IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

CASE NO. 20895

AZWIHANGWISI LUCKSON RAMAVHALE APPELLANT

and

THE STATE

RESPONDENT

CORAM: HEFER, FH GROSSKOPF et SCHUTZ JJA

DATE HEARD: 27 FEBRUARY 1996 DATE

DELIVERED: 18 MARCH 1996

SCHUTZ JA

J U D G M E N T

SCHUTZ JA:

The appellant, a magistrate, was sentenced to 20 years imprisonment by the Venda Supreme Court for the murder of Azwinndini Ronneth Rabali ("the deceased") at Thohoyandou on Thursday 4 June 1992. Leave to appeal against conviction and sentence was granted on petition to this Division.

That the appellant shot and killed the deceased was not in issue. What was in issue was whether in doing so he acted in self defence.

The shooting took place in the lounge of the appellant's home

roundabout 22.30h. The weapon used was a 6.35 mm pistol. Four shots were fired. All of them hit the decceased from the front, one on either side of the left nipple, one below it, and the fourth went through his left hand. He died on the spot. The appellant telephoned the police station to report the shooting. When detective-sergeant Nemugadi arrived not long afterwards he found the deceased's body sprawled prone with the feet in the lounge just across the threshold and the rest of the body on the verandah. One shoe lay next to the feet. Copious blood had run from the deceased's mouth onto the verandah. There was blood on the lounge floor, and there is nothing to contradict the appellant's version, indeed the blood marks tend to support it, that the deceased had fallen inside the lounge and been dragged by him to where the police found

him. (The appellant's explanation for this action was that while he thought the deceased might still be alive he had attempted to get him to the hospital.)

There were four 6.35 mm cartridge cases on the lounge floor and also a fixed blade hunting knife lying within a metre to half a metre from the body. No satisfactory reason was given why this knife was not tested for fingerprints. There was no blood on it. The appellant showed no injuries. On the following morning a panga was found outside on the driveway next to the verandah at one of the front corners of the house. The house is a small one. A reason was given for the panga's not having been examined for fingerprints. It was wet with dew.

At the time of the police's arrival the deceased's bakkie was

standing in the entrance driveway just outside the gate. Both doors were open and the keys were in the ignition. The bakkie was in working order.

The State had no eye witness. The appellant did not give evidence. So there was no direct testimony of the shooting. The State relied upon the circumstantial evidence already set out, the testimony of Wilson Nembudani, three statements made by the appellant containing contradictions and at least one important untruth, a piece of hearsay evidence deposed to by Nembudani (about which more below), and the appellant's failure to go into the witness box.

Obedience to Dumas' injunction to find the woman leads to Joyce Singo, at the time the 18 year old third wife of the appellant, married to

him by custom, and resident in his home, although not present on the night of the shooting. She herself gave evidence of an affair with the deceased that had started some six days before. Wilson Nembudani contradicted most of her evidence, but nonetheless his own observations suggested some bond between them. His evidence also made it clear that the appellant believed that there was a sexual liaison. The appellant himself, in the statement that caused him so much trouble, linked Joyce and the deceased so as to suggest that the latter was a competitor for her favours. To my mind the evidence as a whole clearly indicates that, at the least, the appellant believed that there was an affair and was jealous of it.

The evidence on this matter needs to be explored more fully to

place the hearsay evidence alluded to in its context. According to Joyce, on 29 May 1992 she took a lift with the deceased, then a stranger. Nembudani, another stranger, was in the vehicle. The deceased slept with her that night. No suspicion was aroused when she returned home. On the evening of 1 June, the appellant being absent, Nembudani and the deceased arrived at the appellant's home, and she went outside and spoke to the deceased. On the next day the deceased persuaded her to come with him to Nembudani's home, where she spent the night. At all stages Nembudani played the role of facilitator in love ascribed to him. On 3 June the deceased had advanced to the point of persuading her to move to his home. She was afraid to fetch her clothes. On the deceased's suggestion she went to the magistrates' court where the appellant worked

to get some sort of assistance in retrieving her clothes, but overcome by fear of meeting the appellant she did not carry the matter through. She spent the night with the deceased, and saw him for the last time when he left the next morning. On the 5th she heard of his death from Nembudani, who told her to keep quiet about the association over the previous few days. He was anxious that the appellant should get into trouble over the death of the deceased, and warned her that if she should mention his, Nembudani's, name he would take drastic steps against her. Indeed, at the end of her evidence she volunteered that on the previous day he had said to her that "should he fail to succeed in this matter" (presumably the prosecution of the appellant) or should she mention his name in evidence, he would buy a firearm and carry it around with him.

Her question whether he would do so "for me" apparently elicited no direct answer.

Nembudani, in his evidence, denied making any of these threats or as having acted as a go-between in the manner described by Joyce. The deceased was a friend of his. He did not know anything of a relationship between him and Joyce. He first met her on 1 June when the deceased was driving him home. The deceased stopped at the appellant's home, saying that he had a case two days hence and that he had something to discuss with the appellant. The appellant was not there. Joyce came outside and spoke to the deceased. After he and the deceased had left they came upon the appellant driving home, and the deceased arranged to meet him in his office on the next day. On that day, 2 June,

Nembudani was delivering goods at the Technical College at about 13.10h when the appellant approached him angrily. He wished to know what Nembudani was doing to him by bringing to his home a man who thereafter took his wife away. Nembudani at first did not understand what the appellant was talking about, but it then emerged that the reference was to the previous day's events when the deceased had spoken to Joyce. His expostulation that he had been but a passenger was rejected by the appellant, who called him a liar. The appellant insisted that he drop his business and drive him around to look for the deceased. This he did, but without success. They parted on the note that he would look for the deceased in order to tell him that the appellant wished to see him. When he found him the deceased's reaction was that they must go

straight to the appellant's home, which they did. There they found only a servant with whom they left a message that they had called. They drove off but came across the appellant, who requested them to follow him home.

After they had entered, the appellant locked the door and pocketed the key. He called in the servant and asked her to identify the one who had left with Joyce. The servant pointed out the deceased. The appellant unlocked the door and ordered Nembudani out. After waiting in the vehicle until sunset was approaching he decided to walk home. On his way he espied Joyce hiding behind a bush. He grabbed hold of her hand and marched her back to the appellant's home. Arrived there he found that the appellant and deceased had left in the former's vehicle

in search of her. Nembudani then walked home.

On the next day, 3 June, he attended court to hear the deceased's case. There he came upon the appellant, who took him into his office and asked forgiveness for having suspected him and having wasted his time. He added that the deceased had already brought Joyce to his office, and that he had arranged that the deceased would visit him again at 13 00h to settle the matter.

After this he met the deceased, whose case had been remanded. State counsel warned him against going into details regarding their conversation "because that would be hearsay." Nembudani went home.

He met the deceased again the next day, 4 June, the day of his death, when the two of them went to Pietersburg. There then follows the

passage leading up to the hearsay evidence, with which I shall deal at a later stage.

The Court a quo regarded Nembudani as a reliable witness and rejected the evidence of Joyce wherever it conflicted with his.

The appellant's defence of self defence needs to be explained. There is not, as already indicated, any direct evidence of it. The appellant relies on his own extra-curial statements, made orally to detective-sergeant Nemungadi and later repeated to Lieutenant Mbulaheni on 4 and 5 June, and in writing to regional magistrate Mr Booi on 5 June. These statements were proved by the State without objection by the defence. The defence was then entitled to rely on the parts thereof favourable to the appellant, upon the principle that when one party

proves against the other a statement made by the latter, the Court must not disregard any portion of such statement, even though it is in favour of the party who made the statement: R v Valachia and Others 1945 AD 826 at 835. But, as was pointed out by Greenberg JA (at 837):

> "Naturally, the fact that the statement is not made under oath, and is not subject to cross-examination, detracts very much from the weight to be given to those portions of the statement favourable to its author as compared with the weight which would be given to them if he had made them under oath, but he is entitled to have them taken into consideration, to be accepted or rejected according to the Court's view of their cogency."

I shall not set out the statements in any detail nor analyse the inconsistencies or alleged inconsistencies between them, but indicate only in outline what the appellant's version was. He had been asleep when he was awakened by a noise outside. Someone knocked on the door and

claimed to be from the Venda police. When he unlocked the door the deceased burst in, armed with a knife and threatening to kill him. Another who had come in with him threatened to shoot him if he moved. The other or others outside shouted encouragement to shoot. Believing his life to be in danger he drew out his pistol and shot the deceased, who fell down. His knife fell on the floor. The others ran away, leaving the deceased's vehicle behind.

A point of importance in the police testimony was that the appellant had volunteered that he did not know the deceased. The defence was quite content with this evidence, the cross-examiner even pointing out to Nemugadi that he had been recorded at the inquest as saying that the appellant had said that he did know the deceased by his

name of Rabali. Nemugadi could not recollect having said this, but the cross-examiner assured him that his version given in evidence had the full support of the appellant, who would also say that he did not know the deceased. So emphatic was this stand that another witness, Nembudani (already mentioned) was vigorously cross-examined about his account, which involved the Appellant's being acquainted with the deceased.

Then came a bombshell. The State produced a statement made by the appellant to the police in the role of complainant on 3 June 1992, that is on the day before the shooting. The purpose of the statement was to found a charge of theft against Joyce, as having stolen R1000 in cash and his firearm from his wardrobe, she having gained access to his room with

duplicate keys. What is important is that he several times named the deceased (correctly) as Rabali, and gave a detailed account of his (the appellant's) comings and goings with Nembudani (which corroborated many details of the latter's evidence which had up to then been challenged): as also of his attempts to find Joyce (and his pistol) through the intermediacy of the deceased. The appellant had been caught out in a blatant lie on an important point. The cross-examination of Nembudani came to an abrupt halt. The Hearsay

The Judge a quo is contended to have misdirected himself in two respects relating to the alleged hearsay: (a) in admitting it as evidence as proof of its content, and (b), even if he was correct in admitting it, in not

putting the defence on its guard that he intended doing so, thereby denying the defence the opportunity of possible compensatory action, particularly the calling of the appellant to give evidence.

I have referred already to the passage where State counsel warned Nembudani not to describe the conversation that he had had with the deceased on 3 June. What followed was Nembudani's evidence that on the 4th the deceased and he had been to Pietersburg and back. The record proceeds:

> "Now I do not want you again to go into any discussions you had with the deceased because that would also be hearsay ...
>
> Did you and the deceased ever go back to the accused's house after returning from Pietersburg on the 4th? ... No.
>
> You did not go, do you know if the deceased went?
>
> In fact before we could separate the deceased had

indicated that accused had promised him money, so he was supposed to go there."

There was no objection to this evidence at the time. But before the State case was closed Mr Manctelow, for the defence, did place on record his objection to its admission on the ground that it was hearsay that had not been specially qualified for admission. His failure to cross-examine should not be interpreted as a concession. The reason why he had not objected earlier was that the evidence had come suddenly, and before he had a chance to object other evidence had followed. He had chosen not to interrupt the flow of evidence at the time.

Normally argument should not be included in an appeal record. In this case it has been included and in my view correctly so, in order that an exceptional situation should be capable of being assessed by this

Court.

After both parties had closed their cases, in his main argument Mr Morrison, for the State, made a passing statement at p 114 which may have been a reference to the hearsay evidence, or which may equally have been a submission that in the circumstances an inference should be drawn that the appellant had invited the deceased to his home, while setting a trap for him, with assassination his intention.

Mr Manctelow seemed to have treated it as the latter. In any event he did not allude to the aspect of hearsay in his main argument. Nor did the Judge ask him about it, nor give any warning that he might be intending to rely on the evidence in question.

During the State's reply the Judge asked Mr Morrison some

pertinent questions, along the lines whether the presence of the knife could be brushed aside as a plant by the appellant, without "some indications and something" on which the Court could make such a finding beyond reasonable doubt. This elicited the following response and exchange:

> "My Lord, I know that your Lordship will most probably rule that the last remarks made by the witness Nembudani was inadmissible hearsay but bearing in mind that the law with regard to hearsay evidence has changed, that there is a proclamation which allows this Court, if it is in the interests of justice, to accept certain hearsay, unfortunately the evidence did slip out of the witness' mouth but we have a statement by Nembudani with regard to the fact that the deceased told him certain things, that he was going to visit the accused. I do not know if your Lordship can really attach any weight to that,I know my learned friend will argue that no basis was laid for the leading of such evidence, however ... (intervenes) Court: Yes, but if the deceased in fact said that why is

it hearsay. You are not giving that evidence to show the truth of it.

Mr Morrison: No, no.

Court: All you show is it is a fact that he told somebody that he is going to visit the accused.

Mr Morrison: Yes.

Court: Why should that be hearsay?

Mr Morrison: But it went a bit further than that, he was going to visit the accused because the accused had offered to pay him some damages an amount of money.

Court: So if that is what he said why is it hearsay, it is merely evidence that such a statement was made, it is not made to show that what Nembudani said was the truth.

Mr Morrison: No, I agree with you there, my lord, but if one were to go a bit further than just to say that statement was made, I mean it was something the witness himself perceived with one of his senses but if one were to go further and to accept that that may possibly have been the reason for the visit,in other words, to attach some weight to the statement that this was the main reason for the deceased having gone to the accused's house, then we have a slightly different light thrown on the incident in question, then we have a situation where it is unlikely that the deceased would have gone there, as the accused alleges, to

> attack him and to kill him and go accompanied with a number of people armed to the teeth whereas in actual fact the deceased had been expecting some form of damages for statements, libelous statements, made by the accused against the deceased [I must admit that I do not understand the passage]. If one takes it that far. Then if your lordship accepts that then there may be a reason for believing that the knife and the pange were planted there,especialy in the light of the fact that the accused never testified and gave evidence in support of the allegation that the deceased in there wielding a knife, (sic) that he violently entered the room etcetera. So we have got a question mark raised over his credibility ..." (own emphasis). The Judge a quo gave Mr Manctelow an opportunity to reply,

which he did. He submitted that anything that Nembudani had said

relating to what the deceased had told him could not be tendered for

proving the truth thereof. A basis for introducing it had to be laid and

this had not been done. In this connection he referred to Hoffmann and

Zeffertt The SA Law of Evidence 4 ed 126. That the Judge a quo had

not yet properly addressed the question whether the evidence should be

admitted to prove the truth of its content, despite the exclusionary rule,

seems to appear from his following remark to counsel:

> "Now the fact that he made that statement is surely evidence and then one can look at what he said and decide how much value has to be placed on it. One question one can ask is, if he intended to go there with five people to -kill the accused, why would he say to Nembudani that I am there but I am going there at the invitation of the accused? Is it not a factor, is it not evidence which can be taken into account?"

The defence did not attempt to re-open its case and the trial ended.

In Venda at the time of the trial the admissibility of hearsay evidence was governed by s 2 of Proclamation 37 of 1991 (Venda), which was the equivalent of the South Africa Law of Evidence Amendment Act 45 of 1988, and particularly of s 3 thereof. For the sake

of convenience, and particularly future convenience, I shall refer to the latter section.

In his judgment the Judge a quo pointed out, correctly, that hearsay evidence is now defined to mean evidence the probative value of which depends upon the credibility of any person other than the person giving such evidence. On the facts of this case the deceased is the person first mentioned, and Nembudani the second.

The learned Judge then proceeded to say that it was not placed in issue that the statement was in fact made. I have a difficulty with this statement. Even if belatedly, Mr Manctelow had challenged the hearsay before the end of the State case. Mr Morrison did not take up the challenge. Indeed his repeated attempts to keep hearsay out (successful

except in one instance) suggested that he did not wish to do so. If he had wished the evidence to be accepted he should have said so, particularly as he had not uttered a word about overcoming the exclusionary effect of s 2. That that was not his intention is confirmed by his frank admission in this Court that at the end of the State case he had no intention of relying on the hearsay. Nor had the Judge called for any definition of the position. What might have happened had the admissibility of the statement been argued, or had the content and reliability of it been probed, is a matter for speculation entirely. That is one of the problems about how this case was run, not by the defence in my opinion, but by the prosecution and the presiding Judge. I shall return to this subject.

The Judge a quo then addressed the question whether that part of the statement which depended upon the credibility of the deceased should be admitted, having regard to the considerations set out in s 3(l)(c) of the Act. Before setting out those considerations it is necessary to emphasize what has already been mentioned, that s 3(1) is an exclusionary subsection and that the touchstone of admissibility is the interests of justice, as is made clear by the words: "... hearsay evidence shall not be admitted as evidence ... unless - ... the court, having regard to (the considerations in subsection (c)) is of the opinion that such evidence should be admitted in the interests of justice."

The matters listed in s 3(l)(c) are:

> "(i) the nature of the proceedings; (ii) the nature of the evidence;

(iii) the purpose for which the evidence is tendered;

(iv) the probative value of the evidence;

(v) the reason why the evidence is not given by the person upon whose credibility the probative value of such evidence depends; (vi) any prejudice to a party which the admission of such evidence might entail; and (vii) any other factor which should in the opinion of the court be taken into account."

I shall now deal with each of these matters. (i) The Nature of the Proceedings

The trial Judge, having mentioned that this case is concerned with evidence tendered by the prosecution in a criminal case, and that in Sv Dyimbane and Others 1990(2) SACK 502 (SECLD) at 504 it had been said that a Court would less readily admit the evidence in such a case than when it was tendered by the defence, or by either party in a civil

case: went on to opine that the Court should have regard to all the factors and "not as a starting point be averse to allowing such evidence because it is tendered by the State." That may be, but I agree with van Schalkwyk J's remark in Metadad v National Employers' General Insurance Co Ltd 1992(1) SA 494(W) about, "the Court's intuitive reluctance to permit untested evidence to be used against an accused in a criminal case" (at 499 H). Without engaging in a debate about everything that was said in those cases I further agree with the expression of the same concern in Hewan v Kourie NO and Another 1993(3) SA 233(T) at 239 E-F and S v Cekiso and Another 1990(4) SA 20(E). An accused person usually has enough to contend with without expecting him also to engage in mortal combat with the absent witness.

I consider that the trial judge underestimated this factor badly. (ii) The Nature of the Evidence

The trial Judge considered that the fact that the remark was made in passing as a parting remark without any specific purpose, added to its reliability. If by this is meant that spontaneity and artlessness are partial guarantees of truth I would agree. But the Judge proceeded, "The truth of the statement that the deceased intended to go to the accused is further borne out by the rest of the evidence which shows that he in fact was there on the evening in question." I find this reasoning very difficult to follow. It is common cause that the deceased visited the appellant's house on that night. The issue was why he went. Reiterating that he went helps not one jot in answering that question. This part of the

statement may have been admissible as a statement of intention, in no wise dependent upon what the deceased was supposed to have said. But the real sting lay in the suggestion that the appellant had lured him there. The trial Judge proceeded, "This reliability is further enhanced by the fact that the reason for the visit of the deceased as given by the accused (i.e. to attack him) in his statement was found to be false." By this I think was intended that the appellant had been found to have lied about whether he knew the deceased, and that the statement about the invitation to the deceased to visit him was a natural complement to the lie. That may be. (iii) The Purpose for which the Evidence is Tendered

The trial Judge said that the purpose of the evidence was, in the

first instance, to show that the deceased had expressed an intention to go to the appellant, "something which is improbable if he intended to muster up forces in order to go and kill the accused." Here, I think, is repeated the fallacy discussed under (ii) above. It is unlikely that the deceased would have told Nembudani that he was going to go to the appellant's house to kill him. But that is not the statement which he is supposed to have made. Again, a part of his intention which is not in issue is severed from its context and joined to something else to create an aggregate statement which it is unlikely he would have made.

I proceed to the succeeding remarks of the trial Judge which do reflect the rub of the evidence, "It (the statement) further provides the only evidence of the reason why he went to the accused other than the

false statements of the accused that the deceased was an unknown person attacking him .... It further shows that the deceased went to the accused at the instance of the accused himself. The statement further shows that the accused and the deceased knew each other before the shooting, a fact which is supported by the other evidence which I accept."

This is indeed the only evidence on the State's side indicating why the deceased went to the appellant's house. It is of central, perhaps of decisive, importance in the Court's reasons for rinding that the State had discharged the onus of disproving self defence. The passage quoted from the argument indicates that at that stage at least the trial Judge had a difficulty with the State's case, i.a. because of the presence of the knife, and that the State counsel resorted to this evidence only when in serious

difficulty, first tentatively, but progressively more confidently as the argument found favour with the Judge. This evidence played an important role in the judgment refusing leave to appeal, and also in the judgment on sentence where it is said, "... one must take into account that here the accused designed as it were a scheme by means of which he lured the deceased to his home under false pretences clearly to give him the opportunity to kill him..."

I do not wish to enter into the debate whether s 3(l)(c) should or should not "be lightly applied" (see eg Metedad's case above at 499 E-F), but I would agree with the remarks in this and other cases, the effect of which is that a judge should hesitate long in admitting or relying on hearsay evidence which plays a decisive or even significant part in

convicting an accused, unless there are compelling justifications for doing so. To my mind the trial Judge was too easily persuaded by the State to place weight on this evidence for the purpose of convicting and sentencing the accused. (iv) The Probative Value of the Evidence

The trial Judge had nothing to add under this head and was content to rely on what he had already said under (iii).

The enquiry under this head should proceed under two heads namely (a) the reliability and completeness of Nembudani's transmission of the deceased's words, and (b) the reliability and completeness of whatever it was that the deceased did say. None of these subjects was probed in evidence; on the defence side because of a deliberate decision

to leave the evidence alone: and on the State side because the State had not been looking for it, did not want it when it came out, and turned its back on it until the late stage in argument already alluded to. So that here the general problem about hearsay evidence, the inability to cross-examine the source is even further compounded by there not being even a haltered attempt to End out the full context in which the words were spoken or the full content of what the deceased had said.

Turning back to (a): the reliability and comprehensiveness of Nembudani's contribution -I have not much to say - only this: he was a friend of the deceased, he seemed anxious to make this contribution despite State counsel's repeated warnings not to repeat the conversation, and he was accused by Joyce of trying to suppress evidence with a view

to securing the appellant's conviction. I recognize that the trial Judge rejected the evidence of Joyce and accepted that of Nembudani, and that his was largely corroborated by the appellant's statement alleging theft by Joyce, but I do not think that his evidence can be taken as that of a witness wholly independent.

However, it is (b) that is important. It seems to me that the trial Judge did not manifest a sufficient awareness of the perils of hearsay evidence. For many years our law knew a rigid exlusionary rule which allowed specific exceptions but no relaxation. Now there is no exclusion as such. Hearsay evidence may be accepted subject to the broad, almost limitless criteria set out in s 3(1). But the facts of life do not simply vanish at the flourish of the legislator's pen. Hearsay evidence was long

recognized to tend to be unreliable, and continues to tend to be so. The old works are replete with warning, based on the accumulation of the experience of centuries. I take as an example Taylor's A Treatise on the Law of Evidence 12 ed (1931) at para 567:

> "For it is deemed indispensable to the proper administration of justice, first, that every witness should give his testimony under the sanction of an oath, or its equivalent, a solemn affirmation; and, secondly, that he should be subject to the ordeal of cross-examination by the party against whom he is called, so that it may appear, if necessary, what were his powers of perception, his opportunities for observation, his attentiveness in observing, the strength of his recollection, and his disposition to speak the truth. But testimony from the relation of third persons, even where the informant is known, cannot be subjected to these tests. As Buller J., observes: 'If the first speech were without oath, another oath that there was such a speech makes it no more than a mere speaking, and is of no value in a court of justice'."

See also Hoffmann and Zeffertt (op cit) 125 and Theron v AA Life Assurance Association Ltd 1995(4) SA 361(A) at 369 E-H, 382 H.

Leaving aside the generalities and turning to the facts: the evidence was that the appellant "had promised him money." During argument this becomes in the Judge's words, "the deceased had been expecting some form of damages from statements, libelous statements, made by the accused against the deceased." In the judgment on sentence it becomes "the accused designed as it were a scheme by means by which he lured the deceased to his home under false pretences." (The main judgment says much the same.) These passages show how the imagination can take wings when one is incapable of discovering the facts. On the evidence itself, for all I know, the deceased may have been going to

collect the price of an amplifier he had sold the appellant.

So much, probative value. (v) The Reason why the Deceased did not give the Evidence

This item is uncontentious. The deceased was dead. (vi) Prejudice

The trial Judge rightly pointed out that the deceased's death had frustrated the appellant's right of cross-examination. But, he opined, there were other avenues open to him to counter the evidence. One of them was to give evidence himself. I find the implications of this reasoning disturbing. Taken to its logical conclusion it involves that the State by piling on flimsy hearsay can force the accused into the box in a case where the dearth of weightly direct evidence is such that he

should be entitled to stay out.

Then the Judge said, "In this case the accused relied on false statements to explain the reason for the deceased's visit ... The admissibility of this hearsay evidence was not attacked when it was given but only during argument after the accused closed his case without giving evidence." This is not a correct reflection of what had happened. Defence counsel did object even before the State case was closed. That is not the only criticism. If at the stage when this evidence was given the Judge thought that it was going to be important (I do not think that he then did) he should have raised the question of admissibility: or, if not then, then at a sufficiently early stage. It is the duty of a trial judge to keep inadmissible evidence out, not to listen passively as the record is

turned into a papery sump of "evidence." The frequent practice of admitting evidence provisionally, though appropriate to some situations, often works most unfortunately. Instead of forcing practitioners to prove relevant facts by admissible evidence it may allow them to range around vaguely, which is not good for the administration of justice or for anybody, except perhaps the beneficiaries of costs unnecessarily incurred. In any event, I doubt that this evidence was admitted, even provisionally. It was just there; in the words of State counsel, "unfortunately the evidence did slip out of defendant's mouth." But even if it was provisionally admitted, another adverse consequence of the practice is exposed - who knows what's in and what's out? This may lead, in a criminal case, to the defence counsel being placed in an unnecessarily

difficult position when deciding whether to put his client in the box. The Judge criticised the appellant for not going into the box. A wrong decision under s 3(l)(c) may have a bearing upon whether a party is to be criticised for not calling evidence: Mdani v Allianz Insurance Ltd 1991(1) SA 184(A) at 190 D. In the light of what had gone before I do not think that the defence can be faulted for assuming, at the stage of closing its case, that the evidence had not been admitted. Nor can it be faulted for not applying to re-open its case at the end of the main argument, as the Judge had still not given a ruling on admissibility. To hold otherwise would be to hold that the more indecisive the judge is in making rulings the more is the accused compelled to go into the box. I am of the view that there was clear prejudice to the appellant in

admitting the hearsay at the stage at which it was admitted, which was only at the stage of judgment. (vii)

Any Other Factor

I can think of no other factor justifying the admission of the hearsay.

In the result I am of the opinion that it was emphatically not in the interests of justice to admit the evidence. There were two irregularities, first, the admission of the evidence, and second, its admission at the stage and in the manner that occurred. The second was a particularly serious irregularity, which had the effect, I regret to say, that the appellant had a less than fair trial. The Judge should have required the question of admissibility to be argued at latest at the close of the State

case. Having failed to do so he should not later have pressed its admission on the prosecutor. I do not think that defence counsel is to be faulted. Perhaps he would have been wiser to have requested a definite ruling, but I think he was entitled to think that he had made his point and that it had been accepted. Effect of the Irregularities

The irregularities in the case are close to being so gross that the trial is vitiated: see S v Moodie 1962(1) 587(A). But we consider that they just fall short of that degree of irregularity, so that the test for the lesser degree is to be applied: whether this Court considers, on the evidence (and credibility findings if any) unaffected by the irregularity or defect, there is proof of guilt beyond reasonable doubt. If it does so

consider, there is no resultant failure of justice: S v Tuge 1966(4) SA 565(A) at 568 F-G: S v Bernardus 1965(3) SA 287(A) at 299. Can Appellant's Version Now Be Rejected?

I have mentioned before that the appellant was caught out in a blatant lie in claiming that the deceased was a stranger to him. Apart from placing emphasis on this lie (correctly) the Judge also referred in detail to inconsistencies in the statements he made to the police and to Mr Booi, matters such as whether three or five people came to his house, whether one of them came in armed with a gun together with the knife-wielding deceased, and so on. I do not propose analysing all of them. Some of the apparent inconsistencies may be capable of being explained away by the appellant's being in a state of shock when he spoke to the

police (assuming for these purposes as one must in his favour that he had been attacked as he said), or by the statement to Booi being a summary only (as it was expressly stated to be). Suffice it to say that the comparison of the statements does nothing to enhance the appellant's credibility, already dealt a grievous blow in the manner mentioned.

The Judge referred to some improbabilities in the appellant's version. One at least is considerable, and that is that the appellant should have fired four shots at the knife-wielding deceased while sparing none for the gunman beside him.

The Judge also referred to the appellant's failure to give evidence. Once disentangled from the inadmissible evidence, this remains a considerable point to be added in the scale to the State evidence properly

admitted.

I do not propose reiterating the principles relating to untruths told by an accused, or an accused's choice not to give evidence under oath. Neither of these factors is decisive in this case, but they both have weight, the lie about not knowing the deceased weighing heavily. But even that lie is not necessarily consistent only with guilt.

In a re-evaluation of the evidence two jarring items need to be considered afresh - the knife on the floor, and the condition in which the deceased's bakkie was found. In order to overcome these points the State must suggest that (a) the appellant planted the knife, and (b) put the keys in the bakkie and opened both doors. Being a man experienced in the practice of the law, so the State contended, its perversion in this way

might come easily to him. The trial Judge accepted both of these submissions, or so it seems. He may have been right, but I am not at all confident that he was.

First, if a murder was as carefully planned to be concealed as the judgment a quo suggests, I find it odd that the appellant, who must now for the purposes of the argument be allowed the benefit also of being a magistrate, should have botched his statements so badly.

Secondly, if he did plant the knife, is it not likely that he, as a magistrate again, would have wiped it clean of his own fingerprints? He was not to know in advance that the police would fail to have the knife tested. But then, if the knife had been tested and had been found to be free of all prints would that not have aroused suspicion of a plant. So

the matter was not so easy. The answer may have been to wrap the deceased's nerveless hand around the knife. But if so, it would have required remarkably steady nerves not to make a suggestion to the police that the knife should be tested, and there is no evidence of such a suggestion.

Thirdly, in any event the failure of the police to test the knife may have deprived the appellant of evidence to the benefit of which he was entitled.

Fourthly, if the appellant was responsible for the state in which the bakkie was found it was an inspired piece of scene setting. Had the deceased arrived to receive his money (for whatever reason owing) I would have expected the doors to have been shut (or at least one of

them) and the keys with the deceased. The state in which the vehicle was found is strongly suggestive of a gang arriving at speed, piling out and rushing to the attack, with the bakkie left ready for a quick getaway. Its abandonment after the unexpected death of the driver would hardly have been surprising.

The approach of the trial Judge was not to analyse the weight to be attached to the state in which the vehicle was found, but rather to find a reason for that state which would make it conform to the conclusion he had already reached, that the appellant's story was false. He referred to the evidence of detective-sergeant Nemungadi that when he arrived at the scene on the night of the shooting the appellant was busy reversing his vehicle out of the yard, so as to pass between the gatepost and the

deceased's bakkie. "It is a real likehood" the learned Judge proceeded, "that the accused himself may have been responsible for the position in which the (deceased's bakkie) was found. ... It is therefore quite possible that the accused, when he wanted to leave with his vehicle, found the (deceased's bakkie) in a position leaving him no room to get out of the premises and that he himself removed (it) in order to allow him room, and that he therefore himself left it in the position it was found in" (own emphasis). The "real likelihood" I find difficult to follow. The possibility I accept. But it seems to me very improbable, if the deceased had arrived on a peaceful errand, on his own, which must be postulated, that either he when alighting, or the appellant later when moving the bakkie out of the way, would have left both doors open

(never mind even one). It seems to me that if the scene depicted by Nemungadi is viewed without preconceptions it gives significant support to the appellant's version: it being acknowledged, on the other hand, that it may have been a piece of visual theatre that appellant got right, in sharp contrast to his fluffing his lines so badly when giving explanations to the police and Booi. It may be added that there is no evidence that the vehicle was tested for the appellant's fingerprints.

The question is raised, and rightly raised, but why should the deceased have murderously attacked the appellant? The counter is, why should the appellant have murdered the deceased? The answer in both cases is: Joyce.

In the upshot, although there is much suspicion, I do not consider

that the appellant's version may be rejected as not reasonably possibly

true.

Effect of Appellant's version

The State must disprove that the appellant acted in self defence. As things now stand, that must be done accepting his version.

The appellant was outnumbered. He was faced by a knife and a gun and expressions of murderous intent. The closing range was short. There was nowhere to run. His pistol was of relatively light calibre. Even the armchair critic would recognize the futility of warnings, and the peril of a mere winging shot. The appellant must be allowed his defence.

The appeal succeeds and the conviction and sentence are set aside.

WP SCHUTZ JUDGE
OF APPEAL

HEFERJA)

CONCU

R FH GROSSKOPF JA)