

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA  
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: A133/2018

(1) REPORTABLE: YES / NO  
(2) OF INTEREST TO OTHER JUDGES: YES/NO  
(3) REVISED.

27/11/2018  
DATE

*J. Matsemela*  
SIGNATURE

In the matter between:

**HARTNEY BOBBY JACK**

APPELLANT

and

**THE STATE**

RESPONDENT

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**JUDGMENT**

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**MATSEMELA AJ**

[1] The appellant was arraigned in the Randfontein Regional Court on the following counts:

Count One: In that he killed one Moade Kwenyana by stabbing him with a knife.

Count 2: In that he assaulted one William Kaalse with fist with the intent to cause him grievous bodily harm.

Count 3: In that he assaulted one Ms Lee-Ann Kwenyana by stabbing her with a knife with the intent to cause her grievous bodily harm.

- [2] On the 26 February 2015 he was found guilty on count 1 and 2, and acquitted on count 3.
- [3] On the 29<sup>th</sup> July 2016 he was sentenced as follows:  
 On count 1  
 In terms of section 279(1) of the criminal procedure Act read with the provisions of section 51(2) part 2 of schedule 2 of the criminal law amendment act 105, he was sentenced to 20 years imprisonment.  
 On count 2  
 12 months imprisonment  
 Both sentences were ordered to run concurrently.
- [4] The appellant applied for condonation in that the heads of argument were filed late. The condonation was granted.

#### **AD CONVICTION**

- [5] This matter emanates from an incident that occurred on the 25 December 2014. It's not in disputes that the appellant stabbed the deceased twice. It's also not in dispute that the appellant assaulted William Kaalse. What is in dispute is that he acted in self-defence.
- [6] The evidence before court is that Lee-Ann Kwenyana was asleep with her husband (the deceased) in their bedroom at about 22h00 on that day. They were awakened by the noise made by the appellant who was enquiring with William Kaalse in that other bedroom. William Kaalse is the father of Lee-Ann Kwenyama.
- [7] Lee-Ann and the deceased went to investigate because they heard that there was an argument between the Appellant and his girlfriend. They saw the Appellant coming out of William Kaalse's bedroom. When he came out he had already assaulted William Kaalse with a fist on his forehead. Mr Kaalse did testify later on that the Appellant came to his bedroom opened his blankets and

punched him on his face. When he came out of the bedroom the deceased was standing in the entrance of the kitchen. The Appellant was swearing at Lee-Ann Kwenyana, her father and the deceased. The Appellant was asked to leave the house. The appellant indicated that he wanted to put on a top as in jacket or jumper. He suddenly turned around and stabbed the deceased twice. He thereafter jumped the fence and escaped.

## **ISSUES**

### **SELF DEFENCE**

[8] The appellant raised the defence of self-defence. In his testimony he said the deceased hit him with a fist on his mouth, he fell down. The deceased continued to assault him by jumping over him and kicking him. Lee Ann and the father came to join in the attack. He fell on the ground and tried to get up. However he fell against the sink and saw a knife. He took it. He warned them to move away but they refused, he then stabbed the deceased. The court a quo rejected his defence of self-defence and correctly so.

[9] In R.Snyman Criminal Law Fourth edition at page 102 says:  
 “a person acts in private defence and the act is therefore lawful if she uses force to repel unlawful attack which has commenced or eminently threatening upon her or somebody else’s life, bodily integrity, property or other interests which deserves to be protected provided the defensive act is necessary to protect the interest threatening and directed against the attacker than necessary towards to ward off the attack.”

[10] Evidence from the record shows that the appellant was the aggressor when the incident took place. The Appellant and his girlfriend Olive had a quarrel in their bedroom. This caused the Olive to leave the room. This made the Appellant very angry. He started to look for Olive in the other rooms. He went into the room of Mr William Kaalse and when he did not find her he took out his frustrations on Mr Kaalse. Then he came to passage where he met the

deceased and his wife. They asked him to leave the house and he stabbed the deceased.

[11] In *S v De Oliveira* the court said the following:

“a person who acts in private defence acts lawfully, provided his conduct satisfy the requirements laid down for such a defence and does not exceed its limits. The test for private defence is objective. Would a reasonable man in the position of the accused have acted the same way (*S v Ntuli* 1975 (1) SA 429 (A) at 436 E). If an accused honestly believes his life or property to be in danger, but objectively viewed they are not, the defensive steps he takes cannot constitute private defence. If in those circumstances, he kills someone his conduct is unlawful.

[12] In *Papu and two others vs State* 2015 (2) SA CR 313 the following was said:

“The appellant reliance on private defence rejected by the final court after an holistic examination and appraisal of the evidence concerning the sequence of events which preceded the stabbing of the deceased”

[13] In the present case the learned magistrate reasoned as follows:

“According to him [Appellant] he was jointly assaulted by three of them whilst he was inside the kitchen. He tried to get up and fell against the sink. He took a knife on the sink and screamed at them to move away. When they failed to move away he stabbed the complainant. He does not know if they knew that he had a knife. If the deceased was in fact in front of him and Lee-Ann and her father on either side what would have prevented them from seeing him grab a knife” How can the people attack you when you armed and they are not.

[14] Under cross examination the Appellant said he does not know what caused the injury on Mr Kaalse's forehead. According to him he was acting in self-defence. Remember that Mr Kaalse testified that the Appellant came into his room looking for Olive. When he could not find her he opened the blanket and hit him in the face. I submit that the trial court correctly convicted the Appellant on assault with the intention to do grievous bodily harm.

## **SINGLE WITNESS**

[15] It was argued on behalf of the Appellant that the complainant is a single witness in so far as the incident of stabbing is concerned and that the cautionary rule should apply when assessing her evidence relating to the stabbing of the deceased. I do not think that this court should even consider this aspect because it is common cause that the Appellant stabbed the deceased. The issue was whether he acted in self-defence.

## **SENTENCE**

[19] Sentencing falls exclusively within the discretion of the trial. The appeal court will only interfere with the sentence where the trial, exercised its discretion improperly or unreasonable or misinformed itself as to the facts which resulted in the shockingly inappropriate sentence. See *S v ANDARSON* 1964 (3) SA 494 (A)

[20] As it was adumbrated in the case of *S V Zinn*, the triad must be taken into account when sentencing. The following were put before court a quo:

Personal circumstances of the accused

1. He is 34 years of age.
2. He was unemployed
3. He is the father of two minor children.
4. He has previous convictions. He was convicted of assault.

## **SERIOUSNESS OF THE OFFENCE**

[23] The appellant was convicted of a serious offence. The offence was committed in a vicious and callous manner. The brutality of the appellant indeed showed that he attaches no value to human life.

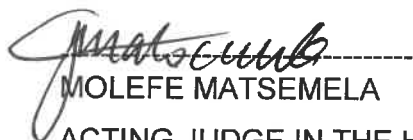
## **INTEREST OF THE COMMUNITY**

[24] The offence of which the appellant was convicted of is very serious. The community needs to be protected against such violent attacks. The message must be sent out there that there would be criminals are discouraged from committing such offences.

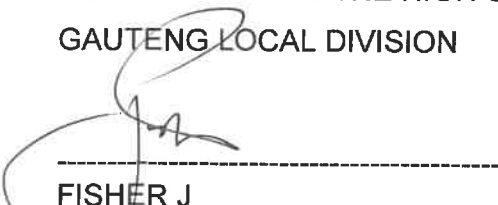
[25] The trial court correctly imposed a minimum sentence in regard to the count of murder. There was nothing that was placed before it , to persuade it to deviate from the minimum sentence. There were no substantial and compelling circumstances. There is nothing shocking and inappropriate about the sentence which was imposed by the trial court.

I therefore make the following order:

Appeal against both the sentence and conviction is dismissed.

  
MOLEFE MATSEMELA

ACTING JUDGE IN THE HIGH COURT OF SOUTH AFRICA  
GAUTENG LOCAL DIVISION

  
FISHER J

JUDGE IN THE HIGH COURT OF SOUTH AFRICA  
GAUTENG LOCAL DIVISION

FOT THE APPELLANT  
INSTRUCTED BY

FOR THE RESPONDENT  
INSTRUCTED BY

S NOBANGULE  
LEGAL AID SOUTH AFRICA  
011870 1480  
ADV ZINN  
DIRECTOR OF PUBLIC PROSECUTIONS  
0760887801