

(APPELLATE DIVISION)

In the matter between:

ZIBUSE SOKHELE Appellant

AND

THE STATE Respondent

Coram: JOUBERT, CILLIÉ JJA et HOWARD AJA

Heard: 9 March 1984

Delivered: 23 March 1984

J U D G M E N T

CILLIÉ, JA :

The appellant was found guilty in

the Witwatersrand Local Division of the Supreme Court

of having murdered his former lover. Because there

were extenuating circumstances present at the murder he was sentenced to 8 years imprisonment. This Court gave him leave to appeal against his conviction. The following evidence was placed before the Court a quo and has to be considered.

For a number of years the appellant and the deceased lived together in a room on the premises of her employers in Kelvin. Another room on the premises was occupied by Caroline Mphaka, the second domestic servant of the same employers; she was the only state witness at the trial of the appellant. When the employers moved to Morningside at the end of February 1982 the appellant was informed that there would be only one servant's room

available at the new premises; this room had to be shared by the deceased and Caroline; there would be no room for him and he would have to take his belongings to his sister in Soweto. Apparently he did not remove all his possessions in time and they were taken to the house in Morningside. The appellant did not know the address of this house. The lovers became estranged. It is unnecessary to deal with the appellant's evidence of how he discovered the address and visited the deceased a few days before she was killed.

On the fifth of May 1982 at about 09h00 and after the employers had left the house, the deceased and Caroline were in the kitchen with the employers' small child when the appellant appeared at

the outer door. He asked the deceased for the key to

her room because he wanted to remove his belongings.

She gave it to him. Apparently the lock of the door

was fitted with a security device which he could not

operate; he returned to the kitchen and asked her to

come and help him. According to Caroline the deceased

left with the young child in her arms. Caroline fol-

lowed and saw the appellant strike the deceased in the

face at least three times before she could open the door.

Caroline testified that the deceased put the child on

the ground; she, Caroline, bent down and picked up the

child; when she came erect she saw the appellant

with a knife in his hand and the deceased clutching

her chest; the deceased said: "Caroline, he has stabbed

me". The deceased ran into the kitchen and locked the door behind her. Her body was later found on the floor of the kitchen. It was common cause that she died as a result of a "stab wound of the left lung".

The appellant was the only witness for the defence. According to him the deceased came to the door of the room without the child. She refused to open the door and he slapped her once only in the face with the open hand. Thereupon she unlocked the door and they went into the room. He slapped her again and she took a knife out of a cupboard. When she tried to stab him they struggled. He pretended that he was going to bite her hand,

she released her grip on the knife and he took it from her. He put the knife under his belt so as to keep it out of her reach. She was stronger than he was and she forced him out of the room. His evidence about when they moved out of the room is confusing and unsatisfactory. He described the manner in which the deceased was injured as follows:

"Yes, she pushed me outside. When we got outside I noticed she was intending to get hold of the knife. I then took it out and thought she would flee. After I had taken out the knife she came and we wrestled I fell and she fell on top of me. I just heard her saying: 'I am stabbed'. I got up and ran away."

During cross-examination he said twice that when she rushed at him on the last occasion she wanted

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to strangle him. He also said that her last words were: "You have stabbed me".

The trial Court found that Caroline had testified in a satisfactory manner and that her evidence was reliable, pointing out that if she had wanted to lie she would have said that she saw the appellant stab the deceased. It was suggested that Caroline bore the appellant a grudge and had a motive for getting him into trouble. In my view there was no acceptable evidence of such a grudge or motive.

It was submitted on appeal that Caroline's evidence was "contradictory, evasive, improbable and generally unreliable and amounted to a

reconstruction of events". After considering all the evidence I have come to the conclusion that not one of these allegations can be substantiated.

Two further arguments about Caroline as a witness should be mentioned. She was severely criticised because she could not give an adequate description of the knife with which the wound was inflicted. Her explanation was that it was held by the appellant in his hand and she could not see the whole knife. The importance of this evidence lies not in the appearance and nature of the knife but in the fact that it was in the appellant's hand immediately after the wound was inflicted and this fact was admitted by the

appellant.

It was also argued that the Court a quo had permitted Caroline "to give hearsay evidence of a very material fact". The complaint was that she testified that the deceased had said: "Caroline, he has stabbed me". This argument was repeated by counsel for the appellant although it appeared that, according to Caroline, the statement was made in the presence of the appellant and immediately after the stabbing. Furthermore the appellant testified that the deceased had said: "You have stabbed me".

The Court a quo found that the appellant's evidence was "most unsatisfactory" and rejected / 10

rejected it "as not being reasonably possibly true".

In my view the record contains sufficient material for the learned Judge's findings.

It was submitted that the Judge a quo had committed an irregularity when he intervened during the cross-examination of the appellant and referred to his evidence of the last struggle as a "fairy story". Admittedly this was not a well chosen phrase. However, the story of a woman rushing at a man who holds a dangerous knife poised in his hand, with the intention of throwing the man down on the ground and then throttling him while standing over him does not bear any marked resemblance to reality.

It was submitted on behalf of the appellant that "an adverse inference should be drawn" from the State's failure to call the gardener who may have been present at some time during these events. It is difficult to understand this submission. At the conclusion of the State case the prosecutor informed the Court that the gardener, who was the third witness on the State's list, could not be traced by the investigating officer. The defence raised no objection to this statement, did not ask that the investigator should be called so that his inability to find the missing witness could be tested, and offered no evidence of where he could possibly be found. It is also significant that there was no indication of what the

nature of his evidence would have been. There is no force in this argument.

Another argument advanced was that the State had not called the district surgeon to rebutt the appellant's version of how the wound was inflicted. At the start of the trial the defence admitted that the district surgeon had conducted a post mortem examination and that his findings were correct. He was therefore not called as a witness and there was certainly no onus on the State to call him. Other general submissions which counsel made have even less merit.

Finally, on a consideration of the record of the trial and the arguments advanced,

