

IN THE SUPREME COURT OF SOUTH AFRICA
(CISKEI PROVINCIAL DIVISION)

CASE NO. 19/96

THE STATE

versus

MZUVUKILE NGETE

J U D G M E N T

EBRAHIM AJ: In this matter the accused, MZUVUKILE NGETE, a 19 year old male from Mdantsane, is charged with the crime of Murder. The indictment states that on or about the 12th day of August 1995, and at or near N.U.2, Mdantsane, in the district of Mdantsane, the accused did unlawfully and intentionally kill LUYANDA FELIX MENDILE, a male adult'.

Accompanying the indictment, as required by s 144(3)(a) of the Criminal Procedure Act 51 of 1977, is a summary of the substantial facts and a list of 13 witnesses. Two of these witnesses, Dr D T John and a Warrant Officer Mncedisi Ndwili, are from the State Mortuary. The remaining witnesses whose addresses are all in N.U.2, Mdantsane were presumably to testify on certain aspects of the events relating to the deceased's death.

The accused, who is represented by Mr Nyangiwe, pleaded not guilty to the charge of murder and elected not to disclose the basis of his defence in terms of s 115 of the Criminal Procedure Act 51 of 1977.

Mr Kristafor, who appeared for the State, handed in a handwritten statement, Exhibit 'A', containing certain facts agreed upon by the State and the defence. In terms of s 220 of the Criminal Procedure Act these were recorded as admissions and read as follows:

1. The deceased died as a result of the stab wound to the front of his chest.
2. He died at the place where he was stabbed.
3. He was transported to the Mdantsane mortuary without receiving further injury.
4. He was properly identified to Dr John, who conducted a post mortem examination, as being the person named as deceased in the indictment.
5. The post mortem report is admitted into evidence by consent.
6. The issue in dispute is whether accused inflicted the fatal wound on the front of the chest or the superficial cut on the back.

In view of admissions nos. 1 to 5 the State was relieved of the burden of presenting evidence so as to establish that the accused had not sustained any further injuries after the fatal assault and during transportation to the state mortuary.

The issue that has to be determined, therefore, is whether the accused inflicted the fatal wound which caused the death of the deceased and whether he did so unlawfully and intentionally.

The post mortem report, Exhibit 'B', handed in by the State confirms that the deceased died as a result of a stab wound to the chest which penetrated the heart. In the report this wound is described as a '(p)enetrating incised wound on It (sic) side of front of chest. Penetrating incised wound on the heart'. Dr D T John's observation, contained in the report, is that it is an 'incised wound 2,5 x 0,9cm, vertically

oblique on It (sic) side of front of chest 8cm It (sic) collar bone and 2cm to It (sic) of midline, penetrating.' The report also states that there was an 'incised wound 2,5 x 1,1cm over It (sic) shoulder blade' and a laceration on the inner side of the lower lip and abrasions on the face and the knee. This was the only documentary evidence which the State tendered.

The State relied on the evidence of two witnesses one of whom, LUNGILE NJAJULA, is an eye-witness who resides at 5599 N.U.2, Mdantsane, which is a four-bedroomed house with a flat. His evidence is that on 12 August 1995 at 9.30 pm he proceeded from the flat to the house. It is used as a shebeen and is run by his elder brother, BISTO, whose full name is MAZWANZIMA BISTO NJAJULA. He observed a number of patrons at the house and heard screaming but when he tried to enter the house he found the door locked. He managed to open it and found a person, known to him as SIGAQA, behind the door who appeared to have been keeping it closed. He saw another man, known to him as NKOSINATHI KOKA, armed with a knife who was attempting to stab the deceased.

Mr NJAJULA had a stick with him and used it to hit NKOSINATHI KOKA and his two friends, forcing them to run outside. The deceased when running away occasionally retreated backwards due to the blows administered by Mr NJAJULA and in the process slipped and fell on his side. The deceased, he says, was 'a little bit drunk'. He concluded this because of the noise the accused and his friends had made earlier. At this stage the accused, whom he knows only by the name of SAYIBHOKWE, appeared armed with a fixed blade knife which the witness says is called a 'Rambo'. SAYIBHOKWE then stabbed the deceased once but he cannot say where the wound was inflicted although, during his evidence, he pointed to the front of his chest. The deceased, who was unarmed and trying to get up when he was stabbed, screamed and said, 'You have finished me'. The assault occurred about 2 to 3 metres in front of him in the street which was unlit. The only lighting came from single light bulbs affixed to the front of the walls of the houses. Immediately after the stabbing he went home.

Under cross-examination it emerged that both the accused and the deceased had their backs to the witness when the stabbing occurred. He also stated that prior to the incident the accused and the deceased had not quarrelled. As he put it, he considered the accused to be fighting for his friend who had quarrelled with the deceased. When asked why he had not offered any assistance to the deceased after the stabbing, he said that he had to return to the shebeen in order to serve patrons. Further, the deceased was being assisted by the deceased's younger brother. About 20 other individuals were also at the scene of whom quite a few were involved in the incidents in one way or another.

In reply to questions about the lighting conditions he stated that a flood light had been installed at the house recently but it was not there when the incident had occurred. Asked if he had said in his statement to the police that he had not noticed where the injury was he said he could not remember telling them this. But, he had told the police that the person who stabbed the deceased was SAYIBHOKWE. When it was put to him that the assault had occurred in the house and that the accused had stabbed the deceased in the back, he denied this version of the events.

The statement made by the witness LUNGILE NJAJULA to the police on 4 September 1995 regarding the events of that evening was referred to by Mr Nyangiwe during cross-examination and handed in as Exhibit 'C'. He, the witness, confirmed that he had been satisfied with the contents of the statement, which had been read back to him, and that it was the truth.

The only other witness called by the State was ELMA LULAMA MVANDABA, the deceased's grandmother. Her testimony, briefly, was to the effect that she had observed earlier in the day that the deceased's arm was bandaged and had bled -to her recollection the left arm. Further the deceased had told her that he had another wound on his back but she declined to see it when he had volunteered to show her. She had asked the deceased to go to hospital for treatment but he had

refused as, according to him, the injuries were minor. The deceased had also told her that he had come from the highway where the stabbing apparently occurred.

The State's intention in presenting this evidence was to try to establish that the incised wound on the deceased's back had been sustained, at the latest, before 12.00 noon on the fateful day and not during the course of the events which occurred at the shebeen that evening. This evidence is, of course, hearsay and consequently inadmissible. This concluded the evidence tendered by the State in substantiation of the charge against the accused.

The accused testified in his own defence. In his version of the events he said that he, his girlfriend and various friends arrived at the shebeen at about 6.00pm that evening, 12 August 1995. The purpose of their visit was to drink liquor and this they duly did. Sometime later the deceased and his friends arrived carrying a box of liquor which they intended drinking there. They sat down and after a while told the accused and his friends that they would stab them when next they saw them. But, some thirty minutes later they got up with knives drawn.

The accused says the deceased and his friends closed the door and wanted to stab him. He and his friends then drew their own knives whereupon the deceased and his friends ran from the house. In so doing the deceased had to pass the accused who was close to the door and in the process the accused stabbed the deceased in the back. At that stage BISTO appeared with a firearm and stick and proceeded to strike at the deceased and his friends chasing them from the premises.

He stated that he had acted in self-defence. He stabbed the deceased in the back in order to defend himself against a possible attack from the deceased. He denied that he had stabbed the deceased in the chest or that the incident had occurred in the street, as stated by the witness, LUNGILE NJAJULA, in his testimony.

During cross-examination the accused adhered to this version of events. But, he conceded that any immediate threat to his life, which he may have perceived from the deceased, had ceased to exist at the time that he stabbed the deceased. The accused's testimony was the only evidence tendered in his defence.

Mr Kristafor, in argument, contended that the accused should be convicted on the charge of murder. He asserted that Mr LUNGILE NJAJULA was a credible witness and that his evidence concerning the events of the fateful evening should, therefore, be accepted.

On the other hand Mr Nyangiwe, asserted that the accused should be acquitted on the charge of murder as he was a truthful witness whereas Mr NJAJULA was a liar. He contended that since this witness had beaten the deceased with a stick in driving him out of the house he was to be regarded as an accomplice. This contention, to put it mildly, is extravagant to say the least. Whatever criticism one may level at his conduct that evening it cannot be said that he is a co-perpetrator of the crime of murder.

Mr Nyangiwe also referred to the fact that the evidence presented by the State, via the testimony of this witness, did not accord with the summary of substantial facts. In view of this I requested both counsel to address me on its implications and also to refer me to the relevant authorities on this aspect. I requested them further to address me on whether an adverse inference could be drawn from the State's failure to call any of the other witnesses on its list of witnesses? I appreciate the assistance of counsel in this regard.

Mr LUNGILE NJAJULA in his evidence in chief initially created a fairly favourable impression but when he was cross-examined a different picture materialized. Contradictions emerged between his evidence and the statement, Exhibit 'C, which he had made to the police.

In the statement which he made to the police on 4 September 1995, 23 days after the incident, he said, 'I stopped him not to stab the deceased but it was too late instead he said to me he had finished stabbing the deceased once. I did not notice where the injury was.'

However, his testimony in court does not accord with this. Firstly, he stated that it was the deceased who, when he was stabbed by the accused, had shouted,

'You have finished me'. Secondly, the accused had stabbed the deceased in the chest though he could not say where in the chest. His testimony in court is more than 14 months after the fatal incident yet he is now able to recall on which part of the deceased's body he was stabbed. In his statement to the police there is no mention of the front door being closed nor that he was unable to enter. Further, he does not provide a description of the knife which he so graphically described as being known as a 'Rambo'.

He says that when the deceased was stabbed both the deceased and the accused had their backs to him - the accused being between the deceased and him- but he was able to see that the deceased was stabbed in the chest. His evidence in this respect was more a conclusion than an observation. On certain other aspects too his testimony amounted to conclusions and not what he had observed himself and it included hearsay. I also do not consider that he has been entirely candid in respect of the events which unfolded that evening.

The prevailing circumstances made proper and reliable observation difficult. It was not disputed that the intensity of the lighting in the area where the stabbing occurred was poor. The only light came from single bulb lights on the walls of the houses. There were also a number of patrons at least 20, from the shebeen who were at the scene and were either involved directly in the incidents or interested in what was taking place. In view of what was occurring - a knife fight - there was clearly confusion and people

were chasing each other. These conditions impose an additional need for caution since there is the danger of errors in observation.

Since a conviction depends entirely on the evidence of this eye-witness the cautionary rule in relation to the testimony of a single witness must apply. It is not solely a question of determining whether he is a credible witness. I am called upon to approach his evidence with caution. I have to decide whether his evidence is reliable and if it is safe to convict thereon. I must be satisfied that his evidence is clear and satisfactory in every material respect. Whether in the circumstances that prevailed it is not possible that he has made a mistake? This approach is not a rule of law but has been endorsed as a guide in various decisions. See *R v Mokoena* 1932 O.P.D 79 at p .80, *R v Bellingham* 1955 (2) SA 566 (AD) at p.569, *R v Mokoena* 1956 (3) SA 81 (AD) at p.85-86, *R v T* 1958 (2) SA 676 (AD) at p. 679, *S v Kubeka* 1982 (1) SA 534 at p. 537 (WLD).

In my view, the evidence of Mr LUNGILE NJAJULA fails the test which is enunciated in the various authorities. I have already indicated what the position was in respect of the lighting and the overall situation which prevailed there. His opportunity for observation was far from ideal and the possibility for an error in observation cannot be excluded. It appears from his evidence that he assumed rather than saw that the person, who he says was the accused, had stabbed the deceased in the chest.

In my view, on the evidence before me it is probable that when the deceased was attacked, as he was trying to get up from the ground, that he may not have been stabbed in the chest. The evidence in this regard is far too uncertain for me to be able to find that the knife blow was delivered to his chest in the street and that it was the accused who did so. The accused, of course, denies that he stabbed the deceased as described by this witness.

In addition, I am confounded by his subsequent conduct. If the deceased had indeed been stabbed as

he described why did he not render assistance to the deceased. Instead he returned to the shebeen to serve the patrons. His conduct under the circumstances is not only difficult to comprehend but also callous. Someone whom he knows, who is not a stranger to him, has been stabbed in the chest in his presence, yet he does not deem it necessary to either ascertain the extent of the injury or to render assistance. The only plausible reason for him not to do so is if there was no need to, that is, if the deceased had not been stabbed. Accordingly, I am not satisfied that the evidence of Mr NJAJULA is reliable and can be accepted without reasonable doubt. Mr NJAJULA did not see the knife strike the deceased in the chest. He was clearly unsighted in terms of where the blow was directed and where it landed. It is possible that it could have struck him on his back or have missed him. This cannot be excluded.

I now address the question of the difference between the summary of substantial facts and the evidence which the State presented in court. Paragraphs 2 and 3 of the summary read as follows:

- '2. Deceased had an argument with Bisto, who chased him from the shebeen. As the deceased ran, the accused took up the chase, then threw a stone at the deceased, striking him and causing him to fall to the ground.
3. As deceased was on the ground accused came up to the deceased and stabbed him once on his chest with a knife.'

The evidence presented by the State clearly does not accord with this. It is so that the summary is not to be regarded as evidence. But, the court, in assessing the weight to be attached to the State case, can compare the evidence actually led with the summary of what the State had indicated it intended to prove. See *S v Kgoloko 1991(2) SACR 203 at p.207(A)*.

There is also the question of the State not calling any of the remaining witnesses on the list of

witnesses. This is a matter entirely in the discretion of the State and its failure to do so may, at most, result in an adverse inference being drawn in respect of its case. This approach was laid down in *S v Kelly 1980 (3) SA 301 at p.311 (AD)*.

I turn now to the evidence given by the accused. In our law there is no onus which rests on the accused to prove his innocence. The Interim Constitution, Act 200 of 1993, has entrenched this by proclaiming in s 25 that:

- '(3) Every accused person shall have the right to a fair trial, which shall include the right-
- (c) to be presumed innocent and to remain silent during plea proceedings or trial
- and not to testify during trial.'

I am not personally convinced that the accused has told this court the entire truth.

But, that is not the test that I am required to apply. It is not a question of whether I subjectively believe the accused or not. Nor am I called upon to balance his version against that of the State witnesses. In *S v Kubeka 1982 (1) SA 534 at p.537 (WLD)* it was held that it is sufficient if I find that the version given by the accused may reasonably possibly be true.

Even though the evidence of the accused was not entirely satisfactory I cannot find that his version is inherently so improbable that I am entitled to reject it as false as expressed in *S v Munyai 1986 (4) SA 712 at p. 715 (V)*. I also do not have to believe it in all its details. It is enough if in my view there is a reasonable possibility that it might be true. This approach was set out in *S v Jaffer 1988 (2) SA 84 at p. 89 (C)*.

The onus is on the State to establish the guilt of the accused beyond a reasonable doubt. The evidence which the State has placed before this court regrettably does not meet this threshold.

There are direct conflicts of fact between the evidence of the State witness and that of the accused which, together with all the other issues I have referred to, create a reasonable doubt in my mind of the guilt of the accused. He is entitled to the benefit of that doubt and, that being so, he is entitled to be acquitted on the charge of murder.

But, that is not the end of the matter. I must still consider whether on the basis of the state's evidence and the actions of the accused he may not be guilty of a lesser offence. On the accused's version of what transpired that evening it is clear that he was not acting in self-defence nor was he in imminent danger of attack when he stabbed the deceased in the back. Such danger, as allegedly perceived by him, had passed. In fact the accused says that the deceased was running out of the house and past him when he launched the attack and stabbed the deceased in the back.

Under cross-examination the accused stated that he had stabbed the deceased in order to prevent the deceased from stabbing him at a later stage. It was certainly the accused's intention to assault the deceased and to injure him so that the deceased should be incapable of injuring the accused at a future stage. This he admitted and it is substantiated by his own evidence overall. I am, accordingly, satisfied on the evidence before me that it has been proved beyond a reasonable doubt that the accused is guilty of the offence of assault with intent to commit grievous bodily harm, which is a competent verdict on a charge of murder.

In the circumstances, I find the accused guilty of the offence of assault with intent to commit grievous bodily harm. However, since the evidence is insufficient to sustain a conviction on the charge of murder the accused is, accordingly, found not guilty of murder and discharged in respect thereof.

Y EBRAHIM

ACTING JUDGE OF THE SUPREME COURT OF SOUTH AFRICA (CISKEI PROVINCIAL DIVISION)

Heard on the	15, 16, 17, 18, 21 and 28 October 1996
Judgment delivered on the	28 October 1996
Counsel for the State	Mr J G Kristafor
Counsel for the Accused	Mr X Nyangiwe