IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: ***NO***
(2) OF INTEREST TO OTHER JUDGES: ***NO***
(3) REVISED: ***Yes***
Date: 07/02/19 Signature

APPEAL CASE NO: A3146/2017

In the matter between:

SHABALALA, TRUEMAN Appellant

and

THE STATE Respondent

JUDGMENT

MATSEMELA AJ:

[1] This is an appeal by the appellant against the judgment of the Magistrate Mr Pretorius sitting with assessors in the Regional Court at Randburg. The Appellant pleaded not guilty and made certain admissions in terms of Section 220 of Criminal Procedure Act 51 of 1977. The Appellant was found guilty on the charge of murder and was sentenced to 12 years imprisonment.

[2] This is an appeal against both the Conviction and the Sentence with the leave of the Court a quo.

AD CONVICTION

BACKGROUND

[3] In summary the evidence before the court a qou was that Aletta Rapleng, at the time of incident was the girlfriend of the Deceased and the ex-girlfriend of the appellant. She ended the relationship somewhere between 2013 and 2014 with the appellant. At the time of the incident she was not on speaking terms with the Appellant. She did not know accused 2.

[4] She met the deceased on 7 August 2015 sometime after 21:00 in the evening at Patrick's tavern. He was in the company of what she regards his friend and a lady. The deceased asked the DJ to play a certain song. The Appellant assaulted the deceased with open hands. He assaulted the deceased all over the head and face. The assault ended in the toilet. She saw that accused 2 pulled the deceased to the toilet and en route to the toilet he too assaulted him with the open hands. At a certain stage

she, and Lebo had then arrived at the toilet. When they arrive at the, accused 2 already left the scene.

[5] Appellant pushed Lebo out of the toilet. Appellant, who was then inside the toilet played with a knife in front of the deceased by making cutting movements with the knife in front of the deceased's chest. Appellant then proceeded to grab the deceased with his clothes, on his chest area. She then saw the appellant stabbing the deceased on the neck area. However she does not know how many times.

[6] The second witness called by the state was Victoria Matlau. She did not witness the incident. She saw the deceased when leaving the toilet. The deceased was holding his neck. When the deceased removed his hand blood sprayed from his neck.

[7] The third state witness was Lebo Magaluka. She testified that she saw the Appellant for the first time that day. She did not see accused 2 at all. She went to toilet with Aletta's cousin. Whilst standing at the toilet she heard voices inside the toilet however she did not see the people enter the toilet. She opened the toilet door and noticed that Aletta, Appellant and the deceased were inside the toilet. Aletta was in the corner of the toilet. The deceased and the Appellant were on the other side facing each other. She saw the Appellant playing with a bread knife on the chest of the deceased. When she saw this, she screamed. The Appellant then pushed her out of the toilet. Sometime thereafter she saw the Appellant run out of the toilet. She thereafter saw the deceased coming out of the toilet holding his neck

[8] Doctor Moore, testified that the deceased had two stab wounds, one penetrating and piercing into the left lung. The point of entry of this wound is above the collar bone into the top part of the lung. It is this wound that resulted in the death of the deceased. The depth of the

wound was two centimetres. According to him the deceased was struck from behind, from his observations it is a sharp object that penetrated from the above downwards and inwards. A victim who has sustained such a wound will survive for a certain amount of time. The second wound is on the left upper arm, it also has a downwards and inwards tract to a depth of two centimetres and it stopped against the bone in the arm. The length of the deceased was approximately 1.68 metres.

[9] The fifth state witness was Charlie Dube. He testified that on the night in question he was the DJ in Patrick's tavern. He did not witness the incident. He heard screams, especially from women. He lowered the volume and went to look. People were making a circle and the man was lying down.

[10] The Appellant testified that he and accused 2, who is his friend, were drinking at Patrick's Tavern on that particular evening. They drank one milk stout, the other one was spilled on the ground by the deceased as he danced next to their table. Appellant then informed the deceased that he has spilled their beer but the deceased did not want to talk about it. Appellant then ignored the deceased and told accused 2 to finish the remaining beer and so that they should go home.

[11] The deceased previously was his friend. He observed that the deceased was drunk. He then went to the DJ, that is now Charlie. This DJ stays in the same street as the Appellant. On his way to the DJ the deceased pulled Appellant by his pants.

[12] The Appellant testified further that the deceased pulled him to the toilet. They both entered the toilet, the deceased asked Appellant what he wants from him but before he could answer the deceased pulled the knife from his right sleeve. The deceased tried to stab the Appellant with his right

hand. Appellant blocked the blow with his right hand and got stabbed on the inside of his right hand.

[13] Then the Appellant wanted to pull the knife from deceased's hand and they started to wrestle for the knife. There was water on the floor, that caused both the Appellant and the deceased slip and fall on the floor. When the Appellant got up from the ground or the floor he noticed that there was blood on the deceased. It was in that manner that the deceased was stabbed. There was a broken Savanna bottle in the toilet and the deceased attempted to reach for it. Appellant then left the deceased in the toilet and he went outside.

ISSUES

[14] It is trite law that the burden is on the State to prove the guilt of the accused beyond reasonable doubt. If the accused's version is reasonably possibly true in substance the court must decide the matter on the acceptance of that version and acquit the accused.

[15] In the case of **S v Jackson 1998 (1) SACR 470 (SCA) at 476** the court stated as follows:

"Burden is on the State to prove the guilt of an accused beyond reasonable doubt, no more and no less. The evidence in a particular case may call for a cautionary approach, but that is a far cry from the application of a general cautionary rule."

[16] In the case of **S v Ntsele 1998 (2) SACR 178 (SCA)** Eksteen AJA (as then he was) stated the following:

"Prove guilt beyond reasonable doubt – not beyond a shadow of doubt – if only remote possibility in his favour which can be dismissed with the sentence 'of course it is possible, but not in the least probable', the case is proved beyond reasonable doubt."

[17] In the case of **Shackell v S 2001 (4) ALL SA 279 (SCA)** Brand AJA (as then he was) stated the following:

"A Court does not have to be convinced that every detail of an accused's version is true. If the accused's version is reasonably possibly true in substance the court must decide the matter on the acceptance of that version. Of course, it is permissible to test the accused's version against the inherent probabilities. But it cannot be rejected merely because it is improbable; it can only be rejected on the basis of inherent probabilities if it can be said to be so improbable that it cannot reasonably possibly be true."

[18] It was argued on behalf of the Appellant that Aletta Rapleng was drunk as she consumed six Red Squares liquor. It was argued further on behalf of the Appellant that his version of events was probably true. It was further argued on behalf of Appellant that the Appellant was on his way to the DJ when the deceased pulled him by his pants. This suggested that the deceased was the aggressor.

[19] It was argued further on behalf of the Appellant that the deceased is the one who pulled the Appellant to the toilet. Once they were inside the toilet, the deceased tried to stab the Appellant. Appellant blocked the blow with his right hand and sustained an injury.

REASONS FOR THE JUDGEMENT

[20] The court a qou correctly found that although Aletta Rapleng was drunk, she knew exactly what was happening in her surroundings. She also saw exactly where the knife came from. There is nothing on the record that shows that she did not see and know what was happening around her

[21] I cannot agree with the submission on behalf of Appellant that the Appellant was on his way to the DJ when the deceased pulled him by his pants. The court found that this is contrary to what was put in cross-examination to Aletta Rapleng. In cross examination it was put to Aletta Rapleng that it was whilst Appellant was talking to the DJ when he was pulled by the deceased.

[22] The court a quo correctly rejected the evidence of the Appellant that he blocked the blow by the deceased because he could not show to the court the injuries he sustained.

[23] The court a qou found that on the testimony of the Appellant that he was stabbed by the deceased and thereafter they wrestled for the knife the Appellant was raising a defence of private defence or self-defence.

THE LAW

[24] On page 102, **Criminal Law, CR Syman 4th Edition**, the learned author defines private defence as follows;

[25] "A person acts in private defence, and the act is therefore lawful, if she uses force to repel an unlawful attack which has commenced or is imminently threating upon her or somebody else's life, bodily integrity, or property or other interest which deserves to be protected, provided the defensive act is necessary to protect the threatened, is directed against the attacker and is not more harmful than necessary to ward off the attack."

[26] In **S v De Oliveira [1993] ZASCA 62** at paragraph 14 Smallberger JA says the following

"A person who acts in private defence acts lawfully, provided his conduct satisfy the requirements laid down for such defence and does not exceed its limits. The test for private defence is objective – would a reasonable man in the position of the accused acted the same way (**S v Ntuli 1975(1) SA 429(A) at 436 E**. In putative defence it is not lawfulness that is an 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 constitute private defence. If in those circumstances he kills someone his conduct is unlawful"

[27]. In his testimony on record the Appellant gives various versions in explaining how he defended himself. It varies from the moment he says the deceased tried to stab him. He blocked a blow and he himself sustained and injury. And from moment where he says he tried to disarm the deceased and he held onto the wrist of the deceased. His version varies further as to how he tried to pull the knife out of the deceased's hand and eventually the knife falling to the ground.

[28] The evidence indicates, however, that the deceased sustained two stab wounds and the court wants to emphasise that these were stab wounds, not cut wounds. The fatal wound entered above the left collar bone into the lung, as the doctor testified the track is downwards in wards, in other words it excludes the possibility that the deceased could have fallen onto the knife.

[29] The wound to the arm was so severe that the knife stopped against the bone in the arm. The court a qou said that if, hypothetically, the stab wound to the arm was the first wound, it must have caused great

discomfort to the deceased. The deceased would move towards kneeling down. That would link in with the doctor's evidence that either the person who stabbed the deceased was taller or the deceased was more on his knees when he sustained the injury that entered above the collar bone. Both the injuries were on the left side of the body. The court a qou found that the person who inflicted the injuries was right-handed and so is the Appellant. This tallies with how the injuries were inflicted on the deceased.

[33] The Appellant could not explain why the deceased sustained, two stab wounds if he acted in self-defence. The Appellant conceded that It is common cause that when the deceased entered the toilet he was not harmed and did not bleed. He only bled when he fell to the ground according to his version.

[34] There is also direct evidence that the Appellant was seen brandishing the knife on the chest of the deceased and stabbing him. The court a quo correctly found that the Appellant's version of events is not probable and rejected it beyond reasonable doubt. His version of self-defence was also correctly rejected by court a qou in that it was not probable.

[35] I agree with the finding of the court a qou that the state proved that the Appellant acted with *dolus enventualis* as a form of intent. The Appellant was convicted of murder in that he stabbed the deceased twice and foresaw the possibility of his conduct causing the death of the deceased, and was reckless in doing so. The Appellant was thus correctly convicted of murder on basis that his form of intent was *dolus eventualis.*

AD SENTENCE

[29] The appeal court will not interfere with the sentence imposed by the court a quo unless it is shockingly inappropriate, or ~~when thewhen the~~ said court has misdirected itself. See **S V Pillay 1977 (4) SA S31 (A)**

[30] In **S v Zinn 1969 (2) SA 537 (A)** it is was said that in sentencing the accused the court should take into account the triad.

PERSONAL CIRCUMSTANCES

[31] The appellant was duly convicted. The appellant was sentenced to 12 years imprisonment and declared unfit to possess a fire-arm. The appellant did not testify in mitigation of sentence. The state proved no previous convictions was treated as a first offender. His representative informed the court he was 23 years of age. He was employed at Porter House Restaurant as a general labour and earning R2200 per month/week. His level of education is grade 11.

INTEREST OF THE COMMUNITY

[32] The ever-increasing wave of violence cannot be tolerated by the society. It is clear from the record, that the court a quo did take into account the prevalence of the offence in its area of jurisdiction of his court. The deceased was attacked in a tavern where he is supposed to enjoy himself. The society should feel safe in such places. The society expect courts to impose heavier sentences to restore and maintain safe living conditions.

THE SERIOUSNESS OF THE OFFENCE

[33] It cannot be over emphasized that murder is the most serious crime. Violence in any form is a serious offence more so when the Appellant take the life of a person. It shows that the Appellant has no respect for human life. Heavier sentences must be imposed by the courts sending a message to the prospective criminals that this kind of behaviour can no

longer be tolerated. See **S V MSIMANGA AND ANOTHER 2005(1) SACR.**

THE LAW

[34] In terms of **section 51 (3)** the court a quo considered factors justifying deviation from imposing the minimum sentence.

[35] The test for whether there are substantial and compelling circumstances present was formulated in **Malgas v The State** as follows:

[36] "*Moreover, those circumstances had to be substantial and compelling. Whatever nuances of meaning may lurk in those words, their central thrust seems obvious. The specified sentences were not be departed from lightly and for flimsy reasons which could not withstand scrutiny. Speculative hypotheses favourable to the offender, maudlin sympathy, aversion to imprisoning first offenders, personal doubts as to the efficacy of the policy implicit in the amending legislation, and like considerations were equally obviously not intended to qualify s substantial and compelling circumstances. Nor were marginal differences in the personal circumstances or degrees of participation of co-offenders which, but for the provisions, might have justified differentiating between them. But for the rest I can see no warrant for deducing that the legislature intended a court to exclude from consideration, ante Omnia as it were, any or all of the many factors traditionally and rightly taken into account by courts when sentencing offenders. The use of the epithets "substantial" and "compelling" cannot be interpreted as excluding even from consideration ant of those factors. They are neither notionally nor linguistically appropriate to achieve that. What they are apt to convoy, is that the ultimate cumulative impact of those circumstances must be such as to justify a departure. It is axiomatic in the normal process of sentencing that, while each of a number of mitigation factors when viewed in isolation may have little persuasive force, their combined impact may be considerable*".

[37] In **S V ANDERSON 1964 (3) SA 494 (A)** it was held that the appeal court must determine what the proper sentence ought to be. It can only do so after having considered all the relevant circumstances. If the difference between the sentence that this court would impose and the sentenced imposed by the trial court is so great that the inference can be made that the trial court acted unreasonably and therefore improperly, the court of appeal must alter the sentence.

[38] The court a qou pointed out that on a charge of murder, the minimum sentence should apply unless there are compelling and substantial circumstances. Taking into consideration all the factors mentioned above the court did find that there were compelling and substantial circumstances. Having read the record I am also of the view that there are compelling and substantial circumstances that justify a deviation from the prescribed minimum sentence. Those circumstances were that the Appellant was relatively a young person. This was not a premeditated murder. The assault took place in a tavern and the was probably drunk at the time.

[39] There is nothing on record that shows that the magistrate misdirected himself in imposing these sentences. I am of the view that, the sentence as it stands, does not induces any sense of shock. The appellant was correctly sentenced to 12 years imprisonment

Order

Accordingly, I make the following order:-

1. The appellant's appeal on both the conviction and sentence is dismissed.

J M MATSEMELA

Acting Judge of the High Court of South Africa

Gauteng Local Division, Johannesburg

I agree,

M TWALA

Judge of the High Court of South Africa

Gauteng Local Division, Johannesburg

HEARD ON:	18 OCTOBER 2018
JUDGMENT DATE:	07 FEBRUARY 2019
FOR THE APPELLANT:	ADV SH MCWANGO
INSTRUCTED BY:	JOHANNESBURG JUSTICE CENTRE
FOR THE RESPONDENT:	ADV BS MASEDI
INSTRUCTED BY:	DIRECTOR OF PUBLIC PROSECUTIONS