

SOUTH AFRICA / JUDGMENT

Mokaba v S - Appeal (A15/2023) [2023] ZALMPPHC 102 (31 October 2023)

[2023] ZALMPPHC 102**COURT**

Limpopo High Court, Polokwane

BEFORE

Kganyago, Kgatla

CASE / FILE NUMBER

A15/2023

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Source record**REPUBLIC****OF SOUTH AFRICA****IN****THE HIGH COURT OF SOUTH AFRICA****LIMPOPO****DIVISION, POLOKWANE****CASE****NO: A15/2023****REPORTABLE:**

YES/NO

OF

INTEREST TO OTHER JUDGES: YES/NO

REVISED

In

the matter between:

DERRICK

TEBOGO MOKABA

APPELLANT

And

THE

STATE

RESPONDENT

JUDGEMENT

KGANYAGO J

- [1] The appellant was arraigned in the regional court on one count of murder read with the provisions of section 51(1) of the Criminal Law Amendment Act[1] (CLAA). He appeared before regional magistrate Swanepoel in the Seshego regional court. He was found guilty in terms of section 51(2) of the CLAA and sentenced to 15 years direct imprisonment. The appellant is appealing against both conviction and sentence. The appeal is with the leave of the court a quo.
- [2] The appellant had pleaded not guilty to the charge and raised self-defence. The basis of the appellant's self-defence as stated in his plea explanation was that he had an argument with the deceased who was his girlfriend in the early hours of the morning. As they were arguing, the deceased took a knife which was on top of the refrigerator. The appellant took the knife from the deceased in order to disarm her. The deceased pushed the appellant who fell on top of a bed. The deceased jumped on top of the appellant and started biting the appellant on his left breast. The appellant tried to push the deceased away, but the deceased did not stop biting him. The deceased was inflicting serious injury on the appellant's breast and was not stopping to bite him.
- [3] The appellant was feeling excruciating pain as a result of the persisting biting by the deceased, and that is when the appellant stabbed the deceased once with that knife which he had disarmed her. The intention of stabbing the deceased was to ward off the deceased from biting him. After stabbing her, the deceased stopped biting him. The appellant realised later that he had stabbed the deceased on the chest when he saw her bleeding. He tried to stop her bleeding but he could not succeed, and the deceased became motionless. The appellant was now in state of panic and confused. In the morning the appellant bathed and left the deceased body in the shack, and went to his brother's house in Mankweng. He did not tell his brother what had happened. He out of his own volition handed himself at Mankweng police station after 3 days and explained to the police what transpired. The appellant further stated that deceased died as a result of his conduct, but denied that he had intention to kill her, and that he was acting in self-defence. However, the appellant did not consent to admissions in his plea explanation to be recorded as formal admissions in terms of section 220 of the Criminal Procedure Act[2] (CPA).
- [4] Matome Mashao was the State's first witness. He testified that he is a member of the South African Police Services (SAPS) and he is captain by rank. He is the investigating officer in the appellant's case. He is the one who had fetched the appellant at Mankweng police station and took him to Polokwane police station. As he was interviewing the appellant, he realized that the appellant was admitting some of the things pertaining to the offence he was facing which amounted to a confession. He decided to arrange warrant officer Matlwa to take the appellant's confession. Matlwa came and took the appellant from his (witness) office. Later

Matlwa brought the statement that he had taken from the appellant. When the witness read the appellant's statement, he saw that it contained the same things that the appellant had told him about the offence. At Mankweng police station the witness was told that the appellant had handed himself to the police. The witness was cross-examined but nothing new came out of the cross-examination.

- [5] Joseph Matlwa was the State's second witness. He testified that he is a member of the SAPS and warrant officer by rank. He recalls the face of the appellant as captain Mashao had requested him to take the appellant to colonel Nemukula. When he took the appellant to Nemukula, the appellant was fine and did not have any injuries, and did not complain of anything. He only asked the appellant about his name. After the appellant was finished with Nemukula he is the one who took the appellant back to Mashao. The appellant was with Nemukula for about an hour. When the witness took the appellant from Nemukula, the appellant was still fine and he did not complain about anything. The witness was cross-examined.
- [6] Mulimisi Gedeon Nemukula was the State's third witness. He testified that he is a member of the SAPS and lieutenant colonel by rank. He knows the appellant very well as the appellant was brought to his office so that he be able to take the appellant's confession. The appellant was brought to his office by warrant officer Mandla. Mandla waited outside the office and he (witness) was left inside the office with the appellant. Prior to that he was called by the investigating officer who told him that the appellant wanted to make a confession. He explained to the appellant his constitutional rights before he could proceed taking his statement. The appellant did not have any injuries but had old scar underneath his chest on the left-side. At that stage the State wanted to introduce the appellant written statement to Nemukula, but the defence objected to that. A trial-within-a-trial was held to determine the admissibility of the appellant written statement. At the end of the trial-within-a-trial the court a quo ruled that the appellant's written statement to Nemukula was inadmissible.
- [7] Mokgadi Sabina Monyai was the State's fourth witness. She testified that she is a member of the SAPS and constable by rank. On 18th June 2017 she attended a murder scene at Buite street in Polokwane. On arrival at the scene she found the deceased lying on the bed on her back with her face facing up. The deceased was a female person and was lying in a pool of blood. She was also covered

with a blanket. She checked the body of the deceased but did not want to conclude whether she was breathing or not. She decided to call the paramedics to come and check her. The deceased had what looked like a stab wound on her chest. The paramedics came and certified the deceased dead on the scene. After that she called other stakeholders to come to the scene. She did not know the appellant.

- [8] The witness was cross examined and she stated that she could not tell how many stab wounds was the deceased having as she was lying in a pool of blood. The witness conceded that in her written police statement she had stated that the deceased had one stab wound on the left side of her breast. The witness further stated that she did not know who had covered the deceased with a blanket.
- [9] Sarah Selowa was the State's fifth witness. She testified that she is the deceased mother, and she knows the appellant. The appellant had a love relationship with the deceased. The deceased used to visit her in the company of the appellant. The deceased and the appellant have been in a love relationship for about two to three years. Nothing bad was ever reported to her about the love relationship between the deceased and the appellant. The deceased when she was in Polokwane used to buy some items and send the appellant to deliver them to her (witness) residential place.
- [10] She used to phone the deceased, and the deceased will tell her that she had a fight with the appellant and that the appellant sometimes places a knife underneath the pillow when he sleeps. On 17th June 2017 the witness had phoned the deceased just to check on her. During their telephonic conversation, the deceased told her that the appellant had reverted to sleep with a knife underneath his pillow and that the appellant wants to kill her. On 18th June 2017 the witness went to Buite street where the deceased was renting. On arrival at Buite street she found that the body of the deceased was already removed. A certain lady opened the room for her which the deceased was renting. On entering the room, she saw blood on top of the bed. She then took the deceased clothes and left. That concluded the evidence for the State and it closed its case. The appellant in turn closed his case without leading any evidence.
- [11] The court a quo convicted the appellant on the basis of the appellant's plea explanation, the evidence of the fourth State witness and the pathologist report. In convicting the appellant, the court a quo found that the appellant did not withdraw his informal admissions in the plea explanation, but elected to close his case without leading any evidence. The court a quo further found that the only person who can come forward and deny the prima facie evidence that the deceased died as a result of the stab wound, and that the stab wound was inflicted in self-defence was the appellant. The court a quo in analysing the evidence in its totality came to the conclusion that the appellant was guilty of murder on the basis of *dolus eventualis* as the appellant had stabbed the deceased on the chest area close to where vital organs like heart and lungs were situated.
- [12] The appellant had raised self-defence as his defence. An accused who kills another, believing his or her life to be in danger, when objectively, it is not acts unlawfully. However, where such an accused kills another in the mistaken but genuine belief that his life is in danger, the accused lacks the necessary intention to act unlawfully. The accused may be guilty of culpable homicide. That depends upon whether his belief that his life was in danger was reasonable or not. Putative private defence is thus concerned with the culpability and not unlawfulness. Culpability on a charge of murder is judged according to

what the accused believed. Culpability on a charge of culpable homicide is determined on the basis of the reasonableness of that belief. (See *Tuta v The State*[3]).

- [13] The appellant was convicted of murder on the basis of his informal admissions in the plea explanation. The appellant in his informal admissions as contained in his plea explanation has stated that he had disarmed the deceased of a knife, and the deceased pushed him and he fell on top of a bed. After the appellant fell on top of a bed the deceased jumped on top of him started biting him on his left chest. The appellant tried to push away the deceased, but he failed and the deceased continued biting him inflicting a serious injury on his breast. He could not withstand the pain anymore and he stabbed the deceased once with that knife. The intention of stabbing the deceased was to ward off the attack and stop the deceased from biting him. When the appellant saw that the deceased was bleeding from the chest, he tried to stop the blood without success. In the morning out of panic

and confusion he left the deceased body in the shack.

[14] There is nothing preventing a court to take into consideration informal admissions or statement not made under oath and which was not subjected to cross examination. (See *DPP, Gauteng Division Pretoria v Heunis*[4]). Since the appellant has raised putative self-defence as his defence, for the court a quo to convict him on a count of murder, it must have assessed the evidence before it according to what he believed did the appellant hold at the relevant time, and determine whether the manner in which the appellant had stabbed the deceased was commensurate with the attack. The appellant had stabbed the deceased once on the chest with a knife. That is corroborated by the post mortem report which also shows that the deceased was stabbed once on the chest. The fourth State witness also corroborates this version.

- [15] The appellant believed that his life was in danger and that the only way to ward off the deceased from biting him in the manner he was doing, was to stab her as he had already tried other avenues without success. Even after stabbing the deceased, the appellant tried to stop the blood until he saw that the deceased was no longer moving. The court a quo in assessing the evidence found that on the appellant's own version, he attempted to stop the bleeding, got afraid and fled the scene. That the appellant had failed to give a proper explanation why he left the deceased unattended for two days, and that the only inference that can be drawn is that the appellant unlawfully caused the death of the deceased.

- [16] The court a quo has overlooked that in putative private defence it is concerned with culpability and not unlawfulness. The court a quo has failed to take into consideration as what he believed did the appellant hold at the time of stabbing the deceased, and also whether the stabbing was commensurate with the attack. Had the court a quo taken into consideration what he believed did the appellant hold at the relevant time, it would have found that the appellant had tried other avenues in warding off the deceased and believed that the only way to ward her off was by stabbing. No evidence was led by the State to refute this version. The appellant had stabbed the deceased once on her chest, and this version is been corroborated by the post mortem report and the evidence of the fourth State witness. By stabbing her

once support the appellant's version that he was trying to ward off the deceased from biting him.

[17] There is no evidence that when the appellant stabbed the deceased he was specifically aiming at the most delicate part of the deceased body. The appellant stated in his plea explanation that he had stabbed the deceased without pointing at any part of the body, but only realised after he had stabbed her that he had stabbed her on her chest. There is no evidence on record that prove that the appellant had the intention to kill the deceased when he stabbed her. There is also no evidence that the appellant had acted negligently when he stabbed the deceased. In my view, the manner in which the appellant had stabbed the deceased, is commensurate with the warding off the attack by the deceased who was persisting in biting him. It follows that on conviction the appeal stands to succeed.

[18] In the result the following order is made:

18.1 The appeal on conviction is upheld.

18.2 The appellant's conviction is set aside and substituted with the following:

"The accused is found not guilty and discharged on the count of murder".

JUDGE OF THE HIGH COURT OF SOUTH

AFRICA, LIMPOPO DIVISION,

POLOKWANE

I AGREE

KGATLA AJ

ACTING JUDGE OF THE HIGH COURT OF

SOUTH AFRICA, LIMPOPO DIVISION,

APPEARANCES: Counsel for the appellant : R Scott Instructed by : Legal Aid SA Polokwane Office
Counsel for the respondent : Adv AP van der Kooi Instructed by : DPP Polokwane Date heard : 8th
September 2023 Electronically circulated on : 31st October 2023

[1] 105 of 1997

[2] 51 of 1977

[3] [2022] ZACC 19; 2023 (2) BCLR 179 (CC) (31 May 2022 at para 46

[4] 2017

(2) SACR 603 (SCA)

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