

IN THE HIGH COURT OF SOUTH AFRICA
(ORANGE FREE STATE PROVINCIAL DIVISION)

Appeal No.: A210/2003

In the appeal between:

SEIPHEMO JACOB MODUPI

Appellant

and

THE STATE

Respondent

CORAM:

HEARD ON:

JUDGMENT BY:

MUSI, J

DELIVERED ON:

11 MARCH 2004

[1] The appellant was convicted of murder in the Regional Court at Petrusburg on 17 October 2001. He was sentenced to 15 years imprisonment. He appeals against the conviction and sentence.

[2] The court *a quo* made factual and credibility findings in favour of the sole eye-witness for the State, Thomas Januarie (Januarie), in terms of which he accepted his version as true. It made adverse

credibility findings against the appellant and his two witnesses and rejected his version as false. The court *a quo* thus convicted the appellant basically on the basis of the version of a single witness. In doing so, the court *a quo* rejected the two pillars on which the appellant's defence rested, namely that the deceased was armed with screwdriver and, secondly, that the appellant acted in self-defence in stabbing the deceased with a knife and thus killing him.

- [3] Now the court *a quo* was better placed to assess the credibility of the witnesses and it is settled law that a Court of Appeal will not lightly interfere with such findings. However, a perusal of the record reveals that the testimony of the sole eye-witness for the State was not satisfactory in every material respect and, standing alone, it could not have been sufficient to support a conviction. Ms Reinders, who appeared for the appellant, correctly pointed to the contradictory nature of his evidence relating to the issue of whether the deceased had a screwdriver when he entered the appellant's house immediately before being stabbed by the appellant. Counsel also pointed to a contradiction between his statement to the police and evidence in court in one particular respect. Now January denied that he would have told the police that he witnessed the

stabbing from outside and he ascribed the discrepancy to the fact that the statement was not read back to him. However, he was contradicted by the police officer who took the statement, who insisted that what he wrote was what was conveyed to him by the witness and that he had read the statement back to the witness. Now these are certainly demerits in the State case.

- [4] A perusal of the record also reveals that though the appellant does not appear to have been an impressive witness (he appears vague and had to be prodded to elaborate on aspects of his version), there are not material contradictions or inherent improbabilities in his evidence. Nor was he discredited under cross-examination. In my view the Magistrate was wrong in rejecting his evidence *in toto*.
- [5] The correct approach in determining whether the State has discharged the onus of establishing the guilt of an accused beyond a reasonable doubt is to consider the totality of the evidence on record. Neither the evidence of the State nor that of the defence should be looked at in isolation. The court has to take into account the merits and demerits in the evidence of the State and that of the defence as well as the probabilities in the matter. (See **S v SINGH**

1975 (1) SA 227 (N) at 228G; S v MATTIODA 1973 (1) PH H.24 (N)). The test was succinctly expressed as follows by Nugent, J (as he then was) in **S v VAN DER MEYDEN 1999 (1) SACR 447 (W) at 449j-450b:**

“The proper test is that an accused is bound to be convicted if the evidence establishes his guilt beyond reasonable doubt, and the logical corollary is that he must be acquitted if it is reasonably possible that he might be innocent. The process of reasoning which is appropriate to the application of that test in any particular case will depend on the nature of the evidence, which the court has before it. What must be borne in mind, however, is that the conclusion which is reached (whether it be to convict or to acquit) must account for all the evidence. Some of the evidence might be found to be false; some of it might be found to be unreliable; and some of it might be found to be only possibly false or unreliable; but none of it may simply be ignored.”

[6] In my view, the evidence of Januarie as to what happened immediately prior to the stabbing has a ring of truth and is probable. It finds support in aspects of the evidence of the appellant and his wife. According to their version the appellant

and his wife had a quarrel during which the wife went into the bedroom. It is from there that she heard people shouting that the deceased had been stabbed or killed. It all fits in with Januarie's evidence that the appellant had become aggressive, got hold of a knife and wanted to go for his wife who had hid herself in the bedroom. And the question arises as to how would January have witnessed all this if he was not inside the house. And I am of the view that the learned Magistrate was correct in rejecting the version of the appellant in this regard. January gave details of what happened inside the house, whereas the appellant's version is a bare denial that January was present. As for the appellant's wife, she was clearly a poor witness whose concern was to protect her husband. She gave a very bizarre account of her conduct that night. Her own brother had been bludgeoned to death right at the doorstep of her house and yet when she goes out of the house she simply takes a glancing look at him and goes away. Januarie's evidence in this regard also puts in serious doubt the accuracy of that portion of his extracurial(?) statement to the effect that he witnessed the stabbing from outside. If this was what he had said, I can see no reason why he would want to exchange it for a version that removes his view from the actual stabbing. It is generally

known that statements taken from witnesses by the police do not always accurately reflect what was said and there are many reasons therefore. (Compare **S v BRUINDERS EN 'N ANDER 19998 (2) SACR 432 (SE)**). *In casu* it is not inconceivable that the relevant passage reflects what was told by other people who had been outside, like Johannes, and was incorrectly incorporated into Januarie's statement. I can see no reason, moreover, why Januarie's version in the witness-box should not be accepted.

- [7] Januarie's version that the appellant had been very aggressive is borne out by the fact that as soon as the deceased put his foot at the door, the appellant immediately confronted him. There is no suggestion that the deceased had uttered any word or done anything to warrant such confrontation. The appellant only talked vaguely about the deceased having been angry and aggressive as he came in. By the appellant's own version he got hold of the deceased's hands and pushed him backwards as a result of which the deceased fell down the stairs outside. Clearly if there had been any threat from the deceased it dissipated when he fell and the appellant could have avoided any further trouble by simply slamming the door and

keeping the deceased out. No, he does not do that. On his own version he pulls out a knife and goes for the deceased. To show that the appellant was in an aggressive and fighting mood he stabs the deceased not only once but four times so that the deceased dies right there on the spot.

- [8] The version of the appellant that he was acting in self-defence is not supported by the objective facts in the matter: the nature and number of the stab wounds inflicted on the deceased (one was even on the back) whilst the appellant himself sustained not even a single scratch and the deceased died right there on the spot. The appellant's conduct after the stabbing is also not consistent with that of someone who had been attacked. As soon as the deceased drops dead he simply goes back into his house and sleeps as if nothing had happened, even after hearing people shouting that the deceased was dead. Surely one would have expected him to have gone to report the incident at least to his employer. He could also have made sure that he gets hold of the screwdriver if indeed he had been attacked with it. No, he does not even look for it. Even though he has a right to silence and cannot be held against him that he did not give any explanation to the police, surely he could have

mentioned the screwdriver to them. His conduct is more consistent with that of someone who had achieved what he had wanted to.

[9] Most importantly there is no credible evidence that the deceased posed any serious threat of harm that the appellant would have been compelled to avert in the manner that he did. He only makes a statement that the deceased wanted to stab him, which has got no cogency whatsoever. Interestingly he was able to grab the deceased and push him down the stairs causing him to fall. Even accepting that the deceased threatened him with a screwdriver, he had other ways of averting the danger, for instance by simply closing the door and keeping the deceased outside after the latter had fallen. I hold therefore that even if the deceased may have had a screwdriver with him, he did not threaten the appellant therewith. Moreover it is more likely that the screwdriver would have been in the deceased's pocket at the time, on Januarie's evidence.

[10] In my view the appellant was correctly convicted and the appeal against conviction must fail.

On behalf of Appellant:

Adv. C. Reinders
instructed by
Legal Aid Board

On behalf of Respondent:

Adv. S. Giorgi
Instructed by
Director: Public Prosecutions

/scd