IN THE HIGH COURT OF SOUTH AFRICA,

FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	**YES/NO**
Of Interest to other Judges:	**YES/NO**
Circulate to Magistrates:	**YES/NO**

Case Number: A19/2023

In the matter between:

SELLO LUCAS SELLO Appellant

and

THE STATE Respondent

CORAM: REINDERS, ADJP *et* CHESIWE, J

JUDGMENT BY: REINDERS, ADJP

HEARD ON: 1 NOVEMBER 2023

DELIVERED ON: 1 FEBRUARY 2024

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[1] On Christmas evening 2021 a young man aged 16 (hereafter the deceased) tragically met with his untimely demise as a result of a stab wound inflicted to his neck. Subsequently the appellant was arraigned in the Regional Court in Welkom on a charge of murder read with the provisions of s51(2) of the Criminal Law Amendment Act. [1]

[1] 105 of 1997.

[2] Appellant pleaded not guilty but, having heard the evidence of the two state witnesses and the appellant (who also called his wife as a witness), the trial court on 26 August 2022 convicted him of the murder of the deceased and subsequently sentenced him to imprisonment for fifteen years on 2 September 2022.

[3] Leave to appeal against both his conviction and sentence was refused by the trial court but granted by this court on petition. Mr Van Rensburg appeared on behalf of the appellant whilst the state was represented by Mr Lencoe. Counsel not only provided us with comprehensive and able heads of argument (including subsequent supplementary heads of argument) for which we are indebted, but advanced thorough submissions during oral argument.

[4] From the record it would appear that on that specific evening the appellant visited Welkom from Kempton Park. Whilst visiting someone broke into his motor vehicle (the bakkie) and stole some of his personal items. A local informed his aunt that this was committed by one Papa, where after his aunt proceeded to lead the way to an unknown property, with his wife and him and their child following. At the initial address his aunt was directed to another address, where his wife and an occupant at the said premises got involved in a verbal argument. From there evidence adduced by the state and that of the accused and his wife, differs. According to the first state witness (Ms Vanessa Ndiamane) the appellant started chasing the deceased around. The appellant on the other hand testified that the deceased alighted from a vehicle and started assaulting his wife and aunt where after he acted in defence of his family members by taking a multi-tool out of his pocket to stop the attack on not only his wife, but also himself. The second witness called by the state (the mother of Vanessa) testified she never saw any chasing around, neither did she witness the stabbing.

[5] The learned magistrate accepted the states version and rejected the testimony

of the appellant, as supported by wife.

[6] The appellant's grounds of appeal against his conviction (as contained in the appellant's application for leave to appeal[2]), read as follows:

> "1.1 The Learned Magistrate erred in finding that the State proved its case beyond reasonable doubt;
> 1.2 The Learned Magistrate erred in rejecting the version of the Appellant, as not being reasonably possibly true;
> 1.3 The Learned Magistrate erred in finding that the Appellant did not act in defence of his wife – who was being assaulted;
> 1.4 The learned Magistrate erred in failing to attach adequate weight to the various contradictions and improbabilities in the evidence of the State witnesses;
> 1.5 The Learned Magistrate failed to apply the cautionary rule, regarding the single witness, Vanessa Ndiamane, by not taking into account the contradictions and improbabilities in her evidence;
> 1.6 The Learned Magistrate erred in finding that the version of the Appellant is not reasonably possibly true – as corroborated by the witness on behalf of the Defence."

[7] At the heart of this appeal lies the question of the trial court's evaluation of the evidence of a single witness and the principles applicable to a plea of private-defence.

[8] In terms of s208 of the Criminal Procedure Act (CPA)[3] a court can convict an accused on the evidence of a single competent witness. Recently in ***Michael Jantjies v The State***[4] the Supreme Court of Appeal confirmed the principles applicable in respect of a single witness' evidence. It was held[5]:

> "…When assessing the credibility of a single witness, it is crucial to understand that there is no one-size-fits-all approach. The evidence presented by such a witness must undergo the same rigorous scrutiny as any other evidence. The trial court is tasked with meticulously evaluating the

[2]Record B1-B4.
[3]51 of 1997.
[4](Case no 532/2022) [2023] ZASCA 3 (15 January 2024).
[5]At para [15].

> evidence, taking into account both its strong points and shortcomings. After this thorough examination, the court must then determine whether, despite potential flaws or inconsistencies in the testimony, it is convinced of the truthfulness of the witness's account . This careful and balanced evaluation is fundamental to ensuring a fair and just legal process."
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> [The numbering of these and all subsequent footnotes in case law referred to, are adjusted to follow chronologically in this judgment.]

[9] It is trite that in the absence of an irregularity or misdirection by the trial court, a court of appeal is bound by credibility findings thereof, unless it is convinced that such findings are clearly incorrect.[6]

[10] In ***Rolston Pillay v S***[7] the Supreme Court of Appeal dealt with an appeal emanating from the Full Bench, Gauteng South Division, in respect of the appellant's plea of self-defence:

> '[15] In matters of this nature, this Court is not at liberty to interfere with the findings of fact made by the trial court unless the manner in which the evidence was evaluated is proved to be wrong.[8] In determining the question of whether the full bench committed an error, of fact or law, the findings of fact made by the trial court must be evaluated against the entire evidence that was led at the trial. That much was stated by this Court in *S v Trainor*.[9] That exercise has to be undertaken against the legal principle that the duty to prove that the accused is guilty lies squarely within the domain of the prosecution, and that duty does not shift to the accused even if they have raised a private-defence.[10] Where, in the performance of that exercise, it is found that it is reasonably possible that

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S v Sauls and Others 1981 (3) SA 172 (A) 180E-G.

[6] See: ***S v Francis*** 1991 (1) SACR 198 (A) at 204c; ***J v S*** [1998] 2 All SA 267 (A) at 271c.

[7] (451/2022 [2023] ZASCA 3 (15 January 2024).

[8] ***Rex v Dhlumayo and Another*** 1948 (2) SA 677 (A) at 706; ***S v Francis*** 1991 (1) SACR 198 (A) at 204C-F; ***S v Hadebe*** 1997 (2) SACR 641 SCA at 645E-G.

[10] ***S v Trainor*** [2003] 1 All SA 435 (SCA) para 9.

[11] ***S v De Oliveira*** 1993 (2) SACR 59 (A) at 63H-64A.

[12] ***R v Difford*** 1937 AD 370 at 373 and 383.

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the accused might be innocent, the accused must be acquitted.[11]'(emphasis added)

[11] The learned magistrate, after having found the appellant's version to be "inherently improbable", proceeded as follows in her judgment:

> "He (the accused) agreed …He conceded during cross-examination that he exceeded the bounds of self-defence by doing that. Hence the Court does not have to go into the details of self-defence and private defence pertaining to the law, because he – he conceded to same."[12]
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> '…At the time he stabbed the deceased he said he did not aim to stab the deceased on the neck. He agreed with the state that it was a vital organ, and it was a sensitive organ. He said he just tried to stop him.
>
> However, when it was put to him during cross-examination that he exceeded the bounds of self-defence, he said he agreed. He said he agreed. He says that is what it seems like. He did agree that he exceeded the bounds of self-defence. [13]

[12] In assessing the version of the appellant and his wife that she had sustained a laceration to her face (upper lip) caused by the deceased stabbing her, the learned magistrate held:

> "Now indeed she was injured. The medic…The photograph indicates some injuries. The state did not challenge that. But there is no medical evidence before this court to indicate that it was indeed caused by a sharp object.
> This, the second state witness told the court that she assaulted the deceased – the accused's wife with a fist and as the Court has indicated, there is no medical evidence to that effect. But on the face of it, from the photograph, it is

[11]

[12]Record: p 232 lines 17-21.

[13] See also: Record p 227 lines 17 to 24.

> "PROSECUTOR: And alternatively, Sir, I put it to you that you exceeded even if you acted in self-defence like you are saying, you exceeded the bounds of self-defence.
>
> ACCUSED: I may agree to that because my actions of that day in question as per the law state that I am a murderer.

> just and injury on the lip and – and on the nose, a slight injury higher than the lip. It cannot be said that it was indeed caused by a sharp object. The probability that it was caused by a fist does exist.[14]

[13] It appears from the record that the learned magistrate was appraised thereof that Vanessa was a single witness in respect of the actual stabbing of the deceased by the appellant.[15] Reference was made to the well-known dicta in ***S v Sauls*** supra, stating the manner in which a court should go about in considering the credibility of a single witness. The learned magistrate held:

> 'And yes, her version during cross-examination did bring out some contradictions, as the Court mentioned earlier, but it was mostly pertaining to the positioning of the bakkie, etcetera.[16]

Ultimately, the version of this witness was accepted by the learned magistrate and it formed the basis of the conviction of the appellant on a charge of murder.

[14] On a reading of the evidence I could not find any corroboration for the evidence of the single witness. It is of concern that the second witness did not notice that the deceased was chased by the appellant as the single witness described. Neither the grandmother and/or grandfather who were present during the incident according to the state witnesses, were called to testify. As mentioned, the learned magistrate found as a fact that the appellant's wife sustained injuries during the incident. It stood uncontested that after the incident the appellant's wife as well as the aunt were taken for medical assistance. The appellant and his wife testified that the deceased was responsible for the injuries. The state version does not really explain how appellant's wife sustained the injuries. In the absence of any corroboration for the single state witness, I therefore differ from the conclusions by the learned magistrate and hold the view that the appellant's version could not and should not have been rejected as not reasonably possibly true. Accepting that the appellant's version is reasonably possibly true, the matter had to be adjudicated on the appellant's version as supported by the evidence of his

[14]Record p 233 lines 21-24
[15]Record: p 234 lines 21 - p 235 line 10
[16]Record: p 234 lines 21 - p 235 line 10

wife. In my view the concession by the appellant that he exceeded the bounds of self-defence and that therefore the court "does not have to go into the details of self-defence and private defence pertaining to the law", was an incorrect approach. Notwithstanding the concession, it is in my view still necessary for the court to consider the facts as testified and apply the legal principles thereto.

[15] The Supreme Court of Appeal in ***S v Steyn***[17] stated in respect of private defence the following:

> '[19] Every case must be determined in the light of its own particular circumstances and it is impossible to devise a precise test to determine the legality or otherwise of the actions of a person who relies upon private defence… modern legal systems do not insist upon strict proportionality between the attack and defence, believing rather that the proper consideration is whether, taking all the factors into account, the defender acted reasonably in the manner in which he defended himself or his property'. (emphasis added)

[16] Recently in ***Botha v S***[18] Tshiqi JA (Seriti and Zondi JJA and Mokgohloa concurring, Schippers JA dissenting) set out the principles to be applied when a defence of self-defence is raised.

> '[10] In order to successfully raise self-defence, an accused must show the following: (a) that it was necessary to avert the attack; (b) that the means used were a reasonable response to the attack; and (c) that they were directed at the attacker. (See Jonathan Burchell *Principles of Criminal Law* 5 ed (2016) at 125.)'

16.1 In dealing with these principles the court considered whether the use of a knife in averting the attack was reasonable in that circumstances.

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[17] 2010 (1) SACR 411 (SCA).
[18] [2019]1 All SA 42 (SCA); 2019 (1) SACR 127 (SCA).

"[12] This enquiry is in practice more a question of fact than of law. (See *S v Trainor* 2003 (1) SACR 35 (SCA) para 12). In C R Snyman *Criminal Law* 6 ed (2014) at 110-111, the learned author says:

> '[T]here should be a reasonable relationship between the attack and the defensive act, in the light of the particular circumstances in which the events take place. In order to decide whether there was such a reasonable relationship between the attack and defence, the relative strength of the parties, their sex and age, the means they have at their disposal, the nature of the threat, the value of the interest threatened, and the persistence of the attack are all factors (among others) which must be taken into consideration. One must consider the possible means or methods which the defending party had at her disposal at the crucial moment. If she could have averted the attack by resorting to conduct which was less harmful than that actually employed by her, and if she inflicted injury or harm to the attacker which was unnecessary to overcome the threat, her conduct does not comply with this requirement for private defence. (See also *S v Ntuli* 1975 (1) SA 429 (A), *S v Ngomane* 1979 (3) SA 859 (A) at 863A-C), *Grigor v S* [2012] ZASCA 95.)"

16.2 In assessing whether the court a quo was correct in its finding of that murder in the form of *dolus eventualis* was proved, the Supreme Court dealt in para [14] of the judgment as follows:

> "In *S v Humphreys* [2013] ZASCA 20; 2015 (1) SA 491 (SCA) paras 12-17 this court considered whether murder in the form of *dolus eventualis* had been proved and said:
>
> > '…In accordance with trite principles, the test for *dolus eventualis* form is twofold: (a) did the appellant subjectively foresee the possibility of the death of his passengers ensuing from his conduct; and (b) did he reconcile himself with that possibility ...
> >
> > …For the first component of *dolus eventualis* it is not enough that the appellant should (objectively) have foreseen the possibility of fatal injuries to his passengers as a consequence of his conduct, because those consequences. That would constitute negligence and not *dolus* in any form. <u>One should also avoid the flawed process of deductive reasoning that, because the appellant should have foreseen the</u>

consequences, it can be concluded that he did. That would conflate the different tests for *dolus* and negligence…' (emphasis added)

…

[15] This brings me to the second element of *dolus eventualis*, namely that of reconciliation with the foreseen possibility. The importance of this element was explained by Jansen JA in *S v Ngubane* 1985 (3) SA 677 (A) (*Ngubane*) at 685A-F in the following way:

'A man may foresee the possibility of harm and yet be negligent in respect of that harm ensuing, eg by unreasonably underestimating the degree of possibility or unreasonably failing to take steps to avoid that possibility .... The concept of conscious (advertent) negligence (*luxuria*) is well known on the Continent and has in recent times often been discussed by our writers…

Conscious negligence is not to be equated with *dolus eventualis*. The distinguishing feature of *dolus eventualis* is the volitional component: the agent (the perpetrator) "consents" to the consequence foreseen as a possibility, he "reconciles himself" to it, he "takes it into the bargain."

The true enquiry under this rubric is whether the appellant took the consequences that he foresaw into the bargain; whether it can be inferred that it was immaterial to him whether these consequences would flow from his actions. Conversely stated, the principle is that if it can reasonably be inferred that the appellant may have thought that the possible collision he subjectively foresaw would not actually occur, the second element of *dolus eventualis* would not have been established.'

[17] Regarding the onus placed on the state to prove an accused's guilt beyond a reasonable doubt, the following was held in ***Pillay*** supra (at par [9]):

'…This court stated in *S v De Oliveira*[19] concerning *S v Ntuli*[20], that where the defence of self-defence has been specifically pleaded by the accused or

[19]Supra.
[20]1975 (1) SA 429 (A) at 436D-437G

emanates from the evidence, the onus nevertheless remains on the State to prove beyond reasonable doubt that the accused acted unlawfully and that he realised, or ought reasonably to have realised that he was exceeding the bounds of self-defence. The full bench ought to have found that the defence as pleaded by the appellant was reasonably possibly true in its features. The appellant did not have a duty to convince the court of the truthfulness of his version that he acted in self-defence.'

[18] The appellant's testimony throughout was that he did not intend to kill the deceased, more specifically, it was not his aim to stab the deceased in his neck with the multi-tool. His evidence was that "I just moved the hand towards him. Unfortunately, it landed on his neck." On the same basis as in ***Botha*** supra [par 13] I am not persuaded that it was reasonable for the appellant to merely direct a stab movement in the direction of the deceased, especially when facing the deceased. In this respect in my view he did not act in the circumstances like the reasonable person in the same circumstances would have. I accept that in the heat of the moment, he did not intend to kill the deceased but rather that he was negligent. In the circumstances I am of the view that he should have been convicted of culpable homicide instead of murder.

[19] In the event of a conviction of culpable homicide, the imposed sentence cannot stand and we are to consider all the trite factors in metering out a just and balanced sentence to be imposed.

19.1 The appellant is a first offender (at the time of his conviction aged 45). He is gainfully employed as a fire-fighter and paramedic. He is married and the biological father of two minors. Not only does he financially support his wife and children, but also his unemployed family members.

19.2 There can be no dispute that the crime of which the appellant had been convicted by us, namely culpable homicide, is indeed of a very serious nature. The deceased was a teenager who had barely begin to live his

life, but he lost his life at the hands of the appellant. It can be accepted that the collateral damage caused by his demise would be devastating to his extended family who lost a song, a grandson, a cousin and a friend. It is indeed tragic that the deceased died in the arms of his mother. No sentence can ever return the deceased to his family. The interest of society demands that an accused not be punished too leniently and the sentence imposed should serve as a deterrent for would-be offenders. This factor should however be balanced against all other factors that we are to consider in reaching a just sentence.

19.3 The learned magistrate in her consideration of the personal circumstances of the appellant alluded (in our view correctly so) thereto that the appellant is "basically a good Samaritan and an asset to society."[21] We have also taken into account that the appellant all throughout is testimony indicated that he is sorry for the crime that he had committed and the damage that he had caused to the deceased's family. Moreover, he contributed financially to the funeral of the deceased. After the deceased was stabbed the appellant attended to the deceased by driving the deceased to hospital before taking his own family to another hospital. In our view these factors are indeed indicative of remorse shown by the appellant. It is trite that in reaching a balanced and just sentence, the sentence must be "blended with a measure of mercy according to the circumstances".[22]

19.4 Counsel for appellant submitted that, in the event this court should find appellant guilty of culpable homicide, a totally suspended sentence be considered. We are of the view that the circumstances of this matter does not leave room for a suspended sentence. As alluded to, the crime is of a very serious nature. In the ***Botha*** matter supra the Supreme Court deemed a sentence of 3 years' imprisonment in terms of s 276(1)(i) of the CPA to be an appropriate sentence. In view of paras 19.1-19.3 above, we are of the view that a similar sentence

[21]Record p 261 line 7.
[22]***S v Rabie*** 1975 (4) SA 855 (AD) at 862.

should be imposed herein, but for a longer period of incarceration, namely 5 years.

[20] The result therefore is that the appeal should succeed.

[21] Accordingly the following order is made:

21.1 The appeal is upheld to the extent set out below.

21.2 The conviction of murder and the sentence of 15 years' imprisonment, are set aside and replaced with the following:

> 'The appellant is convicted of culpable homicide and is sentenced to five years' imprisonment subject to the provisions of s 276(1)(i) of the Criminal Procedure Act 51 of 1977.'

21.3 The sentence should be deemed to have been imposed on 2 September 2022.

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C REINDERS, ADJP

I concur.

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S CHESIWE, J

On behalf of the Appellant: Adv GSJ van Rensburg
Instructed by: Finger Attorneys

BLOEMFONTEIN

On behalf of the Respondent:	Adv M Lencoe
Instructed by:	Director of Public Prosecutions
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