IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE DIVISION, MAKHANDA)

CASE NO. CA&R 221/2023

In the matter between:

CLEMENT HUMAN **APPELLANT**

and

THE STATE **RESPONDENT**

JUDGMENT

Rugunanan J

[1] The appeal before this Court is automatically prompted by section 309(1) *(a)* of the Criminal Procedure Act[1] following a conviction for murder and a

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[1] Act 51 of 1977.

sentence of life imprisonment imposed on the appellant by the Regional Court, Gqeberha on 21 September 2018.

[2] The offence was committed on 31 August 2014 in Bardien Avenue, Bloemendal when the deceased RG[2] was stabbed with a knife in the yard of his place of residence.

[3] The decisive issue for determination in this appeal is whether the appellant stabbed the deceased.

[4] In prosecuting its case the State relied on CCTV video surveillance footage and the testimony of seven witnesses namely: Enver Jasson, Clement Johnson (Johnson), Reveno Latola (Latola), Dr Keith Kalev, Ms Melanie Barnard, Deondre Davies (Davies), and Ms Davidene Jasson (Ms Jasson).

[5] The judgment on conviction evinces a holistic evaluation of the evidential mosaic[3] but indicates that the magistrate drew inferences implicating the appellant without properly evaluating the evidence given by the witnesses Johnson and Latola. In that regard, he erred.

[6] Considering that the remaining witnesses did not observe the appellant stabbing the deceased and testified only about his presence at the scene, their evidence for that reason will not be repeated in this judgment except for recapping the remaining evidence which is necessary for the specific issue on appeal to be considered.[4] In employing that approach we are enjoined to keep in mind the abiding principle that the totality of the evidence is in the ultimate analysis essential for determining whether the guilt of the appellant has been

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[2] Initials used.
[3] *S v Shilakwe* 2012 (1) SACR 16 (SCA) para 11]; *S v Hadebe and Others* 1998 (1) SACR 422 (SCA) at 426F-G
[4] *S v Zondi* 2003 (2) SACR 227 (W) para 9.

proven beyond reasonable doubt, though it is not impermissible to break down the evidence into its component parts in arriving at a conclusion.[5]

[7] On the day in question the appellant together with two other individuals one being Thandekile Attwell Maxengana (the appellant's father) and the other, a sibling named Boetie, were in the front yard of the deceased's premises. Coinciding with their presence was the deceased who was stabbed with a large knife having a blade length of approximately 20 centimetres. The medical evidence indicated that the deceased sustained bruises and five incised wounds among them, a large gaping incised wound from he succumbed measuring 12 centimetres on the left side of his neck. This brief overview is largely common cause and led to the prosecution of Mr Maxengana and the appellant respectively as accused 1 and 2 on a charge of planned or premeditated murder. The appellant's sibling Boetie, had passed on by the time the criminal proceedings were instituted.

[8] The appellant does not dispute being at the scene. His version at the outset is that he did not stab the deceased – he disarmed the knife from Boetie after Boetie stabbed the deceased. This version must be tested against the reliability of the evidence of Johnson and Latola as well as the CCTV footage. The footage captures events in real time in the period indicated by time stamps 19:35 to 19:36. The calibration or accuracy of this timeline was not disputed, and it is accepted that the events occasioning the stabbing occurred during 19h35 and 19h36.

[9] Given the time of day when the incident happened the evidence of visibility conditions and proximity of witnesses is vital to determining whether the appellant's version is reasonably possibly true. For reasons to follow the evidence on these aspects is unsatisfactory and the surveillance footage, which

[5] *S v Shilakwe* 2012 (1) SACR 16 (SCA) para 11.

does not capture the actual stabbing of the deceased, does not assist either. It will be shown in this judgment that the footage is unhelpful and similarly are the observations by Johnson and Latola as to whether they indeed saw the appellant wield a knife and stab the deceased.

[10] The surveillance footage was introduced by Ms Jasson. She is an employee at a store which is located next to the deceased's residence in Bardien Avenue. She downloaded the footage onto a flashstick. The device was handed over to the investigating officer for safekeeping. It was held in *S v Ramgobin and Others*[6] that for video tape recordings to be admissible as evidence, it must be proved that the exhibits are original recordings and that there exists no reasonable possibility of interference with the recordings. There was no cross-examination disputing the authenticity of the footage, or that there was interference with its recording quality and timing. In the absence of any dispute about the authenticity of the recording, it was admitted into evidence.

[11] The CCTV camera from which the surveillance footage was recorded is mounted on the roof of the store and faces somewhat obliquely the direction of the street. It does not give coverage of the yard in which the incident occurred nor of the entrance to the yard. For that reason there is no depiction of how the actual stabbing occurred or by whom it was executed. The evidence scantily indicates that there was light or perhaps a light source somewhere in the street. There is no indication that the light illuminates the yard, except only (as a matter of inference) that light falls within the range of the CCTV camera.

[12] In that range and within the recorded timeline it is not disputed that the surveillance footage depicts the co-accused Thandekile Maxengana and Boetie moving towards the direction of the deceased's residence followed a few

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[6] 1986 (4) SA 117.

moments later by the appellant who was running while holding onto something unidentifiable near the right side of his waist.

[13] It is also not in dispute that the appellant, while holding a knife in his right hand and followed by his co-accused and Boetie, emerged a few moments later into the range of the CCTV camera as if exiting the yard; the camera at some point capturing Davies throwing stone(s) at the appellant and the others (Davies's denial is however inconsequential to the reasoning employed in this appeal save that he testified that it was dark when he saw the appellant and the others).

[14] In his judgment the learned magistrate made the finding that Boetie and the co-accused were, as a matter of probability, unarmed when they approached the deceased's premises. This finding is not supported by the evidence of Johnson and Latola. Neither of them were specifically asked if Boetie or the other co-accused was unarmed with a knife, nor can this be inferred from the CCTV footage.

[15] Johnson was a street observer on his way to purchase beer. His faculties were not tasked as to his proximity from the scene, his state of sobriety, his age, his eyesight, or his opportunity for observation both as to time and situation.[7] It is no exaggeration that the transient time frame in the surveillance footage is indicative of a fast moving scene. It was therefore incumbent for the prosecution to have explored these aspects for establishing the reliability of Johnson's evidence.

[16] That was not done.

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[7] *S v Mthetwa* 1972 (3) SA 766 (AD) at 768A-C.

[17] An overall reading of Johnson's evidence indicates that he was not an impressive witness.

[18] His testimony is punctuated with hesitancy and his responses required prompting. He gave contradictory evidence on a number of material aspects as is evident from the following excerpts in the transcript:

'Wat sien u nog? --- En dis daar wat ek sien wat, wat *number two* die mes uit nou haal and daardie tyd wat hulle hom so by die kappie het dan steek hy.

Ja. Wat sien u nog? --- En is daar wat hy mos nou geskree het los my, los my dan. Los hulle hom nie dan steek hy, het gesien hy het twee kere …

Tweekeer gesteek? --- Hmm.'

…

'Die stekery. Is dit nadat hulle hom uit die huis uitgetrek het? --- Nee toe hulle hom uittrek, ek weet nie het hulle hom in die huis al klaar gesteek nie maar ek het gesien wat hulle hom uitgetrek het, het hulle hom tweekeer gesteek.'

…

'…u stap nader aan die hek. Is dit reg? --- Ja meneer.'

…

'U staan en kyk en dan stap u skielik agtertoe. Wat het gebeur? --- Is daardie tyd wat hulle steek mos nou.'

[19] Johnson's response in the above excerpts suggests that the appellant and the two others stabbed the deceased twice. This response is puzzling. His entire narrative suggests that the stabbing was executed by the appellant and the others and that it occurred at the same time. This could only have been possible if any one of the other two who accompanied the appellant was also armed with a knife. It is also noteworthy that Johnson's account of events is inconsistent with the medical evidence regarding the number of wounds sustained by the deceased. There is no evidence nor any account by any other independent witnesses that could possibly explain how the deceased's remaining wounds

were inflicted. One is therefore left with the appellant's version indicating that upon his arrival at the scene, Boetie had already stabbed the deceased.

[20] Elsewhere, and in response to a leading question, the transcript reads:

'En nommer twee hom steek met hierdie mes. Is dit so? --- Ja.'

[21] This is completely at odds with Johnson's narrative and required him to speculate in proffering an affirmative response to a deceptive question.

[22] Significantly, the exchange in cross-examination exposed the following anomalies:

'Sien u of hy hom fisies raaksteek of sien u net hy steek na hom? --- Ek het gesien hy steek na hom, ja.

Goed. Maar net u kon nie sien of hy raakgesteek word en waar nie? --- Uh-uh.'

[23] After a repeated pattern of responses with a similar exclamation Johnson is asked by the magistrate to clarify but proffers no response.

'Uh-uh, beteken uh-uh nou nee of ja of wat? --- Kan u nie weer verduidelik nie?

[24] On being questioned about visibility conditions, the transcript is revealing:

'Stem u saam dis 'n donker erf daardie? --- Die huis se lig skyn daar.

Watse tipe lig is dit? --- Dis die voorhuis , die lig van die huis, die voorhuis lig skyn buitekant toe …

Die gewone gloeilamp liggies? --- Huh?

Daardie *bulbs*? Ja.

Is dit die enigste lig daar, net die bulb wat in die huis self brand? --- Wat gebrand het, ja. En die kitchen lig mos nou.

So u stem saam met my dit is maar ‘n baie flou liggie daardie in so ‘n groot gedeelte to verlig wat uit die huis uit skyn? --- Ja.

Nou u stem saam dit is relatief donker dan in daardie erf as dit die enigste beligting is? --- Dit was donker daar, ja …

Die beligting is dof, dis nie ‘n helder lig nie. U stem saam met dit? --- Oukei ek stem saam.’

[25] Having conceded that the scene in the yard was dark Johnson moreover stated, without indicating how far, that he stood quite a distance away.

[26] In summing up her cross examination the appellant’s legal representative put the following to Johnson:

‘So ek wil dit aan u stel dat onder daardie drie faktore dit vir u moontlik kan wees om ‘n fout te maak aangaande die identiteit van die persone of presies wat daar gebeur het want eerstensnis u sig beperk vanweë die lig en die afstand wat u staan. En tweedens vanweë die tempo waarteen die voorval plaasgevind het. So voordat u aantwoord ek stel dit nie aan u dat u jok nie, ek stel dit aan u dat u moontlik van die feite verkeerd kan hê, onder andere wat hulle bydra betref. Stem u saam met my? --- *Sorry*?

[27] Despite the clarity of the question and its sequentially reasoned summation of the evidence, Johnson’s response indicated that he either did not understand the question, or that he did not hear it –or perhaps, as a possibility, he required the question to be repeated.

[28] What followed was a complete undermining of the purpose sought to be achieved by the appellant’s legal representative when the magistrate interjected as follows:

‘U sê, stem u saam as hulle sê jy maak ‘n fout dat hulle het niks gedoen daar nie, dis Boetie wat gesteek het en beskuldigde 1 het niks gemaak nie? --- Nee ek stem nie saam nie.

[29] Needless to say Johnson's response did not compensate for the shortcomings in the case for the prosecution.

[30] This is also apparent from the testimony of the witness Latola.

[31] His evidence does not require detailed examination. He experienced a great deal of stress while recounting events in the witness stand. He visited the deceased earlier that day. When he left – by his estimate sometime after 17h00 – he said that it was already dark and upon exiting the deceased's yard into the street he encountered the appellant (known to him as Porky) along with Boetie and accused 1. He did not see the appellant in possession of a knife. On viewing the surveillance footage he confirmed that he featured at 19:33 but clarified that he was on his way home. The footage indicated that he was bespectacled and somewhere behind him the witness Johnson appeared. There is a considerable amount of confusion about whether Latola returned to the scene and what prompted him to do so, but much of what was traversed with him about what he observed concerning who entered the deceased's home is irrelevant to the material aspects of his testimony which, quoted only where relevant, read as follows:

'U sien hulle gaan in die huis in? --- Ja.

Wat sien u nog? --- Wat verder aan weet ek nou nie wat het … gebeur het wat hulle daar in die yard ingegaan het nie.'

[32] From hereon, the evidence indicates that Latola had already proceeded a distance into the street. As he made his way home he was side-tracked when Deondre Davies threw stone(s) at the appellant and the other two men at which point he observed the appellant carrying a knife in his hand. According to Latola, the appellant had by then been out of the yard and was in the street.

[33] The prosecutor put it to Latola:

'Ek verstaan u getuienis reg meneer u het nie gesien dat iemand vir die oorledende steek nie? --- Nee want ek was nie op die, op die toneel gewees daardie, by die stekery gewees nie.'

[34] Further on in his testimony, and what can only be described as an attempt to either mislead or confuse Latola, the prosecutor impermissibly put it to him:

'En die, en die beligting meneer soos wat dit is op die beeldmateriaal is dit maar hoe dit elke in die aand daar lyk? Is dit hoe die beeldmateriaal lyk, ag die beligting --- Ja.

So jy kan duidelik sien wat in die erwe gebeur? --- Ja'

[35] In cross-examination Latola shifted position on the aspect of visibility. His testimony reads:

'Die vorige getuie Clement Johnson het vir ons gesê dat dit redelik donker is in daardie erf. Die enigste lig wat daar was was van 'n gloeilamp, 'n bulb wat binne-in die huis gebrand het? --- Ja.

…

So dit was relatief donker in die erf en mens se sig was redelik beperk as vanweë die beligting. Is dit reg? --- Ja.

En as ek u getuienis reg kan opsom het u ook 'n hele entjie van die voorval af gestaan. U weet nie presies wat daar tussen beskuldigde 1, Boetie en die oorledende gebeur het nie? --- Ja.'

[36] Albeit for minor blemishes, a fair conspectus of Latola's testimony reveals frankness. This emerges from the version of the appellant being put to him:

'En u kan bevestig toe beskuldigde 2 die perseel genader het het u nie 'n mes of enige ander wapen by hom gesien nie. Dis slegs toe hy uitgekom het wat hy die mes gehad het? --- Uitgekom ja.

Beskuldigde 2 stem saam met daardie weergawe. Sy instruksies is ook hy het nooit ‘n mes gehad nie. Hy het wel ‘n mes by Boetie gaan afvat want Boetie is die person wat hom gesteek het, die oorledende. U sal nie weet nie? --- Nee ek sal nie weet nie.’

[37] Turning to the version of the appellant.

[38] The appellant and the deceased were known to each other. Earlier during the day they were socialising at the house of a mutual friend, known as Basil. The deceased, without reason, threatened to kill the appellant and assaulted him. There was a struggle. The appellant sustained a fractured nose and was stabbed with a knife in his right hand causing him to sustain swelling and fractures. A medical report was produced to confirm the injuries. Basil ushered the deceased out of the house but the appellant remained there for a while before returning to his home. On returning home and upon learning that his brother Boetie and their father were somewhere up in the street on their way to the deceased’s place, he went out to look for them. He was unarmed. When he got to the yard he saw Boetie stabbing the deceased with a knife. He disarmed the knife from Boetie.

[39] In cross-examination the appellant’s testimony unfolded as follows:

‘Nou die beeldmateriaal wys dit baie duidelik dat u kom daar aangehardloop. Is dit reg? --- Dis reg.

Toe … is beskuldigde 1 en Boetie alreeds binne-in die erf, in die yard van die oorledende? --- Dis reg.

Nou wat sien jy presies wat gebeur toe daarso toe jy daar kom? --- Ek het gesien Boetie steek vir die oorledende.

Waarmee? --- Met’n mes.

Beskryf die mes meneer? --- ‘n Groot mes.’

[40] As for the presence of the co-accused, the appellant had this to say in response to questions by the prosecutor:

'… en wat maak nommer een toe jy sien Boetie steek hom? --- Ek het hom nie gesien nie.

Hoe bedoel jy jy het hom nie gesien nie? Hy is dan duidelik in die erf in? --- Ja ek was gefokus op Boetie … vir Boetie gekeer.

[41] The transcript indicates that the following imputation was put to the appellant:

'U het die mes uitgehaal uit jou regter heup volgens Clement? --- Ek dra nie 'n mes nie.'

[42] The question is inaccurate. Johnson never testified that he saw the appellant enter the yard with a knife on his person and for that reason he could not give detail about where the knife was secreted. Moreover, it is nowhere apparent from the transcript that Johnson testified that he saw the appellant take out the knife from his right hip.

[43] As the appellant's testimony progressed he indicated that he believed that his co-accused together with Boetie went over to the deceased's house because they heard of the assault on the appellant earlier that day. Upon viewing the surveillance footage he protested that he was unarmed when he entered the yard but was holding onto his cellphone on the right side of his waist. He maintained that he was not focussed on the presence of his co-accused in the yard because his efforts were directed at disarming Boetie. He denied that he stabbed the deceased. He stated that he disarmed Boetie using his left hand but conceded that upon exiting the yard he carried the knife in his right hand notwithstanding the injury inflicted earlier by the deceased. He confirmed that Davies threw stone(s) as he exited the deceased's yard.

[44] Insofar as the proper approach to the evaluation of evidence in a criminal trial is concerned, it is settled law that the onus is on the prosecution to prove its case beyond reasonable doubt. In *S v Van der Meyden*[8] the court said:

'The onus of proof in a criminal case is discharged by the State if the evidence establishes the guilt of the accused beyond reasonable doubt. The corollary is that he is entitled to be acquitted if it is reasonably possible that he might be innocent (see, for example, *R v Difford* 1937 AD 370 especially at 373, 383). These are not separate and independent tests, but the expression of the same test when viewed from opposite perspectives. In order to convict, the evidence must establish the guilt of the accused beyond reasonable doubt, which will be so only if there is at the same time no reasonable possibility that an innocent explanation which has been put forward might be true. The two are inseparable, each being the logical corollary of the other. In whichever form the test is expressed, it must be satisfied upon a consideration of all the evidence. A court does not look at the evidence implicating the accused in isolation in order to determine whether there is proof beyond reasonable doubt, and so too does it not look at the exculpatory evidence in isolation in order to determine whether it is reasonably possible that it might be true.'[9]

[45] *Van der Meyden* was cited with approval by the Supreme Court of Appeal in *S v Chabalala*[10] where it is stated:

'The correct approach is to weigh up all the elements which points towards the guilt of the accused against all those which are indicative of his innocence, taking proper account of inherent strengths and weaknesses, probabilities and improbabilities on both sides and, having done so, to decide whether the balance weighs so heavily in favour of the State as to exclude any reasonable doubt about the accused's guilt.'[11]

[46] The appellant's testimony comes down to a crude version that he was not the perpetrator of the stabbing. It does not instil confidence that he was a credible witness. Nor does it automatically translate into guilt. If his version is reasonably possibly true then he must be acquitted. Whether one subjectively believes him is not the test. A court may only convict if it is satisfied not only

[8] *S v Van der Meyden* 1997 (2) SA 79 (WLD); 2001 (2) SACR 97 (*Van der Meyden*).
[9] Ibid at 80H-81B.
[10] *S v Chabalala* 2003 (1) SACR 134 (SCA).
[11] Ibid para 15.

that the explanation is improbable but that beyond any reasonable doubt it is false.[12]

[47] Johnson emerges as the only witness who might have seen the stabbing (within the time interval depicted in the surveillance footage) but it is not insignificant that his evidence is materially lacking in the aspects that were not canvassed with him. Latola on the other hand was emphatic that he did not see the stabbing. For reasons already dealt with, the surveillance footage offers no assistance and is no substitute for filling the cavities in the direct testimony of the two witnesses. On the available evidence it must be acknowledged that visibility conditions were limited and that events unfolded in a fast moving scene, cumulatively throwing a shroud of doubt on the reliability of the evidence presented. In the circumstances the appellant's explanation leaves no room for finding that it is improbable and beyond any reasonable doubt, false.

[48] The magistrate was not cognisant of the limitations in the case presented by the prosecution particularly those affecting Johnson's evidence. The discrepancies in the evidence were not properly evaluated and the magistrate's reasoning to a significant extent appears to have been manifestly influenced by probabilities that exclude factoring the evidential material accentuated in this judgment.

[49] The prosecution has clearly not discharged the onus of proof beyond reasonable doubt. However improbable the appellant's version might be it is doubtful if it is false.

[50] Respectfully, the magistrate's approach attracted an erroneous result which entitles this Court to interfere on appeal[13].

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[12] *S v V* 2000 (1) SACR 453 (SCA) at 455*b*.

[13] *S v Hadebe and Others* 1997 (2) SACR 641 (SCA) at 645*e-f*.

[51] In the result the following order issues:

51.1 The appeal is allowed.

51.2 The appellant's conviction and sentence are set aside.

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M S RUGUNANAN

JUDGE OF THE HIGH COURT

I agree.

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L ELLIS

ACTING JUDGE OF THE HIGH COURT

APPEARANCES:

For the Appellant:	*D P Geldenhuys* Instructed by Legal Aid South Africa Makhanda
For the Respondent:	*H Obermeyer* Instructed by The Office of the Deputy Director of Public Prosecutions Makhanda
Date heard:	17 April 2024.
Date delivered:	07 May 2024.