

IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE NUMBER:

A347/2010

5

DATE:

18 MARCH 2011

In the matter between:

10 **THE STATE**

and

XOLISA JEVU

15

JUDGMENT

VAN HEERDEN, AJ:

20 The appellant in this matter was charged with two charges;
assault with intent to inflict grievous bodily harm in that he
assaulted Thembisa Mampufu by hitting her with his fists. The
second charge is that on or about 22 July 2007 and at or near
Dunoon he did unlawfully and intentionally kill Thabang
Mampando by stabbing him with a sharp object.

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The appellant pleaded not guilty to both charges on 13 August 2007. On 13 October 2009 Appellant was found guilty on a charge of assault (common) and murder. On 27 October 2009 the appellant was sentenced to eight years' imprisonment, both
5 counts to be taken as one for the purpose of sentence. The appellant was further declared unfit to possess a firearm.

The appellant is appealing on both conviction and sentence. It, however, appears from the application for leave to appeal
10 that the appellant's application for leave to appeal is only against the conviction on the two charges. A power of attorney also relates to the appellant appealing against conviction. According to the heads of argument filed on behalf of the appellant the appellant was granted leave to appeal against
15 his conviction on 20 January 2010.

With regard to the conviction of common assault the State relied on the evidence of two witnesses, the complainant, Thembisa Mampufo, and the evidence of Busiswe Ngonya.
20 With regard to the murder charge the State relied on the evidence of Busiswe Ngonya and the deceased's brother, Richard Garwi.

The assault took place on Saturday evening of 21 July 2007.
25 The assault is indirectly connected to the murder which took
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place on the Sunday morning of 22 July 2007.

The State's evidence was that during the evening of 21 July 2007 the appellant arrived at a shebeen in Gcegceleay Street,
5 Joe Slovo. When he arrived there he placed two cell phones on a table and promptly fell asleep on a couch. Busiswe Ngonya (hereinafter referred to as "Busiswe"), testified that when the appellant awoke he noticed that one of his cell phones was missing and he enquired about its whereabouts.

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The complainant in the assault charge, Thembisa Mampufu (hereinafter referred to as "Thembisa") informed him that he asked a person by the name Orenta where the phone was. Orenta is now also the deceased. Thembisa informed the
15 appellant that the deceased was the only person who left the room, so it might have been him who took the phone. According to Busiswe an argument developed between the appellant and Thembisa and the appellant then assaulted Thembisa by smacking her on her face with his open hand and
20 also with his fist. The appellant left the premises and returned the next morning.

When the appellant returned on the Sunday morning of 22 July 2007 he was accompanied by a person known to Busiswe as
25 his brother, Vuyisa. While there, he told his brother that the

person he was looking for was not there.

The appellant then left and went to the house opposite the shebeen to ask the occupants where the deceased lived. As
5 he was busy enquiring about the deceased's whereabouts, the deceased came down a passageway between the houses, apparently to collect water. The deceased was noticed by the appellant, who followed him.

10 When Busiswe again saw the appellant he was walking back from the direction he had walked following the deceased. He had blood on his shirt and he had a blooded knife inserted at his waist. He returned to the shebeen and informed his brother in words to the effect that: "I have finished that shit".
15 His brother then asked him why he did not rather go to the police and make a charge against the deceased for the theft of the cell phone.

Busiswe could not see what happened at the deceased's
20 shack, but she saw that the appellant walked towards the deceased's shack where the deceased stayed with his brother. After the appellant returned to the shebeen he left with his brother.

25 Busiswe did not go to the shack, but the next thing she noticed

was that the deceased's brother, who also stayed in the shack with the deceased, was phoning for an ambulance because his brother had been assaulted. She estimated that the attack on the deceased occurred at approximately 10h00. She did not
5 see the deceased again, but she saw someone being put inside an ambulance.

Busiswe was adamant that she knew the appellant, as he was regularly present at her premises and one of his family, in fact,
10 married her aunt. Busiswe's evidence was not in any material aspect challenged to be incorrect in cross-examination.

The deceased's brother, Richard Garwi (hereinafter referred to as "Garwi"), was sitting with his brother, Orenta Thabang
15 Mampande, in their shack when there was a knock on the door. The deceased got up to open the door and with that the deceased was stabbed on his left side and fell down. He thought that the incident occurred at about 12h00 on the Sunday morning of 22 July 2007. Garwi stated on more than
20 one occasion that he saw the assailant, who was known to him, as he had seen him every weekend in Joe Slovo. He identified the assailant as being the appellant. The deceased also knew the appellant.

25 Garwi stated that the day before he had seen the appellant at

the shebeen. Although he stated at first that he saw the knife used to stab the deceased, he later said he had not seen a knife but assumed it was a knife because the deceased started to bleed. The witness was aware that the appellant had
5 suspected his brother, the deceased, of stealing his cell phone as he was present at the shebeen the previous evening when the dispute relating to the missing cell phone took place.

It was put to Garwi that the appellant will say that he had
10 never met or seen Garwi or the deceased and did not know them. This was disputed by Garwi. It was further put to Garwi that the appellant will state that he was not present on the Sunday when the deceased was stabbed and that he was at a party at a certain Thambolindo's house as the appellant had
15 turned 25 on that day. Gowie disputed this.

After the stabbing Gowie noticed the appellant running away and he records that the appellant had dreadlocks and that he knew the appellant well. On questioning by the Court he
20 confirmed that the appellant had demanded his cell phone from the deceased the day before at the shebeen.

Thembisa confirmed that she knew the appellant from the Eastern Cape and Milnerton, where he at a stage resided with
25 her family. She recalled the incident when the appellant

arrived at the shebeen, which was at Nombuto's house, the name of the shebeen owner, with two cell phones. She said that the appellant placed the two cell phones on the room divider and then went to sleep. She then left to go to the toilet
5 and when she returned one of the cell phones was missing. Before she went to the toilet Orenta, that is the deceased, came in and sat next to the cell phones. When she returned from the toilet Orenta was not there and one cell phone was missing. After approximately 10 minutes Orenta returned and
10 she asked him where the appellant's cell phone was, but he stated that he did not know.

When the appellant woke up and asked for his cell phone, Thembisa said that the deceased had taken his phone. The
15 appellant, however, smacked Thembisa and said that she must return the cell phone to him. Thembisa later confirmed that Garwi was present at the shebeen and she asked Garwi to tell the deceased to return the cell phone. Thembisa then stated that after the assault on her she left the premises, and using
20 her words, "swollen and bleeding". Thereafter she went to the clinic and was referred to Somerset Hospital.

Thembisa stated further that the appellant smacked her once on the side of the face and the left eye and as a result thereof
25 her nose bled. She could not see out of her left eye. She

conceded that she was only smacked and not hit with the fist. She stated that the appellant was wearing a ring on his finger and this seems to have caused the injuries to her.

- 5 It has been argued before us that the appellant merely retaliated. In my view a retaliation is not justified in the sense that the retaliation does not result to a defence of self-defence.
- 10 The appellant confirmed that he arrived at the shebeen on the Saturday evening with two cell phones and when he woke up one of his cell phones was missing. He stated that one of the people suggested that all be searched, but then Thembisa stated that no-one is going to be searched and she then
- 15 smacked him with an open hand and he smacked her back. After that he left the shebeen.

The appellant stated that the next day, Sunday 22 July 2007, was his birthday and he decided to go and enjoy himself at Du Noon and drove to Du Noon early in the morning. They remained at Du Noon until approximately 23h00. In cross-examination he confirmed that he heard Thembisa accuse the deceased of taking the phone. He disputed the evidence of Busiswe that she saw him walk in the direction of the deceased's shack and return with a bloody knife and

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bloodstains on his shirt. He said he was not at Joe Slovo on 22 July 2007 as he was at Du Noon.

The appellant then led the evidence of his brother, Vuyisa.
5 When questioned on what transpired on 22 July Vuyisa stated that he could not recall anything as he woke up early in the morning and he had a hangover and that the rest of the day he drank. Vuyisa also disputed that he was present with the appellant on the morning of 22 July at the shebeen as testified
10 by Busiswe. His reason given was that "I don't go along with him", being a reference to his younger brother.

The defence further led the evidence of Rosina Xalabile (hereinafter referred to as "Rosina"), the ex-girlfriend of the
15 appellant. She was to give evidence in support of an alibi that the appellant was not present at the time the murder occurred. She stated that the appellant and his brother, Makatsi, arrived at her house at approximately 10h00 by motor vehicle. They were to have the appellant's birthday party at the house. It
20 appears that they sat around and drank the whole day and at a stage the appellant became drunk and fell asleep. Rosina stated that the appellant was with her the whole day until late evening.

25 Rosina could not name one person other than the appellant
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and his brother, who was present at the party held at her home. She stated that there were approximately 9 people there. According to Rosina the party was arranged approximately a week before the time, whereas according to
5 the appellant the parties was arranged on the spur of the moment, as his mother did not want the noise of a party at her house.

The appellant's brother, Makatsi, was also called as a witness.
10 The only person other than the appellant that Makatsi can remember at the party was the appellant's girlfriend, Rosina. He did not know any of the other people. Makatsi said he decided to go with his brother to the party notwithstanding the fact that he had a prior arrangement to play soccer.

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Although there are some discrepancies between Garwi's evidence and his police statements, in both his statements he says that he will be able to identify the appellant and, in fact, in his second statement he does identify the appellant. Garwi
20 was somewhat uncertain about the time the incident took place, but it's apparent from his evidence, seen holistically, that it occurred on the Sunday morning sometime before 12h00. In my view Garwi's and Busiswe's versions of the incident corroborate each other's version.

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The appellant's defence was one of an alibi, and as this version and the version of the State are mutually inconsistent, obviously they cannot both be true. There are certain improbabilities and inconsistencies in the evidence of the
5 appellant and the witnesses who gave evidence on his behalf.

In this regard the appellant states that on the morning of his birthday he decided to have his birthday party at Du Noon, whereas two of the witnesses state that this was planned some
10 days before. Rosina, his girlfriend, saying it was planned approximately a week before. Both Rosina and Makatsi did not know the names of the people at the party, yet it was at Rosina's house. One would expect her to know at least the names of some of the people at the party. Makatsi knew only
15 Rosina and Rosina knew only the appellant's brother, Makatsi. The defence raised in this regard in my view is not a genuine offence.

In S v Charzen & Another 2006 (2) SACR 143 SCA at 147-148
20 Cameron JA stated as follows with regard to identification:

"As our Courts have emphasised again and again in matters of identification, honesty and sincerity and subjective assurance are simply not enough. There must in addition be certainty beyond reasonable
25 doubt that the identification is reliable. And it is

generally recognised in this regard that evidence of identification based upon a witness's recollection of a person's appearance can be 'dangerously unreliable' and must be approached with caution."

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If regard be had to the evidence relating to the identification of the appellant, I am satisfied that it satisfies the requirements as set out by Cameron JA in S v Charzen. Both Garwi and Busiswe had seen the appellant on numerous occasions before and both Garwi and Thembisa gave evidence that the deceased was involved in a difference of opinion the night preceding his murder regarding the appellant's loss of his cell phone.

15 Garwi's evidence on more than one occasion was that he saw the appellant's face at the time he stabbed the deceased. Busiswe said she saw the appellant walking after the deceased and shortly thereafter he returned with blood on his shirt and the knife which he tucked into his belt. She further stated that
20 he told his brother words to the effect that he had "dealt with" the deceased. The identification of the appellant was during daylight and I am satisfied that the appellant was genuinely recognised and identified by both witnesses.

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In my view the so-called alibi defence falls to be rejected for the reasons herein set out. I would accordingly DISMISS the appeal and confirm the conviction and sentence.

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VAN HEERDEN, AJ

CLEAVER, J: I agree, it is so ordered, the conviction and
10 sentence are confirmed.

CLEAVER, J