

SOUTH AFRICA / JUDGMENT

Barends v S (R104/09) [2016] ZANCHC 17; 2017 (1) SACR 193 (NCK) (9 September 2016) [2016] ZANCHC 17

COURT

Northern Cape High Court, Kimberley

BEFORE

Kgomo, Matlapeng

CASE / FILE NUMBER

R104/09

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IN

THE HIGH COURT OF SOUTH AFRICA

(Northern

Cape Division, Kimberley)

Case

No: CA&R 104/09

Heard: 08/08/2016

Delivered: 09/09/2016

Reportable: Yes
Circulate
to judges: Yes
Circulate
to magistrate: Yes
Circulate
to Regional Magistrates: Yes
In

the matter between: ANDRIES
 BAREND'S Applicant
 v
 THE
 STATE Respondent

Coram: Kgomo JP et
 Matlapeng AJ

JUDGMENT

KGOMO JP

[1] The appellant was, notwithstanding his plea of not guilty, convicted by the Regional Magistrate (Upington), Mr M Viewe, on 09 March 2007 that he had the direct intent of murdering the deceased, Mr Lebogang Solomon Lepodise, a 21 year old man, on 06 May 2003. He was sentenced to serve 8 (eight) years imprisonment. Leave to appeal was sought only in respect of the conviction and was granted by the presiding Regional Magistrate on 06 June 2007. The appellant was throughout represented by Mr Tobie Kotze whereas Ms D Engelbrecht prosecuted the case.

[2] THE DELAY IN PROSECUTING THE APPEAL

The delay in prosecuting this appeal is ascribed to the fact that mechanical recordings/tapes/compact discs (CDs) went missing, and when they were eventually traced and transcribed certain portions of the evidence were either not mechanically recorded or the recordings could not be retrieved or were inaudible. The defective portions of the record have now been reconstructed to the substantial satisfaction or sufficient consensus of the Regional Magistrate, the defence and the state. See: the classical judgment of Olivier J (Lacock J and Williams J concurring) in *S V Van Staden* [2008] ZANCHC 45; 2008 (2) SACR 626 (NCD) and cases cited therein.

[3] What could not be accomplished though was the reconstruction of the judgment as ordered by Mamosebo AJ (then) and Erasmus AJ on 08 June 2015 for that assignment to be completed by 31 July 2015. The appeal was postponed to 31 August 2015. Fast forward: On 30 May 2016 Olivier J sent a stern directive that the definitively reconstructed judgment reach the Registrar of this Court not later than 30 June 2016 to serve before the Court of Appeal on 08 August 2016. Well, this has not happened and the frustration persists.

[4] The Regional Magistrate explains as follows in paras 2-9; for his inability to reconstruct the judgment:

“2. Op ‘n stadium het ek my notas tesame met my geskrewe uitspraak aan die klerk van die hof oorhandig sodat dit getik kan word. Dit het egter in daardie proses verlore geraak en het ek dus nie meer my notas tot my beskikking nie.

3. Vanwee die lang tydsverloop kan ek nie die detail van my uitspraak in herinnering roep nie, alhoewel die rekord van die getuienes nog beskikbaar is.
 4. Ek kan wel onthou dat daar 'n inspeksie ter plaatse gedoen was soos dit uit die record blyk.
 5. Die toneel was wel nie meer soos dit tydens die voorval daaruit gesien het nie maar wat ons kon wel waarneem waar die basiese structure (pale van die binne heining) was uit die merke wat ons kon sien op die grond.
 6. Dit was 'n dubbel omheinde erf bestaande uit draad heinings en afsonderlike toegangshekke. Ek kan egter nie meer die toneel so helder oproep nie, alhoewel dit 'n groot deel uitgemaak het van my uitspraak waaraan ek die beskuldigde se weergawe getoets het en ook uiteidelik verwerp het.
 7. Ek kan my wel herinner dat daar wel weersprekings was tussen die 3 staatsgetuies, maar vanweë die feit dat dit 'n bewegende toneel was het ek ook bevind dat dit nie wesenlike weersprekings was nie.
 8. Ten opsigte van die beskuldigde se verweer van noodweer dat die gemeenskap hom aangerand het, het ek dit as onwaarskynlikheid bevind aangesien dit nie sin maak dat die gemeenskap hom (die beskuldigde) sou aanrand nie, terwyl die Oorledene (aldus die beskuldigde se weergawe) die aggressor was. Die getuies het aangedui dat die gemeenskap die beskuldigde met klippe bestook het na die aanrandding deur die beskuldigde op die Oorledene, wat die mees waarskynlike was.
 9. Sedert die aansoek om verlof tot appèl toegestaan was, is die beskuldigde op borg vrygelaat en het dus nog nie begin om die vonnis uit te dien nie". (emphasis added)
- [5] How the clerk of court could so easily, not for the first time in the same case, have lost an official document (the "geskrewe uitspraak") boggles the mind. There is a sick, very sick, malady emanating from the Upington District and Regional courts. The Northern Cape/ Provincial Efficiency Enhancement Committees (NC/PEEC) is dealing with this problem and has urged disciplinary and/or criminal consequences.
- [6] With hindsight our colleagues' directive to the Regional Magistrate should have incorporated an alternative to the effect that failing the reconstruction of the judgment that the Magistrate, based on the record, simply give reasons for his conviction. This would not be dissimilar to a District Magistrate whose records were in manuscript, but gave an unwritten *ex tempore* judgment, which is not mechanically recorded. They only furnished written reasons/judgment upon request. See: *Securiforce V Ruiters: Case No. CA&R 64/2010 (02/12/2011): Kgomo JP (Pakati AJ(then) concurring)*. At para 22 thereof the following is said:
- "[22] I hasten to make the following observation. When a losing party asks for reasons for the court's finding what is in fact being called for is a judgment. A proper judgment at that. I appreciate that Magistrates have to contend with heavy court rolls and that they work under tremendous pressure. See S v Steyn 2001(1) SA 1146(CC) at 1155F-1159D (paras 13-21). The aforesaid difficulties notwithstanding, a better judgment should have been produced particularly if regard is had to the wide*

ranging and comprehensive argument that was presented by the legal representatives before the presiding Magistrate as reflected in the transcribed record. Of note is what the applicable Rule 51(1) provides:

“(1) Upon a request in writing by any party within 10 days after judgment and before noting an appeal the judicial officer shall within 15 days hand to the registrar or clerk of the court a judgment in writing which shall become part of the record showing –

- (a) The facts he or she found to be proved; and
- (b) His or her reasons for judgment.”

This situation no longer obtains in criminal cases in this province because all judgments are mechanically recorded.

[7] The appellant was entitled to expeditious justice which did not come his way. He should no longer be held in anxious suspension. Our authority for the route envisaged is to be found in the following cases where no judgments were available or given for a variety of reasons:

7.1 In *S V Mokela* 2012(1) SACR 431 (SCA) at paras 12 and 13 Bosiello JA stated:

” [12] I find it necessary to emphasise the importance of judicial officers giving reasons for their decisions. This is important and critical in engendering and maintaining the confidence of the public in the judicial system. People need to know that courts do not act arbitrarily but base their decisions on rational grounds. Of even greater significance is that it is only fair to every accused person to know the reasons why a court has taken a particular decision, particularly where such a decision has adverse consequences for such an accused person. The giving of reasons becomes even more critical if not obligatory where one judicial officer interferes with an order or ruling made by another judicial officer. To my mind this underpins the important principle of fairness to the parties. I find it un-judicial for a judicial officer to interfere with an order made by another court, particularly where such an order is based on the exercise of a discretion, without giving any reasons therefore. In *Strategic Liquor Services v Mvumbi NO & others* 2010

- (2) SA 92 (CC) para 15 the Constitutional Court whilst dealing with a failure by a judicial officer to give reasons for a judicial decision stated that:

‘...Failure to supply them will usually be a grave lapse of duty, a breach of litigants’ rights, and an impediment to the appeal process...’. See also *Botes & another v Nedbank Ltd* 1983

- (3) SA 27 (A) at 28.

[13] Regarding the duty of judicial officers to give reasons for their decisions it is instructive to have regard to what the RT Hon Sir Harry Gibbs GCMG, AC, KBE, the former Chief Justice of the high court of Australia stated in the *Australian Law Journal* 1993 (67A) 494 where he said at 494:

‘...The citizens of a modern democracy – at any rate in Australia – are not prepared to accept a decision simply because it has been pronounced, but rather are inclined to question and criticise any exercise of authority, judicial or otherwise. In such a society it is of particular importance that the parties to litigation – and the public – should be convinced that justice has been done, or at least that an honest, careful and conscientious effort has been made to do justice, in any particular case, and that the delivery of reasons is part of the process which has that end in view...’.

See also *Mphahlele v First National Bank of SA Ltd* [1999] ZACC 1[1999] ZACC 1; ; 1999

(2) SA 667 (CC) para 12; *Commissioner, South African Revenue Service v Spring Investment 117 CC t/a Global Investment* 2011

(4) SA 551 (SCA) paras 28-30.

7.2 In *S v Carter* 2014 (1) SACR 517 (NCK) at paras 3 and 4 this Court (Kgomo JP et Mamosebo AJ-then) stated:

“[3] The less said about the judgment of the regional magistrate, the better. The judgment does not provide any factual background. There is no critical assessment of why the acts of the appellant constituted attempted rape, and not rape for which he was

charged. No authority is cited for the drastic deviation from the original charge. There is no explanation for rejecting the complainant's evidence that she was sexually penetrated. The appellant did not testify, nor did he call any witness. The impact of the appellant's choices to remain silent in the face of implicative evidence is not dealt with. The magistrate, and indeed the magistracy, may do well to look at the following judgments in this respect: *S v Mokela* 2012

(1) SACR 431 (SCA) ([2011] ZASCA 166) at 436e – 437b (paras 12 and 13) and cases cited therein; *Strategic Liquor Services v Mvumbi NO and Others* 2010 (2) SA 92 (CC) (2009 (10) BCLR 1046) at 96B – 98A (paras 12 –

19) and cases there cited.

[4] It is not the length of the judgment that matters, but whether the state has proved its case beyond a reasonable doubt. This the court establishes by investigating whether all the elements of the crime an accused is charged with have been proved. In casu on the merits, if the recital of the charges and verdict part are excluded, the body of the judgment of the regional magistrate is hardly a page long”.

[8] THE APPELLANT’S DEFENCE

In his written plea-explanation, Exh “C”, the appellant maintains, inter alia, that:

8.1 He acted in self-defence and in defence of his family (“huismense”) and property when he was attacked by the deceased and his friends who hurled missiles at his home;

8.2 His wife from whom he was busy divorcing, T., summoned his intervention. He was inside the house. She reported to him that the deceased attacked her in front of their house. On turning the corner of the house the deceased struck him with a sealed bottle of beer and thereby flattened him.

8.3 In his dazed state he managed to disarm the deceased of his knife and stabbed him indiscriminately, and cannot say where the stab wounds were inflicted.

8.4 He had no other choice in doing what he did because the missiles rained on him, his family and the property unabatedly. His house and tuck-shop, run from his premises, were damaged.

[9] THE STATE'S CASE

The post-mortem report was conducted by Dr G.A. Isaacs on 13 May 2003, the day after the deceased's death. The doctor noted the following injuries and the cause of death ("Exh B"):

“

“(Iv) That the main post-mortem findings with respect to this body were:

1. Single penetrating stabwound left anterior chest entering between ribs 3 and 4.
2. Left pneumothorax.
3. 1 cm stabwound in the anterior wall of the right ventricle.
4. 3 different stabwounds on the back.

(v) that, as a result of my observations, a list of which follows I have decided:

- a) That the death has occurred 7 days prior to my examination, and
- b) That the cause of death is:

Hypovolaemic shock due to stabwound in the heart”.

[10] Messrs Itumeleng Pitso and Robert Fish testified that during the evening of 06 May 2003 they, the deceased (Lebogang) and Mr Daniel (Nathaniel) Motaung(Mataung) went to appellant's place to buy bread as they were hungry. The appellant and/or his wife run a shebeen and a tuck-shop. There is a difference in the evidence of these two witnesses (Daniel did not testify) as to whether deceased or Daniel purchased the two bottles of (750 ml) of beer from the appellant's wife (Mrs M. “T.” B.) and whether or how much they had drunk from the already opened beers when a quarrel or misunderstanding ensued between the deceased

and Mrs B.

[11] It is unclear what the source of the conflict was. It was suggested that it had to do with the price of bread, which was nevertheless never bought, or perhaps the unappreciated romantic attention that the deceased may have paid Mrs B.. It cannot be established for

certain because Mrs B. did not testify and when he did the appellant did not invoke any of these suggestions on why he accosted or was accosted by the deceased. What is of significance is that the two men faced and spoke to each other. The appellant produced a huge knife. The deceased turned round and fled, pursued by the appellant who stabbed him at least twice on his back, they said. But as already shown, the post-mortem recorded three stabwounds on the back. The deceased collapsed and landed on his back. According to Mr Pitso the appellant then landed two or three blows on the deceased's chest which ended his life on that spot.

- [12] Mr Fish testified that after the deceased landed on his back he did not witness what happened to him because he (Fish) fled or kept away, for whatever reason. He therefore did not see the deceased being stabbed on the chest. However, in his police statement he stated that he witnessed the appellant stabbing the deceased once on his chest. When this inconsistency was pointed out to him he denied the accuracy of the statement and blamed it on an incorrect interpretation. He gave his statement to Supt Fillies in Setswana for whom Capt Mona interpreted into Afrikaans. On the ill-conceived application of Mr Tobie Kotze, the appellant's attorney, the Magistrate ordered a trial-within-a-trial for Mr Fish's witness statement to be admitted, which it was. The propriety and futility of this exercise will manifest later.
- [13] Ms Sylvia Julies, the appellant's neighbour, testified that during the evening in question she was concerned about the whereabouts of her six-year old son who was not indoors. Out in the street looking for him, she noticed that the deceased, who was unknown to her, and the appellant involved in a quarrel. The street, it was common cause, was brightly lit and visibility was good. The two were next to the appellant's small gate. She overheard the deceased telling the appellant: "As ek iets sleg gesê het aan jou vrou, dan moet jy my verskoon". Ms Julies gained the impression that they had smoked the peace pipe because they walked together into the appellant's premises.
- [14] As the appellant and the deceased approached the tuck-shop Ms Julies saw Mrs Arends confronting the deceased and pummelled him with clenched fists. The deceased lifted his arms as if to retaliate (maybe even to perry the blows). At that juncture the appellant grabbed the deceased by the shoulder. The deceased broke free and fled:

"Goed en wat is die volgende wat toe gebeur?==En beskuldigde was agter hom en ek het gesien beskuldigde haal onder sy jas uit (hy het 'n army jas aangehad) 'n mes en hy steek op die oorledene.

Weet u waar op die liggaam van die Oorledene is hy gesteeke?== Ek kan nie sê nie, want die Oorledene – hy het hom van agter af gesteeke. Ek kan nie sê waar nie.

Hoeveel houe?== Ek kan nie sê nie. Ek kan nie sê hoeveel houe nie, want toe die Oorledene val toe sien ek dat die Beskuldige sit bo-op die Oorledene en hy steek aanhoudend. So ek kan nie sê hoeveel houe nie.

En wat maak hy toe?==En toe is daar iemand- ek weet nou nie is dit die Oorledene se maatjies nie of iemand wat daar was, wat die Beskuldige van die Oorledene af getrek het.

Nou op die stadium to die Beskuldige so oor die Oorledene buk, wat het hy gemaak?== Hy het gestee. Ek het gesien hy steek.

Kan u net vir ons wys hoe het die Beskuldige gebuk? Watter posies was dit?==Dit was in so 'n posisie. (Onhoorbaar).

HOF: Getuie toon aan met die een knie op die grond gedeelte en dan steek bewegings van bo na onder.

AANKLAER: En toe die Oorledene geval het, hoe het hy gaval?== Die Oorledene het op sy rug gegaan val.

En wat was die Oorledene se posisie op die stadium toe die Beskuldigde steek, steekbewegings uit oefen?== Die posisie was so.

HOF: Getuie toon aan so 'n keer beweging.

AANKLAER : U sê iemand het Beskuldigde van die Oorledene afgeruk en wat gebeur toe verder? == En toe loop – die Oorledene het seker net

- hy het opgestaan, hy het seker net so twee tree gegee, toe gaan val hy daar hy gelê het oop in die yard.

Goed en toe hy gaan val, wat gebeur verder?== Toe het hy daar gaan val. Toe skree sy maatjies dat die Beskuldigde het hulle se maatjie gestee.

Sê gou vir die hof tot op hierdie stadium weet u van enige klip gooiery wat daar was?== Ja.

Goed, op watter tydstip is klip gegooi?== Is nadat die Beskuldigde die Oorledene gestee het, wat die Oorledene daar lê, toe het die Oorledene se maatjies die Beskuldigde se huis gegooi met die klippe.

Sê gou vir die hof op die stadium toe Beskuldigde die Oorledene steek, watter beserings het die Beskuldigde opgedoen?== Nee.

Is hy ook beseer?== Nee, ek het niks in daardie oomblik gesien nie. Ek het gesien toe die ambulans en die polisie kom, toe is dit mos nou lig. Ligte wat werk, toe sien ek dat die Beskuldigde se gesig is vol bloed, maar ek kan nou nie sê het hy 'n hou teen die kop of die voorkop nie. Ek het daardie tyd gesien die Beskuldigde het ook bloed aan sy voorkop.

So dit is eers na die tyd wat u sien die Beskuldigde is beseer?== Ja, na die klip gooiery”.

[15] Ms Julies' observation is borne out by the J88 Medical report compiled by Dr V.M. Jansen who treated the appellant on 07 May 2003, a day after the incident. The Doctor recorded his injuries as follows:

“Fractures or dislocations (if any):

- 1) (L) Oogbank – gekneusde rooiperskleurig gehegde sny wond 3cm lank steke in.
- 2) (L) Oog – geswel rooiperskleurig
- 3) (L) kant van nek veelvuldige snywonde met 2 wonde elk een dermaton steek in.
- 4) (L) Oorskulp – geswel – rooiperskleurige kneusplek.
- 5) agter (L) oor op haarlyn kneusplek wat geswel is met klein snywond – droë bloed waargeneem by wond – kneusplek is rooiperskleurig.

By beserings is ± 12 ure oud en sny wonde (L) oogbank wat gekneus is veroorsaak deur 'n harde hou deur 'n stompvoorwerp, die besering by (L) oorskulp en op (L) haarlyn veroorsaak deur 'n harde hou deur 'n stompvoorwerp, besering van (L) oorskulp en (L) haarlyn is aaneenlopend klein snywondtjies in nek (L) veroorsaak deur 'n skerp voorwerp”.

[16] Mr Fish testified before Ms Julies. Mr Kotze put to him that the deceased was armed with a home-crafted long knife, that is the reason why Fish and his companions did not intervene and stop the deceased from attacking the appellant. Fish then responded that he saw the deceased produce what seemed like a butcher's knife from underneath a long coat (“lang jas”). Fish went on to say that he and his companions spent the whole day with the deceased and did not notice the knife on him. Besides, says Fish, the deceased wore light clothes (“ligte klere”) underneath which he could not conceal such a big knife. Still on the knife theme; when he testified in-chief the appellant said the following about of the knife.

“Die mes wat u by die man afgevat het en waarmee u toe nou na hom gestee het, kan u sê hoe die mes gelyk het?== Ek kan nie sê hoe het die mes gelyk nie. Dit het vir my soos ‘n gemaakte ding gelyk want dit is nie ‘n mes...(tussenkoms)

Het hy ‘n skerp kant voor gehad?== Ja, hy het net ‘n skerp kant voor.

Soos ‘n lem?== Ja, soos ‘n lem.

Blink?== Nee, soos ‘n ysterlem.

Het hy ‘n handvatsel gehad?== Nee, hy het nie handvasel gehad nie. Net so gemaakte ding gehad.

Kan u sê van waste material daardie ding aan die agterkant was?== Dit is ook staal.

Ook staal. Kan u sê wat die kleur was?== Hy was vir my swart gewees.

En kan u min of meer die lengte van die mes sê of die hele mes nou? As u nou moet skat?== Dit is, hy is omtrent [so] lank.

Hof: Omtrent ongeveer amper wat – 50,60 sentimeter?== Ja, is so ding. Hy is amper soos slaanding wat jy kan ‘n mens mee slaan.”

[17] It was therefore common cause that the weapon was huge. It answers more to a description of a sword or a sable. Exh “E”, photos 4 and 6, depict the deceased lying on his back. He wears a short-sleeved white shirt and a pair of blue long pants. I agree with Fish that it

would have been impossible for the deceased to conceal the described weapon underneath his clothes. If he did he would not have been able to sit for the entire day. The evidence shows that he did sit at the appellant's place. He was up and down, talking to the appellant's wife.

THE APPELLANT'S EVIDENCE

[18] When he testified the appellant at no stage mentions that the deceased molested his wife or that she complained to him about anything or sought his intervention. In fact, he intimated that he was unaware of her exact whereabouts during his fracas with the deceased.

[19] The appellant says the trouble started when he was in the house, resting. His house was being stoned. He got out, unarmed, to investigate who the troublemakers were as he wanted to evict them ("ek wil nou hierdie mense uitstel"). He also wanted to close the small gate. As he touched the gate he was struck with a bottle over the head. The bottle shattered. He was dazed and crawled through the fence, apparently of the courtyard. The house is fenced off with a perimeter fences (the main yard) and a courtyard (the inner yard).

[20] The appellant says he noticed the deceased on the other side of the fence. It must have been the courtyard fence because he says it was close to the door. The deceased was armed with the weapon already described. He pulled the deceased through the fence into the yard. He continues the narrative:

"Goed en wat gebeur toe ===Toe begin steek ek. Toe... steek ek maar net dat ek 'n pad kry nou.--- want die mense gooi aanmekaar met klippe.

Goed. Kan u onthou hoeveel hou u gestee het?===

Ek kan nie sê hoeveel hou nie want toe ek met die klippe raak gegooi raak, toe weet ek nie meer waar is ek nie. Toe moet ek nou maar net ...(onvoltooid).

Goed. Sê net vir die hof was u in die proses wat u gestee het na die man, was u raak gegooi ook met klippe?=== Hier op my liggaam. En dit het later vir my geklink soos bierbottels wat hulle ook teen die huis gooi. En daar het klomp glase en goeterse ook in daai tyd gelê".

[21] The appellant maintains that when he started stabbing the deceased he cannot say whether the deceased faced him or had turned his back on him. He could not see properly because one of his eyes was blinded by the blood flowing from his head-injury. The missile-throwers entered the yard. He escaped into the toilet where he discarded the weapon, which went missing and was never retrieved. The police rescued him from the angry mob. The deceased lay more or less where he had stabbed him. He (the appellant) was hospitalised.

[22] Another vital piece of evidence emanates from a question by the Court seeking elucidation:

"Hof: Wat het u gepraat van toe u omdraai, wat van die omdraai?=== Toe ek opstaan, die omdraai is wat hy nou geloop het, gehardloop het.

Toe? Toe steek u nog steeds?=== Ja, want die mense gooi klip u Edele. Ek kan mos nou nie want ek het maar net daai tyd gedink ek moet my nou net beskerm want die mense gooi my nou dood en my huis en my kinders”.

Notably from the above quoted passage, the appellant now recalls or concedes that he stabbed the deceased on his back. This tallies with evidence of Pitso, Fish, Ms Julies and the results of the post-mortem report already adverted to.

[23] The prosecutor concluded his cross-examination on this revealing note:

“Meneer, is dit nie waar omdat u en – u was kwaad vir die Oorledene omdat hy en u vrou gestry het?
=== Nee.

En toe het julle woorde?=== Nee, ek het niks – ek weet niks van daai mense af nie.

Want Sylvia, sy het vir die hof gesê julle het gestry in die straat?=== Nee u Edele.

En Sylvia sê jy wou, die Oorledene wou vir Meide geslaan het en dit is toe wat jy nou daar holla aankom en hom gryp?=== Nee u Edele. Ek het wakker geraak toe my vrou in die huis in kom hardloop. Dit is al”.

Mrs B., the appellant’s wife, did not testify.

[24] When it comes to self-defence, the defence of others on property our courts have enunciated the following principles:

In *R v Patel* 1959 (3) SA 121 (A) the Appellat Division held at 123 A-E:

“Having consulted the old writers cited in *Gardiner and Lansdown*, vol. 2 at

p. 1549 (6th ed.), I approve of the following passage in that work:

'A person has the same right to use force in the defence of another from a threatened danger, as he would have to defend himself, if he were the person threatened - *Moorman* 2.3.5. (this should read 2.2.5.); *van der Linden* 2.5.9.; *Matthaeus* 48.5.2.12.; *von Quistorp* para. 245.'

The general principles mentioned by WATERMEYER, C.J., in *R v Attwood*, 1946 AD 331 at p. 340, are that an accused is entitled to an acquittal on the ground that he was acting in self-defence if it appears as a reasonable possibility on the evidence -

'(a) That he had been unlawfully attacked and had reasonable ground for thinking that he was in danger of death or serious injury. (Though there may be cases of lawful self-defence where the accused was originally the aggressor *R v Ndara*, 1955

(4) SA 182 (AD) at 184 E.);

(b) That the means of self-defence which he used were not excessive in relation to the danger;

(c) That the means he used were the only or least dangerous means whereby he could have avoided the danger.'

In considering these, the Court must beware of being an arm-chair critic, and must take into account the exigencies of the occasion. Thus in *Union Government (Minister of Railways & Harbours) v Buur*, 1914 AD 273 at p. 286, INNES, J.A. (as he then was) said

'Men faced in moments of crisis with a choice of alternatives are not to be judged as if they had had both time and opportunity to weigh the pros and cons. Allowance must be made for the circumstance of their position'.

[25] As noted earlier we have unfortunately been deprived of the benefit of the Regional Magistrate's insights as regards who he believed or disbelieved and, having been steeped in the atmosphere of the trial, what the demeanor of the various witnesses on the witness stand was. However, when it comes to the assessment of the recorded evidence is concerned we are just as in such a good position as the Magistrate himself to draw our own conclusions. We are therefore at large to do so as if the Magistrate has completely misdirected himself. See: *R v Dhlumayo and Another* 1948 (2) SA 677 (A) at 706 where it was held at paras 10 and 11:

"(10) There may be a misdirection on fact by the trial Judge where the reasons are either on their face unsatisfactory or where the record shows them to be such; there may be such a misdirection also where, though the reasons as far as they go are satisfactory, he is shown to have overlooked other facts or probabilities.

(11) The appellate court is then at large to disregard his findings on fact, even though based on credibility, in whole or in part according to the nature of the misdirection and the circumstances of the particular case, and so come to its own conclusion on the matter".

See also: *R v Van Der Walt* 2006(4) SA 382(A) at 382H-383A; and *S v Van Wyk* 2006(2) SACR 22 (NCD) 23G-24H (Tlaletsi J, Kgomo JP concurring) in which the presiding judicial officers failed to provide any judgments apart from merely returning a verdict of guilty.

[26] For me Ms Julies was an extremely good witness, better than the rest. Her evidence reads very well. Her evidence was simple and

straightforward. She was very observant and her memory served her very well, regard also being had to her police statement which was put in in an attempt to discredit Fish who testified before her. She never contradicted herself.

[27] Mr Kotze, who seemed not to appreciate his duty to his client and the Court, unjustifiably attempted to make Ms Julies out to be a woman of loose morals who was involved in a love relationship with a "swart-man" or a man of a "swart-nasie". The Magistrate never enquired from him why he was playing the race card nor did he call Mr Kotze to order. The hurt that Ms Julies felt is poignant and must be reflected:

“U sien Beskuldigde sê vir my dat hy kan nie sê dat daar inderdaad ‘n verhouding was tussen u en die Oorledene nie, maar wat hy weet is dat hy julle baie bymekaar gesien het in daardie tyd en dat hy vermoed het dat daar moontlik ‘n verhouding tussen julle kon wees.=== Ek en wie?

U en die Oorledene?=== Nee Meneer, daardie kant het Beskuldigde regtig ‘n fout [gemaak]. My kinders is almal by die huis. Ek het nog nooit nadat ek en my man uit mekaar is, vir my aan mekaar gesteeke weer met ‘n man nie en ek drink nie. Ek stel in niks belang nie. Beskuldigde het daardie kant ‘n fout. Ek ken nie daardie Oorledene nie. Ek ken ook nie die persone wat – sy maatjies wat by hom is nie. Daardie kant het Beskuldigde eerlikwaar voor die aangesig van die Here, daardie kant het hy regtig ‘n fout gemaak. Daar het jy ‘n fout began Hendrik [the name of the appellant]. Ek het niemand. Soos ek nou hier sit werk ek vir my en my kindertjies. Ek is enkel. Ek is enkel. Ek het niemand.

Ek vra maar net vir u omdat dit dalk ook ‘n rede kan wees hoekom u wegstrem daarvan dat u die Oorledene en sy vriende geken het en hoekom hier gestaan het in die verklaring Oorledene en sy vriende kom gereeld by Beskuldigde se woning, jy weet?=== Nooit nie Meneer. Ek sweer voor die aangesig van die Here. Ek ken nie daardie mense nie en ek ook nie met een van hulle ‘n verhouding gehad nie. Ek sien hulle daardie aand vir die eerste keer by Beskuldigde se huis.

Goed.=== Ek het getuies wat kan sê – ek meen of ek iemand aanhou. Ek het niemand nie. Tot by my werkplek ook, hulle weet ek het niemand. Ek is net met my kinders”.

[28] When he testified the appellant vindicated Ms Julies. He said the deceased did not have a love relationship with Ms Julies. In fact he stated that he did not know the deceased. Notwithstanding the appellant’s categorical denial Mr Kotze valiantly tried to hang a peg on her. Ms Julies’ police statement does state that: “Oorledene en sy vriende kom ook gereeld by beskuldigde se woning”. Ms Julies was not asked to explain this part of her statement. She should have. What I have noticed is that Pisto, Fish and the appellant are in agreement that it was Pitso, Fish and Daniel Motaung’s first visit to the appellant’s place. The statement on this point is clearly wrong. No adverse finding can follow from this. See generally *S v Mafaladiso en Andere* 2003(1) SACR 583 (SCA).

[29] Pitso and Fish corroborate each other on material aspects in respect of occurrences prior to Ms Julies coming onto the scene. Their evidence is essentially consistent with that of Ms Julies where they observed the events from the same vantage point. On some narrow aspects, not worth specifying, where there is some divergence in their evidence Ms Julies’ ought to prevail. She was a star witness, as I have said. She was also independent from Pitso and Fish. She had no relationship or attachment to the deceased. She harboured no rancour against the appellant. She says of him:

“Wat sal u sê wat was u verhouding of hoe het julle oor die weggekom?=== Andries Barends is ‘n baie stil persoon. Ek ken hom op ‘n manier, hy het gewerk hier in die dorp en dan ry hy met sy fiets altyd huis toe. En hy is ‘n persoon wat altyd in sy yard gewees het. Hy is nie ‘n persoon wat sommer rond geloop het nie en hy is baie stil. Hy is nie ‘n woelige persoon nie.

Sou u sê u en hy al probleme met mekaar op gedoen op enige stadium?=== Nee.

Of het julle goed oor die weg gekom?=== Nee, ek het nog nie probleme met hom gehad nie. Ons het goed oor die weg gekom en ek het vir hom respek gehad en hy het vir my respek gehad”.

[30] The aspect where Fish states in his police statement that he saw one stab wound being inflicted by the appellant on the deceased but was adamant in his evidence that he only witnessed the stabbing on his back does not detract from the overall credibility of his evidence. He desisted from embellishing his evidence by exaggerating the case against the appellant. Mr Kotze’s full-blown exercise to have Fish admit such evidence which is, ironically, implicative of his client to the point of embarking on a trial within-a-trial is truly mindboggling.

[31] I am therefore satisfied that the evidence of all the state witnesses, bolstered by the admissions and documentary evidence, is trustworthy and credible and that the witnesses were honest. Their evidence was accordingly correctly accepted. This must be so because the Magistrate in his explanatory note, at para 7 thereof (quoted at para 4 of this judgment), state that the contradiction in the evidence of the three state witnesses were minor and not material. Such evidence inexorably points to the appellant not having acted in any of the grounds of defence he invoked.

[32] Furthermore, and in any event, the appellant has been shown beyond any doubt to have been an unmitigated liar. He armed himself with the sword-like weapon; put on an army coat to conceal it with, drew the weapon when no danger was lurking; pursued the unarmed deceased who fled; stabbed his quarry three times in the back; and when the hapless quarry landed on its back he stooped over him (not to conquer but to quench his bloodthirst and plunged the weapon several times, once through the heart, and killing him instantly; he then fled and did away with the weapon whose only purpose was meant to harm others. The Magistrate therefore correctly rejected his defence. See the magistrate’s para 8 quoted at para 4 of this judgment.

[33] The Magistrate, in the premises, correctly convicted the appellant of murder with the direct intent to do so (*dolus directus*). What the Magistrate should have added is that the murder was premeditated. To then have sentenced the appellant to 8 years imprisonment was a travesty of justice and betrays him as not having had regard to s51(1) of the Criminal Law Amendment Act, 105 of 1997, and/or the countless decided cases, particularly the Supreme Court of Appeal and the Constitutional Court cases, on this legislation pertaining to minimum sentences. For the state not to have appealed the sentence is heaping insult to injury on the deceased, his family and society generally. This brings the administration of justice into disrepute.

- [34] This bench has been asking in numerous judgments since the year 2000 why such serious cases are assigned to the regional court. Ours have been a voice in the wilderness. The office of the Director of Public Prosecutions must do something about assigning chicken-feed to the High Court and matters of such serious magnitude to the Regional Court. The Society is becoming restless and may soon run out of patience.

THE IRREGULAR TRIAL-WITHIN-A-TRIAL.

- [35] The ruling by the Regional Magistrate in which he permitted that a trial within a trial be conducted because there was a conflict between the testimony of Mr Fish in court and his witness statement deposed to before a police officer, Col Fillies, is irregular and unprocedural. This was not a statement made by an accused person to a police officer or a magistrate, pertaining to an admission or a confession the admissibility whereof was called into question as not having been made freely or voluntarily, while not in the accused's sound or sober senses or dictated to him or her or manufactured by the police. See s217 of the Criminal Procedure Act, 51 of 1977 (CPA).
- [36] The conflict in the police statement and the oral evidence issue had everything to do with the accuracy or reliability with which Fish's statement was obtained and not its admissibility. The defence did not object to its admission into evidence but passively permitted its acceptance. What is ironic is that the statement of Fish aggravates the case against the appellant by corroborating the evidence of Pitso and Ms Julies that the appellant stabbed the deceased, not only in the back, but in the chest as well. What Mr Kotze wanted to achieve is difficult to fathom.
- [37] The Magistrate should have asked Mr Kotze for his authority in bringing the application. What should have happened is that Mr Kotze should have cross-examined Fish on the discrepancy and leave it to the state to call the police officer who obtained the statement and his interpreter. If the prosecutor was not disposed to doing so the defence could call them when it presents its case. What has happened is that the Magistrate has unwittingly ruled on the credibility of Mr Fish (by believing the police witnesses and disbelieving Fish) before he completed his evidence because he allowed Fish to be cross-examined after the ruling. The credibility finding also came before the accused testified and therefore before all the evidence in the case was adduced or presented. This was highly irregular and the magistrate placed himself in an invidious position when it came to the consideration of the conspectus of the entire case.
- [38] Useful guidance may be sought in *S V Mafaladiso* (supra) at 584H-585D where the headnote (in English) reads:

"The juridical approach to contradictions between two witnesses and contradictions between the versions of the same witness (such as, inter alia, between her or his viva voce evidence and a previous statement) is, in principle (even if not in degree), identical. Indeed, in neither case is the aim to prove which of the versions is correct, but to satisfy oneself that the witness could err, either because of a defective recollection or because of dishonesty. The mere fact that it is evident that there are self-

contradictions must be approached with caution by a court. Firstly, it must be carefully determined what the witnesses actually meant to say on each occasion, in order to determine whether there is an actual contradiction and what is the precise nature thereof. In this regard the adjudicator of fact must keep in mind that a previous statement is not taken down by means of cross-examination, that there may be language and cultural differences between the witness and the person taking down the statement which can stand in the way of what precisely was meant, and that the person giving the statement is seldom, if ever, asked by the police officer to explain their statement in detail. Secondly, it must be kept in mind that not every error by a witness and not every contradiction or deviation affects the credibility of a witness.

Non-material deviations are not necessarily relevant. Thirdly, the contradictory versions must be considered and evaluated on a holistic

basis. The circumstances under which the versions were made, the proven reasons for the contradictions, the actual effect of the

contradictions with regard to the reliability and credibility of the witness, the question whether the witness was given a sufficient

opportunity to explain the contradictions - and the quality of the explanations - and the connection between the contradictions and the rest of the witness' evidence, amongst other factors, to be taken into consideration and weighed up. Lastly, there is the final task of the trial Judge, namely to weigh up the previous statement against the viva voce evidence, to consider all the evidence and to decide whether it is reliable or not and to decide whether the truth has been told, despite any shortcomings”.

See also cases cited in the Mafaladiso judgment, which also warn that presiding judicial officers must be astute to ensure that police statements are not abused by defence counsel.

[39] The Magistrate probably did not have any regard to the criteria upon which leave to appeal should be granted. The appeal is “dead in the water”. See the advice that Mr Justice Yacoob gives the Magistracy in *Shinga V The State: State V O’Connel* 2007(2) SACR 28 (CC) at 52C-H para 53 whereat he states:

“It is important to emphasize the judicial character of the task conferred upon magistrates, in particular, in determining whether to grant leave to appeal. Although the magistrate will have convicted and sentenced the accused, the magistrate is called upon to consider carefully whether another court may reach a different conclusion. This requires a careful analysis of both the facts and the law that have underpinned the conviction, and a consideration of the possibility that another court may differ either in relation to the facts or the law or both. This is a task that has been carried out by High Court judges for many years, but it is new to magistrates under the s 309B procedure. It is a judicial task of some delicacy and expertise. It should be approached on the footing of intellectual humility and integrity, neither over-zealously endorsing the ineluctable correctness of the decision that has been reached, nor over-anxiously referring decisions that are indubitably correct to an appellate Court”.

ORDER

The appeal fails and is dismissed.

F DIALE KGOMO

JUDGE PRESIDENT

Northern Cape Division, Kimberley

I concur

D I MATLAPENG

ACTING JUDGE

High Court of South Africa

On behalf of the Applicant: Mr D Van Tonder

(Legal Aid South Africa, Kimberley)

On behalf of the Respondent: Adv. K Kgatwe

(Director Public Prosecutor, Kimberley)

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