



Reportable:	YES / NO
Circulate to Judges:	YES / NO
Circulate to Magistrates:	YES / NO
Circulate to Regional Magistrates:	YES / NO

**IN THE HIGH COURT OF SOUTH AFRICA
NORTHERN CAPE DIVISION, KIMBERLEY**

Case No: K/S4/2023
Heard on: 24 – 28/07/2023;
28 – 01/09/2023 & 22/01/2024
Delivered on: 02/05/2024

In the matter between:

THE STATE

and

WILLIAM MONGALE

ACCUSED

JUDGMENT

MAMOSEBO J

- [1] The accused stands indicted on two counts: Count 1: Assault with intent to cause grievous bodily harm; Count 2: Murder read with the provisions of s 51(2) of the Criminal Law Amendment Act 105 of 1997 (CLAA).
- [2] He pleaded not guilty to both counts and filed a signed written plea explanation in terms of s 115 of the Criminal Procedure Act, 51 of 1977 (CPA) marked exh “A”. He confirms that although he pleads not guilty to murder read with s 51(2) of the CLAA, his legal representative has explained the court’s sentencing jurisdiction of life imprisonment

irrespective of the prescribed minimum sentences as well as what the competent verdicts entail. His plea explanation pertaining to the assault charge is that Neo MacDonald Molatedi, the complainant, pushed him with a 750ml beer bottle. He produced a nail clipper and opened the built-in nail file with his teeth and used it to stab him on his shoulder in self-defence. He denies stabbing him with a knife or having had the intention to cause him grievous bodily harm.

[3] In as far as the plea explanation pertaining to the charge of murder is concerned he denied stabbing the deceased, Tshepang Ernest Lukang. The accused made the following admissions in terms of s 115(1)(b) deemed to be formal admissions made in terms of s 220 of the CPA:

- 3.1 That the body of the deceased was correctly identified as that of Tshepang Ernest Lukang;
- 3.2 That the body did not sustain any further injuries from the time the deceased was declared dead until the medico post-mortem examination was conducted by Dr Tebogo Charles Kanaomang on 25 October 2022;
- 3.3 The content of the report on the post-mortem examination compiled by Dr Tebogo Charles Kanaomang is acknowledged as correct; and
- 3.4 That the cause of death was blood aspiration.

The s 170A of the CPA application for evidence of minor witnesses to be obtained through an intermediary

- [4] At commencement of the trial, because the State intended to call two minor witnesses, it made an application in terms of s 170A of the CPA. Ms Wilma Roux, with 26 years' experience as a social worker, of which, 6 years was in her capacity as a probation officer, was called to testify. Her evidence that the two minors, Oarabile M and Tumisang C M testify through an intermediary was supported by her written reports marked exhibits "E", "F" and "G". She recommended that the two witnesses testify through a Setswana speaking intermediary and *in camera*. It cannot be gainsaid that child witnesses should be exposed to as little stress and mental anguish as possible. I was satisfied at the end of her evidence and after cross-examination that the minor children might be exposed to undue mental stress and suffering unless the recommendation is endorsed and ordered that their testimony be heard through an intermediary, Ms Angela Kedisaletsi Louw.
- [5] It is opportune at this stage to highlight the practical challenges this Court experienced through the dysfunctional intermediary equipment in Court. It is prudent that the Court Manager and/or the Registrar ensure that the CCTV cameras are functional at all times to avoid the inevitable consequence of having to postpone cases involving minor accused and/or witnesses whose testimony must be obtained through an intermediary. This case was unfortunately no exception. As pointed out by Ngcobo J, then, in *Director of Public Prosecutions, Transvaal v Minister of Justice and Constitutional Development, and Others* 2009 (2) SACR 130 (CC) at para 2:

"[2] ...Our constitutional democracy seeks to transform our legal system. Its foundational values of human dignity, the achievement of equality and the advancement of human rights and freedoms, introduce a new ethos that should permeate our legal system. Consistent with these values, s 28(2) of the Constitution requires that in all matters concerning a child, the child's best interests must be of paramount importance."

- [6] Further challenges which were highlighted in this matter necessitating attention and cooperation by the criminal justice cluster is the availability of juvenile witnesses to probation officers to enable them to complete and make reports available to all the relevant stakeholders timeously. I have noted with concern that the accused's legal representative was handed a copy of the probation officer's report literally at the doorstep of the trial proceedings. All parties need to exercise more care in the interests of the administration of justice.

The version of the State

- [7] The State's case is predicated on the following evidence. The incidents occurred on 22 October 2022 at Laundry's Tavern in Warrenton. Dr Tebogo Charles Kanaomang holds an MBChB degree as well as a Bachelor of Surgery obtained in 2009 at the University of Pretoria. He served the Department of Health in various capacities. More important, he served as a Medical Officer: Forensic Pathology from 2014 to April 2023 and is currently self-employed. The experienced doctor, whose credentials are undisputed, conducted the post-mortem on the body of the deceased, Tshepang Earnest Lukang, identified to him by Forensic Pathology Officer A Nkadimeng on 25 October 2022. The deceased's reputed age is 24 years.
- [8] The doctor noted a 1cm incision on the left upper chest wall, just underlying the medial 3rd of the clavicle (collar bone). The wound has sharp edges. There were no other associated external injuries. In as far as the thoracic cage and diaphragm are concerned, the doctor recorded that there was no rib or clavicle fractures present. The sternum and diaphragm are intact. There is a stab wound through the 1st intercostal space (between the 1st and 2nd ribs) into the chest cavity. Intercostal space refers to the muscle between the ribs. There is 800ml of blood in

the left chest cavity. There is blood inside the oesophagus, trachea and bronchi.

- [9] The doctor recorded the chief post-mortem findings on the body as:

“A body of a Black adult male with a single stab wound on the left upper chest wall, as depicted above and on the provided sketch. The sharp blade penetrated the left chest cavity through the 1st intercostal space and went through the upper lobe of the left lung, extending into the pulmonary blood vessel within the lung. There is blood in the left chest cavity. Both lungs are congested and there is a leopard skin pattern appearance in the lung parenchyma, which is consistent with blood aspiration. There is blood in the trachea, bronchi, and oesophagus. The stomach is full of blood. There is minor subendocardial bleeding on the posterior wall of the left ventricle of the heart (suggestive of significant blood loss).”

As a result of his observations, he concluded that the cause of death is blood aspiration.

- [10] Dr Kanaomang further explained that blood aspiration is when a person swallows the blood which goes into the parenchyma (lung tissue) coming through the trachea (windpipe) into the lungs. According to the doctor blood in the left chest cavity of the deceased caused him to collapse and he was breathing blood in and out after falling. The nature of the wound is V-shaped on the one side while the other side is more U-shaped. That means that apart from the wound being caused by a sharp object the make of that object was not double but single-edged. The deceased's bleeding was mainly internal despite blood droplets on the ground. Excessive blood seen on his face came from his mouth as he was trying to breathe. The doctor estimated the depth of the wound to have been between 5 – 10cm. There were neither sharp nor blunt injuries observed on the deceased's head. The doctor refuted the allegation that the wound could have been caused by a nail file from a nail clipper.

- [11] Neo Macdonald Molatedi (Neo) knows the accused because they grew up together and attended the same primary school. The evening of the incident, around 21:00, he found the accused at Laundry's Tavern and shared his liquor. The accused also gave him three cigarettes. The accused was busy arguing with the deceased, whom he referred to as "Green". He could not hear what the argument was about because the music was loud.
- [12] Neo observed that the deceased was holding a 200ml bottle of Old Buck Gin and a closed okapi knife pressed against the bottle during the argument. Since the tavern was filled to capacity with patrons, they occupied the veranda outside the tavern. There was sufficient lighting outside the tavern. The accused produced a knife from his pocket and opened it with his teeth. Neo intervened. For his trouble the accused stabbed him with his knife.
- [13] Neo left the scene and entered the tavern where he made a report to Theko, one of the employees at the tavern whose surname is unknown to him, and showed him his injury. Theko went outside while Neo remained inside the tavern. He did not witness the deceased being stabbed. Later it was reported to him that Green had died and the police arrived at the tavern. It was put to Neo that the accused took out a nail clipper and unclipped the built-in nail file with his teeth which he used to stab Neo in self-defence because Neo had pushed the accused using a 750ml beer bottle. Neo denied pushing the accused with a beer bottle and disputed that the object that the accused had was a nail clipper. He did not receive any medical treatment and the wound has healed. He pointed to a less than 1 cm scar for the record.

- [14] Tumisang C M is a 16-year old minor who testified through an intermediary and *in camera*. His guardian was present throughout his testimony. Oarabile M is his friend. They, together with Serapelo and Monnapule, were standing opposite the garage and across the street, at Laundry's Tavern on 22 October 2022. It was around 19:00 at night. The deceased appeared and entered the tavern and as he came out the accused, referred to as "Mawila" was standing outside. He cannot explain what happened and did not notice them talking but only saw Mawila stabbing the deceased in the area of the throat. The accused first put his arm around the deceased as if he was hugging him and the other hand was lifted in a stabbing position. He stabbed the deceased with an okapi knife while they were both still next to the garage inside the tavern premises. He indicated photo 3 point 4 as depicted on Exh "B". He explained that an okapi is a folding knife. He saw the accused folding the knife after the stabbing.
- [15] The deceased exited the tavern premises and entered the passage. Tumisang followed the deceased into the passage and asked him if he was okay but was met with no response. He continued to walk next to him until he collapsed. Tumisang returned to the tavern and sought help from the patrons. He left with the other patrons to where the deceased had collapsed. He observed blood oozing from the deceased's mouth. He left the scene thereafter. Tumisang identified the accused in court (dock identification).
- [16] Oarabile M is a 15-year old Grade 4 learner who also testified through an intermediary and *in camera*. His guardian was present throughout his testimony. He attends school at Warrenton Public Primary School. He knows that he celebrates his birthday on the 16th of June but does not remember the year when he was born. I admonished him to tell the

truth. He confirmed having been at Laundry's Tavern on Friday 21 October 2022, the evening before the fatal incident. He and his friends, Monnapule, Tumisang and Serapelo were standing at a fence when they encountered the accused. The accused informed them that he was going to kill someone the following day.

- [17] On Saturday 22 October 2022, Oarabile and his friends returned to the tavern and stood as depicted at point 3 of photo 3 of Exh "B" in front of the tavern, when they saw the deceased entering the tavern. At that stage the accused stood talking under the veranda with Tiny and Peke. The deceased bought beer inside the tavern and returned to the veranda where he stood at point 4 at photo 3 of Exh B. The accused was in possession of cigarettes and packets of Clorets gum. Oarabile moved to a point just behind the boundary wall to purchase Clorets gum from the accused who was standing there in the company of the deceased, Peke and Tiny.
- [18] According to Oarabile, the deceased lit a cigarette and the accused requested a puff (colloquially referred to as a "*skyf*" when somebody requests to share the same cigarette). The deceased said he will do so but did not. The accused picked up an empty 750 ml beer bottle and hit the deceased on the forehead but the bottle did not break. The deceased wanted to know the reason for the assault from the accused. His response was that the deceased was trying to disrespect and undermine him. The accused then grabbed the deceased by his neck as if he was hugging him. He used his other hand to produce a silver knife which he unclasped with his teeth. He then stabbed the deceased with that knife on the collar of his neck. Green, the deceased, thereafter exited the tavern premises through the entrance and immediately turned left into a passage. Peke Shomoleile, who at the time was wearing flip flops

(push-ins) which were not of the same brand on his feet, followed the deceased who was wearing new Adidas tekkies. Tumisang also followed Peke and the deceased. The deceased collapsed in the passage. Peke took the deceased's tekkies and put them on and left his flip flops at the scene. Peke returned to the tavern. Oarabile went with all the other bystanders to where the deceased had fallen and noticed a bottle of Old Buck Gin, a wallet and two unidentical flip flops. After the deceased was stabbed, the accused and Tiny left the tavern together. The deceased's brother arrived armed with an axe. Oarabile left the scene. Earlier, before the deceased was stabbed, Oarabile saw Neo trying to intervene between the accused and the deceased.

[19] Tiny Mpiti is a 23-year old female and a friend of the accused since 2015. She was at Laundry's Tavern on 22 October 2022. As she was exiting the tavern she saw the accused holding Green, the deceased, by his T-shirt with the same hand that had a box of Clorets gum underneath his armpit. With his free hand he produced a knife that he unfolded with his teeth. She did not approach the two but sat on top of Peke's lap. She took the accused's beer and entered the tavern. She did not witness the stabbing. However, there were rumours inside the tavern that the accused had killed a person but she ignored them. After it was announced that the tavern was closing, the accused gave her money to buy another beer. He walked her to her boyfriend Xolani Shomoleile's place.

[20] At Xolani's one-roomed residence, the accused informed Xolani, within her hearing distance, that he had hit the deceased with a bottle on his forehead and also stabbed him but that he does not know where on his body he had stabbed the deceased. She then slept leaving the accused chatting to Xolani, who was already lying on the bed. The information

divulged by the accused was prompted by her telling him that people were talking at the tavern that he had killed a person. She saw the knife that the accused had from a distance as the accused was unclasping it. She had also seen it earlier during the day in town, at Tony's tavern, when he used it to open a wine bottle. The entire knife was silver or shiny. She refutes the claim that the accused used a nail clipper and maintains that it was a small knife.

[21] Xolani Lennox Shomoleile was asleep in his room on 22 October 2022 around 23:00 when his girlfriend (Tiny), and William (the accused), arrived. They were talking about what had happened at the tavern. Tiny informed the accused that there were rumours that he had killed a person. The accused's response was that the deceased (Green) had asked for tobacco from him and he hit the deceased with an empty bottle on his head. He explained that he held the deceased's hand with his one hand while he took out a knife with the other and stabbed the complainant "Kaka", also known as Neo, on his shoulder. Kaka was intervening between the accused and the deceased. The accused said he stabbed the deceased on his "*krok*" referring to his throat where it meets with the collar bone. The accused left and he went to sleep.

[22] Gabriel Theko Medupe is 52 years old. He was unemployed but, over weekends, including the night of 22 October 2022, he worked as a casual worker at Laundry's Tavern. His tasks included removing empty crates in the tavern and ensuring that there was order. He was inside the tavern and at some point, he took the empty crates outside the tavern and stood next to the boundary wall in front of the toilets within the tavern premises. He saw the accused standing with his back against the boundary wall, holding another person with his right hand while unclasping a knife with his teeth. He saw the shiny blade part of the

knife held by the accused. They stood facing each other. He did not know the person's name but later learnt that it was Green. He ran towards them to intervene. He stood between them and separated them by pushing them apart. The deceased had a bottle of Old Buck Gin and a closed knife in his one hand. After separating them the deceased left and went into a passage next to the tavern.

[23] When Theko entered the tavern, Neo Molatedi approached him, bleeding from the left side of his chest. Neo's T-shirt had a bloodstain. As he was shown bloodstains on his own T-shirt he assumed it was from Neo's injury. A few minutes later they were alerted that somebody had died outside and his body was on the street. Theko walked to the passage and found the deceased lying on his back. Upon close scrutiny he realised that it was the same person that he had separated from the accused. He had blood on his face. When he separated them, the deceased had no blood on his face. The deceased was still breathing as he noticed blood oozing from his mouth. Kidi summoned the police and Theko left. The police seized Theko's T-shirt and handed it over to the forensic laboratory for DNA testing. Theko saw a knife, not a nail clipper, in possession of the accused.

[24] Tebogo Marvin Malgas is a member of the South African Police Service (SAPS) attached to the Local Criminal Record Centre (LCRC). Of his 14 years' experience as a SAPS member, 12 years were in the LCRC. He was summoned to attend the scene by Sgt Shomoleile of the Warrenton Police Station who pointed the scene out to him. Malgas took the photographs and picked up a knife, with a black handle and silver blade but it is not a clasping knife, and sent it to the Forensic Science Laboratory (FSL) on 26 October 2022 under the seal number PA 5002897942 for testing. He did not receive any feedback. Sgt

Shomoleile had expressed suspicions that it may have been the murder weapon. He compiled two photo albums, one on 06 February 2023 and the other on 21 July 2023. When Malgas arrived the emergency services had already left the scene.

- [25] Malgas compiled the second album with the assistance of witness Oarabile who reportedly stood about nine meters from the deceased when he was stabbed, as depicted on point 4 of photos 3 and 4 whereas point 5 depicts where the deceased stood when he was stabbed. The knife found at the scene was 92.1meters from where the body of the deceased was found.
- [26] Sgt Gaobuse Andries Shomoleile has been a SAPS member attached to the Crime Prevention Unit for the past 15 years. His duties entail attending to complaints, patrolling and generally preventing crime. On 22 October 2022 he was on duty patrolling the area when the charge office contacted him reporting an incident in that area. He attended the scene in the company of Sgt Moremi. Upon arrival they found many bystanders, the person who had made the call to the police and a person lying on the ground. He observed that the person lying on the ground had his eyes and mouth open. No one could explain to him what had happened. After a short while the ambulance arrived and the person was certified dead on the scene. Next to the body of the deceased was a black and purple bag containing his identification and a cellphone, sandals that appeared to be grey and a green hat. He expressed the view to Malgas that the knife could have been the murder weapon because it was not far from the bloodstains or drops on the ground.

Before closing its case, the State made available to the defence all the witnesses that it did not call. The State further informed the Court that

the forensic results pertaining to the bloodstain on the T-shirt were still outstanding. There was also not enough DNA obtained from the knife PA5002897942 sent to the FSL as confirmed in the affidavit of Capt. Remembrance Xoliswa Medupe compiled in terms of s 212 of the CPA exh “H”.

The State closed its case.

The defence case

[27] The accused did not proceed with his case immediately at the close of the State’s case but sought a postponement for the DNA results on the T-shirt which was sent to the FSL on 29 November 2022. The Court granted the defence a postponement until 22 January 2024 for this purpose.

[28] Section 167 of the CPA deals with the examination of a witness or person in attendance and stipulates:

“The court may at any stage of criminal proceedings examine any person, other than an accused, who has been subpoenaed to attend such proceedings or who is in attendance at such proceedings, and may recall and re-examine any person, including an accused, already examined at the proceedings, and the court shall examine, or recall and re-examine, the person concerned if his evidence appears to the court essential to the just decision of the case.”

[29] On 22 January 2024 and on the basis of s 167 Mr Theko Medupe, a witness who had already testified for the State, was recalled to testify on the blood stain of the deceased’s blood that was found on his T-shirt on the night of the incident. He could not explain how the deceased’s blood had ended up on his T-shirt as he was not aware that the deceased was bleeding.

- [30] The accused testified in his defence and did not call any witnesses. He is 32 years of age and his highest level of education is Grade 7. On 22 October 2022 he was with Tiny Mpiti at Laundry's Tavern selling cigarettes and Clorets gum. He was approached by Neo asking him for cigarettes. Neo then trampled one box of Clorets. He enquired from Neo what he was doing. Neo pushed him on his chest using a 750 ml bottle of beer. He produced a nail clipper from his pocket and pulled out the filing part of the nail clipper with his teeth, and stabbed Neo with it on the upper part of the right chest. The reason for the stabbing was that he was acting in self-defence because Neo had pushed him with a beer bottle and had threatened him by saying that he will not leave the tavern. He denied any involvement in the murder.
- [31] The accused saw the deceased at the tavern. The deceased asked him for a sip of the autumn harvest wine which was contained in a 2-litre bottle which he last had when he returned from circumcision school offering the accused beer in exchange. The deceased entered the tavern and emerged with Black Label beer but the accused told him that he preferred not to mix alcohol and would rather have Castle beer. The deceased took out a 'hookah pipe' and invited him to take a few puffs but he declined the offer. The deceased left to smoke the pipe outside. Not long thereafter, Nene and Lesego made a report to the accused that the person he was chatting to earlier, referring to the deceased, was lying in the passage with blood in his face. They took the accused to the spot where the deceased was lying and found many bystanders already there. The police were also on the scene and cordoned off the area, clearly to prevent contamination. The accused returned to the tavern. He left with Tiny to her boyfriend, Xolani's, place. He denied telling Xolani or Tiny that he had hit the deceased with a bottle and stabbing him. He denied arguing with the deceased.

The defence case was closed.

The law

- [32] It is trite that the burden of proof rested upon the prosecution to prove its case beyond reasonable doubt. The following remarks by Nugent J in *S v Van der Meyden*¹ bear repeating:

“The onus of proof in a criminal case is discharged by the State if the evidence establishes the guilt of the accused beyond reasonable doubt. The corollary is that he is entitled to be acquitted if it is reasonably possible that he might be innocent (see, for example, R v Difford 1937 AD 370 at 373 and 383). These are not separate and independent tests, but the expression of the same test when viewed from opposite perspectives. In order to convict, the evidence must establish the guilt of the accused beyond reasonable doubt, which will be so only if there is at the same time no reasonable possibility that an innocent explanation which has been put forward might be true. The two are inseparable, each being the logical corollary of the other.”

The issues and the analysis of the evidence

The assault on Neo MacDonald Molatedi

- [33] The assault on Neo Molatedi is not placed in dispute by the accused. In fact, he admits formally that he produced an object used to stab Neo on the right side of his chest towards the shoulder. The dispute pertains to the object used to commit this offence as well as the form of intent. While Neo maintains that it was a knife the accused is adamant that it was the built-in nail file of a nail clipper. The State is of the view that despite the nature of the injuries, the accused had the necessary intent to cause Neo grievous bodily harm.
- [34] Neo avers that he was intervening between the accused and the deceased when the accused produced a knife and whilst pushing him (Neo) away said ‘*can’t you see that he has a knife*’, referring to the deceased. The accused then stabbed him (Neo) at that time whilst pushing him away.

¹ 1999 (1) SACR 447 (W) at 448f-g

The version of the accused, on the other hand, is that he never had an altercation with the deceased. The accused claims that Neo stepped on his box of Clorets gum, a version that was never put to Neo during his cross-examination, and that caused him (the accused) to produce a nail clipper and stab him (Neo) on his shoulder. Neo was not a single witness. Oarabile testified that he saw Neo intervening when the accused had accosted Neo. Xolani also repeated the confession made to him by the accused that Neo had intervened between him and the deceased. I am not persuaded that the cautionary rule finds application because the accused also admits that he stabbed Neo but he did so in self-defence. The situation did not call for self-defence because he was the aggressor. The evidence is overwhelming that he could not and did not use an embedded nail clipper file but a knife.

- [35] The question that remains to be answered is what was the intention of the accused when he stabbed Neo? Was there an intention to cause him grievous bodily harm?
- [36] According to Snyman² assault consists of any unlawful and intentional act or omission (a) which results in another person's bodily integrity being directly or indirectly impaired, or (b) which inspires a belief in another person that such impairment of [his or] her bodily integrity is immediately to take place. The elements of the crime are the following: (a) conduct which results in another person's bodily integrity being impaired (or the inspiring of a belief in another person that such impairment will take place); (b) unlawfulness; and (c) intention.
- [37] The slightest touch by one person on another amounts to assault. It is not a requirement of the crime that the perpetrator should injure his or

² Snyman's Criminal Law, seventh edition updated by SV Hoor, Lexis Nexis p 395

her victim for the offence to be committed. In as far as the element of lawfulness is concerned, the causing of the impairment on the complainant must be unlawful. Couched differently, the accused person must have a ground of justification. For the element of intention to be present, the accused must have intended to apply force to the person of another and *dolus eventualis* is sufficient. See *S v Erasmus 2005 (2) SACR 658 (SCA)* at para 10.

- [38] Based on the two conflicting versions, the accused's version of stabbing Neo for having stepped on his Clorets box is a fabrication at variance with what was put to the witnesses, i.e. that Neo had pushed him with a beer bottle and that he had acted in self-defence. Neo said it was at the time of his attempt to intervene between the accused and the deceased that the accused had inflicted his injury. It must be borne in mind that he was armed with a knife. Having regard to the sensitive area where he stabbed Neo, the accused evidently wanted to cause him grievous bodily harm (GBH). That grievous bodily harm did not eventuate, does not expunge the intention.
- [39] To sum up: Neo, Oarabile and Xolani are credible witnesses and gave reliable evidence. On the other hand, the accused fabricated his evidence of self-defence. He was not under any imminent danger from Neo because Neo was unarmed. I am therefore satisfied that the State proved beyond a reasonable doubt that the accused assaulted the complainant, Neo Macdonald Molatedi, with the intention of causing him grievous bodily harm. As Brand JA has pronounced in *Erasmus*³, the necessary form of intent being *dolus eventualis* was present.

³ Para 38 above

The murder of Tshepang Earnest Lukang

[40] It is incontrovertible that the deceased was killed at Laundry's Tavern on the night of 22 October 2022. Regard being had to the testimony of Dr Kanaomang, it cannot be gainsaid that one stab wound on the deceased led to the blood aspiration that caused his death. Therefore, the first issue to be determined is who the assailant was. It is significant to move from the premise that this incident was observed by different witnesses from different vantage points.

[41] The proper approach to the evaluation of the evidence has been laid down by the Supreme Court of Appeal in *S v Chabalala*⁴ as follows:

"[15] ...The correct approach is to weigh up all the elements which point towards the guilt of the accused against all those which are indicative of his innocence, taking proper account of inherent strengths and weaknesses, probabilities and improbabilities on both sides and, having done so, to decide whether the balance weighs so heavily in favour of the State as to exclude any reasonable doubt about the accused's guilt. The result may prove that one scrap of evidence or one defect in the case for either party (such as the failure to call a material witness concerning an identity parade) was decisive but that can only be an ex post facto determination and a trial court (and counsel) should avoid the temptation to latch on to one (apparently) obvious aspect without assessing it in the context of the full picture presented in evidence. Once that approach is applied to the evidence in the present matter the solution becomes clear."

[42] As stated earlier, the State led the evidence of two minor witnesses who testified through an intermediary. Mr Steynberg, for the accused, attacked the role of the intermediary claiming that while she was correctly sworn in as an intermediary and fulfilled her functions relaying questions to the witnesses, she also acted as an interpreter as she relayed and interpreted the evidence given by the two witnesses back to the Court. Invoking *S v Bongani*⁵ and *S v Mponda*⁶, Steynberg submitted that this Court should reject the evidence as inadmissible as the

⁴ 2003 (1) SACR 134 (SCA) para 15

⁵ 2001 (1) SACR 670 (C) at 673 E – G and

⁶ 2007 (2) SACR 245 (C) para 35

intermediary was not sworn in as an interpreter. It is sensible and pragmatic to deal with this attack first as it will determine what weight, if any, to attach to the evidence of Oarabile and Tumisang.

[43] The interpreter allocated to these proceedings, Mr Thomane, is an experienced senior interpreter who interpreted from commencement to finalisation of this trial. As much as the witnesses were Setswana speaking and the intermediary and the interpreter were conversant in Setswana, Mr Thomane was the interpreter in the proceedings and the roles were clear. This aspect was in fact clarified in chambers with the legal representatives at the inception of the trial. I took the liberty of checking the record of proceedings for the dates 27 July 2023 and 28 August 2023. The record shows the names of the minors responding. Where Ms Louw spoke, the record shows her name but it was in the initial stages where the Court addressed her directly or where she was pointing out that the microphone was dysfunctional and they were unable to hear or follow the proceedings. Ms Louw, throughout the proceedings, kept giving the microphone to the minors to speak. On 28 August 2023 I remarked that Mr Thomane is interpreting for the Court in its entirety and the intermediary is responsible for the person sitting next to her. Meaning that she must simplify what is put to him at his level. I am therefore of the view that the interpreter, Mr Thomane, had performed his functions as was required of him. It therefore follows that the attack by the defence on the purported dual role played by the intermediary lacks merit and stands to fail. Resultantly, the evidence of the minor state witnesses, Oarabile and Tumisang, will be taken into consideration in the assessment of the evidence of the murder offence.

[44] Mr Steynberg argued that because the state witnesses' evidence is riddled with contradictions and improbabilities it should be rejected and

the accused acquitted. The SCA has definitively pronounced in *S v Mkohle*⁷ on contradictions in the witnesses' evidence and said:

"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."

The defence attacked Oarabile's version in that his police statement did not include the aspect of the accused having hit the deceased with a bottle. His response was that he remembered this aspect after furnishing the statement and during his testimony. The SCA in *Mkohle*⁸ reiterates the general rule that a witness's previous consistent statement has no probative value (Hoffman and Zeffert *The South African Law of Evidence* 4th ed at 117). An exception to the rule occurs where it is suggested that the witness's story is a recent invention. This was not the case with Oarabile.

- [45] It is true that on face value one can see contradictions in the witnesses' versions of events. There is also conflicting evidence on whether the deceased had a knife or not. I do not think the contradictions materially affect their credibility neither do they support the rejection of their evidence. In actual fact, I find that there was corroboration on material respects. It is significant to remember that Neo and Tumisang are two unsophisticated minors. It cannot be expected that the testimony of the witnesses would be perfect and similar in all material respects because they relied on their recollection of events.

⁷ 1990 (1) SACR 95 (A) at 98E – F

⁸ Para 45 above at p99D

Assessing the accused's evidence

[46] I am mindful that the accused does not bear any *onus* to prove his innocence. In short, the accused's version was that Neo had asked him for a cigarette but that he had stepped on a box of his Clorets gum. The accused said when he enquired from Neo what he was doing, Neo pushed him with a 750ml bottle of beer. The accused states that he acted in self-defence when he produced a nail clipper from his pocket, pulled out its nail filing part with his teeth, and stabbed Neo on his right shoulder.

[47] The accused's version is farfetched. It cannot be reasonably possibly true. The witnesses testified that the box of Clorets was under his armpit. It is unfathomable how Neo could then have trampled on it. A more plausible explanation is that Neo never trampled on the Clorets box. It is also inexplicable why Lesego and Nene would report the deceased's death to the accused if he did not partake in causing the injury that had led to his death. The evidence by Tiny has the ring of truth that the tavern patrons started talking amongst themselves about the accused having killed the deceased which led to her enquiring from him whether it was true. What is also noteworthy is the narration by Xolani and Tiny of the events as confessed to them by the accused. Neither Tiny nor Xolani witnessed the stabbing but testified to what the accused had relayed to them that night. There is no basis to find that their version might have been a fabrication. I am of the view that the accused did not proffer a truthful account of the incident.

[48] This incident was not static. As already stated, the witnesses observed it from different vantage points. Whereas it is contended on behalf of the accused that the estimation of the size of the knife by all the witnesses does not correlate with the estimated size of the blade as indicated by the

doctor, the witnesses are all unsophisticated and theirs was but an estimate of a shiny knife. A common thread that ran through their evidence was that the object used to attack the deceased was not a nail clipper but a knife. The accused's friend, Tiny, who was with him earlier at Tony's tavern saw him opening a wine bottle with the same silver or shiny knife which he had used that night at Laundry's tavern. It can be accepted that the accused related what transpired freely and voluntarily. The light inside the premises at the veranda provided the illumination, which was adequate for the witnesses to identify the assailant. There can be no issue on the identity of the perpetrator as the witnesses knew the accused. The defence challenged the fact that Oarabile was not afforded the opportunity to identify the accused as the assailant and that created a gap in the state's case. I disagree. Oarabile refers to the accused as "*Mawila*" and they reside in the same street. The accused knows Oarabile by his middle name, "*Oakanang*". Oarabile implicated the accused from the previous night and the accused did not even say anything in that regard. Oarabile placed the accused on the scene. There can be no doubt that Oarabile and the accused are known to each other.

- [49] Oarabile gave detailed evidence and painted a graphic picture of the accused's pre-planned killing of an unidentified person the next day. He made his observations standing outside the tavern premises but had a clear and unobstructed view of what was happening. His narration of what transpired is not only sensible but also coherent and credible. He bought Clorets gum from the accused just before the stabbing occurred. He observed how the accused produced the knife which he unclasped with his teeth whilst his (the accused's) other hand restrained the deceased. He was able to point out where the deceased was stabbed and how he was stabbed. Oarabile saw the accused hitting the deceased with

a beer bottle on his forehead but that it did not break. This piece of evidence is corroborated by Xolani who was not even at the scene of the incident but came to know about the incident as narrated by the accused himself.

- [50] There is corroboration for the version that the accused opened the knife with his teeth. The witnesses are also adamant that the weapon was a knife and not a nail clipper as contended by the accused. Dr Kanaomang's evidence ruled out the nail clipper as the weapon that could have killed the deceased.
- [51] In as far as the improbabilities alleged by the accused are concerned, the following is noteworthy. Neo's version can not be assessed in isolation when he said after the stabbing when he tried to intervene, he returned to the tavern to report to Theko. There is nothing in the evidence that indicates the time lapse between Neo's stabbing and the stabbing of the deceased. Despite the knife having been produced, it is not improbable that Theko arrived to intervene after Neo had left. That explains the deceased's blood on his T-shirt. Whether he denies that the blood belonged to the deceased and maintains that it is Neo's is beside the point because DNA results showed that the blood on Theko's T-shirt matched the deceased's blood. It cannot be correct, as contended by the defence, that Oarabile implied that the stabbing must have happened immediately after the opening of the knife.
- [52] Hearing differs from person to person informed by different factors and health conditions. It cannot be improbable for a 15-year old's hearing to be better than an older person's hearing. The attack on Oarabile's hearing of the conversation between the deceased and the accused can, without more, not be sustained. It is incorrect to argue it as an

improbability that because Neo and Theko could not hear the conversation it stands to reason that Oarabile could also not have heard it.

- [53] The account of Neo, Theko, Tiny, Tumisang and Oarabile is direct eyewitness testimony. They could not have mistaken the assailant because the illumination was good and they knew each other. The significance of the accused's evidence is that he unwittingly placed himself on the scene of crime. There is no suggestion, let alone evidence, that any of the patrons present at Laundry's Tavern could have carried out the murder. The irrefutable evidence is that the accused had caused the deceased's injury that had led to his death.
- [54] Snyman⁹ writes that the test in respect of intention is subjective and can be inferred from the objective facts proved by the state. What remains uncontroverted is that the accused was in possession of a knife which he aimed at the deceased's upper body which blow landed on the deceased's left upper chest wall, just underlying the medial 3rd of the clavicle. In *S v Sigwahla*¹⁰ the court dealt with the aspect of 'intention to kill.' Of importance, following the court's analysis of the *Sigwahla* case, is first, the part of the body that is injured is relevant; secondly, the fact that the accused was indeed armed with a knife and had advanced at the unsuspecting person resultantly causing a 1 cm incision that led to internal bleeding and eventual blood aspiration, inferentially shows that the blow was aimed at the vulnerable part of his body. Holmes JA reasoned:¹¹

⁹ Snyman's Criminal Law, seventh edition, Lexis Nexis, p389

¹⁰ 1967 (4) SA 566 (A) at 570

¹¹ At 570H

“In my opinion the only reasonable inference from those facts is that the appellant did subjectively appreciate the possibility of such a stab being fatal. In other words I hold that there exists no reasonable possibility that it never occurred to him that his action might have fatal consequences, as he was advancing on the deceased with the knife in his hand and as he was raising his arm to strike and as he was aiming a firm thrust in the general direction of the upper part of his body.”

- [55] Considering the weapon used and the part of the body that was aimed at as well as the comments made to Oarabile and his friends the night before the incident, I find that the accused had the direct intention to kill the deceased without any lawful justification.
- [56] The evidence that the accused caused this death is overwhelming and irrefutable. The accused was presented with direct and credible evidence by the state. With regard to the credibility of the witnesses, I considered the totality of the evidence presented including inconsistencies, probabilities and improbabilities, the strength and weaknesses of either versions as well as their weight. The evidence of the state witnesses corroborated each other in material respects. Where there were inconsistencies in the state case, I found them not to be adversely affecting the state's case. The witnesses were able to paint a picture of the incident through the chronology of the events of that evening. Even if the State's case cannot be said to have been without blemish in the versions of the individual witnesses, the totality of the evidence, nevertheless, presented a formidable case against the accused.
- [57] I am satisfied that the state has discharged its duty to prove its case beyond reasonable doubt. The accused intentionally stabbed the deceased without any justification. The accused's version is far-fetched and untenable. I therefore reject the version of the accused not only as not reasonably possibly true but indeed fabricated. On a conspectus of all the evidence in this case I return the following verdict against the accused:

1. Count 1: I find the accused guilty of assault with intent to do grievous bodily harm.
2. Count 2: I find the accused guilty of murder with *dolus directus* as the form of intent.




MAMOSEBO J
THE HIGH COURT
NORTHERN CAPE DIVISION, KIMBERLEY

For the State
Instructed by:

Adv E Mafunisa
The Director Public Prosecutions

For Accused:
Instructed by:

Mr H Steynberg
Justice Centre, Kimberley