with a knife. The appellant then left.

[5.] Later that same night the appellant and Mr Rivonne Christopher Douglas were walking down a street. The appellant was at that stage armed with a 29cm long knife. The fixed blade of the knife was 15cm long. The appellant at some stage crossed the street to where the deceased was. There the appellant stabbed the deceased once, in his chest, and ran away. The blade severed veins and penetrated a lung, resulting in the death of the deceased.

[6.] This incident took place more or less outside the deceased's parental home, or close thereto, and when the deceased called out his father rushed to him. The deceased died on the scene.

[7.] After his body had been removed shortly thereafter his father, Mr van Wyk, picked up a pocket knife of the deceased near the spot where the deceased was found by his father.

[8.] The version of the appellant, as put to witnesses in cross-examination and as testified by the appellant, was that at some stage after the incident with Ms

¹ This was the assault on which count 1 was premised.

Papier, he and Douglas were walking to one "*China*", for whom he had from time to time done delivery work and where he wanted to go to pick up a present which one Brenda had called him about. On the way there, and while Douglas was walking slightly behind him, he heard the deceased swearing at him from the opposite side of the street. He crossed the street to the deceased to find out why. He and the deceased then got involved in an altercation, swearing at one another, and both of them waving their hands about in the process. According to the appellant the deceased then reached into his pocket and took out a knife and started opening it. Believing that the deceased was going to attack him, the appellant took out his own knife and stabbed the deceased once. According to the appellant he fled after Mr Douglas had called out to him and made him aware of six men who were running up the street in his direction.

[9.] The evidence of Mr Douglas was that the appellant had, after the earlier incident, found out from his cousin where the deceased lived. According to him the appellant had thereafter expressed the intention to stab the deceased. He and the appellant were walking down a street when he noticed the deceased on the opposite side of the street. The appellant then crossed the street to the deceased. According to the witness he kept on walking and did not accompany the appellant, because he wanted nothing to do with what was going to happen. He looked back when he heard screaming. He saw the appellant and the deceased arguing and waving their hands, and then he saw the appellant stabbing the deceased.

[10.] The only other eye-witness called by the prosecution was Mr Hershell Vorster. According to him he had been sitting on a stone, with his nephew, Mr Jerome Vorster, when he saw the appellant and Mr Douglas approaching. When the appellant crossed the street towards the deceased, who was at that stage busy opening the gate of his parents' premises, Mr Douglas started running away. When the appellant reached the deceased he called out the deceased's name and, when the deceased turned around from where he was opening the gate, the appellant stabbed him once and ran away. According to Mr Vorster there had

been no quarrel or altercation between the appellant and the deceased before the stabbing.

[11.] The following salient findings appear from the judgment of the Regional Magistrate:

- 11.1 The evidence of Mr Douglas that the appellant had been looking for the deceased with the intention to stab him, was accepted.
- 11.2 It was found that, in view of the earlier events when he was confronted by Foster and the deceased, who as already mentioned was armed with a knife, the appellant would at that stage have had reason to foresee that the deceased would again or still be armed, that the confrontation would lead to a stabbing and that such a stabbing, taking into account the nature of at least the appellant's own knife, would probably be fatal.
- 11.3 It was found that the deceased's knife had fallen out of his pocket after he was attacked and that it was still unopened.
- 11.4 Furthermore it was found that, because the deceased had not during the first incident actually attacked the appellant with the knife, the appellant would during the later incident have had no reason to think that the deceased would do so then.
- 11.5 The Regional Magistrate rejected the appellant's version that he approached the deceased to talk to him, and found that the appellant had approached him to stab him.
- 11.6 It was also found that the fact that the appellant had after the stabbing fled, hid away his knife and hid himself from the police, indicated a guilty conscience on his part and, apparently, that this fortified the probability that the appellant had not acted in self-defence.

[12.] It is trite that a Court of appeal will not readily interfere with the credibility findings of a trial Court².

[13.] The Regional Magistrate found Mr Douglas to have made a poor impression as a witness and decided to accept his evidence only insofar as corroborated. It was found that Mr Vorster, however, had made a good impression and that his evidence had not been discredited in any respect.

[14.] A careful reading of the transcription of the evidence of Mr Vorster reveals several unsatisfactory aspects and contradictions that were apparently not considered by the Regional Magistrate:

14.1 It is difficult to believe that Mr Vorster and his cousin would have sat there on the stone on New Year's Eve, Mr Vorster stone sober, for 5 hours.

14.2 Mr Vorster contradicts Mr Douglas about the formation that the appellant and Mr Douglas had been walking in before the appellant approached the deceased. According to Mr Vorster they had been walking next to each other, while according to the appellant and Mr Douglas, the latter had been walking slightly behind the appellant.

14.3 Mr Vorster initially said that the deceased had turned around when the appellant called his name. Later he indicated that the deceased had stood up when the appellant called his name, and still later Mr Vorster reverted to the version that the deceased had turned around when hearing the appellant's voice.

14.4 Referring to the knife that Mr Van Wyk, the deceased's father, had according to him found lying on the ground after the deceased had been

² Compare **Karrim v S** [2012] 2 All SA 125 (SCA) para [65]; **S v Dada** 2004 JDR 0548 (SCA) para [6]

removed from the scene, Mr Vorster at first seemed to speculate that the knife could have fallen out of the deceased's pocket. Shortly thereafter he stated emphatically that the knife had indeed fallen out of the deceased's pocket, only immediately thereafter to state that Mr Van Wyk had actually taken the knife out of the deceased's pocket. According to Mr Vorster Mr Van Wyk saw the knife falling out of the deceased's pocket, which was in complete contrast to the evidence of Mr Van Wyk. Later Mr Vorster claimed that he did not know how the knife came out of the deceased's pocket.

14.5 According to Mr Vorster he did not know Ms Papier. How is this possible if Ms Papier was the girlfriend of Mr Vorster's cousin, Mr Shan Foster, with whom Mr Vorster stayed?

14.6 Mr Vorster denied that he ever went to call Ms Papier and Mr Foster and to tell them about the stabbing, which was in complete contrast with the evidence of especially Ms Papier.

[15.] Credibility findings of a trial court will be interfered with by a court of appeal where it is clear, from the record, that they are wrong³.

[16.] As already mentioned the Regional Magistrate in effect found Mr Douglas to have been an unreliable witness, but he nevertheless accepted the evidence of Mr Douglas that the appellant had said that he wanted to stab the deceased. The Regional Magistrate motivated this finding on the basis that there would have been no reason for Mr Douglas to lie about this. It must be kept in mind, however, that Mr Douglas was a single witness on this aspect. A part of Mr Douglas' version in this regard was that the appellant found out from his cousin

³ "It is cause for concern to find laudatory epithets applied by a trial court to witnesses when the record shows that their performance, judged by the written word, was obviously far from satisfactory. In such a case an appeal Court will more readily interfere with the findings of the trial court as to the weight to be attached to the witnesses' evidence and its ultimate conclusion based on such findings." - **S v Heslop** 2007 (1) SACR 461 (SCA)

where the deceased stayed, but the evidence of Mr Douglas in this regard was unsatisfactory-

16.1 In his police statement he said that the appellant asked his cousin where Forster stayed. In court he testified, however, that the appellant found out from his cousin where the deceased stayed.

16.2 Mr Douglas testified that he had been unable to hear what the appellant and his cousin discussed, because they were "*talking soft*", but went on to testify that the appellant had immediately thereafter told him that his cousin told him where the deceased stayed.

16.3 In his police statement Mr Douglas said that the appellant told him that he was going to stab both the deceased and his friend. In his evidence Mr Douglas testified only that the appellant had said that he was going to stab the deceased.

16.4 In his police statement Mr Douglas said that he saw a knife in the possession of the appellant, but on his evidence in court he never saw the knife on the appellant.

16.5 In his evidence Mr Douglas testified that the appellant had told him that he was looking for his girlfriend. Why would the appellant have expected to find her where the deceased was? How would looking for his girlfriend fit in with being on a mission to stab the deceased?

[17.] It may, however, be argued that there are other objective indications that the appellant did not cross the street merely to ask the deceased why he had sworn at him. Whether Mr Douglas simply carried on walking when the appellant crossed the street (as Mr Douglas said) or ran away (as Mr Vorster said), the fact is that he did not cross the street with his friend and that he did not wait for him. He clearly expected trouble and his evidence that he did not hang around

because he wanted nothing to do with what was going to happen, would fit in with his evidence that the appellant had earlier expressed an intention to stab the deceased.

[18.] It is in my view also possible, however, that the appellant had not told Mr Douglas that he was going to stab the deceased and that Mr Douglas had simply, when the appellant crossed the street to the respondent, expected trouble because of the events earlier that evening.

[19.] The question could also be asked why the appellant would specifically have wanted to kill the deceased, as intimated by Mr Douglas. It seems unlikely that the fact that the deceased had been part of the earlier confrontation, together with the new boyfriend of Ms Papier, would have motivated the appellant to target specifically the deceased.

[20.] That the appellant fled and hid his knife does not, in my view, warrant the inference, as the only reasonable one, that the appellant did so because he knew that he had gone to the deceased to stab him or because he knew that the deceased had not attacked or threatened the appellant with his own knife.

[21.] The reasonable possibility that the appellant may indeed have been on his way to collect a present, and not to confront the deceased, was in my view not ruled out. No evidence was, for example, presented regarding the probable route that the appellant would have had to follow to where he was supposed to collect the present.

[22.] The question would then remain, however, what exactly had taken place between the appellant and the deceased-

22.1 As already mentioned Mr Douglas testified that the appellant and the deceased had been screaming at each other, waving their hands about,

when he saw the appellant stabbing the deceased. Mr Douglas testified that he could not say whether the deceased at that stage had a knife or tried to stab the appellant.

22.2 Mr Vorster, on the other hand, testified that the appellant called out the name of the deceased and then simply stabbed him. According to Mr Vorster the stabbing was not preceded by any screaming or a waving of hands.

22.3 The appellant, as I have already mentioned, testified that they had been swearing at each other, that both of them had been moving their hands around and that the deceased had taken out a knife and had started opening it.

[23.] Whatever may have led to the appellant crossing the street to the deceased, the question would remain whether the reasonable possibility that the deceased had then attempted or threatened to stab the appellant, was excluded. The knife of the deceased was found at the scene of the incident, and there are indications that it may have been open. We know that the deceased had a knife and that he had earlier that evening not hesitated to take it out to threaten the appellant. Was the reasonable possibility excluded that this happened again when he was later that evening confronted by the appellant? In my view it was not.

[24.] Mr Vorster was a single witness on whether the deceased had attacked or threatened the appellant, because Mr Douglas said that he could not even see if the deceased had a knife. Why was the nephew of Mr Vorster, who according to Mr Vorster was present and was therefore also an eye-witness, not called? It appears from the record that he was present at court.

[25.] If it is assumed that the appellant had crossed the street to confront him, possibly about the earlier incident, the question would be whether, even on the appellant's own version, the appellant had not in effect provoked an attack by

the deceased, as suggested by the prosecutor in cross-examination. The appellant would have had reason to believe that the deceased would be armed with a knife and that he would take it out again.

[26.] In my view, however, simply confronting an armed person cannot necessarily be said to be provoking a lawful attack. Even if the appellant had crossed the street to confront the deceased, and therefore as the aggressor, that would not necessarily mean that the deceased's attack would have been lawful⁴. Even if the appellant and the deceased had been screaming at each other and had swung around their hands in that process, that would not necessarily have necessitated or justified an attack by the deceased, with a knife.

[27.] The Regional Magistrate found that the appellant had not been a good witness and that he had presented blatant lies to the court⁵. The only aspect specifically referred to by the Regional Magistrate, however, was the improbability of the appellant's version that he had only approached the deceased to talk to him. Mr Rosenberg, counsel for the respondent, submitted that the appellant had lied about whether he and Ms Papier had at that stage still been in a relationship. Even if he had I cannot see what relevance the existence or not of the relationship could have to the reason why the appellant had crossed the street to the deceased. There was no suggestion of a relationship between the deceased and Ms Papier.

[28.] Whatever the intention of the appellant may have been at the time when he approached the deceased, the fact would remain that it was undisputed that the appellant had not at that stage produced his knife. The question therefore remains whether the deceased had not, as testified by the appellant, then first produced his knife and started opening it with a clear intention of stabbing the

⁴ See **Strafreg**, Snyman, 5th Edition, p 102; **South African Criminal Law and Procedure**, Volume 1, General Principles of Criminal Law, 3rd Edition, Burchell, page 74

⁵ “*Ek dink daar is aspekte in sy getuienis, belangrike aspekte, waar die beskuldigde ooglopend leuens aan die Hof voorgehou het.*” – Record: Volume 3, page 290

appellant. The reasonable possibility that this may indeed have happened, was not in my view excluded on the evidence as a whole.

[29.] It follows that I am of the view that the conviction on count 2 should be set aside, which makes it unnecessary to consider the appeal against the sentence on that count.

[30.] The following order is therefore made:

THE APPEAL SUCCEEDS AND THE CONVICTION AND SENTENCE ON COUNT 2 (MURDER) ARE SET ASIDE.

**C J OLIVIER
JUDGE
NORTHERN CAPE DIVISION**

I concur.

**J A SNYDERS
ACTING JUDGE
NORTHERN CAPE DIVISION**

**For the Appellant: MR A VAN TONDER
(Kimberley Justice Centre)**

**For the Respondent: ADV J J ROSENBERG
(Office of the Director of Public Prosecutions)**