

IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, JOHANNESBURG)

Case No. 63/2021

REPORTABLE: ~~YES~~/NO

OF INTEREST TO OTHER JUDGES: ~~YES~~/NO

REVISED No

DATE: 11 November 2021

In the matter between:

THE STATE

versus

MZOTSHO, ANDILE

JUDGMENT- CONVICTION

MILLAR, A J

1. The accused was arraigned on a single charge of murder. This charge was preferred in consequence of events that occurred in the late evening of 12 June 2021 at Alexandra which resulted in the death of a person.

2. The accused pleaded not guilty to the charge and was also informed that the State sought the imposition of a minimum sentence¹ in respect of the charge of murder. The accused also made admissions in terms of section 220 of the Criminal Procedure Act².

3. It was admitted that the identity of the deceased was the late Ms. Nolitha Tsita and that she had become deceased because of the infliction of multiple penetrating incised wounds (stab wounds) and a fractured rib resulting in a haemorrhage into her chest cavity on 12 June 2021.

4. An admission was also made as to the correctness of the findings in the postmortem examination and that the deceased had suffered no further injuries after 12 June 2021 until the postmortem was conducted on 15 June 2021. Three photographs of the deceased which depicted the mortal wounds suffered by her were also admitted into evidence.

5. The state called three witnesses and the accused testified in his own defence.

6. The first witness called by the State was Mr. Sebelenkosi Sithethe. He testified in isiXhosa with the assistance of an interpreter. His evidence was that he resides at [...] 11th Avenue in Alexandra Johannesburg. There are several dwellings occupied by different people on the premises. During the late evening of Saturday 12 June 2021 and at approximately 22h00 he left his abode to go and throw out the wastewater after having washed his dishes. He testified that he knew the accused and the deceased for more than 12 years and that they had lived together.

7. He had to walk down a narrow passage, only a metre wide. He came upon the accused kneeling over the deceased who was lying on her side. He could see the accused and the deceased as they were in the light cast by a light outside the door of

¹ Section 51(1) of the Criminal Law Amendment Act 105 of 1997 as amended and Schedule 2. Part 1 of that Act.

² 51 of 1977

one of the dwellings. The accused was stabbing the deceased with a knife – it had a brown handle and a “shining” blade. He did not see how many times she was stabbed, but he did see the accused stab her in the left shoulder area above her collarbone.

8. He testified that he had called out to the accused to stop what he was doing but that the accused had ignored him. He was fearful of approaching the accused alone as he was wielding the knife, so he ran to get help from other residents. When he returned with another resident, the deceased’s uncle, the accused was nowhere to be seen. The deceased was then wrapped by them in a blanket and taken so that transport could be found to take her for treatment. Her uncle took her, but he did not accompany them.

9. He testified that he had never seen the accused and the deceased fight before in the 12 years he had known them. He initially testified that he had regarded them as “lovebirds” but then testified that he knew the relationship had been strained as the accused had gone to his family homestead to take a break from the relationship and when he had returned, had gone to live in a separate dwelling.

10. The second witness called by the State was Mr. Mziyanda Mzotsho. He too testified in isiXhosa with the assistance of an interpreter. He is the brother of the accused and resides in a dwelling on the same premises where the incident occurred.

11. He testified that on the evening in question and while sitting at a bar on the premises where they all reside, a child had come to report that the accused and his wife were fighting. He had immediately gone to see what was going on and had come upon the deceased who was still alive at the time, in the company of two men who were helping her to the gate of the premises.

12. The deceased was covered in blood and obviously injured although he could not see her wounds. He was asked to call an ambulance but instead proposed that transport be found to take her to hospital immediately. This was done and he accompanied the men and the deceased in the transport to the Alexandra Clinic where

she was admitted. He spoke to the deceased and she asked him to look after her children. He decided to then go home and that was the last time he saw her alive.

13. He testified that the next day the police had come to his home to make enquiries about the accused and that he had assisted them. He also telephoned the accused and asked him to hand himself over to the police. The accused had said that he would but first wanted to see his children and asked that they be brought to him and that subsequently, after he had brought the accused's children to him, he had handed himself over.

14. He testified also that he had grown up with the accused who was his younger brother and that he was a good person who loved his family. He testified that he was not a person who would fight, even if he was angry. His evidence was that as far as he knew, although there had been disagreements, the relationship between the accused and the deceased had been a good one.

15. The last witness called by the State was Dr. Dando Claude Mondzanga, the medical practitioner who had conducted the postmortem examination of the deceased. His report and findings were all admitted by the defence. His evidence was in respect of the type, number and location of the stab wounds inflicted upon the deceased.

16. The deceased sustained a total of 15 stab wounds. Of the wounds sustained, 9 were on the front (anterior) of her torso and 6 were on her back (posterior). The wounds to the front were particularly deep. All the wounds were consistent with having been inflicted by a blade with a single sharpened edge. The deceased also suffered a fracture of the second rib on the front right side of her torso. His evidence was that the combined effect of all the injuries inflicted upon the deceased had contributed to her death.

17. The accused called no witnesses and testified in his own defence. He testified that he was married to the deceased and that they had been together for about 12 years. They had 3 children, two boys and a girl. The eldest boy was not his biological

child and was only a few months old when he had met the deceased. He nevertheless regarded this child as his own. The second eldest child is a daughter and the youngest a son. Their present ages are 14, 10 and 6 respectively. The family had 2 abodes in the yard where they all lived – 1 in which the children slept and one which he shared with the deceased. Both he and the deceased worked although he only did so from time to time. His work was the installation of blinds.

18. His relationship with the deceased had until recently been a good one. He had become concerned when the deceased had started sleeping away from home. He had then discovered that she was in a relationship with another man. He attempted to resolve the matter with her and had called a family meeting with the elders of his family and the deceased. During the meeting the matter was discussed, and the deceased had apologized. He believed the matter had been resolved.

19. Shortly after the meeting they had gone to visit the deceased's cousin in the Edenvale Hospital. Due to covid he had been asked to wait outside while the deceased went inside. It subsequently transpired that the deceased had left the hospital while the accused waited there, and she had gone to meet up with the man she had been having the extra-marital relationship with.

20. The accused had then decided that he would go to his family homestead in the Easter Cape so that the deceased "could be free and do what she wanted". He was at the homestead for about a month and eventually returned because the deceased had called him and again apologized and told him she wanted them to be a family.

21. He returned approximately 2 weeks before the day of the incident. On 12 June 2021, he had been at home and the deceased had gone out. She was meant to return later to prepare food for the family. He testified at some length about what transpired during the day and the messages exchanged between them. When the deceased had still not come home by the late afternoon he had decided to go and buy food and prepare the meal for the family himself. While out he had come across the deceased in

the company of the man that she had been in the relationship with. They had seen him, and the man had left the deceased and disappeared into a taxi rank. He did not pursue him or even speak to the deceased who was now alone. His evidence was that he was heartbroken, and he had then gone home.

22. He arrived home before the deceased. When she walked in, she had gone to immediately plug her cell phone into the charger. He was near the kitchen table switching on the kettle at the time. On the table was the kitchen knife he had used to cut bread.

23. He had then gone to her phone and scrolled through the calls and saw that she had been calling the man in question that very day while he had been waiting for her at home.

24. He confronted the deceased and asked her why she had done this to him – called him back when he had left so she could be free. The deceased told him that she had received a “proposal of love” and he had then told her that this was not possible if she was in a relationship with him. At this point the deceased had laughed at him and he had then slapped her with an open hand across the right side of her face.

25. He then told her he was going to take her cellphone and recharge it with airtime so that he could contact the man concerned and tell him he should not avoid him the next time he saw him. The deceased then grabbed the knife from the table – a brown handled kitchen knife with the blade sharpened on one side only. He disarmed her and put the knife on top of the roof beam, between it and the zinc roof sheet, out of the way.

26. He went to get the cellphone and was walking out the door when he felt someone grab him from behind. He turned and saw the deceased brandishing the knife. She tried to stab him, and he put his hands up to ward off the blow and in so doing was cut on his left wrist.

27. He grabbed the deceased's hands and was able to wrestle the knife out of her grasp. The deceased had then put her head down and pushed it into his torso and pinned him up against the passage wall. She had at the same time grabbed him by his testicles and was twisting them. He was in excruciating pain, describing the feeling that "my testicles were above my pubic area" and was also now feeling weak because of the injury to his left wrist.

28. He decided that the only way he could get the deceased to let him go was to stab her and so he stabbed her on the back. The deceased staggered backward, all the while maintaining her hold on his testicles and they then both fell to the ground. They were lying parallel to each other in the passage with one of the deceased's legs between his own. The deceased stood up and went to sit on a nearby step.

29. He too stood up. He was still holding the knife when he started to walk away. Due to his feeling of weakness the knife dropped from his hand, and he was unable to pick it up so he kicked it into a drain.

30. He had gone to sit outside the premises and had seen when the deceased wrapped in a blanket had been taken away. He did not see her again. He had considered handing himself over to the police once his brother had told him she had passed away but had become fearful of what would happen to him. He said that this was because he feared what they would think of a person who had killed his wife and the mother of his children. He subsequently called the police and told them where he was, and he was taken into custody.

31. On several occasions during his testimony the accused became visibly distraught.

32. The evidence of the State witnesses was corroborated in material respects by the evidence of the accused. While he denied that Mr. Sithethe had been on the scene or that he had called upon him to stop, it was common cause that he had been the one

who had stabbed the deceased. He was unable to provide any explanation for the 9 wounds inflicted upon the front of the deceased's torso.

33. While the witnesses for the State gave their evidence in a forthright manner and I have no reservation in accepting it, the same cannot be said about the evidence of the accused. Throughout his evidence he sought to avoid or downplay any suggestion that he may have been angered by the conduct of the deceased. He was cross-examined at some length on this aspect and consistently said that he was "sad" or that his "spirit was down". During his evidence he sought to create the impression that the deceased had him pinned against the wall and that his only recourse to stop her from continuing to inflict pain on him was to stab her.

34. In response to a question from the Court that he describes the precise place the incident took place in more detail, he then sought to move the scene away from the lighted area where Mr. Sithethe had seen them to an intersection of passages – ostensibly to impugn the evidence that he had been seen over the deceased stabbing her and that had Mr. Sithethe being there he would have seen him. To my mind, his evidence that immediately after she stood up the deceased had gone to sit on the step under the light is corroborative of the evidence of Mr. Sithethe on this aspect.

35. It was common cause on the evidence that the accused was the one who had stabbed the deceased and so the issue to be determined is his state of mind at the time. The state argued that the actions of the accused were premeditated³ and the defence that it was not.

36. The approach to be followed in the evaluation of the evidence in a matter such as the present is a holistic one⁴.

³ "*thought about or planned beforehand*" - Shorter Oxford English Dictionary, Vol. 2, Fifth Edition, Oxford Press, 2002 at page 2326

⁴ S v Chabalala 2003 (1) SACR 134 (SCA) at para 15

37. The approach to be followed regarding intention is set out in *S v Mtshiza*⁵ where Holmes JA stated:

“...criminal liability is not regarded as attaching to an act or a consequence unless it was attended by mens rea.... Accordingly, if A assaults B and in the consequence B dies, A is not criminally responsible for his death unless-

(a) He foresaw the possibility of resultant death, yet persisted in his deed, reckless whether death ensured or not; or

(b) He ought to have foreseen the reasonable possibility of resultant death.

In (a) the mens rea is the type of intent known as dolus eventualis, and the crime is murder; and in (b) the mens rea is culpa, and the crime is culpable homicide.”

38. Did the accused intend to murder the deceased? Was his intent premeditated or direct (*dolus directus*) as argued on behalf of the State or was it that he foresaw the possibility of death but proceeded, reckless of the consequences (*dolus eventualis*) as his version suggests?

39. It was argued on behalf of the State that the version proffered by the accused as to what transpired in the abode until Mr. Sithethe saw the accused standing over the deceased stabbing her was a fabrication and should be rejected. It was argued that this version was proffered to demonstrate that the accused had not premeditated the murder of the deceased but had been provoked by her.

40. It was also argued that the accused having had to endure the deceased's infidelity in the past had finally had enough and having caught the deceased red handed

⁵ 1970 (3) SA 747 (A) at 751E;752-753, quoted and discussed in Principles of Criminal Law, Fourth Edition, Juta, Burchell 2013 at 394-395

had gone home and lain in wait for her. His failure to confront either her or the man involved was indicative of this. It was argued that the accused's repeated disavowal of any feelings of anger⁶ toward the deceased was simply not believable.

41. I was urged to find that the accused's evidence as to what had transpired in the abode from the time the deceased arrived home until Mr. Sithethe saw the accused stabbing the deceased, a fabrication, to be rejected. The failure of the accused to address at all in his evidence the total number of stab wounds or specifically the stab wounds inflicted on the front of the deceased's torso was indicative of the falsity of his version.

42. It was argued for the defence that the accused's version as to what had transpired in the abode was the only evidence before the court and that it should be accepted. It was argued that the accused's version was corroborated by the wrist injury sustained by him. Furthermore, the injuries to the deceased's back were consistent with the accused's version.

43. There were no further submissions made by the defence about the number or position of the wounds inflicted on the deceased while it was argued on behalf of the State that the accused's wrist injury could have been self-inflicted.

44. In considering the direct evidence of the accused, this corroborates the evidence of the State witnesses in several respects – specifically that he stabbed the deceased, that she was alive when he left the scene and that she was subsequently wrapped in a blanket and taken for medical treatment. This is where the corroboration ends.

45. The evidence of the accused as to what transpired in the abode and thereafter until Mr. Sithethe arrived at the scene must be assessed against the totality of the evidence. If that evidence is rejected, then the inference argued for by the State is to be considered.

⁶ S v Heslop 2007 (1) SACR 461 at 473

46. Throughout his evidence the accused testified that despite the deceased's infidelity he had never become angry but had rather become sad. Indeed, the events prior to the 12 June 2021 were indicative of a resigned approach to the conduct of the deceased, best reflected in the evidence of the accused and his brother (also corroborated by Mr. Sithethe) that he had left the deceased and gone home for a time. It was put to him on several occasions that the deceased's conduct must have angered him. He denied this.

47. The argument that the accused had gone home and planned an attack upon the deceased on the day in question because of extreme anger is not supported by his version of what transpired in the abode. In that evidence he for the first time admitted to anger and to a physical confrontation between himself and the deceased.

48. While there is a glaring omission in his version as to how the deceased came to have been stabbed on the front of her torso, he did not deny that he was the one who had inflicted those wounds. The version of the accused is not irreconcilable with the evidence of Mr. Sithethe – the omission to testify about what transpired after they fell to the ground, on his version, does not negate his evidence in its entirety on what transpired in the abode.

49. I find, having regard to a conspectus of the evidence that the accused's version as to what transpired in the abode is reasonably possibly true and that consequently the inference⁷ that the State urged me to draw upon the exclusion of that version cannot be drawn.

⁷ See THE SOUTH AFRICAN LAW OF EVIDENCE, 3rd Edition, Zeffert & Paizes, Lexis Nexis 2017; page 102.

R v Blom 1939 AD 188 - "*There were said Watermeyer JA in R v Blom, 'two cardinal rules of logic' which could not be ignored when it came to reasoning by inference:*

'(1) *The inference sought to be drawn must be consistent with all the proved facts. If it is not, then the inference cannot be drawn.*

(2) *The proved facts should be such that they exclude every reasonable inference from them save the one sought to be drawn. If they do not exclude other reasonable inferences, then there must be a doubt whether the inference sought to be drawn is correct.*"

50. I find that there was no premeditation in his actions but that nonetheless the accused unlawfully and intentionally killed the deceased.

51. In the circumstances I make the following order:

51.1 On the sole count in the indictment, the accused is convicted of murder.

A MILLAR
ACTING JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION, JOHANNESBURG

HEARD ON: 8, 9 & 10 NOVEMBER 2021

JUDGMENT DELIVERED ON: 11 NOVEMBER 2021

COUNSEL FOR THE STATE: ADV. D BARNARD

INSTRUCTED BY: NATIONAL DIRECTOR OF PUBLIC
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REFERENCE: 10/2/11/1 -2021/88

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