IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE NUMBER: A725/10

DATE: 11 MARCH 2011

In the matter between:

MQAPHELI NONANTI

and

THE STATE

JUDGMENT

BOZALEK, J:

The appellant appeals against his conviction in the Vredenburg Regional Court on 7 November 2007 on counts of murder and attempted murder for which he was sentenced to an effective term of imprisonment of 12 years. The appellant pleaded not guilty to the charges and was legally represented throughout the trial. He appeals with the leave of the magistrate.

Most unusually the trial commenced in October 2007, more than 10 years after the incident that gave rise to the charges. No explanation at all appears in the record for this inordinate delay in the prosecution, which is to be deprecated since such a lengthy delay must inevitably have a negative effect and impact on the administration of justice in criminal matters.

The State's case against the appellant was that on 21 June 1997 and at Saldanha the appellant had first attempted to kill a Mr Charles Visser by stabbing him with a knife and shortly thereafter fatally stabbed a Mr Willem Jakobus Vraagom. The appellant offered no plea explanation on the charge of attempted murder, count 2, but in relation to count 1 explained and formally admitted that he had stabbed the deceased once in self-defence. He also formally admitted the identity of the deceased and that he had stabbed him as described but placed in dispute that the deceased had died as a result of the stab wound in question.

The State called three witnesses, the first of which was a Mr Albert Brown who had been drinking in the shebeen outside of which the stabbings took place. He could add very little to the State's case, only that he had seen the deceased hale and hearty drinking in the shebeen in the early hours of the morning and had then seen him leave. Brown emerged, he

testified, 20 minutes later to find the deceased's body with a knife in his chest. He added that he had seen "*swartmense*" who had earlier been in the shebeen fighting with the deceased opposite the church shortly before he discovered the deceased's body.

Another State witness who was only able to give peripheral evidence was the policeman, Mr Joseph Oliphant. He testified that he was called to an open piece of ground in White City, Saldanha, on the morning in question at about 7.30 a.m. and found the deceased's body lying under a blanket. Alongside the body he found a knife and a pair of shoes not belonging to the deceased which items were booked in as exhibits. He was not able to say whether the knife had been tested for fingerprints.

The State's main witness was the complainant on count 2, Mr Charles Visser, who testified that he was a friend of the deceased and that they had consumed alcohol together that day. They then parted and in the early hours of the morning the witness had been drinking in the shebeen in Geelbek Street. On his way home he encountered the appellant who had asked him for a cigarette. When he gave him the cigarette which he was smoking the appellant tossed it away and demanded money from the witness. The latter told him he had

no money and he turned around and walked away. As he did so he felt a blow to his back. When he turned around to face the appellant the latter attacked him again stabbing him on his forehead and then in his chest near his heart. The witness showed the Court a 4 centimetre healed scar on his forehead. At that point the deceased arrived on the scene and told the witness to carry on home as he would see to the appellant.

Visser proceeded home and although encountering his stepfather and a friend there, simply collapsed on his bed. He was woken the next morning by family members who noticed that he was bleeding from his wounds and, noting an ambulance outside, they wondered whether he and the deceased had not fought with each other the previous night. Visser was taken to hospital in the same ambulance with the deceased. The witness conceded that he had been drunk on the night in question. He stated that he had not seen the appellant stab the deceased and when they left they, that is the deceased and the appellant, were "*bymekaar daar, amper soos mense wat nou praat en so aan ...*"

Two documents were admitted by agreement and the contents thereof, being firstly the J.88 form relating to an examination of Visser on 27 November 1997 which confirmed that he had old healed wounds on his forehead and then his left shoulder

blade and his right upper chest. The other document was a post-mortem report relating to the deceased which indicated that he had died as a result of three stab wounds, the first a 4 centimetre wound to his left lateral pectoral to a depth of 8 centimetres but which had not penetrated his ribcage; secondly, a 3.5 centimetre wound to his left anterior which had penetrated his chest and severed internal arteries and, finally, a 2.5 centimetre wound just right of his sternum which had penetrated his chest to a depth of 8 centimetres to the superior cava vena and the pericardium. No *viva voce* medical evidence was led but it would appear that at least the second and the third wounds were potentially fatal injuries.

The appellant testified on his own behalf and denied stabbing Visser. According to him in the shebeen Visser had thrown a glass of beer in his face for no apparent reason. In response he had hit Visser with a broomstick until he was stopped by others. Visser left the shebeen and he had followed half an hour later and had then come across Visser together with the deceased. The deceased had then without any forewarning stabbed him in his head and near his wrist whilst Visser stood by. The appellant then produced a knife, stabbed the deceased in his chest, whereupon Visser ran away and the deceased staggered and fell to his knees. The appellant then turned away and left the scene.

In convicting the appellant the magistrate accepted the evidence of Visser. He found him to be an impressive and convincing witness who had given logical chronological evidence which had withstood cross-examination. He noted that Visser had had ample opportunity to gild, to embroider his evidence so as to directly incriminate the appellant but he had not done so. By contrast he described the appellant as an extremely poor witness whose version of events differed in significant respects from that put on his behalf during cross-examination of the State witnesses.

The magistrate accepted Visser's account of the assault upon himself and found that the infliction of three stab wounds by the appellant, two of which were to Visser's chest, indicated that the appellant must have foreseen that he could have killed Visser.

Regarding count 1 the magistrate similarly accepted Visser's account of the encounter between the appellant and the deceased but noted that there was no direct witness to this stabbing. Using circumstantial evidence and inferential reasoning he found that no-one but the appellant could have inflicted the three stab wounds to the deceased. The magistrate accepted that the first stab wound could have been

inflicted by the appellant in self-defence but that the two wounds inflicted thereafter had, even on the appellant's own version of events, exceeded the bounds of self-defence.

Having regard to the location of the wounds, namely in the chest area near the heart and lungs and various major arteries, he concluded that the appellant must have foreseen that the stab wounds could have caused the death of the deceased but had reconciled himself with these consequences.

On appeal Ms Kuun on behalf of the appellant highlighted various discrepancies between the evidence of the three State witnesses as well as shortcomings in the investigation. She emphasised that the State's case rested upon the evidence of a single witness and contended that the State had failed to prove its case beyond reasonable doubt. In particular she contended that, having no admissions in this regard, the State had failed to prove that the stab wounds had led to the deceased's death. She submitted further that the principles relating to findings based upon circumstantial evidence had not been applied and she also criticised the conduct of the magistrate in extensively questioning the appellant.

Dealing firstly with this last criticism, I do not consider that the magistrate exceeded the bounds of proper judicial behaviour.

Turning to the criticisms of the State witnesses, it is so that there are apparent anomalies in their evidence. Brown testified that he had seen the deceased fighting with about four black men shortly before he came upon his body. However, he also testified that these men had been *toyi-toying* shortly before this; that when he found the body the blade of the knife was still protruding from the deceased's chest and that there had been another body lying nearby under a mattress. None of these observations were in any way supported or corroborated by any other witness.

The policeman who was called to the scene and disposed of the body found only that of the deceased and testified that the knife was found under the body of the deceased. Neither Visser nor the appellant spoke of any person being involved in the stabbing incident other than themselves and the deceased. It seems not unlikely that 10 years after the event the witness's memory, i.e. Mr Brown's, already perhaps befuddled by the consumption of alcohol on the night in question, failed him or perhaps for reasons best known to him he was intent upon embroidering his evidence. Whatever the case, I considered that his evidence in those respects can be disregarded. Other anomalies in the evidence are likewise probably accounted for by the inordinate delay in the prosecution.

only reasonable inference which can be drawn from such facts."

The deceased met his death as a result of three stab wounds. At least one of them was inflicted by the appellant shortly after he had stabbed Visser three times. The question which arises is, who else but the appellant could have inflicted the two remaining stab wounds to the deceased? Neither Visser nor the appellant testified that any other persons were involved in the incident and thus is it most unlikely that it was a third party. The deceased's body was found in the immediate vicinity of where the incident took place and, according to the appellant, when he left the scene the deceased had already fallen to his knees as a result of the first stab wound which he had suffered and which the appellant had inflicted.

In my view the magistrate correctly reasoned that the only reasonable inference to draw was that the appellant had inflicted all three wounds but had shrunk from admitting this since he could hardly claim to have acted in self-defence if he had inflicted all three wounds. The facts upon which the magistrate based his inferential findings were in accordance with all the proven facts.

In the circumstances, notwithstanding the shortcomings in the

investigation and the prosecution of this matter, I consider that the magistrate was correct in finding the appellant guilty on the charge of murder.

Counsel for the State is directed to place a copy of this judgment before the director of Public Prosecutions with a view to establishing why the prosecution in this matter was delayed for more than 10 years. That explanation should if at all possible be furnished to the presiding Judge within six weeks of the date of this judgment becoming available.

For these reasons I would dismiss the appeal against the convictions.

BOZALEK, J

MOSES, AJ: I agree.

MOSES, AJ

/DH