

Reportable: Yes / No Circulate to Judges: Yes / No
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Circulate to Magistrates: Yes / No

IN THE HIGH COURT OF SOUTH AFRICA

(Northern Cape Division)

Case no: CA&R 105/04

Date heard: 2004-12-02

Date delivered: 2004-12-02

In the appeal of:

MOSES JANTJIES

APPELLANT

versus

THE STATE RESPONDENT

Coram: MAJIEDT J et WILLIAMS J

JUDGEMENT ON APPEAL

MAJIEDT J:

1. The appellant was convicted of murder and assault with the intent to do grievous bodily harm. He was sentenced on the first count to 10 years imprisonment and on the second count to 18 months imprisonment. The trial court ordered that the sentence on the second count run concurrently with that on the first. The appellant now appeals against both conviction and sentence.

2. The appellant was accused of murdering his girlfriend on 8 December 1995. It is worth noting at this early stage already that the matter was heard some 6 years after the event aforementioned, with the result that witnesses' recollection and memories had faded considerably by the time the matter came to trial. The appellant was also accused of assaulting the state witness Juanita van Wyk by stabbing her once in the shoulder. The appellant

pleaded not guilty on both counts and exercised his right to remain silent. He was represented by an attorney during the trial.

3. Juanita van Wyk was the only eye witness on both counts. She testified that on the day in question the appellant had had a quarrel with his girlfriend, the deceased. She intervened and the deceased then requested the appellant to leave, which he did. According to Juanita, the appellant returned shortly thereafter, some 5 minutes later in fact, brandishing a knife which he used to stab her (Juanita) on the shoulder, and thereafter stabbed the deceased thrice. According to her the stab wounds were on the deceased's chest, neck and back. I must immediately point out that Juanita's description of the location of the wounds as aforementioned, are in

direct contrast with the location of the wounds as described in the *post mortem* report which had been handed in at the trial as an exhibit by agreement between the parties. According to that report the deceased had sustained only 2 stab wounds, namely on her neck and in her shoulder region. This discrepancy was not picked up at the trial at all. Consequently the magistrate did not deal with it in his judgement. Moreover, neither of the counsel appearing before us at the appeal dealt with the matter in their heads of argument. I shall revert to this aspect again when I evaluate the credibility of Juanita van Wyk as a witness.

4. According to Juanita, the appellant fled the premises after he had stabbed her and the deceased. Juanita then went to sit under a verandah. The deceased ran outside and

fell there. Juanita did not receive any medical treatment for her stab wound. When she walked to the spot where the deceased was lying, it was clear that the deceased was already dead. According to her there was sufficient light in the vicinity where the stabbing had taken place.

5. Under cross-examination a number of contradictions in Juanita's oral testimony as well as contradictions between her *viva voce* evidence and her witness statement was brought to the fore to which I shall allude later.
6. Khagiso Kwela was the next state witness who testified that the deceased in the matter had been his cousin. He was at the place where she was murdered on the day in question – this house belongs to his brother who was selling liquor there. On that day he could see that the

appellant and the deceased had had an argument, which apparently concerned the appellant having been suspicious of the deceased having an affair with another man. He heard shouting after a while and the deceased shouted that she had been stabbed by her boyfriend. He saw the appellant running away and followed him. The appellant fell a short distance away and he found a knife on the appellant. Under cross-examination the witness conceded that in fact he did not hear his cousin (the deceased) shout that it was the appellant who had stabbed her; she merely shouted that she had been stabbed.

7. Inspector Samuel Nkosi was the last state witness. He testified that on the day in question he was called out to the scene with a message that somebody had been killed

there. Upon his arrival he found the deceased lying in the street. He also found the previous witness Khagiso Kwela there who handed the appellant to him. He searched the appellant and found a knife in his left trouser pocket. This knife had been bloodstained. The appellant was then arrested and the knife confiscated. This knife was handed in during the trial as an exhibit.

8. The appellant testified in his defence. His version was that he did in fact have an argument with the deceased on the day in question. He had then left to take two children away to another house and upon his return various people accused him that he had stabbed the deceased. He denied that he had anything to do with the assault upon the deceased or Juanita van Wyk and he also denied that he had a knife in his possession on the day in question.

9. Mr Mathewson for the appellant has drawn our attention to various contradictions in the testimony of the state witnesses. I have already alluded to the contradictions in the testimony of Juanita van Wyk, the single eyewitness. There were also contradictions between Kwela and Nkosi relating to the knife allegedly confiscated from the appellant. Kwela had testified that he himself had found the knife upon the person of the appellant and he had handed it to Nkosi when the latter had arrived on the scene. Nkosi on the other hand testified that it was in fact he who had found the bloodstained knife in the left trouser pocket of the appellant.
10. It is indeed so that there are a number of contradictions in the evidence of the state witnesses. Some of these contradictions are more important than others. A crucial

factor which bears consideration when assessing the importance of these various contradictions, is the fact that this matter came to trial some six years after the event. Consequently it is to be expected that witnesses' memories must have faded considerably during this time. Of course this applies equally to the state witnesses and to the appellant. In considering the importance of the contradictions in their evidence, this particular factor needs therefore to be brought into the equation.

11. The magistrate exercised the requisite caution in assessing the evidence of Juanita van Wyk, because he was mindful of the fact that she was a single witness to the stabbing itself. He also exercised caution in assessing her evidence of the identification of the appellant as the assailant. With regard to identification, it

is clear that the appellant placed himself on the scene. It is also clear that he was seen before the stabbing and immediately thereafter by people other than Juanita van Wyk. It is also quite apparent that Juanita knew the appellant very well. I am also of the view that on all the evidence before the trial court that there had been sufficient lighting at the scene to enable Juanita to identify the appellant.

12. Corroboration for the testimony of Juanita as a single witness is to be found in the following:

- a) The fact that a bloodstained knife was found upon the appellant immediately after the stabbing. In this regard I am mindful of the contradiction on this aspect between the witnesses Kwela and Nkosi. I

prefer the evidence of Nkosi to that of Kwela. The latter was very unsure of himself and in fact conceded more than once that his memory may have failed him on important aspects, given the lapse of time since the event had taken place. Nkosi appeared to be more certain of his evidence and could certainly not have made a mistake on such an important aspect as the discovery of a bloodstained knife in the trouser pocket of the appellant. He had also confiscated the knife and brought it to the court where it was handed in as an exhibit at the trial.

- b) The fact that the appellant places himself on the scene before the incident, coupled with Kwela's testimony that he had seen the appellant and the deceased arguing shortly before the stabbing incident.
- c) Kwela corroborates Juanita van Wyk's evidence that the

appellant had run away from the scene after the stabbing.

13. In **S v Mkohle** 1990(1) SACR 95 (A) at 98 f-h Nestadt JA

remarked as follows:

“Contradictions *per se* do not lead to the rejection of a witness’ evidence. As Nicholas J, as he then was, observed in **S v Oosthuizen** 1982(3) SA 571 (T) at 576 B-C, they may simply be indicative of an error. And (at 576 G-H) it is stated that not every error made by a witness affects his credibility; in each case the trier of fact has to make an evaluation; taking into account such matters as the nature of the contradictions, their number and importance, and their bearing on other parts of the witness’ evidence.”

14. With regard to Juanita van Wyk I am of the view that the approach should be that her evidence ought to be accepted only in those instances where it has been corroborated by other acceptable evidence or by the objectively proved facts. I have already shown that there was sufficient corroboration for her evidence on important

aspects. With regard to the discrepancy between her evidence on the location of the wounds of the deceased and the *post mortem* report, it is important to note her actual evidence in this regard. In her evidence in chief she testified as follows:

“So, did you see all three times of the accused’s stabbed at the deceased? --- I see that his hand was moving three times towards her.”

I therefore do not regard this particular contradiction of such importance as to impact negatively on her credibility. The rest of the contradictions in her own testimony and in her testimony compared to that of Kwela, are in my view explicable on the basis of the lapsed time between the event and the date of the trial.

15. The magistrate correctly rejected the appellant’s evidence

as false beyond reasonable doubt. His testimony does not explain why the witness Kwela would have chased after him if, as the appellant alleged, he was innocently returning from his house after having taken two children away. He also does not explain the presence of the knife in his possession, in fact he denies it.

16. A further factor to be considered is the fact that all the witnesses, with the exception of inspector Nkosi, had been to some or other degree under the influence of liquor during the night in question. This obviously affected their powers of observation. This of course equally applies to the appellant. I have, however, no doubt whatsoever in my mind that the appellant was a lying witness and that the magistrate had correctly found that it was in fact he who had stabbed the deceased and Juanita van Wyk.

17. Consequently I am of the view that the conviction is in order.
18. The incident occurred before the advent of Act 105 of 1997 ("*the Act*") which introduced a minimum sentences for certain offences. In the instant matter the appellant would have faced a minimum sentence of 15 years imprisonment on count 1 (murder), had the provisions of the Act been applicable. There is some suggestion that this was an act of jealousy on the part of the appellant in stabbing the deceased, his girlfriend. Be that as it may, I am of the view that the sentence imposed cannot be said to be shockingly excessive, nor has our attention been drawn to any misdirection on the part of the magistrate. The test is not whether we would have imposed the same sentence, but whether we find it shockingly excessive. I

am of the view that the sentence is appropriate in the circumstances and the appeal must also fail on this aspect.

19. The appeal fails. The appellant's conviction and sentence on both counts are confirmed.

SA MAJIEDT
JUDGE

I concur:

CC WILLIAMS
JUDGE

FOR THE APPELLANT	:	Mr A Mathewson
FOR THE RESPONDENT	:	Adv C Jansen
DATE OF HEARING	:	2004-12-02
OF JUDGEMENT	:	2004-12-01

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