

ZAKHELE ENOCH MBATHA Appellant

and

THE STATE Respondent

JOUBERT, JA.

IN THE SUPREME COURT OF SOUTH AFRICA

APPELLATE DIVISION

In the matter between:

ZAKHELE ENOCH MBATHA Appellant

and

THE STATE Respondent

CORAM: JOUBERT, VILJOEN, JJA et GROSSKOPF, AJA

HEARD: 4 NOVEMBER 1983

DELIVERED: 22 November 1983

J U D G M E N T

JOUBERT, JA :

-The _____

The appellant was charged in the Witwatersrand Local Division before McCREATH J with murdering Humphrey Gumede (the Deceased). He pleaded not guilty since he had acted in self-defence in killing the deceased. He was tried and convicted of murder with extenuating circumstances. He was sentenced to 7 years imprisonment, half of which was suspended on certain conditions. With leave granted by the trial Judge he appeals to this Court against his conviction.

It was common cause at the trial that during the late afternoon of 24 February 1982 at or close to a soccer field situated in Zone 4, Meadowlands, the

/appellant.....

Bonginkosi, a brother of the appellant, came on the scene of the crime shortly after the stabbing had taken place.

Oupa Shezi testified that on the afternoon in question while he was playing soccer he noticed that the appellant joined the deceased and some other players who were resting alongside the soccer field. He saw the appellant speaking to the deceased but from his position on the soccer field he could not hear what they said. He heard that they had raised their voices and he observed that they were pointing their fingers at each other. Simelane separated them whereupon the

/appellant

appellant walked away in the direction of his home.

The appellant returned after about half an hour while

he was still playing soccer. At that stage the de=

ceased was sitting on a bench in the company of some

spectators. Shezi held the soccer ball and stood

watching the appellant as he walked straight towards the

deceased. When the appellant was about 1 pace from

the deceased he without uttering a word drew a knife

from under his waistband and made a quick stabbing

motion at the deceased who was retreating backwards.

Shezi did not see where the stab wound was inflicted.

The deceased was chased by the appellant for a short

/distance

distance until he collapsed. The appellant thereupon returned to get his raincoat. He wiped the blood off the knife on the grass. Under cross-examination Shezi admitted that the deceased was his friend and that he was very upset by his death but despite this he was not angry with the appellant. He stated that the deceased was a sickly person. He admitted that he and Simelane discussed the case and that their discussion was confined to a mere statement that what the appellant had done to the deceased was bad, and he denied that they had discussed what they had observed about the incident.

/Zacharia

Zacharia Simelane testified that on the afternoon in question he interrupted his game of soccer owing to tiredness. The appellant came there and swore at the deceased by his mother's private parts. The deceased swore back at him. Under cross-examination he said he did not hear any mention of money but he conceded that money could possibly have been mentioned "because I did not pay much attention to the accused then". The appellant and the deceased started to fight with clenched fists but under cross-examination he stated that they pointed their fingers at the noses of each other. Simelane claimed that he separated them. Before

/departing

departing from the scene the appellant said that he was going to stab the deceased. After about 6 minutes the appellant returned but in the meantime Simelane had resumed his game of soccer. At that stage Simelane was about 7 or 8 metres away from where the deceased was sitting. The appellant walked straight up to the deceased and when he was about 4 paces from him he produced his knife from under his waistband. The deceased got up and retreated backwards asking : "But what have I done to you?" The appellant made a stabbing movement with the knife. In his evidence in chief he said : "It was here in

/the

gave the knife to Bonginkosi. According to Simelane the appellant ran away from the scene of the crime. Simelane denied under cross-examination that the deceased had a knife. He also admitted having been a friend of the deceased. There was a very important aspect of his evidence to which reference should be made, viz. that in his sworn statement (Exhibit G) which he made to the police on 6 April 1982 no mention was made of the argument and fight between the appellant and the deceased at the soccer field before the appellant left to go home. Under cross-examination he insisted

/on

on having made reference thereto in his statement but
when the omission thereof was pointed out to him he
gave the following explanation:

"There is no mention in the statement what=
soever of this incident which you described
in your evidence of the swearing and the
fisticuffs? Would you explain why there
is nothing said about that in this statement?
- - - Well I said many things to the police=
man to whom I was making the statement, it
is possible that I did not mention that to
him."

He admitted that the statement had been read back to him
by the policeman before he confirmed its contents on
oath.

/According

According to Bonginkosi's evidence he was playing soccer on the afternoon of 24 February 1982. His attention was concentrated on the soccer. Hence he did not observe what occurred between the appellant and the deceased. On hearing a report he went to the scene of the crime where he took a dagger from the appellant. He took it home with him. At a later stage the appellant came and fetched it. He affirmed that the appellant did not run away from the scene of the crime.

The appellant told a different story. Some 2 or 3 years (elsewhere in his evidence he put it at 3 or 4 years) ago the deceased sold certain commodities

/on

on his behalf but failed to pay the appellant the proceeds thereof, amounting to R30, as he was obliged to do. The mother of the deceased, however, undertook to pay the appellant the money but she failed to do so. Under cross-examination he alleged that he waited for her to pay him. He also said that he had left it at that and that he had forgotten about the money. Although he knew where the deceased lived and despite the fact that he often saw the deceased playing soccer he never raised the topic of the payment of the money with the deceased. He denied that there was any bad feeling between him and the deceased. As he was

/passing

passing the soccer field on 24 February 1982 at approximately 5.30 p.m. the deceased remarked: "Here is this man, he is going to bother me again, he is going to ask me about that old money". The appellant's reaction was that he was merely passing on his way and that he had not come to ask the deceased about the money. The deceased swore at him and he swore back at the deceased. The latter also pointed his finger at him and pressed his finger on the nose of the appellant. He turned to walk away but the deceased pulled him back. This provocation on the part of the deceased made him angry.

/Under

Under cross-examination he claimed that he then noticed that the deceased had a knife in his waistband in the region of his right hip. But he also testified that the deceased did not wear a jacket and that the knife was "clearly visible right from the start". He became frightened because he knew the deceased was a dangerous person who was prone to stab people. He accordingly grabbed hold of the knife and pulled it from the waistband of the deceased. He held the knife in a stabbing position only to scare the deceased. He even shifted backwards but as the deceased rushed at him he stabbed the deceased to the right of his sternum. He was,

/however

however, unable to explain why the deceased who was unarmed rushed at him in the face of a raised knife poised to inflict a stab wound. He denied that he intended to stab the deceased. He did not intend to kill the deceased. His intention was to scare the deceased. After being stabbed the deceased ran away. He threw the knife away and also ran away. He did not see Bonginkosi, his younger brother, at the scene of the crime.

In assessing the quality of Shezi's evidence the trial Judge held that Shezi impressed him

/as

as an honest witness. He found Shezi's evidence in all material respects the same as that of Simelane. In his assessment of the quality of the latter's evidence he stated that in view of the conflict between his evidence and his sworn statement he would not have accepted his evidence, had it stood alone, as opposed to the version given by the appellant. When he assessed the quality of Bonginkosi's evidence the trial Judge likewise found him to be an honest witness. There was, moreover, no reason why he would have given false evidence against his brother, the appellant.

/The

The trial Judge made the following observation in his judgment: "The accused did not impress me as a witness - - ". Had his intention been to comment merely on the demeanour of the appellant one would have expected him to have specified factors such as, for instance, evasiveness, hesitancy, reluctance etc. From a very careful scrutiny of the scheme of the judgment, and in particular from the context in which the observation was stated, it would seem that the trial Judge in making the observation intended to comment on the quality of the appellant's evidence

/and

and that he had per incuriam omitted to insert the word "honest" before the word "witness". In other words, the trial Judge intended to state that the appellant did not impress him as an honest witness. That this was the intention of the trial Judge is, in my opinion, supported by his comments which immediately preceded and by his conclusion which immediately followed the abovementioned observation. His preceding comments were related to the improbabilities which he found in the evidence of the appellant, such as the following:

1. It was unlikely that the deceased would have played soccer while he carried on his person a dagger which

/was

was 29 cm in length.

2. Although the dagger was according to the appellant clearly visible on the person of the deceased "right from the start" he noticed it only when the deceased grabbed him.

3. It was unlikely that the deceased would have raised the question of money which had not been an issue between them for some time prior to the incident.

The trial Judge also drew attention to the inability of the appellant to explain the contradiction between his evidence and that of Bonginkosi in regard to what

/happened

happened to the dagger after the stabbing of the

deceased. The conclusion of the trial Judge which

immediately followed the abovementioned observation

was: "- - and in the result I accept the evidence of

the witness Shezi, corroborated to the extent that it

is by the first State witness (i.e. Simelane) and by

the accused's younger brother (i.e. Bonginkosi)".

This conclusion arose from an evaluation of the evidence

as a whole. It amounted to the acceptance by the

trial Judge of Shezi's evidence, as corroborated by

the evidence of Simelane, regarding the killing of the

/deceased

deceased and to the rejection of the appellant's

version of the killing as not being reasonably true.

In the result the trial Judge found that the appellant

intentionally killed the deceased and that he did not

do so in self-defence. The State had succeeded in

proving beyond reasonable doubt that the appellant was

guilty of murder as charged.

Counsel for the appellant contended that

the evidence of Simulane was completely unsatisfactory

and should be totally rejected. In support of his

contention he relied inter alia on the fact that

/according

according to Simelane the appellant stabbed the deceased in the neck which was contrary to the medical evidence. I have already referred to this aspect of Simelane's evidence from which it appears that he saw a stabbing motion in the region of the base of the neck but he made it clear under cross-examination that he did not afterwards examine the body of the deceased to ascertain the locality of the stab wound. Counsel for the appellant also referred to contradictions in Simelane's evidence, to contradictions between his evidence and his sworn statement and to contradictions between his evidence and that of Shezi.

/The

The contradictions referred to concern mainly matters of detail which were not really of material importance. Many of these contradictions had been raised unsuccessfully in argument before the trial Judge. The latter in analyzing Simelane's evidence was fully aware of these contradictions including the aforementioned omission from his sworn statement. The said omission from the sworn statement constitutes a blemish in Simelani's evidence but does not in my view warrant the rejection of his evidence as a whole.

—Moreover, the contradictions are, in my opinion, —

/insufficient

insufficient in themselves to render his evidence completely unsatisfactory as contended for by counsel for the appellant. The trial Judge, in my view, did not misdirect himself, nor can it be said that he was wrong in accepting Simelane's evidence as being reliable enough to corroborate Shezi's evidence.

Counsel for the appellant criticized Shezi's evidence in various respects and he contended that Shezi standing on his own as a single witness was not a satisfactory witness. The inconsistencies in his evidence to which reference was made on behalf

/of

of the appellant were not of a substantial nature and in the circumstances of the case they did not reflect adversely on his credibility or on the quality of his evidence. I do not propose to deal with other minor submissions made by counsel for the appellant. I have considered them all and I am satisfied that they are without merit. I am not persuaded that the trial Judge erred in accepting Shezi's evidence to the extent that his evidence is corroborated by the evidence of Simelane and Bonginkosi. Counsel's contention concerning Shezi as a single witness accordingly falls away.

/The

The submission by counsel for the appellant that the trial Judge misdirected himself in rejecting the appellant's evidence in regard to the killing of the deceased is in my view devoid of substance. It was in my view highly improbable that the deceased after having been deprived of his dagger by the appellant would have rushed at the appellant who held the dagger in a raised position ready to inflict a stab wound. On the appellant's version the conduct of the deceased in rushing at him amounted to a suicidal act.

/Upon

Upon a careful consideration of the evidence in its totality I can find no misdirection on fact by the trial Judge. I am also satisfied that the trial Judge was correct in his finding that the appellant killed and murdered the deceased as charged.

The appeal against the conviction is dismissed.

JOUBERT, JA.

VILJOEN, JA)

GROSSKOPF, AJA)

Concur