



**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG**

CASE NO: AR228/2019

In the matter between:

ZANDISILE QAYI

APPELLANT

and

THE STATE

RESPONDENT

ORDER

1. The appeal in respect of the appellant's conviction for assault with intent to do grievously bodily harm is dismissed.
2. The appeal in respect of the appellant's conviction for the offence of murder is upheld and the appellant's conviction and sentence in respect of this charge are set aside.

JUDGMENT

Delivered on ⁴10 September 2021

Gani AJ et Mngadi J (concurring)

[1] On 23 October 2018 the appellant was convicted of two offences, assault with the intent to do grievous bodily harm and murder. The appellant appeals against both convictions with leave of the Court *a quo*.

[2] The offences arise from occurrences on the evening of 3 February 2018. The State's case, in summary, was that the complainant in respect of the first offence (Xolani Sqwayana) left a tavern with the appellant and another person (Kabelo) and during the course of them walking to Kabelo's house, words were exchanged between Xolani and the appellant subsequent to which the appellant drew his knife and attempted to stab Xolani. Xolani sustained injuries to his fingers as was evidenced by the medico-legal report. In respect of the murder offence the State's case was that this offence was committed after the first offence and arose from an altercation between the appellant and the deceased, witnessed by the second state witness (Atang Ramatseka) during the course of which the appellant and the deceased fought with knives and the appellant stabbed the deceased. Both Xolani and Ramatseka were single witnesses for the purposes of the respective offences.

[3] The appellant testified and denied stabbing Xolani. In respect of the murder offence the appellant's version was that he and the deceased engaged in a scuffle during the course of which the deceased was stabbed. His version was that the deceased had been armed with a knife, the appellant struggled with him and managed to dispossess him of the knife, the deceased then attempted to take possession of the

knife again, a struggle ensued and the deceased was stabbed accidentally during that struggle.

[4] In my view the appeal against the first conviction must fail. Although Xolani was a single witness, in its totality his evidence was clear, coherent and reliable and, when taken in conjunction with the other objective evidence, the State had proved beyond a reasonable doubt that the appellant was the person who had caused injury to Xolani. It was not in dispute that Xolani actually suffered injuries during the incident. The question was whether the appellant was the person who had injured him. In this regard Xolani positively identified the appellant and his evidence was corroborated by the testimony of Ramatseka. Ramatseka testified that he observed the appellant attempting to climb over the fence of Xolani's home and the appellant told him that he had been quarreling with Xolani. Further, even though the appellant's version as to what had transpired was different, on the appellant's own version he had chased Xolani, which supports Xolani's version that he had ran away after being stabbed by the appellant.

[5] On the evidence before the Court *a quo* therefore, the appellant was the person who had stabbed Xolani and the appellant's denial cannot reasonably, possibly be true. There was a discrepancy in Xolani's evidence as to which hand and fingers had been cut during the episode. In our view this is not material since the medico-legal report clearly shows that Xolani had been injured and this was not in dispute. The appeal in respect of the first offence therefore fails.

[6] On the evidence before the Court the State did not prove all of the elements of the offence of murder. It was not in dispute that the appellant and the deceased engaged

in a struggle during the course of which the deceased was fatally stabbed. The issue was whether the State's evidence demonstrated that the appellant had intentionally stabbed the deceased and in my view the evidence did not demonstrate this beyond a reasonable doubt. As above, Ramatseka was a single witness in respect of the murder offence. On Ramatseka's own version it was the deceased who had drawn a knife from his backpack in order to confront the appellant. Under cross-examination Ramatseka testified that the deceased had been advancing towards the appellant with his knife indicating that he was going to stab the appellant.¹ Ramatseka grabbed the deceased in an effort to disarm him, and both of them fell to the ground, however the deceased yet managed to get up and confront the appellant with his knife.² Ramatseka conceded during cross-examination that nothing prevented the appellant from delivering further blows to the deceased, which supports the appellant's version that he was warding off being attacked by the deceased and did not intend to kill him

[7] Ramatseka was also cross-examined on the statement he had provided to the police the morning after the event and his state of inebriety at the time of the incident. He made concessions in this regard which detract from the reliability of his version. He conceded that different versions of events had been provided and that drunkenness and alcohol were contributing factors to these different versions.³ Ramatseka's statement to the police a day after the incident was to the effect that the person who stabbed the deceased was unknown to him, he was under the influence of alcohol and he did not know what had transpired between the deceased and the person who had stabbed the deceased, nor did the deceased tell him who had stabbed him.⁴

¹ Evidence of Ramatseka, page 3, lines 1 - 4.

² Evidence of Ramatseka, page 3, lines 5 - 7.

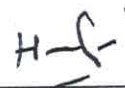
³ Evidence of Ramatseka, page 9, lines 17 - 20; Evidence of Ramatseka, page 11, lines 10 - 15.

⁴ Evidence of Ramatseka, pages 11 and 12.

[8] Considered in its totality, Ramatseka's evidence, as that of a single witness, cannot be regarded as clear and satisfactory in every material respect. His admission of being drunk and the discrepancies with his previous statement detract from the reliability of his evidence. In any event, his actual testimony was that it was the deceased who had commenced the attack and it is indisputable that the deceased was stabbed in the course of an attack on the appellant which he (the deceased) had initiated. It is the onus of the State to prove every element of the offence and the State's evidence did not prove that the appellant had intentionally killed the deceased. The evidence of the single witness was far too unreliable to support a conviction on the second count and the appeal must consequently succeed in respect of the murder conviction.

[9] In the circumstances I propose the following orders:

1. The appeal in respect of the appellant's conviction for assault with intent to do grievously bodily harm is dismissed.
2. The appeal in respect of the appellant's conviction for the offence of murder is upheld and the appellant's conviction and sentence in respect of this charge are set aside.



GANI AJ

I agree, it so ordered

A handwritten signature in black ink, consisting of several overlapping loops and a final flourish, positioned above a horizontal line.

Mngadi

APPEARANCES

Case Number : AR 589/18

For the Appellant : Mr V. E Ngwenya

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For the respondents : Ms S Singh

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Heard on : 10 September 2021

Judgement delivered on :