15-9-1971

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G.P.-S. J. 445.

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

(APPELLATE DIVISION).
AFDELING).

APPEAL IN CRIMINAL CASE.
APPÈL IN STRAFSAAK.

SAMUEL MDLALOSE
Appellant.

versus/teen

THE STATE
Respondent.

Appellant's Attorney Van Dee *Respondent's Attorney* A.G.(Natal)
Prokureur van Appellant *Prokureur van Respondent*

Appellant's Advocate R.J. CARSTENS *Respondent's Advocate* F.C. REISINGS
Advokaat van Appellant *Advokaat van Respondent*

Set down for hearing on 2-11-1971
Op die rol geplaas vir verhoor op 1,3 6.

(D.C.L.D.) Ogilvie Thompson C.J., Botha J.A., Jansen, J.A.

9.45vm.-10.09vm.
10.09vm.-10.30vm.

C.A.V.

Appeal dismissed per Jansen J.A.:
application allowed. Conviction and
Sentence set aside.

IN THE SUPREME COURT OF SOUTH AFRICA.

(APPELLATE DIVISION)

In the matter of

SAMUEL MDLALOSE ..... Appellant.

and

THE STATE ..... Respondent.

Coram : OGILVIE THOMPSON CJ, et BOTHA, JANSEN, JJA.

Heard: 2nd November, 1971. Delivered: 26th November, 1971.

JUDGMENT.

JANSEN JA:-

The appellant was convicted in the Durban and Coast Local Division (per Leon J and assessors) of murder with extenuating circumstances and sentenced to eight years imprisonment. He subsequently applied to Leon J for the receipt of further evidence in terms of sec. 363(3) of Act 56 of 1955 and leave to appeal against

the /.....

the conviction. The learned Judge allowed the further evidence and in view of the effect thereof granted the leave applied for.

The additional evidence received must now "be deemed to be evidence taken or admitted at the trial" (sec. 363(4)), but it will be convenient to deal, initially, with the trial and to refer to the additional evidence at a later stage.

The deceased had died in a matter of minutes as a result of a single stab wound in the chest. In finding that the appellant had inflicted that injury with an intent to kill, the trial court relied on the evidence of the two witnesses called by the State to testify to the circumstances of the deceased's death. Joseph Makhanya said that on the evening in question, at about 9 p.m., he was in his house. He heard a noise outside, went out and found the deceased hitting his [the deceased's] wife. The accused, who was also present, then asked the deceased why he did so. Thereupon he (the witness) told the deceased to take his wife away and "not to come and hit his wife in a place

where I stay". The deceased left, but his wife remained. The accused spoke to the latter, but he (the witness) did not hear what was said. The deceased returned, and the accused went up to him and "he struck the deceased twice and when he struck him for the third time the deceased said 'Samuel you have stabbed me'". The deceased took off the shirt he was wearing and began to stagger. Blood then came from the deceased's chest. The deceased fell and the accused walked away. The other witness, Dudu Khumalo, did not see the actual stabbing. He had been gambling and drinking somewhere nearby and states that "as we were walking out, I heard a voice say 'you have stabbed me, Sayi'". As he came closer he saw the deceased, who then had blood on his chest. He asked the deceased about this and the latter "then said - told me, that it was Mandhlovu (the deceased's wife) who had caused Sayi to stab him, or, it was through Mandhlovu that Sayi had stabbed him." The appellant was then about 5 paces from the witness; the former "had a dish in his hand and he was pouring water

over /.....

over the deceased"; anyone who "paid attention" would have heard what the deceased was saying, the appellant must have heard this, but "he didn't say anything".

The appellant denied killing the deceased. According to him, as he was returning from the city, where he had been drinking at the main beer hall, he heard "this noise". He went to investigate and enquired "what the cause of the noise was". The deceased then said "Oh, they have stabbed me, Sayi". The deceased "came out of the crowd and then he staggered and went and sat down and sat on his buttocks and I lit a match and I saw the wound on his chest ..... I ordered or asked them to bring water and I wanted to throw the water over him because he was perspiring a great deal". He (the appellant) then went away to telephone. He had not spoken to the deceased's wife at any stage that evening. The deceased was a great friend of his, but he was not on cordial terms with the deceased's wife. As to the alleged statement by the deceased to Khumalo, he "didn't hear the deceased saying that".

The Court a quo thought that Makhanya and Khumalo were satisfactory witnesses, that "their stories hang together" and that there was "nothing inherently improbable in their version", whereas the appellant was not a good witness and his story "intrinsically improbable because it involves accepting the hypothesis that two good friends of the accused have given false evidence against him". The appellant, it is true, had said in cross-examination that he and Makhanya had quarrelled, but this the Court rejected as an afterthought, since Makhanya had in examination-in-chief denied that he had ever quarrelled with the appellant, and this had not been challenged in cross-examination. The Court also held it against the appellant that during his cross-examination he had claimed to be hard of hearing. Asked whether he had heard Makhanya saying in evidence that he (the appellant) had stabbed the deceased, the appellant answered that he had not, and then explained that he was hard of hearing. The judgment deals with this as follows :-

"We /.....

> "We also consider that the accused was lying when he claimed to be hard of hearing. The interpreter interpreted in his normal manner throughout the trial and when the accused gave evidence he did not indicate in any way that he could not hear what the interpreter was saying and in evidence he claimed to have heard what the deceased said without difficulty."

In the result the Court a quo accepted the evidence of Makhanya and Khumalo and rejected that of the appellant.

The judgment, however, does not refer to certain unsatisfactory features in the case against the appellant. They may be indicated as follows :-

(1) Makhanya claims that he saw the appellant strike three blows in rapid succession at the deceased, "all three blows struck him [the deceased], up to the third one when the blood came out of his chest" - it was "bright moonlight". He is even able to demonstrate the appellant's three jabbing movements with his right hand, but the post mortem revealed only a single injury, and the light must have been somewhat dim - the last quarter had commenced two days before. In reply to a question by the Court, Makhanya said that "he [the appellant] didn't have a knife and I didn't see the knife".

(2) /.....

(2) There is no direct evidence of immediate provocation, or of a liaison between the appellant and the deceased's wife, explaining the conduct attributed to the appellant. The admissibility and evidential value of the alleged statement by the deceased to Khumalo, referring to his wife, is necessarily based upon the appellant's reaction, viz. of non-denial, but this in turn is wholly dependent on whether the appellant had in fact heard what was said. (It was never contended that this statement was "spontaneous" and part of the res gestae - S. v. Tuge, 1966(4) SA 565(A), 573-4). Khumalo, it is true, does say that "anyone who paid attention" would have heard the deceased, and that the appellant "must" have heard what was said; but, on the other hand, he concedes that both he and the appellant were under the influence of liquor. Moreover, it is likely that there was some commotion and noise (as, indeed, the appellant's evidence suggests). There were quite a number of people present (including the deceased's wife, a woman called Albertina and others). Makhanya says that the deceased's wife "was crying and she was hysterical and throwing herself onto the ground."

(3) There is a material contradiction between

Makhanya /.....

Makhanya and Khumalo: after the stabbing, according to Makhanya, the appellant "did nothing for him (the deceased) because he just walked away"; according to Khumalo, the appellant remained there and poured water over the deceased (which is consistent with the appellant's story). Khumalo places Makhanya among those then present.

In view of these unsatisfactory features and the inexperience of pro deo counsel (he had only been at the bar for two weeks) the Court a quo, in the interests of justice, might well have made greater use of its powers of examination and have considered the possibility of itself calling witnesses. The deceased's wife, for example, was, according to Makhanya, only two paces from the deceased when he was stabbed. If available, and whatever she might have said at the preparatory examination (if she did give evidence on that occasion), she should have been able to shed some light on at least some aspects of the case. But, no doubt, this course did not occur to the Court, or the Court considered it unnecessary, as a result of its firm impression of the appellant's mendacity as opposed to the

bona fides of the two State witnesses.

The additional evidence, received by Leon J in conjunction with the application for leave to appeal, relates in particular to some of the factors which gave rise to this impression. The effect of this evidence may be stated as follows :-

(a) The appellant's claim of deafness during his trial cannot be rejected as a lying subterfuge: during the preparatory examination the appellant had complained of his hearing, and about a month before his trial, whilst in custody, he was treated for wax in the ears; after the trial he still complained about his hearing, was often troubled by his left ear and received treatment.

(b) The fact that Makhanya was not cross-examined about his denial of any quarrel with appellant, does not justify an inference that the appellant's allegations in this regard were an afterthought, nor can these allegations be rejected.

About two months before the stabbing Makhanya had caused the appellant's arrest and conviction for trespassing, resulting in a fine of R10 or 10 days imprisonment. The appellant

said /...

said that this had given rise to a quarrel between them after his discharge. He also spoke of two subsequent quarrels about money: 61 cents Makhanya had borrowed and not returned, and 45 cents staked in gambling, to which the appellant was entitled and Makhanya had appropriated. The gambling incident occurred about two weeks before the death of the deceased and almost led to blows. The Court recalled Makhanya, who persisted in his denial of any quarrel whatsoever. This direct conflict in evidence Leon J, in his fair and objective reasons for granting leave to appeal, assessed as follows :-

> "I find myself unable to say that the applicant's (viz. the appellant's) evidence with regard to these quarrels can be rejected as false. There appears to me to be no proper basis upon which I could conclude that Joseph Makhanya's evidence falls to be accepted on this point in preference to the applicant's. There did not appear to me to be anything to choose between the two witnesses when they gave evidence today. Accordingly, there must at least be a reasonable possibility that these quarrels did in fact take place."

In effect, the additional evidence largely negatives the grounds upon which the Court a quo based its rejection of the appellant's evidence. Consequently, we are now asked, on behalf of the appellant, to set aside the conviction and sentence and enter a verdict of not guilty or, at least, remit the matter to the Court a quo for further evidence. As to this latter course, we were referred to no authority allowing such a procedure. Neither sec. 22 of the Supreme Court Act, 1959, nor sec. 369 of the Criminal Procedure Act, 1955, appear to envisage that this Court should have the power to call for even further evidence in a situation such as this. On the contrary, the procedure instituted by sec. 363(3) and (4) of the Criminal Procedure Act appears to assume that the appeal should be disposed of on the totality of evidence then placed before it. But be that as it may, in the present instance the problem does not arise as the evidence, in any event, allows of a final decision on the merits.

In view of the additional evidence received,

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the adverse finding of the Court a quo on the appellant's credibility must be largely discounted, and it must be accepted as reasonably possible that Makhanya was untruthful in respect of the quarrels alleged by the appellant. It is argued on behalf of the State that this possibility is largely irrelevant, as the appellant conceded that he and Makhanya had become reconciled, and were still friends at the time the deceased met his death. It is also pointed out that Makhanya was clearly not the aggrieved party, and that the alleged quarrels could hardly present a motive for Makhanya to have falsely implicated the appellant. This may be so, but the possibility of such quarrels would strengthen the impression given by Makhanya, when he was recalled, that he must have considered the appellant a nuisance. Moreover, the evidence of one of the co-owners of the premises where Makhanya lived and where the stabbing took place, discloses a general inclination on the part of Makhanya to hold the appellant responsible for disturbances on the premises, whenever the neighbours complained.

Once it is accepted as reasonably possible that Makhanya was lying about the quarrels and that he was generally /....

generally inclined to blame the appellant for disturbances on the premises, the unsatisfactory features in his evidence take on an added significance. He appears to exaggerate the illumination supplied by the waning crescent of the moon, which enabled him to see every blow struck by the appellant, even the blood drawn by the last, but not the knife. Moreover, the three blows described and demonstrated by him are hardly consistent with the single injury sustained by the deceased. Any doubt about his evidence in this regard must also taint his evidence of the deceased exclaiming "Samuel you have stabbed me!". On the appellant's own version, the deceased shortly after being stabbed, did exclaim "Oh, they have stabbed me, Sayi". In the circumstances, misunderstanding at least, by Makhanya, cannot wholly be discounted. The difficulty of registering and recalling precise words in circumstances such as then prevailed, is amply illustrated by Makhanya's own uncertainty, as appears from his cross-examination, whether the deceased used the English version of the appellant's name ("Samuel") or the Zulu version ("Sayi"). It is true that some

corroboration of Makhanya can be found in the evidence of Khumalo, but, on the other hand, that evidence also leads to the former's destruction. The contradiction already noted (Makhanya: the appellant left immediately after the stabbing; Khumalo: he remained on the scene, assisting the deceased), is, as the record stands, hardly explicable on the basis of mere error. The argument that it is improbable that two friends of the appellant would falsely implicate him, appears to be, in the light of the circumstances now known, insufficient to save Makhanya for the State and the argument that his impartiality is demonstrated by his readiness to admit that he had not seen the knife, can hardly tilt the scale.

The State, however, argues in the alternative that the conviction is, in any event, justified on the evidence of Khumalo alone. It is pointed out that he was found to be a satisfactory witness and that this finding is in no way affected by the additional evidence received. That is, indeed, the case; but when it comes to the weighing up of his evidence against that of the appellant, the State

can no longer rely upon an adverse finding by the Court a quo in regard to the credibility of the appellant. As has been indicated above, a number of the factors that weighed with the Court in disbelieving the appellant, must now be discounted. There remains, it is true, the finding that the appellant was "evasive", but it is difficult to resist the conclusion that this impression cannot be totally divorced from the factors now to be discounted: from the mere record it is at least difficult to pin-point clear instances of such tendency by the appellant.

With no adverse finding on credibility against the appellant, there is very little to choose between his version and that of Khumalo. This was fully recognised by Leon J in allowing further evidence, when he said: "..... if the evidence of Joseph [Makhanya] is eliminated, it is doubtful whether the evidence of Dudu [Khumalo] would be sufficient to warrant convicting the applicant". Even assuming Khumalo's bona fides, in the circumstances existing after the stabbing of the deceased and he being, on his own admission, under the in-

fluence /.....

fluence of liquor, he could easily have misunderstood what the deceased had said to the appellant. Further, the alleged statement by the deceased to Khumalo can form no basis for an adverse inference from the appellant's silence unless it is clear beyond reasonable doubt that the appellant had, at least, heard what was being said. On Khumalo's own evidence this is far from clear. The mere proximity of the appellant at the time when the deceased spoke, can hardly lead to an inference that the appellant, who was also under the influence of liquor, was paying attention to and heard or realized what the deceased was saying.

In view of these considerations it cannot be held on the totality of evidence (that given at the trial, together with that subsequently received in terms of sec. 363(3) of Act 56 of 1955) that the appellant's version of his role, in the events of the evening the deceased met his death, could not, reasonably, be true.

In /.....

In the result the State has failed to prove its case beyond reasonable doubt.

The conviction and sentence are set aside.

E. L. Jansen.

JANSEN JA.

OGILVIE THOMPSON CJ.)
BOTHA JA.) Concurred.