Case No 215/96
/mb

IN THE SUPREME COURT OF APPEAL

In the matter of:

ZUNAID MOHAMED SEEDAT APPELLANT

and

THE STATE

RESPONDENT

CORAM: SMALBERGER, HOWIE et SCOTT JJA

HEARD: 18 FEBRUARY 1997

DELIVERED: 6 MARCH 1997

J U D G M E N T

SCOTT IAV...

SCOTT JA:

The appellant, a 26 year-old man, was charged with murder in the former Witwatersrand Local Division. He was convicted by Claassen J, sitting with an assessor, and sentenced to 16 years imprisonment of which 8 years were conditionally suspended for 5 years. With the leave of the court a quo the appellant appeals to this Court against the conviction only.

It was common cause at the trial that the deceased, who was 40 years of age, died as a result of a stab wound in the chest which he sustained on 4 November 1993. At the time he was living with Mr and Mrs Ibrahim and their 3 young children in Mayfair, Johannesburg. Mr Ibrahim was the deceased's brother-in-law. The appellant's parents lived nearby and were acquaintances of the Ibrahims. The appellant lived in the same suburb but no longer with his parents.

Evidence was adduced at the trial not only in relation to the events of 4 November 1993 but also in relation to an incident or incidents which occurred some two weeks prior to 4 November 1993. I need refer only briefly to the latter. Mrs Nazreen Ibrahim testified, in short, that on a Sunday night about two weeks before the deceased's death, the appellant, his parents as well as two brothers, one of whom was Ferard, came to the Ibrahims' house where the appellant accused the deceased of having raped his girlfriend, one Shana; that the appellant in the course of a heated exchange threatened to kill the deceased, and that the appellant's parents had returned about half an hour later to apologize and to say that Shana had denied that she had been raped. Mrs Oliphant, a neighbour, also testified on behalf of the State. She confirmed the evidence of Mrs Ibrahim that she, Mrs Oliphant, had telephoned to find out what the commotion was all about. She said that after telephoning she had gone outside on the night in

question and had heard the appellant threatening to kill the deceased.

The appellant admitted that on that evening he had gone to the Ibrahims' house together with his mother and father but insisted that the circumstances of his visit were entirely different. He said that a few days previously the deceased, whom he then did not know, threatened him for no apparent reason. He told his father, who fortuitously found out who it was. On the night in question they went to the Ibrahims' house to ascertain what the cause of the trouble was. He said that when his father questioned the deceased, the latter simply apologized and gave the assurance that such a thing would not happen again. The appellant denied that there had been any mention of rape or that the exchange between the two groups had ever become heated. He denied also that his brother, Ferard, was present. The appellant's evidence in this regard was supported by his father, Mr Seedat senior, and brother, Ferard.

In his judgment, Claassen J referred to various improbabilities and unsatisfactory features in the appellant's version but found the incident to be "peripheral" and "not germane" to the central issue of what happened on the afternoon of 4 November 1994. He accordingly made no finding with regard to the incident. I do not think this approach can be faulted. Neither version of the incident in question would necessarily be inconsistent with the appellant's or the State's version of how the deceased came to be stabbed.

I turn to the events of 4 November 1993. The State adduced no direct evidence that it was the appellant who stabbed the deceased. The appellant's case, however, was that the deceased had accidentally sustained the fatal stab wound while attempting to attack the appellant. There was no suggestion by the appellant that any one else was involved in the stabbing. The question that accordingly had to be decided was whether

there was a reasonable possibility of the appellant's version being true. That version differed from the evidence of various State witnesses in material respects. In order to appreciate the significance of those differences and the extent of the case against the appellant, it is necessary to set out in broad terms both the evidence adduced by the State and that of the appellant and his witnesses.

On behalf of the State Mrs Nazreen Ibrahim testified that on the afternoon of 4 November 1993 while she was at home entertaining a neighbour, Mrs Madia Alli and the latter's sister, the deceased returned home after having made some purchases. As he was feeling tired he lay down in Mrs Ibrahim's bedroom which was the room where the television set was kept. Shortly thereafter the three women went to Mrs Alli's house, which was some 6 houses away, for coffee. About 5 minutes later Mrs Ibrahim's domestic worker, Lizzie Pakedi, came running to call them. Mrs

Ibrahim and the others hurried back. They found the deceased covered in blood lying on the bedroom floor. A number of friends and neighbours came to assist. One of the persons Mrs Ibrahim said she saw in the house was the appellant's brother, Ferard, who told her that he had called for an ambulance. The deceased was taken to hospital where he died the same day.

Lizzie Pakedi confirmed that the three women had gone to Mrs Alli's house for coffee leaving the deceased lying on the bed in Mrs Ibrahim's room watching television. She said that she had thereafter gone to the toilet which was outside at the back of the house. When she returned the deceased came into the kitchen where he collapsed. He was covered in blood. He then got up again and went into Mrs Ibrahim's room. She said that she found the knife with which the deceased had presumably been stabbed in the bedroom of Mrs Ibrahim's six year-old son, Rawes. Neither

she nor Mrs Ibrahim had ever seen this knife before.

Mr Mohammed Abader, who lived next-door to the Ibrahims, was working on his motor car in the street outside his house. He heard people shouting outside the Ibrahims' house. He said he heard someone say "I will fucken kill you" and then the front door slam shut. He said that he looked up and saw both the appellant and his brother, Ferard, whom he knew only by sight, on the front stoep of the Ibrahims' house. Ferard, he said, was pushing the appellant away from the house and off the stoep. The appellant then walked up the street in a westerly direction while Ferard left in the opposite direction. Shortly thereafter he heard someone screaming in the Ibrahims' house. He went to investigate and found the deceased lying in a pool of blood. While telephoning for an ambulance he saw Ferard walking into the house. He said that he asked him to leave.

Another witness implicating the appellant was Mrs Ibrahim's

six year-old son, Rawes. Testifying through an intermediary, he said that he had run out of money while playing at a nearby games shop and had returned home to fetch more money, which was kept in a drawer in his mother's room. While scratching in the drawer he saw the reflection of the appellant and his brother, Ferard, in the mirror in front of him. He said they were standing at the bed on which the deceased was lying. The appellant, he said, had a knife in his hand which he held at his side. He saw him kicking the deceased in the face around the nose and mouth. Rawes said he asked the appellant please not to kill his uncle (the deceased) before fleeing through the front door and running around the block. He said he did not see the appellant stab the deceased. On returning he was found by Mrs Oliphant who kept him in her house until the deceased had been removed in the ambulance.

Rawes did not tell his mother, nor for that matter anyone else,

what he had witnessed until several months later. Mrs Ibrahim testified that Rawes took the death of the deceased very badly. On the night in question he cried in his sleep and thereafter went through a period of bedwetting. In December the children spent some while in Cape Town with her sister who arranged for Rawes to see a psychologist for therapy. After his return to Johannesburg and while the investigation officer was taking a statement from Mrs Ibrahim he unexpectedly interrupted her and told them both what he had seen.

It is necessary to mention that Mrs Ibrahim, Mrs Pakedi and Mrs Alli (who also gave evidence for the State) all testified that prior to the ambulance arriving the deceased had told them that he had been stabbed by the appellant. The court a quo, however, made no ruling as to the admissibility of this evidence and came to the conclusion it did without any reliance upon it.

I turn to the appellant's version of what happened on the fatal afternoon. He testified that on his way to his parents' house he saw the deceased standing outside the Ibrahims' house. He said the deceased swore at him but he simply continued on his way. When he returned, some 20 to 25 minutes later, the deceased was still standing at the front gate. He asked the appellant to wait and went indoors, returning shortly thereafter with his right hand behind his back. The appellant explained that the deceased then moved down to the second step from the stoep while he, the appellant, walked two paces forward towards the deceased. At this point the deceased suddenly shouted "I will fucken kill you". The appellant said he tried to turn and walk away, but the deceased grabbed him by the shoulder and pulled him towards him, at the same time raising his right hand in which there was a knife. According to the appellant he grabbed hold of the deceased's right wrist with his left hand and pulled the deceased forward,

ie towards him. They both fell with the deceased landing on his back and the appellant on top of him. The appellant then saw the knife stuck in the deceased's chest. At this stage, he said, the deceased was still clutching the handle of the knife and he, the appellant, still held the deceased's wrist. He described how they both then got up and how the deceased crawled up the steps bumping or possibly bumping his chin on the way. The deceased went through the front door slamming it behind him. The appellant testified that he knocked on the door to be let in as he wished to assist the deceased. There was no response, however, and he continued on his way up the road in a westerly direction. At some stage he met his brother, Ferard, who was on his way home. The appellant said he requested Ferard to tell their mother what had happened and to ask her to go to the Ibrahims' house to see if she could help.

The appellant's father testified that on his way home from work

on 4 November 1993 he saw a crowd of people at the Ibrahims' house. Inside he found the deceased who, when asked what had happened, was unable to speak. In cross-examination Mr Seedat senior said that his son, Ferard, told him that after the incident he had been into the house as far as the passage. Ferard confirmed in evidence that he had met the appellant who had asked him to deliver a message to their mother. He denied that he knew anything about the stabbing. He testified that he later went into the Ibrahims' house as far as the passage. This was notwithstanding that it had been put to both Mrs Ibrahim and Mr Abader in cross-examination that Ferard had at no stage entered the Ibrahims' house on 4 November 1993.

From the aforegoing it is apparent that the appellant's version is inconsistent not only with the evidence of Rawes but also with that of Mr Abader. According to the latter both the appellant and his brother, Ferard, were on the stoep after someone had shouted "I will fucken kill you". On

the appellant's version he was never on the stoep and his brother was not present. It is also unlikely, to put it at its lowest, that had there been the scuffle between the deceased and the appellant as described by the latter, Mr Abader would not have seen it. The appellant's version that the deceased was standing outside the house for some 20 to 25 minutes (or on two occasions some 20 to 25 minutes apart) would also appear to be inconsistent with the evidence of Mrs Ibrahim, Mrs Alli and Mrs Pakedi that the deceased was lying on a bed in Mrs Ibrahim's room sleeping or watching television. He told them that he was feeling tired and he could hardly have known that the appellant would be walking past the house outside, even if he had been intent upon attacking the appellant.

The court a quo was fully aware of the dangers associated with the evidence of young children. Apart from Rawes's tender age much was made by counsel for the appellant both in this Court and the court below

of Rawes's failure immediately to tell his mother what he had seen. Given the circumstances and the effect which the death of his "uncle" had on Rawes I do not think that his failure to do so justifies the rejection of his evidence out of hand. Claassen J found Rawes to have performed "astonishingly well" as a witness. A reading of the record does suggest a maturity beyond his years; but equally, if not more important, are several factors tending to confirm the credibility of his evidence. I mention three. First, Rawes's evidence that the appellant kicked the deceased in the face is consistent with the evidence of Dr Kemp, the pathologist, who found the deceased to have sustained abrasions on the chin and upper lip. Rawes could hardly have known of Dr Kemp's findings. Furthermore, the appellant's attempt to explain these injuries was most unconvincing. Initially he said that the deceased bumped his face as he crawled up the steps to the stoep. When it was put to him in cross-examination that he

would have been standing behind the deceased, he altered his evidence somewhat by saying that the deceased "must have knocked his face or head or whatever he knocked". Later he said that he could not remember and still later, when the conflict was put to him, he again asserted that he actually saw the deceased bump his face on the steps. The second factor is that Rawes's evidence that Ferard was with the appellant is consistent with and supported by the evidence of Mr Abader who saw Ferard on the stoep pushing the appellant away from the house. The third is the limited extent of Rawes's evidence and his assertion that he did not see the stabbing. Because of the deceased's utterances before he died it was generally assumed by those who knew the parties that is was the appellant who had stabbed the deceased. The evidence discloses that Rawes was aware of this. Had he fabricated his evidence one would imagine that in these circumstances he would have claimed to have seen the stabbing.

The appellant on the other hand made a poor impression in the witness box. Claassen J gives the following description:

> "In one word, he was a shocking witness. He obviously lied and contradicted himself on several occasions as indicated herein. He was evasive and often took a long time to answer questions. He became aggressive when cornered by the state advocate. As a witness he did not fare well at all."

As far as one can judge from a reading of the record there would appear to be no reason for doubting the accuracy of this description. Although no doubt possible, the appellant's version of how the deceased came to stab himself in the chest would seem on the face of it to be somewhat unlikely. According to the appellant he grabbed the deceased by the right wrist and pulled him forward. In these circumstances it is difficult to imagine how the deceased could have managed to turn the knife back in the direction of his own chest as he fell. But perhaps more significant is the fact that the description of the incident which the appellant gave in evidence differed in

a material aspect from the description he gave at the plea stage. Then he had said that he had grabbed the deceased by his shirt (as opposed to the right wrist) and pulled him to the left to ward off the attack.

The appellant's brother, Ferard, was also found to be an unimpressive witness. As previously mentioned the evidence of Mrs Ibrahim and Mr Abader that they saw Ferard in the house after the stabbing was challenged in cross-examination and it was put to both witnesses that Ferard would deny that he ever entered the house on 4 November 1993. Nonetheless, Ferard admitted that he had gone into the house, presumably because of the concession to this effect made by Mr Seedat senior in cross-examination.

In all the circumstances, I can see no justification for interfering on appeal with the trial court's conclusion that the evidence of the appellant was not reasonably possibly true and had to be rejected as

false.

The question that remains is whether even if the appellant's evidence was justifiably rejected the court a quo was correct in finding that the guilt of the appellant had been proved beyond reasonable doubt. The State was unable to adduce any direct evidence as to precisely where and in what circumstances the deceased came to be stabbed; nor is it possible on the basis of the evidence led to draw an inference in this regard. The direct evidence that was adduced, however, establishes that the appellant was seen armed with a knife kicking the deceased and later being pushed away from the house by his brother following an angry exchange of words. It is not in dispute that the deceased sustained a fatal stabwound in the chest. The appellant himself says that he was present when the injury was sustained. His explanation as to how the injury was inflicted was found to be false. There was no suggestion by the appellant that any third person

was involved. In these circumstances the court a quo in my view was justified in coming to the conclusion that the only reasonable inference that could be drawn was that the fatal stabwound was inflicted by the appellant in circumstances that rendered him guilty of murder. The appeal is accordingly dismissed.

D G SCOTT

SMALBERGER JA)
- Concur
HOWIE JA)