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N v H

JEFFREY MALULEKE

First Appellant

SIMON NDLOVU

Second Appellant

and

THE STATE

Respondent

SMALBERGER, AJA :-

IN THE SUPREME COURT OF SOUTH AFRICA(APPELLATE DIVISION)

In the matter between :

JEFFREY MALULEKE

First Appellant

SIMON NDLOVU

Second Appellant

and

THE STATE

Respondent

CORAM:            WESSELS, VILJOEN, HEFER, JJA,  
                     et    GALGUT, SMALBERGER, AJJA

HEARD:            15 AUGUST 1984

DELIVERED:      6 SEPTEMBER 1984

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J U D G M E N T

SMALBERGER, AJA :-

The two appellants were convicted of  
  
murder, with extenuating circumstances, by a Judge

sitting / .....

sitting alone in the Witwatersrand Local Division.

They were each sentenced to six years' imprisonment.

The trial Judge refused the appellants leave to

appeal against their convictions, but such leave was

subsequently granted on petition to the Chief Justice.

It is common cause that one Patrick Lucas

Mabunda (the deceased) was fatally stabbed

during the night of the 20th to the 21st September 1981

in the backyard of the house of a certain Tommy Mabaso

in Soweto, Johannesburg. The essential issues at the

trial, as well as on appeal, related to the identity of

the deceased's assailant or assailants, and the causal

connection between the assault or assaults upon him and

his death. In order to determine whether the appellants

were / .....

were correctly convicted it is necessary to consider the evidence in some detail.

The main witness for the State was a sixteen year old girl, Cecilia Makhubela. On the afternoon of Sunday the 20th September 1981 she went to the house of Tommy Mabaso where a stockvel, which had commenced the previous Friday, was in progress. She was in the company of the deceased, who was her boyfriend at the time, and one Sylvia Maluleke. According to Cecilia, she and the deceased partook of liquor during the course of the afternoon and evening at the party. They each drank an approximately equivalent quantity of liquor. The two appellants were also present at the

party / .....

party. They arrived there after Cecilia and her companions. Late that night, or in the early hours of the following morning, Cecilia's evidence not being entirely clear on this point, Cecilia, Sylvia and the deceased left the house through the kitchen door in order to go to the toilet in the backyard. The evidence shows this backyard to have been three paces in width, with the toilet eight paces from the kitchen door. Cecilia testified that she walked in front with the deceased diagonally behind her. While they were so walking the second appellant came running out of the kitchen with a knife in his hand and stabbed the deceased twice on his chest. The first appellant,

also / .....

also with a knife in his hand, followed a short distance behind, and stabbed the deceased once on his chest as he ran past him. The two appellants then together ran from the property via an opening in the back fence. After being stabbed the deceased ran into the house where he collapsed. According to Cecilia the first appellant, who is Sylvia's brother, was well known to her prior to the incident; the second appellant she had never seen before that day at the party. Cecilia initially testified that Sylvia was behind the deceased when the stabbing took place. Later in her evidence she displayed uncertainty as to precisely where Sylvia was, although the overall impression gained from her evidence was that she was somewhere in the backyard and thus in a

position / .....

position to see what had occurred. No reason for the stabbing of the deceased is apparent from Cecilia's evidence. Cecilia also testified to the arrest of the first appellant on Monday afternoon after she had pointed him out to the witness Michael Modau.

She stated that after his arrest the first appellant had been searched and a knife found in his possession.

The above is Cecilia's evidence in broad outline.

Sylvia confirmed in evidence that she had been at the party with Cecilia and the deceased, and that she had left the house with them to go to the toilet. According to her she went into the toilet

leaving / .....

leaving Cecilia and the deceased standing outside.

She heard nothing while she was in the toilet.

When she came out of the toilet, she saw the two appellants running out of the backyard together through a gap in the back fence.

She did not see their faces,

but she was able to identify them by their build and

their clothing. The first appellant is her brother.

The second appellant is his friend, and is well known

to her. When she saw them they were about three to

four metres away from the deceased. She did not observe

any weapons in their possession, nor did she see any

stabbing take place. Sylvia testified <sup>that</sup> when she emerged

from the toilet Cecilia screamed, and the deceased ran

into the house where he collapsed. Her evidence also

provides / .....



provides no reason for any assault upon the deceased.

The State witnesses Moses Mashele and Tommy Mabaso were not able to shed any light on the actual stabbing. The former testified that he was at the party in the company of the two appellants. At a certain stage he noticed that the two appellants had left the house. It was shortly after this that the deceased entered the house from outside with injuries on his chest. He accompanied the deceased to the hospital, where the deceased died on arrival. The witness stated at one time in his evidence that the two appellants had left the house together. He appears, however, to have assumed this from the fact that they were friends, for it is apparent from his evidence that

he did / .....

he did not actually see them leave, and therefore could not say whether they left together, or in what order they left. Apart from confirming that the State witnesses and the two appellants were present at the party at his house Tommy Mabaso was unable to give any helpful evidence concerning their movements..

Michael Modau testified to the arrest of the first appellant on the Monday afternoon. He stated that Cecilia pointed out the first appellant to him. He approached the first appellant and asked him whether he was the person who had killed the deceased. The first appellant's response to his question was to draw a knife. Subsequently the first appellant was overpowered and arrested. This knife - an Okapi - was

later / .....

later handed to the police, but was unfortunately mislaid and could not be produced at the trial.

The post mortem examination of the body of the deceased revealed that the deceased had been stabbed three times in the chest, and that the cause of his death was stab wounds of the right and left lungs, and of the heart. Dr Nielsen, who performed the post mortem examination, was unable to attribute death to any one stab wound, and concluded that all three wounds contributed to the deceased's death. She further stated that all three wounds, despite their differing external appearance, could have been caused by the same knife. A blood sample taken from the deceased revealed, on analysis, an alcohol content of

.15 grams / .....

.15 grams per 100 millilitres of blood, the equivalent of eight tots of strong liquor.

Both appellants gave evidence. They admitted having been at the party at Tommy Mabaso's house, and having consumed a number of beers between them. The first appellant testified that when the time came for them to leave, he left ahead of the second appellant. They had arranged that he would wait for the second appellant outside. The first appellant testified that on leaving through the kitchen door he saw the deceased and Cecilia in the backyard. They were near the kitchen door. There was no one else in the yard. He walked along a passage adjoining the house to the street in front of the house where he

waited / .....

waited for the second appellant. He was later joined in the street by the second appellant, after which they each went to their respective homes. The first appellant disavowed all knowledge of an assault upon the deceased, or his participation therein. He admitted having been arrested on Monday afternoon by Michael Modau and others, but in circumstances differing substantially from those deposed to by that witness. He denied having had a knife in his possession, or threatening Michael Modau with one. It is not necessary to consider the evidence in this regard in any greater detail.

The second appellant tells a very different story. He admitted that the first appellant left

the / .....

the house before him, but denied that there was any agreement that they would meet outside. He stated that when the first appellant failed to return he went to look for him. In the backyard he found the first appellant, with a knife in his hand, about to stab the deceased. He intervened and was stabbed on the hand by the first appellant. Cecilia, who was also in the yard, then screamed. The first appellant ran away, and he followed. They ran through the opening in the back fence. They were chased by people who had been present at the party. They made good their escape, and ultimately went home. He denied having been in possession of a knife, or having stabbed the deceased.

The / .....

The trial Judge accepted the evidence of Cecilia, Sylvia and Michael Modau and rejected that of the two appellants. He found that both the appellants had stabbed the deceased, as deposed to by Cecilia, and that the assault by each on the deceased was causally linked to the deceased's death. He accordingly convicted both the appellants of murder, but found that there were extenuating circumstances present.

The evidence establishes that, apart from the deceased himself, the only persons present in the backyard of Tommy Mabaso's house when the deceased was stabbed were Cecilia, Sylvia and the two appellants. In this respect the evidence of Cecilia and Sylvia

identifying / .....

identifying the two appellants was rightly accepted by the trial Judge. There is no need to consider all the evidence led concerning the available lighting in the backyard at the relevant time. Suffice it to say that the evidence establishes that there was sufficient light in the backyard to permit of reliable identification of the persons present in it. The honesty of Cecilia and Sylvia's identification of the two appellants is not in issue. The reliability of such identification is enhanced by the fact that the first appellant was well known to both witnesses, and the second appellant was well known to Sylvia. In addition both appellants had for a substantial period prior to the stabbing of the deceased been in the same room at the party as

Cecilia / .....



Cecilia and Sylvia, and had been observed by them there.

These considerations reduce the risk of incorrect

identification (R v Dladla and Others 1961(1) SA 307 (A)

at 310 B - E). Furthermore, the second appellant

places both himself and the first appellant on the

scene at the relevant time. Even the first appellant

admits his proximity to the scene, if not his presence

on it. Neither appellant suggested that there were

any other persons on the scene who may have been

responsible for stabbing the deceased.

It follows logically, in the absence of any  
suggestion that either Cecilia or Sylvia were responsible  
for stabbing the deceased, that the deceased could only

have / .....

have been stabbed by one or other of the appellants, or both of them. If the evidence justified a finding that the deceased was stabbed pursuant to a common agreement between the two appellants to assault him, it would not have mattered if both or only one of them had stabbed him, for each would be liable for the act of the other done in pursuance of a common design (S v Shaik and Others 1983(4) SA 57 (A) at 65 A).

However, the trial Judge specifically found that it had not been proved that the two appellants had "acted in conjunction with each other after any prior arrangement".

Accepting the correctness of this finding the guilt of each appellant has to be determined on the basis that each is answerable only for his own conduct (S v Mbambo

1965(2) SA 845 (A) at 852 H - 853 A). What must therefore be determined, in the first instance, is whether the State established beyond all reasonable doubt that both the appellants stabbed the deceased. Only thereafter is it necessary to enquire whether the conduct of each appellant was causally linked to the deceased's death. The former enquiry poses the question whether the trial Judge was correct in accepting Cecilia's evidence that both the appellants stabbed the deceased.

In respect of Cecilia's evidence the trial Judge said the following:-

" Having / .....

"Having sketched these introductory aspects of the evidence, we come to the fact that Cecilia Makhubela is a single witness as to the actual assault on the deceased and his killing. She is a 16 year old girl who had consumed a substantial quantity of liquor that night and in her evidence in Court she was sometimes hesitant in certain minor respect contradicted herself and I regard her only as a single witness on whose uncorroborated evidence I would not be prepared to convict.

I find, however, that the broad outlines of Cecilia's evidence give a rational picture of what occurred at the fatal moments in this matter, and in as far as she is corroborated by acceptable evidence, I am prepared to accept her evidence."

As a single witness to the participation of both appellants in the stabbing of the deceased Cecilia's credibility would normally fall to be assessed in keeping with the principles enunciated in S v Sauls and Others

1981(3) SA 172 (A) at 180 E - H to the effect that :-

"There is no rule of thumb test or formula to apply when it comes to a consideration of the credibility of the single witness (see the remarks of RUMPFF JA in S v Webber 1971(3) SA 754 (A) at 758). The trial Judge will weigh his evidence, will consider its merits and demerits and, having done so, will decide whether it is trustworthy and whether, despite the fact that there are shortcomings or defects or contradictions in the testimony, he is satisfied that the truth has been told. The cautionary rule referred to by DE VILLIERS JP in 1932 may be a guide to a right decision but it does not mean

'that the appeal must succeed if any criticism, however slender, of the witnesses' evidence were well founded'

(per SCHREINER JA in R v Nhlapo (AD 10 November 1952) quoted in R v Bellingham 1955(2) SA 566 (A) at 569). It has been said more than once that the exercise of caution must not be allowed to displace the exercise of common sense."

Corroboration / .....

Corroboration, in its correct legal sense of independent testimony which confirms the evidence of a witness, is not an essential legal requirement for the acceptance of the evidence of a single witness.

It is doubtful whether the trial Judge had corroboration in that sense in mind when he expressed himself in the manner quoted above. If he did, then his treatment of the evidence shows that he sought corroboration of Cecilia's evidence only in relation to her identification of the two appellants as the deceased's assailants.

On this issue she was amply corroborated. The trial Judge appears to have been satisfied with Cecilia's evidence that there were two assailants, and that both stabbed the deceased. Cecilia was undoubtedly in a

favourable / .....

favourable position to observe what occurred.

Trenchant criticism was directed at Cecilia's evidence in argument. A number of minor contradictions are apparent in her evidence, but they are of no real consequence. There are aspects of her evidence which suggest that she was liable at times to make assumptions and reconstruct events. This is to be expected to some extent in the case of a youthful witness pressed for details of events which occurred a long time ago, and of which she is unlikely to have retained a perfect recollection. The quantity of liquor she had consumed, the speed at which the events occurred, making accurate observation difficult, and the fact that her evidence

does / .....

does not entirely coincide with that of Sylvia, are further factors which tend to cast doubt on her evidence. It was also argued that the trial Judge accepted the evidence of the two appellants that the first appellant left the house before the stabbing ahead of the second defendant, contrary to Cecilia's evidence in this regard. There is a passage in his judgment which suggests this to be the case, but on a proper assessment of that passage in the context of the judgment as a whole it does not appear that the trial Judge in fact made such a finding. Although he may not have mentioned them all in his judgment, the trial Judge must have been alive to the criticisms and considerations that have been mentioned.

He / .....



He was none the less satisfied that Cecilia told the truth.

Apart from falsely denying that he was not present at the scene of the stabbing, the first appellant tells an unlikely story as to why he left the house ahead of the second appellant and waited for him in the street outside. He was further shown to have been untruthful concerning the events which occurred at the time of his arrest on the Monday afternoon. Although the versions of Cecilia and Michael Modau differ in an important respect in this regard, the trial Judge accepted the evidence of Michael Modau that the first appellant's response to being asked if he was the person who had

killed / .....

killed the deceased was to draw a knife. Modau was better placed than Cecilia when witnessing this incident, and his evidence therefore more acceptable than hers. The first appellant's reaction, in the circumstances, constituted an admission by conduct (Hoffman and Zeffert: South African Law of Evidence 3rd Ed at p 154) and serves as confirmation of Cecilia's evidence of the first appellant's involvement in the assault upon the deceased.

Although the second appellant appears to have made a reasonably favourable impression on the trial Judge, his evidence was rejected because of the blatant lie he told about the injury to his one hand, and the

further / .....

further lies in which he became enmeshed as a result thereof. That he lied in these respects was conceded.

It was argued that it did not follow that because the second appellant lied in relation to his hand injury

he necessarily lied throughout his testimony (cf. S v

Oosthuizen 1982(3) SA 571 (T) at 577 A ), and that

the trial Judge erred in rejecting his evidence as not

reasonably possibly true. The second appellant's

evidence is not wholly inconsistent with the State case.

The lie concerning his hand, however, was a material one,

and undermined his whole defence. Nor was it the only

respect in which he lied. His evidence that he went to

look for the first appellant after the latter had left

the house and failed to return suggests a reasonable

lapse / .....

lapse of time between the emergence of first the one and then the other appellant from the house. This is not in keeping with the evidence of Cecilia and Sylvia. Their evidence, which was accepted, establishes that the two appellants came out of the house, if not together, then shortly after each other. From this one can infer that the second appellant tried falsely to distance himself from the initial events in the backyard. The second appellant also claims that he and the first appellant ran away chased by people wielding golf clubs. This allegation is totally at variance with the State evidence, and falls to be rejected. In the circumstances the trial Judge was entitled to reject the second appellant's evidence / .....:.....

evidence as not reasonably possibly true.

On a conspectus of the evidence as a whole

I am unpersuaded that the trial Judge erred in accepting

Cecilia's evidence that the two appellants stabbed the

deceased in the manner deposed to by her, and rejecting

the evidence of the two appellants to the contrary.

The nature and site of each wound on the

deceased proves beyond all reasonable doubt that each

blow was delivered with the necessary intent to kill.

This was not seriously disputed. As previously

mentioned, Dr Nielsen testified that all three wounds contributed

to the deceased's death.

It was conceded on behalf of the

second / .....

second appellant (but not on behalf of the first appellant) that Dr Nielsen's evidence, if accepted, established the necessary causal link between each wound inflicted on the deceased and his death. This concession was correctly made. (S v Thomo 1969(1) SA 385 (A) at 397 G - H.) There is no reason to doubt the correctness of Dr Nielsen's evidence. As both appellants stabbed the deceased, and each wound contributed to his death, both appellants are legally responsible for his death. They were accordingly both correctly convicted of murder with extenuating circumstances.

In the / .....

In the result the appeals are dismissed.

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J W SMALBERGER

ACTING JUDGE OF APPEAL

|          |       |        |
|----------|-------|--------|
| WESSELS, | JA )  |        |
| VILJOEN, | JA )  |        |
| HEFER,   | JA )  | CONCUR |
| GALGUT,  | AJA ) |        |