IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG

APPEAL NO: AR 534/2017

In the matter between:

MZWANDILE NTUTHUKO NDLELA **APPELLANT**

and

THE STATE **RESPONDENT**

ORDER

On appeal: from the Richards Bay Regional Court (sitting as court *a quo*):

(a) The appeal against conviction and sentence is upheld.

(b) The conviction and sentence of the court *a quo* is set aside.

JUDGMENT

Sibisi AJ (Annandale AJ concurring)

[1] On 5 October 2016, the appellant pleaded not guilty in the Richards Bay Regional Court to the crime of murder, read with s51, Part 11, of Schedule 2 of Act 1 of 105 of 1997, read with s258(a)(b) and s256 of Act 51 of 1977.

[2] On 24 May 2017, the appellant was convicted and found guilty of murder read with s51(2) of Act 105 of 1977. On 30 May 2017, the appellant was sentenced to undergo 8 years' imprisonment. Furthermore, the appellant was deemed unfit to possess a firearm.

[3] The appellant applied for leave to appeal against the conviction and sentence from the court *a quo* and leave against the conviction was granted hence the present appeal.

[4] The appellant contends that the court *a quo* misdirected itself when convicting him.

[5] According to the admissions made by the appellant, the appellant stabbed the deceased ("Mr Bhekithemba Langa") once on his upper body in self-defence and did not intend to kill him. The post-mortem report and chain evidence was admitted by the appellant. The post-mortem report reveals that the deceased sustained a single stab wound to the left front chest.

[6] According to the evidence of the first state witness, Mr Phiwayinkosi Tiding Ximba ("Ximba") on 28 February 2015 at approximately 15h30 he arrived at Makhehleni Tavern situated at Mzingazi, Richards Bay, KwaZulu-Natal. Ximba bought his first beer quart and went out to sit on the tavern's steps. After approximately ten minutes the visibly drunk deceased arrived, sat next to him and Ximba moved his beer from one hand to another. At that stage an argument ensued between them. Ximba struck the deceased on his forehead with the same beer bottle which injured the deceased and caused him to bleed. Immediately thereafter, the deceased retrieved another bottle which had been about four paces away, he broke it, held its neck and went towards Ximba. Ximba retreated and tried to pick up bricks in order to stop the deceased. It is at that point that Mr Mduduzi Feron Ngwenya ("Ngwenya") intervened in order to stop the fight. The deceased turned towards the tavern's gate. Furthermore, Ximba testified that the appellant, who had been inside the

door of the tavern, appeared and went towards the deceased, said nothing to him, took out an object from the right-hand side of his waist and he stabbed the deceased on his chest. It is Ximba's testimony that the appellant left thereafter. The appellant was not trying to intervene in the altercation involving the deceased and Ximba.

[7] The respondent led the evidence of the second witness, Ngwenya. On 28 February 2015 at approximately 16h00 Ngwenya arrived at Makhehleni Tavern. As he entered the tavern's gate, he saw Ximba hitting the deceased on his face with a bottle. Ngwenya noticed the deceased bleeding on his forehead. Furthermore, Ngwenya testified that the deceased then retrieved a bottle which he broke and started advancing towards Ximba. Ngwenya intervened by saying: "Here are the police". This seemed to have had the effect of stopping or halting the fight. The appellant appeared from inside the tavern, took out a knife from the right-hand side of his waist and stabbed the deceased with it once on the lefthand side of his chest. Thereafter the appellant put back his knife and went out the tavern gate. The stabbing happened in front of the tavern's entrance. There was no exchange of words between the appellant and the deceased.

[8] The appellant testified at the trial. According to the appellant, he was seated outside the tavern when the deceased arrived, the deceased bumped him and as a result he bumped himself against the wall. He mentioned that the deceased was involved in a fight and that there was a gentleman who hit the deceased with a bottle. The deceased reacted by breaking a bottle, held what remained of it and instead of going to the person that he had a quarrel with, he went straight towards the appellant. According to the appellant, the deceased had on a separate occasion stabbed him and he ended up in a coma for about three days. The appellant testified that because the deceased had on that date provoked him and was advancing towards him with a broken bottle, he had nowhere else to run to, he stabbed him to prevent injury to himself.

[9] The appellant was not able to call witnesses in support of his version of events. The court called a witness who the appellant had wanted to call whose attendance at court the police had been unable to secure. He had however been so intoxicated that he could not remember anything.

[10] The court a *quo* accepted the respondent's version and rejected the testimony of the appellant.

[11] The appellant contends that that the court a *quo* misdirected itself when it rejected his version. Furthermore, the appellant contents that his actions were necessary as he was acting in self-defence.

[12] *CR Snyman Criminal Law* 6 ed (2014) at 102 defines private defence as follows:

"A person acts in private defence, and her act is therefore lawful, if she uses force to repel an unlawful attack which has commenced, or is imminently threatening, upon her or somebody else's life, bodily integrity, property or other interest which deserves to be protected, provided the defensive act is necessary to protect the interest threatened, is directed against the attacker, and is reasonably proportionate to the attack."

[13] *Snyman* draws a distinction insofar as the requirements of private defence are concerned and deals firstly with the requirements of the attack with which a person who acts in private defence must comply, and secondly the requirements with which the defence must comply.

[14] Insofar as the requirements of the attack are concerned, the attack must be unlawful, the attack must be directed at an interest which legally deserves to be protected and the attack must be imminent but not yet completed.

[15] The requirements for the defence of private defence are the following:

(a) It must be directed against the attacker.

(b) The defensive act must be necessary. Here one considers whether there is a duty to flee, and the defensive act must be the only way in which the attacked party can avert the threat to his/her rights or interest.

(c) There must be a reasonable relationship between the attack and the defensive act. Here it is not necessary that there be a proportional relationship between the nature of the interest threatened and the nature of the interest impaired.

(d) The attacked person must be aware of the fact that he/she is acting in private defence.

[16] The test is an objective one and the courts have emphasised that one should not judge the events like an armchair critic, but rather place oneself in the shoes of the attacked person at the critical moment and bear in mind that at such point in time the attacked person only has a few seconds in which to make a decision.

[17] The court should then ask whether a reasonable person would have acted in the same way in those circumstances. A person who suffers a sudden attack cannot always be expected to weigh up all the advantages and disadvantages of his/her defensive act and to act calmly.

[18] In *Rolston v S*[1] 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. 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*. That exercise has to be undertaken against the legal principle

[1] 451/2022 [2023] ZASCA 3 (5 January 2024)

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 -Where, in the performance of that exercise, it is found that it is reasonably possible that the accused might be innocent, the accused must be acquitted."

[19] The Supreme Court of Appeal in *S v Steyn*[2] stated in respect of the 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. However, there should be a reasonable balance between the attack and the defensive act as 'one may not shoot to kill another who attacks you with a flyswatter'. As Prof J Burchell has correctly explained '. . . 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).

[20] *Botha v S*[3] 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.)"

[21] In *S v Humphreys*[4] the 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...

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[2] 2010 (1) SACR 411 (SCA)
[3] 2019 (1) SACR 127 (SCA)
[4] [2013] ZASCA 20; 2015 (1) SA 491 (SCA) paras 12 – 13

...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 the fictitious reasonable person in his position would have foreseen those consequences. That would constitute negligence and not *dolus* in any form. One should also avoid the flawed process of deductive reasoning that, because the appellant should have foreseen the consequences, it can be concluded that he did. That would conflate the different tests for *dolus* and negligence...." (emphasis added).

[22] In *S v Ngubane*[5] in the following way:

A man may foresee the possibility of harm and yet be negligent in respect of that harm ensuing, e.g. 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...

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".' (emphasis added).

[23] The court *a quo* found that there were no inconsistencies or contradictions in the respondent's case and that the respondent's witnesses both corroborated each other in all material respects[6] despite the following contradictions:

(a) Ximba testified that after Ngwenya interceded the deceased turned towards the gate, was no longer focused on Ximba and walked away from Ximba;[7] and

(b) according to Ngwenya when he interceded the deceased did not even look around but went to Ximba and when he was stabbed, he was still facing Ximba[8]

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[5] 1985 (3) SA 677 (A) at 685A-H
[6] See page 131 line 17, page 132 from line 24 to line 8 on page 133
[7] See pages 9, 15 and 24 of the record
[8] See pages 30 and 34 of the record

[24] Colour photograph 3[9] depicts a mark in red towards the right where the stabbing happened which on the basis of Ximba's evidence is less than five paces away from the other red mark outside the door of the tavern which is the point where Ximba first saw the appellant.

[25] The undisputed evidence is that the deceased took two steps forward after being stabbed before he fell to the floor. Logic dictates that the deceased would have kept moving in his direction of travel before the stabbing.

[26] Furthermore, the evidence indicates that in the immediate area of the scene, everyone was at extremely close quarters at all material times.

[27] According to the appellant, the deceased turned to him, advanced in his direction and was armed with a broken bottle which is a potentially deadly weapon. The appellant had reason to fear the deceased who had stabbed him to the point of putting him into a coma previously. Furthermore, there had been an undisputed earlier incident on the day in question of hostile conduct by the deceased against the appellant.

[28] The deceased was clearly an aggressor, was armed with an extremely dangerous weapon, had declared himself intent on violence, had demonstrated a history of violence, was drunk and not responding rationally. The deceased had at the very least turned away from Ximba, towards the appellant at very close quarters and continued moving towards him moments before the stabbing took place.

[29] In the circumstances, I am not satisfied that it can be said subjectively that the appellant did not append harm in a manner which was objectively reasonable and that he acted in a manner which is not justifiable. Based on the above, I cannot say that the appellant's version is not reasonably possibly true and his conduct disproportionate.

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[9] Page 236 of the record – photograph of the crime scene

Order

[30] In the result, the following order is made:

(a) The appeal against conviction and sentence is upheld.

(b) The conviction and sentence of the court *a quo* is set aside.

Sibisi AJ

I concur:

A.M. Annandale AJ

JUDGMENT RESERVED: 24 JUNE 2024

JUDGMENT HANDED DOWN: This judgment was handed down electronically by circulation to the parties' legal representatives by email publication. The date and time for hand-down is deemed to be 15h00 on 03 July 2024.

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