IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: A767/2013

DATE OF HEARING: 31 MARCH 2014

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

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DATE SIGNATURE

In the matter between:

JERRY YIKA **APPELLANT**

and

THE STATE **RESPONDENT**

J U D G M E N T

AVVAKOUMIDES, AJ

INTRODUCTION AND FACTS

1. The appellant was found guilty of murder on 20 April 2009 by the Regional Court of Gauteng, held at Sebokeng, having pleaded not guilty to the charge. He was sentenced to an effective period of 12 years imprisonment of which 2 years were suspended for a period of 5 years on the usual conditions. He was also declared unfit to possess a firearm.

2. The court a quo granted leave to appeal against his conviction only and his application for leave to appeal against his sentence was dismissed, both applications having been heard on 4 May 2009. The appellant was represented at the trial.

3. The State called only one witness, namely Jeremiah Makhubo who testified that on 30 August 2008 he had arranged a Stokvel gathering on the property of his parents where he lives in the yard of such property. The appellant was in his room at the time and at the same premises, which he leased from Makhubo's parents. That night Makhubo exited his room to talk to his girlfriend, one Cindy, and he saw the deceased who had been asleep exiting his room to go and relive himself. He was wearing socks without his shoes.

4. Makhubo then witnessed the appellant stabbing the deceased twice in the stomach with a three star knife. This occurred at about 03h00 in the morning and he was approximately 14 metres away from the incident.

5. As the deceased fell to the ground Makhubo approached them both and asked the appellant why he stabbed the deceased. He also lifted the deceased and placed him elsewhere after which he called the ambulance. The appellant answered Makhubo that the deceased owed him money. The appellant then fled the scene. The area was well lit by means of an Apollo light. The deceased died at the scene.

6. The deceased had two stab wounds on the abdomen area according to Makhubo. Although other people also witnessed the incident only Makhubo was called to testify. The State closed its case after Makhubo's evidence. The appellant testified that he was drinking with his friend Lucky at the home of Makhubo. The deceased was also present. The deceased went out of the premises and when he came back he told the deceased that one Kabi had taken his beer.

7. The deceased then approached Kabi and an argument ensued. The appellant went out of the premises and the deceased followed him and demanded his beer. According to the appellant the deceased

then produced a knife and stabbed him on the left hand, at his finger and he fell to the ground. No medical report in respect of this alleged injury was provided to the trial court.

8. The deceased's knife also fell to the ground. Kabi then came and picked up the knife and stabbed the deceased with his own knife. The deceased then hit the appellant with the clenched fists and the appellant then ran away to someone else's residence where he was found by the police. The appellant testified that when he ran away the deceased was still standing.

9. The appellant then closed his case. The trial court took into consideration that the state had called a single witness and that such evidence ought to be approached with the caution that is dictated by the prevailing circumstances. The State's case rested on Makhubo's identification of the appellant. It was common cause that the appellant and Makhubo are well known to each other having grown up together and played soccer.

10. The light was sufficient for Makhubo's identification of the appellant. The trial court accepted the identification of the appellant on the basis of Makhubo's evidence which testimony the court found to be straightforward and without uncertainty. The evidence of having asked the appellant why he stabbed the deceased and the

appellant's response was accepted by the trial court and was not meaningfully challenged by the defence.

11. According to the post mortem report the deceased sustained 9 stab wounds and the trial court accepted that it would have been unlikely for the deceased to hit out at Kabi with clenched fists, given his wounds. Makhubo also testified that Kabi was not there at the time. The trial court accepted that the appellant's version was not reasonably possible and that Kabi could not have stabbed the deceased. The court relied on Makhubo's evidence which it found to be credible and reliable.

CONCLUSION

12. For the reasons stated by the court below the appellant's version that Kabi stabbed the deceased is not reasonably possibly true given the circumstances and thus stands to be rejected. The evidence presented by the State, and the facts that are not in dispute as to the presence of the appellant at the scene, together with the identification of the appellant by Makhubo point only to the appellant.

13. Once the State has made a prima facie case against an accused, that accused must also proffer a reasonably possible version to

meet that case. As Nugent JA stated in S v Van der Meyden 1999 (1) SACR 447 (W) at 448F-H:

"*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*."

Further at 449I-B he stated that: "*The proper test is that an accused is bound to be convicted if the evidence establishes his guilt beyond reasonable doubt, and the logical corollary is that he must be acquitted if it is reasonably possible that he might be innocent. The process of reasoning which is appropriate to the application of that test in any particular case will depend on the nature of the evidence which the court has before it. What must be borne in mind, however, is that the conclusion which is reached (whether it be to convict or to acquit) must account for all the evidence. Some of the evidence might be found to be false; some of it might be found to be unreliable; and some of it might be found to be only possibly false or unreliable; but none of it may simply be ignored*."

14. In the light of the evidence about the events of the evening when the deceased was stabbed, the inconsistencies in the appellant's evidence and the improbability of his version of what happened that night, his version cannot be accepted as being reasonably possibly true. It follows that the appeal must fail.

15. I accordingly make the following order:

The appeal is dismissed.

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AVVAKOUMIDES, AJ

JUDGE OF THE HIGH COURT

I agree:

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JORDAAN, J

JIUDGE OF THE HIGH COURT

Representation for the Appellant:

Counsel	Attorney S Moeng
Instructed by	Pretoria Justice Centre

Representation for Respondent:

Counsel	Adv MM Mashuga
Instructed by:	The State