

24/90
/mb

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

BHEKANI HLONGWA APPELLANT

AND

THE STATE RESPONDENT

CORAM : HEFER, MILNE et KUMLEBEN JJA

HEARD : 18 MARCH 1991

DELIVERED : 21 MARCH 1991

J U D G M E N T

KUMLEBEN JA/...

KUMLEBEN JA:

On 13 August 1988 Patrick Khumalo was fatally stabbed in the chest. This led to the appellant being indicted for murder before Gordon AJ and two assessors in the Durban and Coast Local Division of the Supreme Court. He was found guilty as charged; but with extenuating circumstances proved. The sentence was one of five years' imprisonment. The appellant was granted leave by the court a quo to appeal against his conviction. In addition a question of law, based on an alleged irregularity during the course of the trial, was reserved for consideration by this court in terms of s 319 of the Criminal Procedure Act, 51 of 1977.

The evidence of the State explaining how the deceased came to be killed, and implicating the appellant, was that of a single eye-witness, Patrick Nyathi. He was 18 years old at the time he testified on 7 November 1988. His evidence was to the following

effect.

Nyathi and the appellant were friends and worked for the same employer. On the evening in question the two of them went to a shebeen located in a house or shack, referred to in evidence as Nzuza's place. They expected to find their respective girl friends there. They first entered a room where drinks were available and were there for about an hour. During this time Nyathi remained with the other three but did not drink as he was an abstainer. (In his evidence-in-chief he said "I just don't drink at all", but in cross-examination he watered this down by saying "I normally do not drink" and at a later stage in his evidence said "I'm not a drinker".) When he in due course entered the room where people were dancing, he found his girl friend Zodwa in the company of another young man. Nyathi requested him to accompany him outside the house where Nyathi asked him whether Zodwa

was his girl friend. This person replied that she was. Nyathi told him that she was also his girl friend. Contrary to what one might have expected, this conflict of interest did not give rise to a dispute or worse. Nyathi simply said to him: "[It] was okay, he might as well go along with her because nothing could be done if she was in love with him as well." Although Nyathi was upset by this disclosure, he remained on a friendly footing with this other person and the two of them re-entered the house.

Next an unknown "senior man" appeared and offered Nyathi some free advice. (He was Patrick Khumalo, later the deceased and henceforth referred to as such.) He said that Nyathi should not keep company with Zodwa because she has numerous boy friends. In Nyathi's words: "He told me to beware that whereas I was considerate towards the other young man, there are

those who would not be considerate to me. He advised me to leave her alone". It follows that the deceased must have somehow overheard the conversation between Nyathi and her other boy friend. Before either of them could reply, the appellant appeared, pulled out a clasp knife from his right-hand trouser pocket and opened it. The moonlight outside enabled Nyathi to see that it was an Okapi knife with a red handle and a blade about seven centimetres long. The appellant stabbed the deceased on the left upper arm. The deceased ran away with the appellant, Nyathi and apparently others chasing after him. Nyathi remonstrated with the appellant but to no avail. Under cross-examination he said that he also remonstrated with a certain Mandla and another Sipho, implying that they were at that stage part of the assault group. During the chase the appellant stabbed the deceased once more, this time in the back between

his shoulder blades. This took place when Nyathi was no more than five paces behind the appellant. Nyathi pleaded with the appellant not to assault the deceased as he had "done nothing bad" to him (Nyathi). As a result of the second stabbing the deceased fell next to a stream. Sipho and Mandla were at hand at this stage. After the deceased had fallen, Sipho took a black wallet from the possession of the deceased, but, in some or other manner not explained by Nyathi, managed to leave his brown balaclava cap at the scene in the vicinity of the deceased.

The foursome (Nyathi, the appellant, Mandla and Sipho) left together. When asked why he had not attempted to assist the injured person, he said that he could not because the appellant had threatened to stab him when he pointed out to the appellant that he had attacked the deceased without reason. After they

left the deceased lying there, they did not disperse but went to the garage where Nyathi and the appellant were employed. At no stage on their way there did the appellant leave the other three for any purpose. When asked why he spent the night with them at the garage he said: "I was compelled really to sleep there. There was no other place where I could possibly find to sleep." And when asked why he did not break away from his companions to report the matter to the people at the shebeen, in order that the deceased could be helped, he replied: "It wasn't easy for me to do that. I was part of the group, I was going along with them. How would I explain my departure from them - where could I say I was going if I did so?" He was asked by the court whether he was certain that Sipho and Mandla did nothing to the deceased. In reply he gave this somewhat confused and contradictory answer:

"Well I'm sure that they didn't do anything to him while I was with them all. If they had done it they could have done it when I was not with them all but then I was the person who was watching the deceased."

Certain other State evidence, which is common cause or not disputed, ought to be mentioned. Detective Sergeant Govender stated that a balaclava cap was found next to or close to where the deceased lay. The deceased's lover, Mrs Duma, noticed that the lining of the deceased's trouser pockets had been turned inside out. The findings in the post-mortem report, which were admitted, confirmed the evidence of Nyathi on the infliction of the two stab wounds.

The appellant gave evidence denying that he was in any way involved in the murder. He gave this account of his movements that night. He went alone to the Nzuza shebeen. There was an incident involving him and Thulani, who was Zodwa's brother. He demanded

money from the appellant, felled him with his clenched fist and took his money. The appellant retreated to another house ("Duma's place") which was next door. He remained there until he saw that Thulani had left Nzuzu's shebeen before he returned there. At a later stage Nyathi, Mandla and Sipho arrived. The four of them sat drinking and dancing. Later on they left the shebeen to go home. He, however, returned to Duma's house, which was apparently also a shebeen, in order to buy some beer. His three companions waited for him at a spot about 20 metres from Duma's house. When he arrived there it had already closed and there was no response to his knocking on the door. He turned to rejoin his friends but they had gone. He decided to walk on alone, presumably towards his home, along a footpath. He saw two men approaching him in single file. The first greeted him and he returned the salutation. However, as he was about to pass him,

this person blocked his path, produced a knife and demanded money from him. The appellant shouted out "Why do you stab me?" With that someone from Nzuza's shebeen said: "You, come here." This caused the two men to run away. The appellant walked on and caught up with his three companions. He told them what had happened. They proceeded to the garage where the four of them spend the night. No one produced a wallet at the garage. He denied ever having stabbed the deceased. I should add that under cross-examination the appellant admitted that in the proceedings in terms of s 119 of the said Act he had told the magistrate that one of the two persons who confronted him as he walked home, grabbed his clothing and the other person was armed with a knife, whereas at the trial he was explicit in saying that only one person was involved. The record of the s 119 proceedings was handed in as Exhibit F. He is recorded as having said:

"One of them did grab me as indicated by holding the lapels of my apparel. The other person was armed by means of a knife. After the first person grabbed hold of me, the second person, who had a knife in his possession, demanded me to produce money."

The appellant called Mr Mandla Ngubane to testify on his behalf. He said that he, Nyathi and Sipho had gone to the Nzuza shebeen where they met the appellant. He confirmed the appellant's version to the extent that he said that the appellant left them to buy some beer at Duma's house; that they did not wait for them to return before proceeding on their way; that he caught up with them and told them that two people had tried to rob him.

Gordon AJ at the outset of his judgment

candidly stated that deciding whether the State had proved the guilt of the appellant was no easy task. The court was mindful of the fact that Nyathi was a single witness and that his evidence was unsatisfactory in certain respects. For this reason due regard was paid to what was said in S v Saul and Others 1981(3) SA 172(A) and particularly to the following passage at 180 E - G (which was quoted by the trial court in the judgment):

"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 RUMPF 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."

After referring to the defects in appellant's and Mandla's evidence, the court found both of them to be

untruthful and unreliable and rejected their evidence.

(Without necessarily subscribing to all the reasons given for this conclusion, one can, with respect, confidently endorse it.) As regards the evidence of Nyathi, the court concluded, despite its defects, that there was corroboration of his evidence and that it could be accepted. The relevant, and critical, reasoning which led to this conclusion appears from the following passage in the judgment:

"In weighing up all this evidence in the light of what we have stated, we find that notwithstanding the shortcomings in Patrick's evidence, he - Patrick told the truth when he described to us the wounding of the deceased. His descriptions of the wounds which he observed the accused inflict upon the deceased are absolutely accurate, when considered in the light of the postmortem report and are in addition corroborated by the observations of Gloria, not only as to the nature of the injuries suffered by the deceased, but also as to the place where the body was found.

There is no evidence that Patrick saw the deceased's body the following day. There is no suggestion that Patrick himself did the killing

and falsely implicated the accused. Patrick was a friend of the accused, Sipho and Mandla, yet the accused would have us believe that he falsely implicated both the accused and Sipho in crimes, and places Mandla in the position of an eye witness. Patrick was a friend of theirs and it is in our view improbable that he would implicate all of them in these various respects. Beyond reasonable doubt Patrick told the truth as to how the deceased was killed." (I italicize.)

Before commenting on this reasoning and conclusion, it is, I think, necessary to stress the extent to which Nyathi's evidence was deficient. If he was bent on locating his girl friend, it is somewhat strange that he spent about an hour in another room whilst his friends were drinking before he went to see whether she was there. His evidence on whether he was drinking during that time, or whether he ever imbibes, is, as I have pointed out, contradictory. It is unlikely that the attention this other young man paid to Zodwa would have been treated with such equanimity. It is, if anything, more improbable that an unknown

adult overhearing this conversation would have intervened and offered the alleged advice. The fact that, on Nyathi's evidence, the appellant at this stage attacked and stabbed the deceased for no reason whatsoever, can hardly be accepted. That part of his evidence describing the chase, and the stabbing of the deceased the second time at or near the stream, cannot be faulted. On his version, however, he is quite unable to explain why he accompanied the appellant and the other two from the scene of the crime and spent the night with them: his answers were pitiful and patently false.

Viewing his evidence as a whole, one is left with the inescapable impression: that he was giving an untruthful account of events, particularly with reference to what happened before the deceased was stabbed for the first time; that a further assault may

well have taken place more or less as described by him; that the motive was in all probability robbery; and that, if the appellant was not a participant in the commission of this offence, he certainly condoned it. These misgivings and reservations concerning the evidence of Nyathi were shared by the trial court. With reference to his evidence it is said in the judgment:

"We must record that we feel that the evidence as a totality, even in its absolutely contradictory form, does not constitute the whole truth of the circumstances surrounding the incident in question, nor does it give any satisfactory clue to what actually surrounded what occurred."

and

"In fact we feel that he did not tell the whole, or the accurate truth of what happened immediately before his discussion with the deceased."

Reverting to the judgment, and particularly the passage quoted from it, the court

found corroboration of Nyathi's evidence in the evidence of Gloria Duma and the post-mortem report. But such evidence does not justify the conclusion that "Patrick told the truth when he described to us the wounding of the deceased", if by that observation is meant that he necessarily told the truth as regards the identity of the deceased's assailant or the stabbing on the first occasion. He may well have seen the infliction of the two stab wounds and observed where the deceased ultimately fell. But his evidence in this regard does not serve to corroborate any other details of his evidence or guarantee that such are truthful and reliable. It is true that he did implicate his friend Sipho in the crime of robbery (actually on his version it may have amounted to no more than theft) but I do not consider that this fact really serves to confirm his evidence as to the identity of the person who fatally stabbed the deceased. In this regard what was

said by Schreiner JA, although with reference to the evidence of an accomplice, is pertinent in this case too:

"The cautious Court or jury will often properly acquit in the absence of other evidence connecting the accused with the crime, but no rule of law or practice requires it to do so. What is required is that the trier of fact should warn himself, or, if the trier is a jury, that it should be warned, of the special danger of convicting on the evidence of an accomplice; for an accomplice is not merely a witness with a possible motive to tell lies about an innocent accused but is such a witness peculiarly equipped, by reason of his inside knowledge of the crime, to convince the unwary that his lies are the truth. This special danger is not met by corroboration of the accomplice in material respects not implicating the accused, or by proof aliunde that the crime charged was committed by someone;"

(I italicize: the passage is taken from Rex v Ncanana 1948(4) SA 399 (A) 405.)

As Holmes JA pointed out in S v Hlapezula and Others 1965(4) SA 439 (A) at 440 E - F: "by reason of his [an accomplice's] inside knowledge, he has a deceptive

facility for convincing description - his only fiction being the substitution of the accused for the culprit."

It is to my mind an open question whether there is not sufficient evidence for Nyathi to be treated as an accomplice. Be that as it may, the same danger of deceitful substitution presents itself in this case.

It would appear that this consideration may well have been overlooked, or not have been given sufficient weight, by the trial court in its finding that there was corroboration of Nyathi's evidence. As a spectator, or a participant, Nyathi was in a position to give a convincing account of what happened (not that he did so) but at the same time substitute the appellant for Mandla or Sipho or perhaps himself.

For these reasons I am of the view that, particularly since the evidence of this single eye-witness was unreliable in a number of respects,

Nyathi's evidence, despite the poor evidence of the appellant and his witness, ought not to have been regarded as sufficient to prove the guilt of the appellant beyond any reasonable doubt.

The alleged irregularity related to the use of a different interpreter to translate the evidence of one of the witnesses. Since the appeal on the merits must succeed, there is no point in considering it.

Lastly, an aspect of the transcribed record calls for comment and must be drawn to the attention of the Registrar of the court a quo. The names of the persons putting and answering every question have been typed in the record rather than such identification only when a change of personae arises. This is to an extent a hindrance to the reader and no doubt entails some waste of time and perhaps money. This procedure

should be discontinued.

The appeal is allowed. The conviction and sentence are set aside.

M E KUMLEBEN
JUDGE OF APPEAL

HEFER JA)
MILNE JA) - Concur