Case No 302/92

IN THE SUPREME COURT OF SOUTH AFRICA APPELLATE DIVISION

In the matter between:

MORRIS MOROPA Appellant

and

THE STATE Respondent

CORAM: JOUBERT, EKSTEEN JJA et HOWIE, AJA

HEARD: 10 September 1993 DELIVERED:

27 September 1993

J U D G M E N T

HOWIE, AJA

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HOWIE, AJA

Appellant was convicted in the Witwatersrand Local Division of murder and sentenced to a term of imprisonment partially suspended. With the leave of the trial Judge he appeals against his conviction.

The deceased, a man approximately 21 years of age, was fatally shot shortly after midnight on 1 January 1991 in a street in Alexandra.

It is not in dispute that whoever shot the deceased committed murder. The vital question is whether appellant was the culprit. The State relied in this regard on the evidence of two brothers, Solomon and Michael Mbele, whose testimony was countered by that of appellant.

The relevant evidence, briefly summarised, was this. Solomon Mbele said that he was outside his house in 9th Avenue when he saw the deceased, a close family friend,

walking along the street. The deceased was then set upon by a dog owned by appellant, and bitten. He retaliated by throwing a brick at it. Members of appellant's household (appellant lived across the street at no.18) took offence at this and an altercation ensued between them and the deceased. Solomon intervened and advised the deceased to go home. He observed that the deceased's trousers were torn and that he had a bleeding bite mark on one of his legs. He accompanied the deceased to his house in 10th Avenue and then returned to his own home. He had not been back long when he heard two gunshots. The noise came from a nearby- spot in 9th Avenue to which he immediately proceeded. When he got there he saw the deceased lying on the ground and appellant standing next to the deceased holding a firearm. Solomon asked who had shot the deceased. Appellant admitted having done so and then without further ado walked off with two companions.

Solomon called Michael to the scene and they placed the deceased, who was still alive, in Michael's motor vehicle. He was then taken to the local clinic and later to hospital where he eventually died.

Michael Mbele said that he was seated in the yard of Solomon's house when he saw the deceased being bitten by appellant's dog. The deceased threw a brick at it and it ran off. After coming over to speak to Michael, the deceased went back to his home with Solomon. After about 10 minutes the deceased came back with a stick, with which he proceeded to hit the dog which had by then returned. Not much later Michael heard two gunshots. In due course Solomon called him to where the deceased was lying. Michael said he saw appellant nearby with a gun in his hand. After the deceased had been placed in Michael's car the latter drove him to the clinic.

Appellant testified that he was watching video

films in the house at No. 2 3 9 th Avenue when he was summoned by his son. The latter said that someone was fighting with him and his mother. Appellant and his son then proceeded to no 18. At the main gate, which was in 9th Avenue, stood a group of people. Among them was the deceased who was unknown to him. Appellant's son pointed out the deceased as the man who had been causing the trouble. When appellant asked the deceased what his son had done to him the deceased swore and threatened to kill appellant.

Considering that there was no point in speaking further to the deceased who appeared to be drunk, appellant decided to go home with his son and his wife, who by then was also on the scene. As they traversed the yard of no.18 appellant heard gunfire. When they reached his front door a passerby called to appellant that the man who had been

swearing at him was lying in the street. Appellant made his way back to the street and found the deceased. Michael arrived at about the same time and asked appellant what had happened. When appellant replied that he did not know, Michael said that the deceased had recently been fighting in Solomon's yard and had been warned to leave. Upon the deceased's removal to the clinic, Michael told appellant that they could discuss the matter the following morning.

After daybreak appellant was in his outside lavatory when he saw a throng of armed people approaching. Soon afterwards he saw them chasing his son. They caught him and brought him towards the house. When appellant emerged, the crowd turned on him, some saying that it was he they were looking for. In fear of his life, appellant left the township and said that he had not dared to go home since.

Appellant denied having made the admission alleged by Solomon or having ever possessed a firearm.

The pathologist who conducted the autopsy found bullet wounds consistent with four shots. The fatal shot was through the head. The others were flesh wounds of the left buttock, left thigh and right thigh respectively. No record was made of any other wounds and no test was conducted to ascertain the presence of alcohol in the deceased's bloodstream.

The trial Court (SUTEJ J and assessors) found Solomon to be a good witness. He was described as the best of the lay witnesses. His evidence, said the Court, had to be accepted. Appellant, on the other hand, was "the least reliable" of the three and his evidence was not acceptable. That appellant happened to have been absent from the scene for the precise period in which the shots were fired, sounded, in the Court's assessment, "too good

to be true". However, apart from criticism of appellant for subsequent conduct quite unrelated to the relevant incident, the Court's reasoning was confined to a discussion of the evidence of Solomon and Michael. Reference was made to certain contradictions between Solomon's evidence and that of his brother, which the Court said warranted the exercise of caution, but it found that these differences were such that they rendered it unlikely that the State version had been concocted. The Court went on to say that although on the matter of appellant's alleged admission Solomon was a single witness, and

> "(w)e tend to find that Solomon fell short of requirements in R v Mokoena 1932 OPD 79",

Solomon was nonetheless corroborated in material respects by Michael.

Giving full weight to the advantage which the trial Court had of hearing and observing the vital witnesses, I am satisfied that its assessment of the

evidence lacked the searching critical analysis required of a proper appraisal of criminal guilt. This caused it to overlook certain important features of the case.

It was not in dispute that the Mbele brothers knew appellant well. There is no question, therefore, of their having been mistaken as to the identity of the person who Solomon said made the crucial admission and who, according to both of them, stood by with a clearly visible firearm in his hand on two separate occasions. Either that evidence was true or it was deliberately fabricated.

It is unnecessary, I think, to discuss the various contradictions that are to be found in the Mbele's evidence. Several are of no moment but others are certainly material. This was readily conceded by counsel for the State.

The question, however, whether there was a reasonable possibility of a deliberate fabrication was not,

in my view, resoluble simply by reference to the discrepancies involved.

Accepting that the deceased was attacked by appellant's dog and that that led to the admitted argument between the deceased and various members of appellant's family, the situation was such as to render appellant a ready suspect that night in the mind of anyone in the neighbourhood who did not actually see the shooting. Indeed by the following morning a substantial number of the township's residents had gone as far as to single him out as the killer. Solomon testified that the police were not summoned until the mob had become hostile towards appellant and his family the next day. Only thereafter did the Mbele's lay a charge against appellant. The whole situation would have engendered the incentive in anyone in guest of a scapegoat to point a finger at appellant.

In those circumstances the very real possibility existed that Solomon and Michael succumbed to that incentive by reason of their very close friendship with the deceased and that they therefore falsely implicated appellant in order to saddle someone with liability for his murder. The possible motive for them to give false evidence was not mentioned by the trial Court and was, by all indications, overlooked.

Apart from that motive and the material contradictions referred to, it seems to me to be inherently unlikely that the culprit would have remained on the scene at all much less that he would have made a damaging admission and stood around with a firearm in his hand for all to see. There were many people in the offing who must have seen this if the State version were true and it seems strange that if communal feeling against appellant was as strong the next day as it appears to have been that it did

not erupt soon after the event when the public mood would have been considerably more volatile.

Moreover, on Solomon's evidence appellant walked away after admitting his guilt. It: is also common cause that appellant and Michael were on the scene contemporaneously. On the State case this was a later occasion. This means that appellant was so brazen and uncaring about what people thought that he returned to the scene still with a gun in his hand. That is another improbability in the prosecution case.

Finally, as far as appellant's evidence is concerned, it is significant that the trial Court appears to have been unable to find it false beyond reasonable doubt. The furthest the Court went was to express the criticisms summarised earlier. Even then it did not explain why it found appellant to be the least reliable witness. In my view a study of the record reveals him to

have been in no material measure inferior to Solomon or Michael. And if it was indeed improbable that the shooting occurred during the very period that appellant was proceeding to his house after speaking with the deceased, that was no greater improbability than those which detract, as I have said, from the State's version. If the deceased was as truculent as appellant alleged, he could well have angered any number of people, not just appellant.

For all these reasons I consider that the trial Court erred in convicting and the appeal must succeed.

It remains to say that it was quite wrong for appellant's counsel in the Court a quo to have asked that leave be granted to appeal to this Court. It was equally wrong for the trial Judge to have acceded to that request. It was plainly an appeal that should have been heard by the Full Bench.

The appeal is allowed. The conviction and sentence are set aside.

C T HOWIE, AJA

JOUBERT, JA) concur EKSTEEN,
JA)