263/54

G.P.-S.384–1952-3–10,000. U.D.J. 445.

In the Supreme Court of South Africa
In die Hooggeregshof van Suid-Afrika

(.....DIVISION).
AFDELING).

APPEAL IN CRIMINAL CASE.
APPEL IN KRIMINELE SAAKI.

.....

Appellant.

versus

.....

Respondent.

Appellant's Attorney Louw & S *Respondent's Attorney*.....
Prokureur van Appellant *Prokureur van Respondent*

Appellant's Advocate [illegible] *Respondent's Advocate*.....
Advokaat van Appelant *Advokaat van Respondent*

Set down for hearing on:—.....
Op die rol geplaas vir verhoor op:—

[illegible]

Judgment
on 31/3/55

[illegible]

31/3/55

IN THE SUPREME COURT OF SOUTH AFRICA.

(APPELLATE DIVISION)

In the matter between :-

D. M. BELLINGHAM Appellant

&

R E G I N A Respondent

CORAM :- Centlivres C.J., Fagan et Steyn JJ.A.

Heard :- 24th March 1955. Delivered :- 31-3-55

J U D G M E N T

CENTLIVRES C.J. :- The appellant was charged in the Witwatersrand Local Division with murder. The Court consisted of Malan J. and two assessors. The Court brought in a verdict of culpable homicide. This verdict was arrived at by a majority of the Court, Malan J. dissenting. The appellant was sentenced to three years imprisonment with compulsory labour. Leave to appeal was granted by the trial judge.

The verdict was returned on December 9th, 1954, when the learned judge said :-

" At this stage, by a majority, the accused is found guilty of culpable homicide. The Assessors have come to the conclusion that he is guilty. I have personally come to the conclusion that on the uncorroborated evidence of Joel it is unsafe to convict. My reasons for

" disagreeing with the Assessors will be given later."

Two months later the learned judge gave his reasons for dissenting from the assessors. Except for a short passage, to which I shall refer later, the learned judge did not set forth the reasons which actuated the assessors in coming to their verdict. In the result this Court is in the unfortunate position of not being in possession of the full reasons which motivated the assessors. It seems to me that the interests of justice would have been better served if the reasons of the majority and the minority of the Court had appeared in a judgment of the whole Court given at the time when the appellant was convicted or at any rate if the majority of the Court had at that time been given an opportunity of setting forth their views. Cf. Rex v van der Walt (1952 (4) S.A. 382 at p. 383).

The case for the Crown was that shortly before midnight on July 16th, 1954, the deceased, Joel Molife and three other natives were walking along Perth Road, Westdene, a suburb of Johannesburg. They met five native constables who asked them for their passes. Molife and the deceased then proceeded along Perth Road behind the three other natives. As Molife and the deceased were passing the appellant and one Gobey (who was charged jointly with the appellant but discharged at the end of the Crown case), the appellant addressed them and

said "Tsotsies, come here." The natives replied that it was late and that they could not stop. The appellant again said "Tsotsies come here." After he had addressed them for the third time the appellant said "You Tsotsies come here. You are "the people who go about killing others at night." The deceased, who was wearing a police overcoat, told him that he was a policeman and the appellant replied "Yes, you are the one I want."

Molife and the deceased were followed by the appellant, the three other natives having apparently gone some distance ahead. After the appellant had followed Molife and the deceased for a short distance he stopped and called Gobey and as the latter came up to the appellant he (the appellant) said "Skiet hulle." Shots were thereupon fired one of which fatally injured the deceased. Very shortly after this Molife succeeded in stopping a police van and two European policemen who were in the van arrested the appellant and Gobey. The five native constables who had asked Molife and his companions for their passes also appeared on the scene immediately afterwards.

The case for the defence was that the appellant was a pillion passenger on a motor cycle driven by Gobey who was taking him home. They had gone beyond the house of the appellant in Perth Road and made a U turn to go back. The appellant fell off the motor cycle as Gobey was in the act of turning.

As he lay on the ground the deceased attacked him, as he thought, with the intention of robbing him. The appellant had his weekly wages in the small pocket of his trousers but the deceased did not succeed in robbing him. During the struggle with the deceased the appellant succeeded in getting away from him, he then pulled out his pistol from his hip pocket and the deceased ran away. The appellant said : "Then I saw that "there were a whole lot of them and I chased them, because I "thought that he (sic) wanted to rob me and I had my whole "week's ~~wages~~ salary on me..... When I saw that I could not "catch them I fired a number of shots..... When I had fired "a number of shots they started to run more slowly and I got "hold of the one with the coat on (the deceased) and I grabbed "him and I said 'Come here Tsotsie, you want to rob me'. With "my left hand I grabbed him by the right arm and he swung round "and tried to hit at me. I tried to ward off the blow and then "the revolver went off and I saw him sink down. I got such a "fright that I ran back to Gobey." Asked whether he intended to shoot the fatal shot the appellant replied "No, I wanted to "catch him and take him to the police." ~~The appellant produced at the trial a torn coat and said that it had been torn by the deceased but he did not say whether it had been torn at the~~

~~first or second struggle~~. The appellant said that on the evening in question he and Gobey had three brandies each.

Gobey also gave evidence for the defence and the learned judge correctly characterised his evidence as vague. In chief he did not say that he made a U turn as the following questions and answers show :-

" And did you pass him (the appellant's) house - Yes, and then he jumped off and I still went on. I then fell with the machine and I again picked it up, but the machine fell over on to its other side.
Did you see the accused then ? - No, I did not see him but I heard a few shots.
And then ? - The accused came back and he told me that a native wanted to assault him. He then asked me to remain there as he wanted to go and call the police."

Such was the evidence of those who were in the immediate vicinity of the shooting at the time it took place.

Sergeant Welgemoed who was in the police van which had been stopped by Molife and came on the scene immediately afterwards said :-

" Nodat ek hulle" (i.e. the appellant and Gobey) " gesê het dat daar 'n beweerde skietery was en nadat ek hulle gevra het of hulle iets daarvan weet, en die langer een van die twee het gesê dat hulle daarvan niks van weet nie en hulle wou toe loop en ek het hulle gevra om daar te bly. Die korter een van die twee het gesê dat hy geskiet het omdat hulle hom wou aanrand, en toe kom

" daar 'n ander poliesman aan en hy wou weet waar die wapen was. Ek het gesê dat dit beweer word dat die twee beskuldigdes geskiet het, en die korter een van die twee het gesê dat hy die wapen in sy sak het en dat niemand dit sal kry nie. Konstabel Siegort het hom toe visenteer en die wapen gekry."

Detective Meyer who saw the appellant and Gobey in a police office at 12.15 a.m. immediately after they had been arrested said that they were under the influence of drink but not drunk and spoke quite normally. He said in regard to the appellant that "hy het gesê dat hy 'n passasier was op 'n motorfiets en "dat hulle geval het, en terwyl hy daar gelê het het die oor- "ledere daar aangekom en het begin om hom rond te ruk. Hy het "toe sy wapen uitgetrek en 'n paar skote afgevuur."

Shortly after the shooting Detective Sergeant Willemse visited the scene of the shooting and found five spent cartridge cases.

It was admitted by the parties that the blood of the deceased contained .11 per cent of alcohol and that the bullet which killed the deceased was fired from the pistol found in the possession of the appellant.

The district surgeon of Johannesburg, Dr. Krausey, said that the .11 per cent of alcohol found in the blood of the deceased "would indicate that at the time of death, by average standards,

"you could expect him to be affected by the alcohol, but I "cannot say what the position would have been with this partic- "ular individual." Dr. Krausey said that the bullet entered the head of the deceased a little above the bony portion between the lower jaw and the ear. The following questions and answers are of importance :-

" Was there anything to deviate the bullet ? - Yes, it might be deviated by any little bit of bone. A person can never be certain ; it can be deviated in any direction, depending on the nature of the tissues it strikes. You are not able to form any opinion on it ? - No, I am not able to say whether it was deflected or not. "

" If the man was shot at from behind and he turned around to see what was happening, could he have received that wound ? - Yes, if he turned round. "

" You heard the evidence when I put it to the witness before the last how the wound was received by the deceased ; that it happened when the accused had hold of the right arm of the deceased and that the shot went off when he was trying to ward off a blow from the deceased ? - Yes, I cannot say that the wound is not consistent with that."

" If there was a slight decline in the road and the person firing the shot was following the deceased would you expect the track of the bullet to be as you found it ? - It depends on the angle at which his head was inclined at the time. If he was running he might have been slightly stooped forward and in turning around that might have been possible. "

The learned judge in the course of his judgment said :-

" The Crown case rests upon the evidence of a single witness and it will be extremely dangerous to convict on his evidence unsupported as it is in respect of the origin of the trouble and the circumstances surrounding the final stages of the unfortunate occurrence, especially as there are unsatisfactory features in his evidence."

I must naturally assume that the learned judge instructed the assessors that it was dangerous to convict on the evidence of a single witness and that the assessors bore this in mind during the several adjournments which were made by the Court in order to consider its verdict.

In Nhlapo v Rex (A.D. 10 November 1952) Schreiner J.A. said in giving judgment that "in deciding whether the guilt "of an accused has been established beyond reasonable doubt "a cautionary rule of the kind mentioned" (by de Villiers J.P. in Rex v Mokoene, 1932 O.P.D. 79) "may well be helpful as a "guide to a right decision. It naturally requires judicious "application and cannot be expected to provide, as it were "automatically, the correct answer to the question whether "the evidence of the Crown witness should be accepted as "truthful and accurate. Certainly it does not mean..... "that the appeal must succeed if any criticism, however

"slender, of the witness's evidence were well-founded. "

In Nhlapo's case the appellant had been convicted of murder and sentenced to death. The conviction depended on the single evidence of one witness against that of the appellant and counsel for the appellant made several criticisms of the Crown witness's evidence but this Court dismissed the appeal.

After stating that the Crown's case rested upon the evidence of a single witness Malan J. said :-

" On Joel Molife's version there was no motive whatsoever for the assault upon them. They had remained meek and submissive notwithstanding the insulting manner in which they had been addressed and the conduct attributed to the accused is inexplicable except on the basis that he is of the ruffian type or was strongly under the influance of liquor.

It is notorious that there are irresponsible hooligans in Johannesburg, who molest natives without provocation. But the accused very definitely did not give me the impression of falling in that category. "

The impression made on the learned judge by the appellant and Gobey may not be the same as the impression made on the assessors. In this respect it seems to me that we should apply the principle stated by this Court in Rex v Mtembu (1946 A.D. 880 at p. 882) in the following terms :-

" It was stated by Innes C.J., in Rex v Nyati (1916 A.D.

" 319 at p. 321), commenting on the principle that, generally speaking, the finding of the trial Court in regard to the credibility of a witness is decisive, that the rule applies to a decision by a majority as well as to one that is unanimous, though the reasons of a dissenting minority always demand careful attention. It seems to me that so far as expressions of opinion on the demeanour of a witness are concerned, the opinion of the dissenting member can seldom be allowed to carry any weight with the court of appeal. "

I have already pointed out that this Court has not been provided with the full reasons of the assessors. They may, in forming an impression of the character of the ~~first~~ appellant, have placed some weight on the defiant attitude adopted by the appellant when Sergeant Welgemoed demanded the surrender of his pistol. They may also have attached more weight to the evidence given by Detective Meyer that the appellant, although not drunk, was under the influence of liquor.

The learned judge further said that there were improbabilities in the story told by Molife. In this connection he said :-

" Did accused No. 1 call accused No. 2 immediately before the shots were fired ? There is no suggestion that accused No. 2 had any weapon. The weapon used was admittedly in possession of accused No. 1, so why should he have called accused No. 2 to come to his assistance and then have said "Skiet hulle" ? No. 2 accused stated that he was not called by No. 1 accused, that he did not go to him and that at

" no stage did he leave his motor-cycle. It may be said that accused No. 2 supported accused No. 1 on this point in order to protect a friend. In spite of the vagueness of his evidence as to what occurred at the time when accused No. 1 fell off the motor-cycle, I formed a favourable impression of this witness and I have no hesitation in accepting his evidence when he states that he was not called by accused No. 1 and that he at no time left his bicycle. He is, to a certain extent, borne out in this in that he was on his bicycle when he was arrested. I find that Joel was deliberately untruthful when he gave his evidence. "

The learned judge seems, with great respect, to have overlooked the fact that the appellant said in his evidence that when he and Gobey got near to his home he bumped Gobey to tell him to stop because "he had a Balaclava cap on and he "could not hear me and so he stopped immediately but he had "gone past my house." The fact that Gobey had a Balaclava cap on supplies a reason why he did not hear what the appellant had said to him. It does not appear from the evidence whether the appellant knew that Gobey had no pistol on him. It is possible that Molife heard part of a statement by the appellant to the effect that he was going to shoot natives and this is supported to a certain extent by Molife's evidence that almost at once the appellant fired the first shot. The assessors could not have shared the learned

judge's finding that Molife was deliberately untruthful in this respect.

The learned judge drew an inference adverse to Molife from the direction of the bullet wound on the ground that it travelled backwards and upwards and said that "if the direction of the bullet is taken at its face value the story of Joel is completely destroyed." I have already referred to Dr. Krausey's evidence on this point and I think that on that evidence it is impossible to say that the direction of the bullet wound can be explained only on the basis of the story told by the appellant.

The learned judge drew an inference adverse to Molife from the presence in the blood of the deceased of alcohol. On this point he said :-

> " Dr. Krausey was of opinion that by reason of the presence of .11% of alcohol in the blood of the deceased at the time of his death he, in all probability, had consumed sufficient liquor to have been affected thereby. Molife stated that he and the deceased had been together continuously from 7 p.m. until midnight when the deceased sustained the injury and that the latter did not drink, had not consumed liquor after they had met and was not under the influence of liquor.
>
> When it is borne in mind that the elimination of alcohol from the system is a continuous process there are only two possible explanations of the presence of

" .11% alcohol in the blood of the deceased. If he did not consume alcohol after 7 p.m. there must obviously have been very much more than .11% alcohol in his blood when he met Joel Molife in which event it is unlikely that the latter would not have noticed the condition of the deceased. The only other explanation of the presence of so much alcohol in his blood is that he had consumed liquor after 7 p.m. On either of these assumptions the evidence of Molife is suspect. "

I have read the evidence of Dr. Krausey carefully and am unable to say that that evidence supports the only two possible explanations referred to by the learned judge of the presence of .11% of alcohol. I may add that Samuel Moaheng who was one of the native constables who stopped the deceased and Molife for passes said that the deceased appeared to him to be sober. He was not cross-examined on this.

Towards the end of his reasons the learned judge said:-

" Finally, although I was not able to form a clearly adverse opinion of Joel Molife's demeanour in the witness-box, I had a feeling of uneasiness while he was giving his evidence.

It is the cumulative effect of all these points which has impelled me to the conclusion that I must reject the evidence of Joel. I am satisfied that he has not given a true account of the events but on the other hand I am unable to accept the evidence of accused No. 1 as a full or wholly truthful account of the origin of the trouble. There are improbabilities in his story. "

I think that a fair inference from the above statement is that the learned judge rejected Molife's evidence as a result of the cumulative effect of all the points mentioned by him. I have dealt with these points seriatim and I think that we must assume that the learned judge put all these points to the assessors during the ~~long~~ repeated discussions ~~that took~~ shown by the record to have taken place before a verdict was arrived at. The assessors must have taken a different view from that taken by the learned judge.

In conclusion the learned judge said :-

" The assessors accepted the evidence of Joel and rejected the evidence of the two accused. If the story of Joel is accepted and that of the accused rejected the logical verdict should be one of guilty of murder. Indeed, one assessor came to that conclusion but he deferred to the view of the other that a verdict of culpable homicide was the proper one because he felt that Joel had not stated the full facts surrounding the origin of the quarrel.

I am in entire agreement that at the very least Joel did not state the full facts and once suspicion exists that Joel was not entirely candid, accused No.1 cannot be found guilty of culpable homicide. "

The important fact is that the assessors rejected the evidence of the appellant and Gobey. As the learned judge pointed out earlier there are improbabilities in the story of

the appellant. He does not specify those improbabilities. One is that the deceased should have attempted to rob the appellant when he must have known that that there were a number of native constables in the neighbourhood to whom he had just shown his pass. Another is that the deceased should have attempted the robbery single handed when Molife was there to assist him and possibly the three natives who were walking ahead. A further improbability in the appellant's story is that Gobey knew nothing of the alleged attack by the deceased. The appellant's version was put to Gobey by one of the assessors as follows :- "His story is that immediately after he fell he was attacked by "the native, at a time when he was still on the ground, and do "you know anything about this ?" The answer was "No, I do not." There is also the improbability that the deceased would have slowed down after the shooting started. It is impossible in my view to say that the assessors were not entitled to reject the evidence of the appellant and Gobey.

There is, prima facie, considerable substance in the learned judge's criticism of the view taken by one of the assessors that a verdict of culpable homicide was the proper one because he felt that Molife had not stated the full facts surrounding the origin of the quarrel. Unfortunately the learned

judge omitted to set forth the reasons why the assessor/ referred to felt that Joel had not stated the full facts surrounding the origin of the quarrel. In these circumstances the position is similar to an appeal from a jury when the Court is not aware of the reasons which actuated the jury in arriving at its verdict. As Schreiner J.A. said in R. v D. & Others (1951(4) S.A. 450 at p. 458) "Although therefore the appeal is "by way of re-hearing the Appeal Court is, generally speaking, "unable to conclude that the verdict was wrong if it was one "at which the jury could reasonably arrive. "

I think that it must be taken that the assessor/ referred to, having rejected the story of the appellant, was satisfied in his own mind that the deceased had not attacked the appellant. He may have thought that there was some possibility that the deceased had behaved in some undisclosed provocative manner towards the appellant and that such provocation may have led to the shooting. On this point that assessor may have thought that he should give the appellant the benefit of any doubt and return a verdict of culpable homicide.

After carefully considering the case as a whole I have come to the conclusion that the verdict has not been shown to have been wrong. The appeal is accordingly dismissed.

Fagan
Steyn } concur.

van Heerden