C MKOHLE APPELLANT

and

THE STATE RESPONDENT

Judgment by

NESTADT JA

CASE NO. 639/88
/CCC

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

CEBISILE MKOHLE — APPELLANT

and

THE STATE — RESPONDENT

CORAM: VAN HEERDEN, NESTADT JJA et NICHOLAS AJA

DATE HEARD: 15 AUGUST 1989

DATE DELIVERED: 7 SEPTEMBER 1989

J U D G M E N T

NESTADT, JA:

At about 3 o' clock on the morning of Saturday 24 January 1987, a certain Jackson Nokoyo was shot in the neck with a shotgun. The attack on him took place in a

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black residential area called Old Crossroads in the district of Wynberg in the Cape. He suffered a grievous injury from which he immediately died.

These events gave rise to the prosecution before WILLIAMSON J and assessors in the Cape Provincial Division of appellant on a charge of murder. Though denying his guilt, he admitted shooting deceased. But, he contended, he was justified in so doing on the ground that he had acted in self-defence. The trial court, however, rejected his evidence in support of this plea. Instead, it accepted the State version that the killing was unlawful. Appellant was, accordingly, convicted of murder and, no extenuating circumstances having been found, sentenced to death. This appeal is against both his conviction and sentence.

In advancing the appeal against the conviction, Mr Wittenberg, on behalf of appellant, launched a wide-ranging and detailed attack against the trial court's

credibility finding. This renders it necessary to canvass the evidence in some detail. Before doing so, however, I would mention that the following was not in dispute. Appellant, aged 34, was a so-called special constable in the South African Police. He lived in Old Crossroads in a house which he shared with his father, Jackson Mkohle, and Johannes Nongxaza. Johannes was also a police constable in the same unit as appellant. The 35 year-old deceased, whose girl-friend was Gloria Nzamo, also lived in the township. He resided with Clifford Mkono. Nomute Mthwazi was an acquaintance of both appellant and Clifford. Her husband was a colleague of appellant's. On the night in question she had been to a party at the hut of Mandla Kondile. It was situate roughly between the huts of Clifford and appellant.

The main witnesses for the State were Johannes, Clifford, Gloria, Nomute and Mandla. I commence with the evidence of Johannes. He stated that he and appellant came

off duty on the evening of 23 January 1987 at about 7:30 p m. Thereafter they spent the night in each other's company, first at Mandla's party (until about 10 p m) and then at a second shebeen in the area. At about 2:30 a m they left this place on foot to go home. They saw a group of three persons standing near a parked car. Appellant wished to search them but Johannes was against doing this. They therefore parted. Johannes proceeded home. Appellant approached the group of persons.

The tale of events was taken up by Clifford and Gloria. They and deceased were the members of the group. Clifford owned a Fiat motor car. The nearest it could be parked to his hut was in the open, some 76 metres away. He feared that in this unguarded position it might be stolen or broken into. To prevent this, he was sleeping in it on the night in question. In the early hours of the morning deceased arrived there from Clifford's home. He was accompanied by Gloria. The two of them were carrying Clifford's four year-old child. They had, in

Clifford's absence, been looking after him. However, he had begun to cry for his father. Clifford took the child and put him to sleep in the car. He, deceased and Gloria were then standing outside the car conversing when Nomute walked past. (Nomute testified that she had been to Mandla's party.) She stopped to talk to Clifford. The two of them indulged in some good-humoured banter. Suddenly appellant appeared. He was armed with a baton and a shotgun. It would seem that, having heard the conversation between Clifford and Nomute, he took umbrage at what he regarded as Nomute's familiarity with Clifford. Or he was angry simply because of her being out so late. In any event, he hit Nomute with his baton. She ran away. Appellant then turned his attention to Gloria. He asked her what she was doing there. Deceased intervened by saying that Gloria was his wife. Appellant's reaction to this was to accuse deceased of taking Gloria's part. He threatened to hit deceased. According to Clifford deceased's attitude was one of

"do as you wish." Gloria's testimony was slightly different. It was that deceased asked appellant's forgiveness and said that he and Gloria were on the point of leaving. Appellant and deceased were then about 3 - 6 paces apart. The next moment, and without more ado, appellant shot deceased. It was in these circumstances that deceased met his death.

Appellant told a different story. He denied that he and Johannes had come off duty in the evening or that they had gone to any parties. He testified that their shift ended at 2 p m on the Friday. Soon after arriving home shortly thereafter, Johannes left. Appellant did not see him again until after the shooting. He (appellant) stayed at home together with his father. At about 9 p m he went to bed. At about 3 o' clock the following morning, he was woken by the sound of people talking outside his hut. He got up, dressed and, armed with his shotgun, went to the door. He opened it. He saw a number of people outside. He estimated their number to be

about ten. He asked them "What can I do for you?" There was no answer. He cocked his gun. The persons moved off. He thought they were up to no good. There was a climate of unrest at the time and he feared that their design was to burn down his hut. He wished to identify and then report them. So he decided to follow them. This he did for about 30 - 40 metres in the direction of Mandla's place. They then disappeared amongst the huts of the township. As he was standing there Nomute appeared. She had come out of Mandla's house. He scolded her for being out on her own so late at night. He picked up a stick and hit her lightly with it. He did not have his baton with him. Nomute ran off. As he was about to proceed home he heard from out of the darkness someone behind him say "Here is one of Botha's dogs." He took it to refer to him. He quickly turned around. He had his gun in his hand. He saw three persons walking towards him. They were about 6 - 7 paces away. One of them appeared to be armed with what he thought was a small

firearm. It seemed to be pointed at him. Considering his life to be in danger, he fired one shot "at the three people." They were then about 4 paces away from him. Two of them ran away. The third, however, having been hit, collapsed on the ground. This was the deceased.

Those were the two incompatible versions before the court a quo. According to WILLIAMSON J, Clifford and Gloria "made an extremely good impression." It was found that their account of the night's events was truthful, accurate and probable. They did not contradict each other save in minor or unimportant respects. Moreover, their version as to the events immediately preceding the shooting was supported by the evidence of Nomute who, though not fully to be relied on, (because she was drunk) "came across as a good witness who has no axe to grind with the accused." Appellant, on the other hand, was found to be "an out and out liar"; an "extraordinarily bad witness." In the result, the conclusion reached was that "the picture

painted by Clifford, Gloria and Nomute is the true one" and "the accused's version cannot possibly be true."

The argument on behalf of appellant can be briefly summarised. It was said that the evidence revealed that there was a climate of political unrest which pervaded the township at the time and in particular a feeling of hostility on the part of its inhabitants towards the police; by reason of this, the possibility of the evidence against appellant having been fabricated could not reasonably be excluded; this, it was suggested, might have been pursuant to some of the witnesses having conspired against him and others being "pressurised" to tell a false story; substance was given to these fears by the numerous contradictions, examples of evasion and untruthfulness and certain improbabilities which it was submitted existed in the evidence of the State witnesses; the trial court had overlooked these; and it had adopted an unduly critical approach to appellant's evidence which, in the result, should not have been

rejected.

Strong criticism was, to begin with, levelled at the evidence of Johannes. It was said that he had clearly been untruthful in alleging that he and appellant had been on duty together for the afternoon shift. It was common cause that this assertion was incorrect. His account of where appellant, when supposedly attending the party at Mandla's home, had sat and whether he and appellant had paid for the liquor they allegedly drank and whether there were any other policemen present at the time was in conflict with Mandla's evidence on these points. Subsequent to the shooting and when the police arrived at the scene appellant through Johannes acting as interpreter, told them, and in particular Lt Oor, his version of what had happened. According to Lt Oor (who testified for the State), appellant made reference to the noise which he had heard outside his home. Johannes, however, denied that appellant said anything in this regard. Most important, according to counsel,

was that Johannes, when asked "Aren't you scared that if you don't say what some people want you to say that something might happen to you?", answered in the affirmative.

I am not sure to what extent Johannes' evidence was rendered unreliable by the matters referred to. For the most part they are not dealt with in the judgment of the trial court. This was probably because WILLIAMSON J (though finding that "on balance" appellant's assertion that he did not go out that evening was not to be believed) based appellant's conviction primarily on the evidence of Clifford and Gloria and to a lesser extent on that of Nomute. In my view he was justified in doing so.

Obviously Gloria, having had a relationship with deceased, was not an entirely unbiased witness. But Clifford was. His impartiality is not to be impugned simply because deceased was his tenant. Nor does the reference in the evidence of some of the witnesses to there being ill-feeling

against the police provide a sufficiently firm foundation for the conspiracy argument. This argument rests on a substantially speculative basis. Indeed it was not even put to the witnesses in question.

It is true that Clifford and Gloria contradict each other. Whilst Clifford stated that after the shooting he and Gloria walked away, Gloria's evidence was that the two of them had run away. Clifford said that appellant held his gun in his left hand but Gloria said that it was in his right hand. Clifford and Gloria testified that appellant struck Nomute because of the manner in which she had spoken to Clifford; Nomute's explanation was that appellant was angry because she was out so late (which version corresponded with that of appellant). There was also conflicting evidence as to whether appellant was carrying a rubber, or indeed any, baton. Other contradictions were pointed to. Yet I do not think that they or the ones I

have listed materially affect the credibility of the persons in question. Contradictions per se do not lead to the rejection of a witness's evidence. As NICHOLAS J, as he then was, observed in S vs Oosthuizen 1982(3) S A 571(T) at 576 B - C, they may simply be indicative of an error. And (at 576 G - H) it is stated that not every error made by a witness affects his credibility; in each case the trier of fact has to make an evaluation; taking into account such matters as the nature of the contradictions, their number and importance, and their bearing on other parts of the witness's evidence. WILLIAMSON J obviously did this. In my view, no fault can be found with his conclusion that what inconsistencies and differences there were, were "of a relatively minor nature and the sort of thing to be expected from honest but imperfect recollection, observation and reconstruction." One could add that, if anything, the contradictions point away from the conspiracy relied on. And, of further significance, Clifford and Gloria corroborate each

other in material respects. Their version is, moreover, supported by Nomute. Her evidence places appellant on the scene in circumstances inconsistent with what he alleges them to have been. Though it was not entirely satisfactory, I am not prepared to say that the trial court erred in relying on it to the extent that it did. She was friendly with appellant and in her evidence made significant concessions in his favour. Certainly, she does not appear to have exaggerated the case against appellant.

It was argued that it was improbable that appellant would shoot deceased simply because deceased apparently intervened on the side of Gloria. It is well-known, however, that crimes, even of this nature, are committed consequent upon the offender becoming angry for the flimsiest of reasons. Nor can I agree that it is unlikely that Clifford would have slept in his car to guard it as he alleges. Though he was unarmed, he presumably thought that his mere presence would be a sufficient

deterrent. It was said that Clifford's failure, when reporting deceased's death to the police that morning, to lay a charge against appellant, or to disclose that deceased lived with him, was inconsistent with his version and that his evidence was thereby rendered suspect. I do not agree. It was not to be expected of Clifford that he should, in the circumstances then prevailing, have been concerned with these matters. The fact that he did make a report to the police is rather indicative of him not having been one of the three who accosted appellant. On appellant's version he must have been. I referred earlier to the light-hearted conversation which, according to Clifford, took place between him and Nomute when she walked past where Clifford was standing with Gloria and deceased. What Clifford jokingly said to her was that he wanted her to sleep in the car and look after the child. Her reply, according to Clifford, was "something to the effect that I cannot afford her, I don't know what she meant when she said that." In my view, this evidence

has the ring of truth.

This brings me to an assessment of appellant's evidence. The trial judge was mindful of the fact that already when the police arrived at the scene appellant gave an explanation to them of the shooting which, as it turned out, was substantially the same as his evidence. This was regarded as a factor in his favour. I am not sure that this approach was correct. The general rule is that a witness's previous consistent statement has no probative value (Hoffman and Zeffert; The South African Law of Evidence, 4th ed, 117). An exception to the rule occurs where it is suggested that the witness's story is a recent invention. That did not happen here. But, in any event, I am not persuaded that the trial court was wrong in nevertheless making a credibility finding adverse to appellant. It is clear that his evidence was at variance in important respects with a written statement which he had made to the police on 17 February 1987. Secondly, he was untruthful in alleging

that the police took possession of a panga at the scene. Appellant's suggestion in this regard was that it belonged to one of his three would-be assailants. However, the evidence of a number of policemen (who testified for the State) was that had a panga been lying next to deceased (as appellant said) it would have been found and handed in at the police station. This did not happen. There was no panga. In my view, Mr Wittenberg's suggestion that it was misappropriated by one of the policemen is a far-fetched one. Thirdly, I agree with the trial court that the position in which deceased was found cannot be reconciled with appellant's evidence on the point. This was justifiably (by implication) held to be a further reason for rejecting his evidence. It is to be noted in this regard that appellant was not criticised for his somewhat confused evidence, given under cross-examination, as to inter alia where Clifford's car was parked and where he met Nomute. I mention this because at the commencement of re-examination appellant's counsel made an

application for the holding of an inspection *in loco*. Its purpose was to enable appellant to point out *in situ* the exact location of the places in question. The application was refused. Before us, it was contended that this constituted an irregularity. There is no merit in the complaint. An appeal court is generally reluctant to hold that a trial court was wrong in refusing to hold an inspection (*R vs Roberson* 1958(1) S A 676(A) at 679 F - G). Here, no fault can be found with WILLIAMSON J's exercise of his discretion (under section 169 of the Criminal Procedure Act, 51 of 1977). As the learned judge stated at the time, what appellant wished to point out would have served no useful purpose.

It remains, on the appeal against the conviction, to deal with the trial court's approach to the evidence of two witnesses called by the defence. The one was appellant's father. He testified that having arrived home at about 2 p m on the Friday afternoon, appellant, whom he described

as a "peaceful man", remained there until night-time when the two of them went to sleep. This does support appellant's denial of Johannes' evidence that after supper they went out and spent the night at the two parties to which I have referred. The father also corroborates appellant's version of a conversation which took place between Nomute and appellant one day after the trial had begun. According to appellant, Nomute, on this occasion, admitted to him that Gloria had told her that her testimony should be the same as Gloria's and that if she did not carry out this instruction, she "won't get any money." Nomute's version was that all that happened was that appellant asked her what she had told the police. The trial court's approach to the father's evidence was that he was "manifestly biased in his son's favour" and, in relation to the issue of where appellant spent the night of 23 January, "of no help on the crucial issues." In my opinion, there is no reason to differ. More especially is this

so seeing that, as regards appellant's alleged conversation with Nomute, Nomute was, as I have said, found to be a good witness.

The evidence of the other witness called by appellant may be briefly dealt with. He was a psychiatrist. He purported to explain the discrepancies between appellant's evidence and his police statement. His opinion was that appellant's confusion concerning the sequence of events could have been caused by the drama of the occasion with its consequent "heightened emotions or fear (and) anxiety." I must say that this almost amounts to expert evidence on appellant's credibility and as such (if only for that reason) was not admissible. But, in any event, it is clear that the doctor had not examined appellant and was speaking, as he put it, "hypothetically". His views therefore were of no assistance. It is, in the circumstances, not surprising that WILLIAMSON J did not have regard to them.

It need hardly be stressed that where a trial

court's findings on credibility are in issue on appeal, as in this matter, then, unless there has been a misdirection on fact, the presumption is that the conclusion is correct; the appellate court will only reverse it if convinced that it is wrong. In my opinion the court a quo did not misdirect itself. And, having regard to the cumulative effect of the factors to which I have referred, I am unpersuaded that the rejection of appellant's version was incorrect. Though the State evidence was not without blemish, it constituted a formidable case against appellant. There is no basis for finding that it might have been a fabrication. The two eye-witnesses, Clifford and Gloria, corroborated each other. Their version was supported by Nomute. The trial court was impressed by them. And, for good reason, appellant was found to be an untruthful witness. On the State case it is clear that appellant was guilty of murder. He intentionally shot a defenceless person without justification. In the result, the appeal against the conviction must fail.

In its judgment on extenuation, the court a quo considered the effect of (i) the incident having arisen, as it was put in argument, from appellant doing what he believed to be his duty; (ii) appellant having acted on the impulse of the moment, and (iii) appellant having drunk liquor that night. As to (i), it was held that the incident:

> "proclaims his arrogance and shows what a bully he was. Having this fearful weapon in his possession and under his control clearly allowed him to throw his weight around. The deceased gave absolutely no provocation for the accused to react against this defenceless man with such brutality...(H)is actions show he was prepared to be quite ruthless and brutal in enforcing what he conceived to be his authority."

Against this background it was held, in relation to (ii), that "the impulsiveness of his actions assumes a more sinister connotation and does not have the mitigating force which it might otherwise well possess." Though it was accepted that the liquor ((iii) above) may have affected him "marginally", it played a very minor role and "did not to any material extent hamper his judgment and appreciation." In the result, it was

found that, not even cumulatively, were the factors referred to sufficient to reduce appellant's moral blameworthiness. Despite Mr Wittenberg's earnest argument to the contrary, I do not think the trial court erred. Appellant bore the onus of proof. He did not proffer a truthful account of what influenced him. And, what emerges from the State version was, as I have said, correctly rejected as constituting extenuating circumstances.

The appeal is dismissed. It is, however, recorded that the State President has commuted appellant's sentence to 12 years' imprisonment.

NESTADT, JA

VAN HEERDEN, JA)
) CONCUR
NICHOLAS, AJA)