

REPUBLIC OF SOUTH AFRICA



HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, PRETORIA

CASE NO A164/15

(1)	REPORTABLE: Yes / No
(2)	OF INTEREST TO OTHER JUDGES: Yes / No
(3)	REVISED.
19/8/2016	
DATE	SIGNATURE

19/8/2016

In the matter between

KESELEPHILE REGINAH TOE

FIRST APPELLANT

THATO DEPHNEY TOE

SECOND APPELLANT

KEBODIHILE DOREEN KGAMELO

THIRD APPELLANT

and

THE STATE

FIRST RESPONDENT

J U D G M E N T

CORAM: MAKUME J AND MOOSA AJ

MOOSA: AJ (MAKUME, J CONCURRING):

- [1] The Appellants were tried in the Regional Court Benoni before the learned Magistrate S Makamu in respect of the following charges:

[1.1] First Appellant – Murder.

[1.2] Second Appellant – Murder and two counts of assault with intent to cause grievous bodily harm.

[1.3] Third Appellant - Murder.

- [2] All three Appellants pleaded not guilty on all charges and were sentenced as follows:

[2.1] First Appellant – 10 years imprisonment

[2.2] Second Appellant – 10 years imprisonment. (The counts of assault were taken together with the murder charge for sentencing purposes.

[2.3] Third Appellant – 10 years imprisonment.

- [3] The Appellants were granted leave to appeal against conviction and sentence

- [4] The common cause issues are:

[4.1] That the Second Appellant armed herself with a knife and stabbed the deceased with it, as a result the deceased died.

[4.2] That all three Appellants and the two sate witnesses, Dumisa Bentele and Noxolo Bentele were on their way to the police station when the deceased was stabbed.

[5] The facts which are in dispute are whether:

[5.1] The First and Third Appellant held the deceased in order for the Second Appellant to stab her thus acting in common purpose with the Second Appellant.

[5.2] The deceased attacked the Second Appellant requiring the Second Appellant to defend herself.

[5.3] The Second Appellant stabbed the deceased in self-defence, and if so, did she exceed the boundaries of self-defence or not.

[6] The State's first witness Dumisa Bentele "Dumisa" in examination in chief testified that the deceased "was held on both sides by, on the one side by accused number 1 and on the other side by accused number 3 and accused number 2 was standing in front of the deceased."¹

[7] Under cross examination she changed her evidence and testified that the Second Appellant was on her knees and the deceased bending over the Second Appellant at the time of the stabbing. This is also the version of the Appellants.

¹ Page 12 – lines 5-10 – typed record.

- [8] This version was also corroborated by the State's second witness Noxolo Bentele "Noxolo".²
- [9] "Dumisa" further testified that she did not see any blood on the First Appellant's face even though she was the one who stabbed the First Appellant.
- [10] Both the state's witnesses did not see the stabbing as they testified that they were walking single file to the police station and were concentrating on the traffic around them, they only realised that something had happened when the deceased screamed that she had been stabbed.
- [11] Noxolo contradicted the evidence of Dumisa and when confronted with the contradictions in her evidence she stated that she could not remember.
- [12] Noxolo then testified that she could not give any reason as to why they had followed the Appellants into their home and why the Second Appellant would have stabbed the deceased out of the blue and without any reason.
- [13] Under further cross examination, Noxolo further conceded that it was probable that the First and Third Appellants were holding the deceased in order to possibly keep her up or stop the fight and not to aid the Second Appellant to stab the deceased.

² Page 100 – lines 6-17 typed record

[14] The Appellant's versions are summarised as follows:

[14.1] The deceased and the eye witnesses were the aggressors that evening.

[14.2] The deceased was drunk

[14.3] The police officers and/or paramedics who attended the scene did not find any weapons.

[14.4] According to the police officers who attended the scene neither of the two eye witnesses was present at the scene.

[14.5] The First Appellant was indeed injured and Constable Tshabalala confirmed that he saw a lot of blood on the face of the First Appellant.

[14.6] During the stabbing of the deceased, there was a commotion, that it is not quite clear as to what transpired however it is clear that the deceased and the Second Appellant were engaged in a fight.

[14.7] The visibility at the scene where the deceased was stabbed was not every good.

[14.8] The Appellants went directly to the Police station in order to lay a complaint immediately after the deceased was stabbed.

[14.9] The Second Appellant testified that she fetched a knife from her home to use as protection as the area heading to the police station was very dangerous, especially at night.

[14.10] The Second Appellant's version was that in stabbing the deceased she was acting in self-defence.

[15] The learned Magistrate in convicting the Appellants said the following:

*"I am not persuaded to believe that the evidence of the three accused pertaining to the manner in which the deceased was stabbed is true and as such I reject their version."*³

[16] In so doing the learned Magistrate placed the onus on the Appellants, the learned Magistrate did not give reasons for not accepting their versions as being reasonably possibly true and merely subjectively took the versions of the State's witnesses to be true.

[17] The learned Magistrate did not even deal with the testimony regarding the two counts of assault against the Second Appellant. If he had done so then it would have confirmed that there was acrimony between the deceased, the witness and the Appellants prior to the stabbing and the deceased's part as an aggressor would be considered in confirming that there was a reasonable probability of self-defence.

[18] In view of the foregoing, I am of the view that the learned Magistrate erred in finding that the State had proved its case beyond a reasonable doubt. See **SV Kubeka 1982 1 SA 534 (W)**^{S37} where Solomon AJ said the following:

"Whether I subjectively believe him is, however, not the test, I need not even reject the State's in order to acquit him. It is not enough that he contradicts other acceptable evidence. I am bound to acquit him if there exists a reasonable possibility that his evidence may be true. Such is the nature of the onus of the State."

³ Page 387 – lines 9 -12 typed record

- [19] I accordingly find that there is insufficient evidence to prove that the First and Third Appellants acted in common purpose with the Second Appellant at the time when the Second Appellant stabbed the deceased.
- [20] The Second Appellant acted in self-defence, when she stabbed the deceased. The question is whether in doing so she exceeded the boundaries of self-defence.
- [21] The Second Appellant was clearly aware that the deceased was drunk and had been the aggressor all along. When she joined the group on the way to the Police Station it is the deceased who rushed to her and they started pushing each other.
- [22] The fact that the Second Appellant was seen on her knees must indicate that the deceased must have caused that and at that time the only thing that must have come to her mind was that the deceased was about to hurt her that is when she decided to use the knife to stab the deceased. The deceased was not armed it was not necessary for the Second Appellant to have used a knife to ward off further attack from the deceased. She could have still used her hands. I accordingly find that in so doing she exceeded the limits of self defense.
- [23] In my view the State failed to prove that the Second Appellant had the necessary intention to kill the deceased. The Second Appellant by her actions made herself guilty of culpable homicide.

[24] What now remains is what an appropriate sentence should be now that the count of murder is to be side aside. The Second Appellant was a young 18 year old and is a first time offender, there is sufficient evidence that the deceased and her family were the aggressors from the beginning of the whole episode. I do not think that the Second Appellant need spend further time in prison.

[25] In the result, I propose the following order be made:

[i] The Appeal against conviction in respect of First and Third Appellants is upheld.

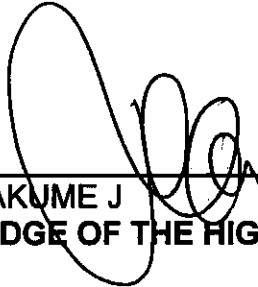
[ii] The conviction on the count of murder is respect of the Second Appellant is set aside and substituted by a conviction of culpable homicide.

[iii] The Second Appellant is sentenced to imprisonment for a period of 6 years which is wholly suspended, for a period of 5 years on condition that the Second Appellant is not found guilty of an offence of which violence is an element.



T MOOSA
ACTING JUDGE OF THE HIGH COURT

I agree



MAKUME J
JUDGE OF THE HIGH COURT

COUNSEL/LEGAL REPRESENTATIVE FOR THE APPELLANTS:

ADV M VAN WYNGAARD

COUNSEL/LEGAL REPRESENTATIVE FOR THE RESPONDENTS:

ADV. M MOLATUDI

DATE/S OF HEARING: 15 August 2016

DATE OF JUDGMENT: 19 August 2016