Judgment 2/12/71 ...

152/71

Perkins ...

G.P.-S.

S. 445.

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

(APPÈL DIVISION).
AFDELING).

APPEAL IN CRIMINAL CASE.
APPÈL IN STRAFSAAK.

WITBOOI JANTJIE

Appellant.

versus/teen

DIE STAAT

Respondent.

Appellant's Attorney Pro deo *Respondent's Attorney* P.G. Bloemfontein
Prokureur van Appellant *Prokureur van Respondent*

Appellant's Advocate A.P.Beckley *Respondent's Advocate* M.M. Beukes S.C.
Advokaat van Appellant *Advokaat van Respondent*

Set down for hearing on 1-11-1971
Op die rol geplaas vir verhoor op

(C.P.A.) 1.6.7

Ogilvie Thompson H.R., Jansen, A.R. Trollip, A.R.

9.45 - 11.00 am.
11.15 - 12.05 pm.

C.A.V.

2.12.71 Trollip J.A

Appeal allowed conviction and sentence set aside.

REGISTRAR, APPEAL COURT.
GRIFFIER, APPÈLHOF.
BLOEMFONTEIN.

- 2 -12- 1971

IN THE SUPREME COURT OF SOUTH AFRICA.

APPELLATE DIVISION.

In the matter between:

WITBOOI JANTJIE .... APPELLANT

AND

THE STATE .... RESPONDENT

Coram: Ogilvie Thompson, C.J., Jansen, et Trollip, JJ.A.

Heard: 11 November 1971. Delivered: 2 December 1971

JUDGMENT.

Trollip, J.A. :

With leave granted by a member of this Court under section 363 of the Criminal Procedure Act, 1955, the appellant appealed against his conviction and sentence of 10 years imprisonment for murdering a Bantu, Xolomoti Nocanda, on Sunday, 1 November 1970. He was tried by the Orange Free State Provincial Division (Erasmus, J., sitting with assessors).

It was common cause or not disputed that on the Sunday in question the deceased, a Bantu aged

about .... /2

about 25 years, accompanied by his friend, Wellington Mboxela, went drinking Bantu beer in a certain house in a Bantu township in Bloemfontein. They must have had a fair amount to drink; 0,17% alcohol was subsequently found in a blood sample taken from the deceased; and Wellington admitted that he had drunk about the same amount as the deceased. When they were leaving this house about 4 p.m., the deceased became engaged in a quarrel about a cigarette or tobacco with one William Siwane (also called Velhapi), a Bantu aged about 21 years, who was on the next-door premises. In the course of this quarrel the deceased stabbed Velhapi in the back in the vicinity of the kidneys with a knife causing a wound that subsequently required five stitches and his being hospitalised overnight. It must thus have been a fairly serious wound. Velhapi then tripped and felled the deceased, and at some stage of the ensuing pursuit of the deceased and Wellington, Velhapi stabbed the deceased several times, in consequence of which he died. On his discharge from hospital Velhapi reported the incident at

the ..../3

the police station and was arrested. Velhapi admitted that he stabbed the deceased, but claimed that he acted in self-defence. He was charged with murder, found guilty of culpable homicide, and sentenced to one year's imprisonment. There is no appeal in his case. The only issue in the present appeal is whether the appellant, who was charged with him, took part in the stabbing of the deceased. The State, relying on the evidence of Wellington, the only eye-witness called by it, maintains that he did; the appellant, relying on his and Velhapi's testimony, maintains that he did not.

Broadly stated, the conflict between the evidence for the State and defence was as follows. According to Wellington, the appellant was with Velhapi when the trouble commenced; Velhapi called to the deceased as he and Wellington were departing, and at Velhapi's request the deceased gave him some tobacco; the deceased asked Velhapi for a draw on the cigarette he was smoking, whereupon Velhapi, annoyed, returned his

tobacco; as the deceased and Wellington were departing, Velhapi tripped and felled the deceased from behind, and attacked him with an open clasp-knife; others, including the appellant, started throwing stones at the deceased and Wellington, who initially retaliated by also throwing stones but then fled; a thrown brick struck the deceased on the jaw, felling him; Velhapi and the appellant, catching up with the deceased, then stabbed him, the latter using a table-knife; after pursuing Wellington for a short way, they returned to the deceased and again stabbed him as he lay rolling about on the ground; eventually they departed, and Wellington caused the deceased to be taken to hospital. Wellington testified that he did not see the deceased with a knife or the latter stabbing Velhapi; he only saw later that he (Velhapi) had a blood stain on the back of his shirt. Velhapi and the appellant denied that version. Velhapi said it was the deceased who approached him and asked him for a cigarette; the appellant was not with him then; on his replying that he had none, Wellington insisted that he had, and while he directed his attention to

replying to Wellington, he was stabbed in the back with a knife by the deceased; he tripped and felled the deceased, in consequence of which the knife fell out of the deceased's hand; he (Velhapi) grabbed the knife and stabbed the deceased with it; he could not say where or how many times he stabbed the deceased; the appellant then arrived at the scene, told him to leave the deceased and Wellington alone, escorted him away and eventually took him to hospital; the appellant had no knife and did not stab the deceased at all. In substance the appellant corroborated that version in so far as it concerned him, denying, in particular, that he had a knife and that he stabbed the deceased. He did not see the quarrel commence, he testified, for he was then inside the house, but at the call and instance of Velhapi's mother, he hurried outside to intervene between the quarrellers; he called upon Velhapi to desist, which he did, and he then took him away. Both of them said that there was no stone-throwing, except by Wellington.

According to the medical evidence and post-mortem report the deceased received no fewer than seven stab-wounds, of which some were on the back, one just above the stomach, and two in the vicinity of the right armpit; he also sustained a fracture of the skull and lower jaw-bone and several bruises and abrasions. The State's pathologist, who conducted the post-mortem, was unable to say whether the stab-wounds were caused by the same knife or different knives. He testified that the other injuries could have been caused by something blunt like stones, kicks from a booted foot, or kieries.

The Court a quo rejected the evidence of Velhapi and the appellant, and accepted that of Wellington, who impressed the learned Judge and assessors as a good and truthful witness. The judgment states that despite the fact that Wellington was the State's only eye-witness and that his evidence therefore had to be approached with caution, the Court a quo was satisfied that he spoke the truth, although it may be that he did not see everything. Those findings on the credibility of the witnesses must, of course, carry great weight on appeal; but even if

due weight is given thereto, the nub of the problem is whether, on the facts and probabilities of the case as a whole, Wellington's testimony was so clear and satisfactory on material aspects that the Court _a quo_ should have been satisfied beyond a reasonable doubt that the appellant joined Velhapi in stabbing the deceased (see _R. v. Mokoena_ 1956 (3) S.A. 81 (A) at p. 85 G to p. 86 G). The need to apply the cautionary rule there mentioned in relying on the evidence of Wellihgton is particularly manifest here. For it is clear that Velhapi did stab the deceased and the appellant did come to his assistance at some stage of the altercation; it would therefore have been extremely easy for Wellington to embellish his testimony by wrongly or falsely adding that he also saw the appellant stabbing the deceased at that stage. Is such an embellishment a reasonable possibility?

Wellington's evidence is, in my view, unsatisfactory in two material respects. Firstly, he professes not to have seen the deceased with a knife

or to have seen him stab Velhapi, which admittedly did happen. The Court *a quo* assumed in the appellant's favour that that happened when the quarrel about a cigarette or tobacco occurred. That is what Velhapi stated, and it is probably correct, since it explains why Velhapi tripped and started attacking the deceased, and why the stone-throwing by others present then began. (That they threw stones at the deceased and Wellington can be accepted, for it is consistent with some of the injuries found on the deceased.) The Court *a quo* said that probably, because of his (Wellington's) intoxication, he did not see those things. But that is contrary to his own evidence, since, speaking about the events at that particular stage, he said: "Ek en die oorledene het langs mekaar gestap en hy was nooit uit my oog nie". So he must have seen this incident but suppressed it in testifying. Secondly, he said in chief that all he saw was Velhapi, after tripping the deceased, attacking him with an open clasp-knife in his hand - "Toe ek sien bevlie (Velhapi) vir

die oorledene met 'n mes genoem word 'number five'".
Neither at the preparatory examination nor in his evidence in chief did he mention where the knife came from. The latter was a point of some importance, for Velhapi's version was that he got the knife from the deceased. However, under cross-examination, for the first time, Wellington maintained that he saw Velhapi take the knife out of his trouser-pocket, open it, and then attack the deceased with it. His explanation - that he was not previously questioned on that particular aspect-is unsatisfactory. For at the preparatory examination (he admitted) and at the trial (as appears from the record) he was allowed to narrate his version of the facts as he had seen them; on both occasions he omitted that important detail; and that he was not led to remedy the omission shows that it was not part of his original version. His addition of that detail under cross-examination was therefore most probably an untruthful

embellishment.

Nor does the unsatisfactoriness of those features of his evidence end there. There probably was some reaction from Velhapi when the deceased stabbed him. Indeed, Velhapi said he asked him why he had stabbed him, which is probably true. Yet Wellington made no mention of that; on the contrary, he said:

> "Die oorledene het gesien dat beskuldigde 1 mes uithaal en hy (oorledene) sê vir beskuldigde 1 'Wedine?' 'Wedine' is 'n Xhosawoord wat ons in Afrikaans sê 'kêrel' of 'jong man', 'Sal jy vir my steek?' sê die oorledene vir die beskuldigde 1."

In the context of the probabilities, as analysed above, that cannot be true.

Now the significance of those criticisms of Wellington's evidence is that he was obviously not only deliberately suppressing the part played by the deceased in starting this fracas, but he was also untruthfully putting the whole blame for it on Velhapi. His motive ~~for doing so is, of course, understandable:~~

spite or prejudice, for he had lost a close friend by the hand of Velhapi. But that does not inspire any confidence in the reliability of his further testimony that the appellant also joined in the stabbing of the deceased, which both the appellant and Velhapi denied. After all, it was easy for Wellington to give further vent to his spite or prejudice by untruthfully saying that the appellant, who went to Velhapi's assistance, also stabbed the deceased. And the doubt about the reliability of that testimony is increased by Wellington's assertion that he noticed at the time the kind of knife the appellant used - a long table-knife. That seems unlikely, having regard to the confusion and excitement engendered by the pursuit, the stone-throwing, and the assault, Wellington's intoxication, and the distance he was then away from the appellant, Velhapi and the deceased, which, he indicated, was about 25 yards.

The Court *a quo* sought support for

Wellington's version in certain other facts. It said his version about how the quarrel commenced (i.e. concerning the cigarette and tobacco) was logical and probable. But it is no more probable or convincing than Velhapi's version. Nor does the fact that Wellington admitted that he later saw a blood stain on the back of Velhapi's shirt, which the Court a quo relied upon, improve his reliability, for it must have been so obvious to all that he had no option but to admit it. The Court a quo also pointed out that the injuries found on the deceased corroborated Wellington's version, as against the denial by the defence, that stones were thrown. That is so, but that is on a minor issue and it does not strengthen his version on the vital point about the appellant's involvement in the stabbing. Nor, in that regard, does the mere fact that Velhapi's and the appellant's general version of the occurrence was rejected as untrue assist the State on that vital point: it does not, in my view, cure the

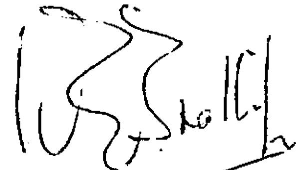
abovementioned unreliability of Wellington's testimony that the appellant was involved in the stabbing. On that particular aspect, too, it is not without some significance that Velhapi's and the appellant's version that the appellant was not so involved was consistent ever since they were arrested just after the occurrence - their statements to the police show that. The medical evidence did not prove that more than one knife caused the incised wounds, so it is neutral in that respect. But the State relied heavily on the multiplicity and and the distribution of those wounds. That indicated, so it was contended, that they were probably inflicted by more than one assailant. There is some force in that contention. On the other hand, Velhapi did not deny that he inflicted all those wounds; he could not say where and how many times he stabbed the deceased; that could possibly have been due to his anger and anguish caused by the deceased's attack on and wounding of him; and in that state of mind he could possibly have repeatedly

stabbed the deceased, especially when the deceased was rolling about on the ground, and so caused all the incised wounds that were found.

To sum up. The Court _a quo_ correctly dealt with the case on the basis that it was the deceased who started all the trouble by stabbing Velhapi - his conviction for culpable homicide only and the sentence of only one year's imprisonment reflect that approach. But, in my respectful view, the Court _a quo_ failed to appreciate the true significance of that proved and accepted fact, and its effect on the credibility and reliability of Wellington's evidence. Consequently, although the matter is not free from difficulty, I have been persuaded by Mr. Beckley, for the appellant, that the Court _a quo_, despite its finding that Wellington was a credible witness, was wrong in relying implicitly on his evidence implicating the appellant and that it should have had a reasonable doubt on that issue. I would add that in _R. v. Mokoena_, _supra_, a case of

murder, there was also a strong finding by the trial court that the single witness for the State was credible, and the accused's denial of guilt was rejected. Despite that, this Court, on weighing up all the facts and probabilities of the case, concluded that because of the witness's interest in implicating the accused, his testimony should not have prevailed against the latter's denial of guilt, and it upheld the appeal.

The appeal therefore succeeds and the conviction and sentence of the appellant are set aside.



W.G.TROLLIP, J.A.

Ogilvie Thompson, C.J.)
Jansen, J.A.) concur.