IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE NUMBER: A721/2010

DATE: 12 AUGUST 2011

In the matter between:

BAPHUMZI MANQUINA Appellant

and

THE STATE Respondent

J U D G M E N T

DOLAMO, AJ:

The appellant was convicted and sentenced in the Regional Court to 12 years imprisonment on one count of murder. He was also declared, in terms of section 103(1) of Act 60 of 2000, unfit to lawfully possess a firearm. He was granted leave to appeal against both his conviction and sentence.

The facts in this matter are briefly as follows: The appellant and his friends were at a shebeen busy drinking liquor when the deceased and his brother arrived, ordered and also

consumed liquor. The deceased's brother, one Matunda Mabonga, was the only witness called by the state ostensibly as an eyewitness to testify about the events later that night and which led to the deceased's death.

This witness' version was that, as he was seated with the deceased minding their own business, the appellant, for no apparent reason, swore at him. The deceased intervened and inquired from the appellant as to the reasons for this anti-social behaviour. The response was for the appellant to call the deceased outside and thereafter leave the room, shortly followed by the deceased. The witness remained inside for a period of approximately five minutes before following his brother to see what was going on. He alleged that he did not immediately follow them, as he was not worried about what may happen outside.

On coming out he was in time to see the appellant stabbing the deceased once, and thereafter fleeing from the scene. The deceased had his hands behind his back, his customary pose, when he was stabbed by the appellant. He was not in possession of any weapon nor in any way attacking the appellant. In short, he posed no threat to the appellant. It was well lit where this attack on the deceased took place and he could therefore clearly see what was happening. He was

also attacked while on the scene, by an unknown assailant, with what appeared to be a hammer. He could not identify the assailant because, presumably, where he stood was dark. The other two state witnesses could not advance the matter any further.

The appellant's version was the complete opposite. According to him, the trouble with the deceased started when the latter interfered with his female companion, or the person who was in their company. When the appellant protested about this, an argument ensued. The deceased and his brother left, promising to come back. True to this promise, they did later return, but were told by the shebeen owner that the place was about to close. They left, but as it later turned out, had waylaid the appellant outside. The deceased advanced on him with what appeared to be a knife. The appellant realised that his life was under threat, stabbed the deceased once and fled the scene.

The court *a quo* found that the state had proved its case against the appellant beyond any reasonable doubt. The learned magistrate was of the view that the deceased's brother placed a version which was logical, probable and chronologically clear and notwithstanding the cautionary approach with which the evidence of a single witness must be

treated, was safe to accept. The appellant on the other hand was found to be a poor and evasive witness. His version was rejected.

The conviction of the appellant followed on the evidence of a single witness. While an accused may be convicted on the evidence of a single witness, such evidence must be clear and satisfactory in every material respect. I am of the view that, *in casu*, the evidence of this single witness, Mabonga, was not clear and satisfactory in every material respect. I find the following aspects of his testimony highly questionable, if not outright improbable.

It is highly questionable that the appellant will, without any cause, real or fabricated, swear at the witness. Even more improbable, on his version, is that he was not worried to find out what was happening outside when the deceased, on the invitation by the appellant who have just sworn at him for no reason, followed him outside. This does not accord with common human experience. Common human experience dictates that at least he will have been concerned about the safety of the deceased.

It also flies into the face of logic that for no reason, he is attacked with a hammer by an unknown person, almost at the

same time as the deceased is stabbed. In my view, there was a reason for the verbal confrontation between the appellant and the deceased inside the shebeen, a reason which he does not want to disclose. There must also be a reason, which he does not want to disclose as well why, on the version he presented, he did not immediately follow the deceased when the latter went after the appellant.

These improbabilities weaken the reliability of the version he placed before the court *a quo*. In my view the circumstances points to appellant's version being the more probable one; that the deceased was the one who caused trouble by interfering with the woman who was in appellant's company; that when the appellant and the others were leaving the shebeen, found the deceased and the witness waiting for them outside.

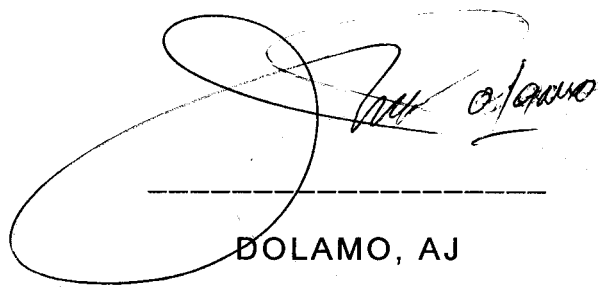
The criticism by the learned magistrate that there was a difference between what was put to the state witnesses regarding what the deceased did to the woman, that is whether he bumped or pulled her; that the appellant was evasive when confronted with this contradiction; that he resorted to lies about simple issues; that he initially could not describe the type of knife the deceased had, but later, under cross-examination, was able to describe it, including its length; how he managed to stab at deceased when he was so near to him,

having to first pull out his knife from his pocket; why he did not remain on the scene, in the security of the company of his friends and wait for the police, while all valid, do not detract from the appellant's version as a whole, which is reasonably possibly true.

In the premises, I find the appellant's version to be reasonably possibly true and in the circumstances entitle him to the benefit of the doubt and an acquittal. The order I propose, therefore, is the following:

1. The appeal succeeds.

2. The conviction and sentence are set aside.



DOLAMO, AJ

VELDHUIZEN, J: I agree. It is so ordered.

VELDHUIZEN, J

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