IN THE HIGH COURTOF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

CASE NO: A342/2019

REPORTABLE:NO/YES

OF INTEREST TO OTHER JUDGES:NO/YES

REVISED

Dte:02 February 2021

AYANDA ALFRED MASUKU **APPELLANT**

and

STATE **RESPONDENT**

DATE OF HEARING: This matter was enrolled for hearing on 10 **SEPTEMBER 2020**, but was dealt with or determined on the basis of the papers or record and written argument filed on behalf of the parties, without appearance and oral argument.

DATE OF JUDGMENT: This judgment was handed down electronically by circulation to the parties' representatives by email. The date and time of hand-down is deemed to be 2 FEBRUARY **2021**

JUDGMENT

KHUMALO J (NEUKIRCHER J concurring)

INTRODUCTION

[1] The Appellant, is with leave of the Regional Court, Benoni (the court a quo) appealing against his conviction by the court's learned Magistrate Schutte on 27 June 2019, on charges of murder (read with the provisions of s 51 (2) of the Criminal Law Amendment Act 105 of 1997 (CLAA) and s 257 and 258 of the Criminal Procedure Act 51 of 1977 (CPA)) and assault, for which he was on 10 July 2019 sentenced to a period of 14 years and 12 months imprisonment, respectively. The sentences were ordered to run concurrently. The effective sentence is as a result 14 years' imprisonment.

[2] On the charge of murder he was found to have intentionally and unlawfully murdered one M N[…] (the deceased) on 27 October 2018 at or near Benoni, by stabbing him once with a knife. He was also found on the same date and place to have assaulted one S M[…] (Miss M[…]) (the Complainant) by hitting her with open hands and threatening to stab her with a knife.

[3] The Appellant was duly represented during the trial and pleaded not guilty to both charges. On the charge of murder, he admitted to having stabbed the Appellant once but pleaded self-defence. The circumstances under which the fatal wound was inflicted on the deceased was in dispute.

[4] The court a quo found that the Appellant's guilt on both charges was proven beyond reasonable doubt, and relied on the evidence admitted in terms of s 220 and of Miss M[…], a single witness, whose evidence it concluded was the truth and therefore credible. The state was found to have discharged its onus to prove its case beyond reasonable doubt. The Appellant's version, which

was the only one presented on his behalf, was rejected as false and not reasonably possibly true.

[5] The salient facts are that on that day an altercation ensued between Ms M[…]'s nephew, A[…], the deceased (who is A[…]'s friend) and the Appellant and his friend V[…]. V[…] stayed with his grandmother who is Miss M[…]'s neighbour. The fight took place in and near the backyards of Ms M[…] and the grandmother's houses. According to Miss M[…], the deceased was trying to intervene, when he was stabbed to death by the […]year-old Appellant.

[6] Ms M[...] was the only eye witness who testified for the state. On the day of the incident she was watching soccer on TV with Alex and the deceased when the two left to buy alcohol at a tavern. Alex came running back and closed the door behind him. He was followed by V[...] who came running accompanied by the Appellant. When Ms M[...] asked what was happening, Alex did not say anything. The Appellant and V[...] tried to hit Alex who was hiding behind Miss M[...] and instead had hit Ms M[...] instead with open hands on her face. V[...] hit Miss M[...] twice and thereafter apologised and told Miss M[...] that their intention was to hit Alex. Miss M[...] tried to stop the fight but V[...] continued and pulled Alex outside the yard. V[...]'s grandmother came into Miss M[...]'s yard and threw stones at Alex. A stone struck Alex on the face and he fell to the ground. V[...] then hit Alex who was lying on the ground. Miss M[...] asked the grandmother to reprimand the children instead of encouraging them to fight. The grandmother did not listen. The deceased arrived whilst Ms M[...] was complaining about also being hit by V[...] and the

Appellant. The deceased confronted V[...] and the Appellant about it. The two turned on the deceased and started assaulting him as well. The deceased retaliated and a fist fight ensued. Miss M[...] told the grandmother that she is very brave to come and start a fight in another man's yard. That is when the three ran off into the street and back into the grandmother's yard, chased by Alex and the deceased, who stopped outside the grandmother's gate.

[7] In a moment, the Appellant and Alex came out rushing out of the grandmother's house and gate. The Appellant carried a silver knife. Miss M[...] warned the grandmother that Appellant was holding a knife and their intervention was needed, otherwise they were going to hurt each other. The grandmother did not respond. The Appellant approached the deceased and threatened to stab him. The deceased called the Appellant a bluff, saying the Appellant was too young, he would not stab him. The Appellant stabbed the deceased once underneath his left hand side nipple. When the Appellant tried to stab the deceased again, Miss M[...] intervened trying to stop the Appellant. The deceased, trying to avert a further attack, picked up a stone but as he was losing strength, he struggled to throw it at the Appellant. The Appellant threatened to stab Miss M[...] and took a swipe aiming at her stomach but Miss M[...] ducked. When he aimed at Miss M[...]'s shoulder, she again ducked and managed to grab the knife from the Appellant. At that time the grandmother ran back into her house to fetch water and poured it on them. The deceased ran into Miss M[...]'s yard holding his wound and fell near the door. By the time Miss M[...] got to him, he had passed on. Miss M[...] handed the knife over to the police.

[8] Miss M[...] confirmed under cross examination that she was not aware of what transpired prior to Alex coming back running into the house. She also did not observe any wounds on the Appellant when he was chasing Alex into her house and assaulting her, nor did the Appellant sustain any injuries during the fight that occurred in her presence. She denied what was put to her, that the deceased had a knife and inflicted injuries on the Appellant in the grandmother's yard. Miss M[...] insisted that the only person that was carrying a knife was the Appellant which he came holding out of his grandmother's house. She did not agree with Appellant's version that was put to her that everything happened at the grandmother's yard. She could also not comment on Appellant's alleged version of how the fight started, that V[...], N[...] and T[...] were sitting outside the grandmother's house drinking liquor when Alex passed by and started insulting N[...] and T[...]. A fight ensued between V[...] and Alex. Alex was then assisted by 6 other men who were accompanying him. The Appellant ran into the grandmother's house. Miss M[...] pointed out that the 6 or more men only came after the deceased had passed on, looking for V[...] whom the grandmother had locked inside her house. It was put to her that the Appellant is the one who ran into the grandmother's house and for whom the men had threatened to burn her house if the grandmother did not let him out and all this happened before the stabbing. Miss M[...] was adamant that it was V[...] and not the Appellant who ran into the house after the stabbing. It was also put to her that the deceased had earlier come out with a knife when they were all standing in front of the gate. The deceased stabbed the Appellant three times upon which the Appellant stabbed the deceased in

self- defence. The Appellant had no intention of stabbing anybody. He thereafter put the knife down and ran away. Miss M[...] denied this version of the Appellant, particularly that the deceased was armed or that the Appellant was stabbed by the deceased whilst the deceased was trying to stab him. She said the unarmed deceased was stabbed once and she got between them. The Appellant then tried to stab her twice and she managed to take the knife away from him.

[9] Alex was not available to testify as he had gone back to Zimbabwe. One N M[…] whom the state had intended to call as a witness was made available to the defence and the state closed its case.

[10] The Appellant's version is that he was sitting with his friends, N[...] and T[...] outside the gate of V[...]'s grandmother's house. Alex walked past the gate and swore at N[...] and T[...]. V[...] stood up and confronted Alex about his swearing at the ladies. Alex started fighting with V[...]. The Appellant stood up with an intention to separate them and that is when Alex called his 6 or 7 friends accusing the Appellant and V[...] of ganging up against him. When Alex's friends got there, they, without asking any questions started fighting with Appellant and V[...]. The deceased, who was one of Alex's 6 friends, took out a knife and stabbed Appellant on both arms. V[...] ran away and when Appellant also tried to run, the group locked him up inside the grandmother's yard and he ran into the grandmother's house. The grandmother chased him out as the group was throwing stones at the house. He took a knife from the table and went out. The group surrounded him. The deceased approached

him with an intention to stab him again but he managed to stab the deceased first, in the neck. He then put the knife down. The other men fled. Miss M[...] took the knife. The deceased went to Miss M[...]'s house whilst he decided to go home. He denied assaulting Miss M[...] or being at her house.

[11] The Appellant insisted under cross examination that it all happened inside the yard of V[...]'s grandmother. He said he tried to run away but he was surrounded by the group. He thought coming out carrying a knife will scare and make the group run away. Instead the group surged forward. He could not go back into the house as the grandmother had chased him out. He denied that anything was said between him and the deceased or Miss M[...], except asking the deceased to stop stabbing him. It was put to him that he armed himself with a knife and went out to avenge himself, not try run away. He denied that or assaulting Miss M[...], also that the deceased was unarmed or that the stabbing took place outside the grandmother's gate. He alleged that he did not report his stabbing by the deceased as he was still confused about what he did. He could not explain what was put to him that the only injuries he complained about when the court suggested that he be assessed and a J88 obtained was a laceration on his left arm. The J88 instead refers to wounds on the left forearm elbow, right middle finger, right index finger and at the back of his head. It was confirmed that although the deceased was supposed to have bled all the way to Miss M[...]'s house, no blood was found at the grandmother's place where the Appellant alleges the stabbing took place..

[12] The Appellant closed his case without calling any of the defence witnesses he mentioned in his evidence. He also did not call N[...], notwithstanding that she was made available to the defence.

[13] Taking into account the totality of the evidence the trial court found the single state witness, Ms M[...] to have been a credible witness whose testimony could be accepted with confidence and not to have been motivated by anything as the Appellant was unknown to her. She was indeed candid and objective about the assaults admitting to certain things that were favourable to the Appellant which if she was motivated by anything against the Appellant she would have a reason to deny. The court also found her version on how she got hold of the knife from the Appellant probable and consistent with the story that the Appellant tried to also stab her. The Appellant's version that he never saw her in the yard or during the altercation but she suddenly came into the grandmother's yard to pick up the knife was found improbable.

Appeal

[14] The Appellant raises the issue of a single witness as the main ground of his appeal against his conviction. He contends that the state relied upon the evidence of Ms M[...], a single witness, when:

[14.1] Miss M[...] did not witness all the events leading to the stabbing of the deceased. She specifically could not say why Alex came back running into the house and hid behind her back or would the Appellant, Alex and his grandmother emerge from the grandmother's house and with no apparent reason come back with the Appellant carrying a knife. She

also could not say if the deceased was stabbed without any provocation. The only person who has answers is the Appellant;

[14.2] Miss M[...] paints a picture of Alex and the deceased having done nothing to start the several fights between V[...] and them. He argues that the version of the Appellant is more probable than that of the state's single witness;

[14.3] the state had failed to call witnesses to corroborate the single witness' evidence, which was accordingly not satisfactory;

[14.4] the Learned Magistrate should have found his version to be reasonably possible true and acquitted him.,

[15] Conversely, the Respondent argued with reference to *R v Abdoorham* 1954 (3) SA 163 (N) at 165 E & F that the court is entitled to convict on the evidence of a single witness if it is satisfied beyond reasonable doubt that such evidence is true. Furthermore, that the court may be satisfied that the witness is talking the truth notwithstanding that in some respects he is an unsatisfactory witness; see *S v Sauls & Others* 1981(3) SA 172 at 180 E-G.

Legal framework

[16] In *S v Pistorius* 2014 (2) SACR 314 (SCA) at [30] Bosielo J for the court enunciated that:

> *"It is a time-honoured principle that once a trial court has made credibility findings an appeal court should be deferential and slow to interfere therewith unless it is convinced on a conspectus of the evidence that the trial court was clearly wrong."*

[17] In *S v Sauls & Others* (*supra*) the court held that:

> "*there is no rule of thumb test or formula to apply when it comes to a consideration of a credibility of a single witness. The trial judge will weigh its evidence and consider its merits and demerits and having done so will decide whether it is trustworthy and whether despite that there are shortcomings, defects or contradictions, he is satisfied that the truth has been told. The cautionary rule may be a guide to a right decision, but it does not mean that the appeal must succeed, if any criticism it does not matter how slender, of the witness' evidence was well founded. It has been said more than once that the exercise of caution must not be allowed to displace the exercise of common sense."*

See also *S v Artman & Another* 1968 (3) SA 339 (A) at 341C.

[18] A conviction on the basis of a single witness' evidence is therefore possible as provided in s 208 of the CPA. The evidence should be given by a competent witness and be clear and satisfactory in all material respects, even though the witness may be an unsatisfactory one, as per *Abdoorham supra,* and correctly pointed out in Respondent's heads of argument. The onus rests on the State to prove the guilt of the Accused beyond reasonable doubt, there is no obligation on an accused to convince the court of his innocence. The court can only convict if satisfied that the evidence of the single witness in its clear and satisfactory form proves the Appellant's guilt beyond reasonable, not all, doubt. it is not said that the evidence should be without criticism, but

the impact of the criticism on the material aspects determines whether it is satisfactory.

[19] The court, in a well- known judgment of *R v Mokoena* 1932 OPD 79 at (80) per De Villiers JP, when referring to an old section which dealt with uncorroborated evidence of a single witness held that:

> ***"thus the section ought not to be invoked where, for instance, the witness has an interest or bias adverse to the accused****, where he has made a previous inconsistent statement, where he contradicts himself in the witness box, where he has been found guilty of an offence involving dishonesty, where he has not had proper opportunity for observation, etc."(my emphasis)*

[20] It would therefore be in exceptional cases that an appeal court will be entitled to interfere with the trial court's valuation of the oral testimony of witnesses. Consequently in order to succeed, the Appellant will have to convince the Appeal Court that the trial court was wrong in accepting the evidence of the state's single witness and rejecting his version, in so far as it was in conflict with that of the state, as being reasonably possibly true, hence a reasonable doubt will not suffice to justify interference with such findings; see *R v Dhlumayo and Another* 1948 (2) SA 677 (A) at 705-706; *S v Francis* 1991 (1) SACR 198 (A) at 204c-e; *S v Monyane and Others* 2008 (1) SACR 543 (SCA) at para [15].

[21] Miss M[...], the single witness in *casu*, testified on all that she saw happen in her presence, including the circumstances under which the deceased was stabbed and she was assaulted, which indicates and proves beyond reasonable doubt that the Appellant was not acting in self- defence. She indeed confirmed to not knowing why Alex came back running or the Appellant and V[...] were chasing Alex as nobody told her when she asked. Furthermore, she pointed out that the Appellant and V[...] continued to assault her in her house, which assault was not justifiable, notwithstanding that they said they intended to hit Alex, as, even when they realised that they were hitting Miss M[...] instead of Alex, they continued to hit her. The court confirmed that she had no interest or bias, adverse to the Appellant who was unknown to her. She never contradicted herself in any material respect. The previous statements made to the police were confirmed not to have been read back to her and to have been brief. She was a satisfactory witness whose evidence the court correctly found could be accepted with confidence.

[22] Furthermore the testimony that after Appellant had sought refuge in the grandmother's house where he was seemingly safe, he armed himself with a knife, came out and went straight to threaten the deceased, who seemingly did not believe that Appellant could stab him contradicts Appellant's self-defence allegation. Appellant stabbed the deceased, notwithstanding that he knew what was happening outside and aware that he was not in any imminent danger from which he could not run away. Appellant as a result came out of the house carrying a knife and instigated the attack instead of averting it. He had intended stabbing the deceased. The Appellant also took a swipe at Miss

M[...] who had put herself in harm's way in defence of the deceased to try and stop a further attack by the Appellant.

[23] It is certainly also improbable that the alleged crowd that has allegedly witnessed the Appellant stabbing the deceased and baying for him would have let him go after he has put the knife down.

[24] It is therefore clear beyond reasonable doubt that the Appellant's allegation of having acted in self-defence, averting an attack or being under a threat of an attack by the deceased when he stabbed the deceased, is not only improbable but false beyond reasonable doubt. The attempt by the Appellant to pretend that he also came under attack and was stabbed during the altercation was correctly foiled by the court that had previously noted his complaint and ordered the injury he claimed to have suffered under attack by the deceased to be examined. The Appellant was therefore correctly found to have intentionally and wrongfully killed the deceased and of assaulting Ms M[...].

[25] The Appeal Court under such circumstances has little space to manoeuvre, as confirmed in *S v Mabena* 2012 (2) SACR 287 (GNP) that:

> *"The power of an appeal court to interfere on fact with the findings of the court below is limited. Interference in this regard is only permissible where the findings of the court below are vitiated by misdirection or are patently wrong. I find no basis for interference in the present case…."*

[26] The Appellant has failed to convince the Court that the trial court was wrong in rejecting his version as being reasonably possibly true and therefore there is no justification to interfere with the court a quo's finding.

[27] In the circumstances I therefore make the following order:

1. The appeal against conviction is dismissed.