IN THE HIGH COURT OF SOUTH AFRICA,

KWAZULU-NATAL DIVISION, PIETERMARITZBURG

CASE NO: AR403/18

In the matter between:

MOSES GASA APPELLANT

and

THE STATE RESPONDENT

This appeal was, by consent between the parties, disposed of without an oral hearing in terms of s 19(*a*) of the Superior Courts Act 10 of 2013. This judgment was handed down electronically by circulation to the parties' legal representatives by email and released to SAFLII. The date and time for hand down is deemed to be 09h30 on 28 August 2020.

ORDER

On appeal from: Regional Court, Port Shepstone (sitting as court of first instance):

The appeal is dismissed.

JUDGMENT

Chetty J (Hadebe J concurring**):**

[1] The appellant was charged with the murder of Sanele Patrick Ngcece (the deceased), a 29-year-old male. It is alleged that the offence was committed on 24 March 2016. The charge sheet was framed in terms of section 51 and Parts I and II of Schedule 2 of the Criminal Law Amendment Act 105 of 1997, in terms of which

murder, if premeditated, would attract a minimum sentence of life imprisonment. The appellant was legally represented at his trial, and after consideration of the evidence, the learned magistrate on 12 October 2017 found the accused guilty of murder as charged, and sentenced him to a period of eight years' imprisonment, of which three years were suspended. The appellant was therefore required to serve an effective five years' imprisonment.

[2] This appeal comes before us as a result of the court a quo having granted leave to appeal against the conviction.

[3] It is submitted on behalf of the appellant that the State failed to prove its case beyond reasonable doubt. In this regard, it is contended that the two State witnesses, Mr Philiasande Ncane (Ncane) and Mr Fano Snethemba Khowa (Khowa) who testified to seeing the appellant being stabbed, gave evidence which was inconsistent with the findings of the post mortem report as to the number of stab wounds on the decesaed. In particular, with regard to Ncane, it was submitted that he testified that he saw the appellant stab the deceased four times, which included a stab inflicted to the back, however it was submitted that the post mortem report, which was handed in without the benefit of the doctor who compiled the report having to testify, indicated the presence of only three stab wounds on the deceased's chest and neck. There is no record of a stab wound on the deceased's back.

[4] In addition to this discrepancy,it was also submitted that the eye witnesses were not credible witnesses as they admitted to being drunk at the time when they are alleged to have witnessed the incident.

[5] The last ground on which the appellant relies is that the State, in its evidence before the court a quo, failed to prove the chain of evidence of the conveyance of the body of the deceased 'from the scene to the government mortuary'. I assume that what this ground is intended to suggest is that the State has failed to show, through evidence, that the deceased did not suffer any further injuries while his body was in transit to the government mortuary, which intervening injuries could have caused his death. In other words, the State would be required to establish a causal nexus

between the injuries sustained by the deceased at the hands of the appellant, and his eventual death. It is worth noting that at the commencement of the trial, the prosecutor indicated that he was in possession of the post-mortem report together with the 'chain', and enquired from the defence whether they have any objections to the handing up of the documents or whether they were disputing the documents. In response the legal representative for the appellant indicated that he would 'consider' the matter during the course of the proceedings. He eventually did not agree to their admission.

[6] Ncane testified that he, together with Khowa and others were drinking beer on the veranda of a tuck shop on the evening of 24 December 2016, in the company of the deceased. He testified to drinking perhaps two quarts of beer. The visibility of the surrounding area was good, and the streetlights were on at the time. While they were standing on the veranda, the appellant, who was in the company of two others, walked directly towards the deceased and without provocation, proceeded to stab him four times with a knife, to his back and front. Ncane was about 10 metres away from the deceased at the time. The deceased then ran off to his home, with the appellant also leaving the scene.

[7] Before commencing his cross-examination of the witness, the legal representative of the appellant placed on record that the defence would not be admitting the 'chain of evidence' or the medico-legal report. The State was therefore required to prove the contents of these documents.

[8] The representative of the accused in the court a quo was badgering the State witness in his cross-examination of the witness, which the presiding magistrate simply allowed. In addition, the cross-examination traversed matters totally irrelevant to the essence of the charge facing the accused, including the state of sobriety of the deceased, which has no relevance to the guilt or innocence of the accused. Ncane was adamant that he saw the deceased being stabbed four times, despite it being put to him that the medical report compiled by the doctor noted that the deceased had sustained two stab wounds - one to the neck and the other to the lung. The defence put forward on behalf of the appellant was that he had been sent to the shop to buy certain items for Christmas the following day. While waiting to pay for the

items, he heard the sound of a knife being opened behind him. The deceased attempted to stab him and in the ensuing struggle, the appellant stabbed the deceased in self-defence. This version was denied by Ncane who said that while he could not be certain as to where the exact blows from the appellant landed, he did see that the deceased was stabbed in the back and front of his body. It was further put to the witness that the appellant and the deceased were entangled over a romantic relationship with a young woman, Asiphe. Even if this were the case, I fail to see what relevance this had with regard to the charge of murder against the appellant. It certainly did not give the appellant justification for fatally stabbing the deceased.

[9] Mr Fano Khowa testified that on the day in question, he was present with the previous witness, Ncane, and the deceased. He corroborated the version of Ncane that the appellant arrived in the company of two other males. The appellant walked directly towards where the deceased was standing on the veranda at the tuck shop. Without any provocation, the appellant stabbed the deceased. He did not recall the number of stab wounds inflicted. The deceased then fled towards his house, where he collapsed near his gate. The appellant and his companions fled in a different direction. Khowa also testified that he had been drinking on the day in question but 'sobered up' on seeing the stabbing incident taking place in his presence. Khowa's evidence was uncontested and was rightly accepted as proven facts by the court a quo. See *President of the Republic of South Africa & others v South African Rugby Football Union & others* 2000 (1) SA 1 (CC).

[10] I am not persuaded by the contention that the mere fact that the two State witnesses, who gave direct testimony of the appellant stabbing the deceased in their presence, can be dismissed on the mere ground that they were drinking beers at the time of the incident. There is nothing to suggest from their testimony that their recollection of the events on the night in question had been impaired by the consumption of alcohol. I am satisfied that the court a quo was correct in accepting the evidence of the two eyewitnesses, whose evidence corroborated each other in material respects, despite the discrepancy in the evidence as to the number of stab wound sustained by the deceased, and the contents of the post mortem report.

[11] The arresting officer, Warrant Officer Nzimakwe, testified that he had received a murder docket in which the appellant was identified as a suspect in the stabbing of the deceased. He was assigned the matter as he lived in the area of Dumezulu near Port Edward, which is where the deceased was stabbed, and after which he was transported to the Thembakisiwe Clinic in Izingolweni and thereafter to Murchison Hospital where he died. The witness confirmed that on arresting the appellant, he searched him and found an Okapi knife in his possession, which appeared to have been cleaned. When Ncane gave evidence, he testified that the appellant stabbed the deceased with an Okapi knife.

[12] Under cross-examination by the defence attorney, the police officer was questioned as to his alterations to certain police exhibits, including the medical report (J88). The witness denied that he had altered any of the reports, indicating that he had merely inserted the correct CAS number on the document as the case had been transferred from Port Shepstone to Port Edward.

[13] As with the previous witness, the defence attorney conducted his cross-examination in what appeared to me to be an abrasive and discourteous manner, including at one stage directing the police officer to ‘behave’ himself. When the witness attempted to give an explanation for his answer, he was refused the opportunity to do so by the defence attorney. It is remarkable that throughout his conduct in this trial, the magistrate did not deem it proper to issue a warning to the defence attorney to conduct himself in an appropriate manner. In any event, I find the explanation for the witness placing his signature on the post mortem report to be entirely plausible as there were two police stations which had dealt with the case. There was no attempt to materially change the content of the report or the venue of the post mortem, which was Port Shepstone. The witness was also chastised for having commissioned an affidavit by a nurse at the causality ward at Murchison Hospital without the document containing her name. Despite this impropriety on his part, which he recognised, his evidence was found to be credible by the court a quo. I can find no reason to interfere with that decision by the court a quo.

[14] The State also called Ms Constance Shusha, the sister of the deceased who confirmed that she was at her home on 24 December 2017 when she received the

news that her brother had been stabbed. She went out and saw the deceased lying on the ground, near the gate. She confirmed that he was bleeding, from what she saw, from four stab wounds. Together with her cousin, they rushed the deceased to the Thembakisiwe Clinic for medical attention. However, in light of the severity of his injuries, he was transported to Murchison Hospital where he died shortly after his arrival due to excessive bleeding. Ms Shusha stated that they were told by the doctors that they had to drain three litres of blood from the deceased. She also testified that she was present when the mortuary vehicle arrived to transport the body of the deceased to Port Shepstone.

[15] The next day, she accompanied her brother to the mortuary in Port Shepstone in an attempt to ascertain when they might be able to release the body for burial. They were informed that this could only be done after the doctors advised them that it was in order to do so, presumably after a post mortem had been conducted. The prosecutor in the court a quo attempted to clarify with Ms Shusha that the deceased sustained no further injuries from the time his body was conveyed from their home to Murchison Hospital where he eventually died. This line of questioning was interrupted by the defence attorney with a frivolous objection, which appeared to be allowed by the magistrate. What is evident is that there was no evidence whatsoever before the court that the deceased sustained any further injuries during the course of his conveyance from the gate of his home to the hospital where he eventually died.

[16] The witness was steadfast in her version under cross-examination that she saw the deceased with four stab wounds, being to the neck, to the right of the chest, another to the stomach area and the fourth to the area around the kidney on the right-hand side.

[17] The brother of the deceased, Mr Linda Ngcece, testified that he had been informed by Ms Shusha of the stabbing of their brother. He then rushed by car, together with his mother and brother, to the clinic where the deceased had been taken. There they witnessed the nurses attempting to treat the deceased. On discovering that his injuries were too serious, they advised the family that he should be taken immediately to the Murchison Hospital. Rather than wait for an ambulance to arrive, the family rushed him to the hospital in their vehicle. Unfortunately, the

deceased succumbed to his injuries at the hospital. The body of the deceased was then placed in a mortuary van and transported to Port Shepstone. Linda Ngcece also confirmed that from the time that the deceased was conveyed from the clinic to the hospital, the deceased sustained no further injuries. His evidence was uncontested.

[18] In so far as the chain of evidence is concerned, Mr Radyn in his written submissions on behalf of the State, made a compelling argument that having regard to all of the evidence before the court a quo, the State satisfied the burden of proving that the deceased sustained no further injuries from the time of the stabbing to the nursing staff at Murchison Hospital declaring that the deceased has passed away. In this regard, counsel for the State submitted that chain of evidence was established having regard to the direct evidence of Ncane and Khowa who witnessed the stab wounds being inflicted and seeing the deceased run off in the direction of his home. His sister, Ms Shusha gave evidence that she found the deceased outside the house bleeding profusely. Notably, she recalls seeing four wounds. Her evidence is that she conveyed the deceased to the clinic where the nurses tried to treat the deceased. At this stage Ms Shusha was joined by the deceased's mother and his brother Linda Ngcece. Both their evidence is consistent that the deceased was then conveyed to Murchison Hospital where he succumbed to his injuries. The body was thereafter transported to the mortuary by mortuary assistants. None of this evidence could be refuted, despite arduous cross-examination by the defence attorney, including the evidence of the relatives of the deceased that they were unable to collect the body the next day for a burial as a post mortem had to be done first.

[19] Counsel for the State conceded that the prosecutor ought to have called the doctor who conducted the post mortem as a witness in light of the contentions advanced by the defence attorney. However, even in the absence of the evidence by the doctor, I am satisfied that the court a quo correctly accepted the evidence of the eyewitnesses, and the family of the deceased as proof beyond reasonable doubt that the injuries inflicted on the deceased by the appellant resulted in his death. It must be noted that the appellant failed to testify in his own defence and therefore the evidence presented by the State is uncontested.

[20] As stated earlier, we are satisfied that the court a quo was correctly entitled to rely on the direct evidence of Ncane and Khowa in accepting as a proven fact that the appellant inflicted more than one stab wound to the deceased. The evidence of Ncane is that the deceased was stabbed four times. This evidence is not corroborated by Khowa who says that he cannot recall the number of times which the appellant stabbed the deceased. The corroboration as to the number of stab wounds related by Ncane can be found in the evidence of the sister of the deceased, Ms Shusha. This issue was raised in the court a quo to create doubt that the post mortem report on which the State relied referred to two stab wounds. In light of this discrepancy, the legal representative of the appellant sought to contend that there was doubt that the post report relied on was actually that which was compiled after an examination of the body of the deceased. In other words, the insinuation being that the State had actually relied on an incorrect report.

[21] To the extent that the appellant, not having testified in the court a quo, raises the issue of causation and suggests that the State failed to prove that the injuries inflicted on the deceased have not been proven to be the cause of his death, Mr Radyn relied on *S v Tembani* 2007 (1) SACR 355 (SCA), where Cameron JA considered the position of the appellant who shot his girlfriend in the chest. She was rushed to a public hospital and it was accepted that the hospital was grossly negligent in failing to care for her. As a result of their neglect, she developed septicaemia and eventually died. Mr Tembani submitted that in light of the hospital's gross neglect, he should not be held responsible for her death, but only for attempted murder. In the present matter, there is no evidence of any supervening act which could have been suggested as a cause of death other than the wounds inflicted on the deceased by the appellant. In *Tembani* para 10 the court stated that the inquiry is '. . . whether the act is linked to the death sufficiently closely for it to be right to impose legal liability'. In my view of the facts of this case, and as stated in *Tembani* para 12, there is no evidence whatsoever of any '. . . subsequent intervening act or omission [that] can exculpate an earlier fatal attacker from liability for death'. On that basis, even if it was established that the staff, either at the clinic or the hospital to which the deceased was taken to, were negligent in any way, this does not exculpate the appellant from liability for murder.

[22] In the result, we are satisfied that there is no merit in any of the grounds of appeal raised, and the appeal must fail.

[23] The following order is made:

The appeal is dismissed.

CHETTY J

For the Appellant:	Ms A Hulley
Instructed by:	Durban Justice Centre
Tel:	031 304 0100
Ref:	Ms.A.Hilley/X71633318
For the State:	K Radyn
Instructed by:	Durban Public Prosecution
Tel:	083 458 6748
Email:	KRadyn@npa.gov.za
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