

CASE NO. 356/89

GEORGE JOSEPH HARPER

APPELLANT

and

THE STATE

RESPONDENT

Judgment by:

NESTADT, JA

CASE NO. 356/89

/CCC

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

GEORGE JOSEPH HARPER

APPELLANT

and

THE STATE

RESPONDENT

CORAM: CORBETT CJ, VAN HEERDEN et NESTADT JJA

DATE HEARD: 20 NOVEMBER 1989

DATE DELIVERED: 29 NOVEMBER 1989

J U D G M E N T

NESTADT, JA:

Appellant was convicted of murder. It was found that on the night of 16 January 1987 he fatally stabbed Maxwell Ogle. The attack on deceased took place whilst he and appellant were passengers on a public bus

being driven in the district of Inanda from Newlands East to Durban. No extenuating circumstances having been found, appellant was sentenced to death.

The issue in the appeal against the conviction is whether the trial court (VAN HEERDEN AJP sitting with assessors in the Durban and Coast Local Division) was correct in rejecting appellant's denial that it was he who killed deceased. The State case that he did rested on the evidence of Conway Johns. He was also a passenger in the bus. His version of what happened was in summary the following. At a particular bus stop a group of about fifteen persons boarded the bus. Appellant, whom he knew, was one of them. They were members of the SGF gang. Appellant was their leader. They proceeded past where deceased was sitting to the back of the bus. Appellant, however, returned and spoke to deceased. He accused deceased of having the previous month stabbed one

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of appellant's friends. Because of this, so appellant threatened, he was going to kill deceased. He was as good as his word. He took out a knife and stabbed deceased once in the chest. As deceased moved into the aisle of the bus appellant stabbed him again in the back. Deceased managed to reach the front of the bus where he collapsed into Johns' arms. The bus stopped. The witness pushed deceased out of the bus and himself jumped off after him. Deceased lay on the ground alongside the bus. That is where he died (as a result of the chest wound). Appellant also alighted from the bus. He told Johns to get back in. Johns complied. Leaving the deceased where he lay, the bus continued on its route. The driver asked appellant why "he did that". Appellant replied "I killed this man because ... he stabbed (my) friend". The conversation was in Zulu. The bus reached the stop that was Johns' destination. He hurriedly got

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off and ran to the nearby house of deceased's brother. He reported to him that deceased had been stabbed. The brother in turn telephonically informed the police.

Appellant in his evidence did not deny that he and Johns knew each other. He also admitted that he boarded the bus at the same time as the group to which reference has been made. It was true that they were members of a gang. He was, however, not their leader or even one of them. He walked past the deceased and sat down. He was unarmed. Trouble arose between deceased and the gang. It began when deceased belittled them by saying they were "cardboard gangsters". One of them, apparently taking offence at this, reacted by challenging deceased to "prove" the allegation. Deceased responded by threatening to hit him. This person said "try it". By this time he had a knife in his hand. Deceased, having noticed this, invited him to put it down whereupon, so deceased added, he

would "show (him) something". The gang member refused to do so. Deceased himself then produced a knife. This person summoned his confederates. They were at the back of the bus. As they surged forward deceased rushed at them. Though armed with knives and belts they retreated. Appellant then noticed that deceased had been injured. He had blood on his shirt. He did not, however, actually see deceased being stabbed. Deceased moved towards the front of the bus. As he did so he turned round and said to the gang that "he's not finished with them". He reached the front of the bus and together with Johns, whilst the bus was still moving, fell out of it through the open door. The bus stopped. Appellant got out. He never saw the deceased. But he noticed the State witness lying on the ground. He helped him up. The two of them got back into the bus which proceeded on its journey. The bus driver asked him what had happened. Appellant replied that "they

are killing each other".

Appellant called a witness, Colin Davids. He testified that he boarded the bus at the same time as Johns. He took up a seat next to the deceased. Later "a group of guys got into the bus". Deceased said something to them "about ... gangsters". One of them took offence and approached deceased. He had an object which looked like a knife. When he saw this, the witness became afraid. He got up and ran to the front of the bus. The door opened and he was pushed out. He never saw what happened behind him. He accordingly never saw deceased being stabbed.

It will be apparent that the trial court was faced with two conflicting versions as to how deceased met his death. On that of the State it was appellant who, bearing a grudge against deceased, killed him. According to appellant, however, deceased was

stabbed by an unidentified member of the gang consequent upon deceased's provocative behaviour. Before us, counsel for appellant, stressing that the State case rested on the evidence of a single witness (the bus driver died before the trial), strongly attacked the trial court's credibility finding on a number of grounds. In summary the argument was the following:

- (i) Johns' veracity should have been held to have been suspect. The witness would have been keen to falsely implicate appellant because appellant was on the evidence (and contrary to appellant's own version) a notorious gangster; he might have been influenced by members of the deceased's family to untruthfully incriminate appellant; it was reasonably possible that he was mistaken as to the exact role appellant played on the bus; when he reported the matter to deceased's

brother, he did not name appellant as the assailant; instead of himself going to the police they had to seek him out (five days after the murder); he bore appellant a grudge because appellant had previously assaulted him and his brother-in-law.

- (ii) Johns was a highly unsatisfactory witness. This was because of numerous contradictions between his evidence and a statement (in the form of an affidavit) he made to the police on 21st January 1987 (ie five days after the crime). They related to the following: whether he saw only the butt of appellant's knife or whether he was able to identify its make (as a three Star Okapi); did appellant take out his knife from his right hand side or from his back pocket; whether appellant stabbed deceased in the chest

or in the neck; when exactly, consequent upon being accosted by appellant, deceased stood up; whether appellant stabbed deceased twice or thrice; where deceased was when a co-accused of appellant (he was convicted of assault) stabbed him; whether it was only appellant and his co-accused who stabbed deceased or whether a third person called Gerald Lamlettie also did so; was it deceased's brother who actually reported the matter to the police or did appellant himself do this.

- (iii) There were certain improbabilities inherent in the evidence of Johns. He testified that besides the assault on deceased by appellant and his co-accused, deceased had been kicked and provoked by other members of the gang. Yet the post-mortem report does not reflect any injuries

to deceased besides the stab wounds. The co-accused's attack on deceased ought to have caused a more serious injury than the superficial one found. It was also improbable that appellant would admit to the bus driver that he had killed deceased.

- (iv) There was no warrant for rejecting appellant's version. It was supported by the evidence of Colin Davids. He stated that he was friendly with deceased and that he regarded appellant as a gangster. It was therefore unlikely that he would testify falsely in favour of appellant.

I do not propose to deal with the argument in detail. For the most part, so it would seem, it was one which was considered by VAN HEERDEN AJP. He nevertheless came to the conclusion that whereas Johns was "a good witness" appellant "was not a satisfactory witness

and was indeed ... an untruthful witness". I am not persuaded that these findings were unjustified. I commence with the former. The learned judge was mindful of Johns being a single witness and of the approach to such a witness's evidence. There is no room for the reasonable possibility that Johns' account of what appellant did was a mistaken one. The position in which he was sitting gave him a good vantage point to observe the whole incident. There was sufficient lighting in the bus to enable him to do this. He knew appellant well. Nor despite him having been a friend of deceased is there good reason for impugning the witness's honesty. He did not himself approach the police because he was afraid of appellant. His failure to do so in itself shows that he was not keen to involve appellant in the murder. It is somewhat strange that he did not tell deceased's brother who had stabbed deceased. However, Johns adequately explained this on the

basis that "as soon as I told (him) he phoned the police and he ran off down to where the party was lying. I had no time to tell him anything". There are many examples of him being a fair witness. Thus (to mention some) he readily admitted that he was friendly with deceased, that he did not tell deceased's brother that it was appellant who had attacked deceased, that he was told that the place where deceased had been stabbed was in the chest and that he did not understand what appellant said to the bus driver. (This he found out afterwards; he remembered the language used and asked someone what it meant.) Generally I do not get the impression that he exaggerates the case against appellant. His description of events was a consistent and coherent one.

Clearly there are discrepancies between the witness's evidence and his police statement. However

the trial court's attention was drawn to them. Its conclusion was that they were not "of such a material nature (as) to discredit the witness". I think that what was meant was that they did not, to any significant extent, detract from his credibility. In my opinion no fault can be found with this conclusion. Contradictions per se do not lead to the rejection of a witness's evidence. As NICHOLAS J observed in S vs Oosthuizen 1982(3) S A 571(T) at 576 B - C, they may simply be indicative of an error. And (at 576 G - H) it is stated that not every error made by a witness affects his credibility; in each case the trier of fact has to make an evaluation; taking into account such matters as the nature of the contradictions, their number and importance, and their bearing on other parts of the witness's evidence. VAN HEERDEN AJP obviously did this. Certain of the so-called contradictions were

correctly described by the learned judge (in an aside to counsel) as "piffling". In some cases it is apparent that the witness's memory for the finer details of the incident were less clear when he testified than at the time he made his statement (some eighteen months before). This is understandable. As regards where the deceased was stabbed he conceded, as I have indicated, that he had subsequently been told (by family of the deceased) that it was in the chest and not in the neck as he had alleged in his statement. It would seem that the wound was in the upper chest and therefore not so far removed from the area of the neck. His assertion (in his statement) that "I contacted the police" is I think explainable on the basis that it was he who was instrumental in the matter being reported to the police. For the rest his explanation was that although his statement had been correctly recorded (he conceded that

he had read it over before signing it), it did not truly reflect what he had said. I can see no reason for not accepting this. As GREENBERG JA in R vs Steyn 1954(1) S A 324 (A) at 335 F - H pointed out, statements made to the police in the course of the investigation of a crime and preparation for a prosecution do not always accurately represent what the witness has said. Reliance was also placed on Johns having contradicted himself in the witness box. He did so, but only in minor respects.

An analysis of appellant's evidence shows that in a number of respects he admits that Johns was telling the truth. I have in mind the following: that appellant was (in the past) the leader of the SGF gang; that he boarded the bus at the same time as the group; that he walked past where the deceased was sitting; that there was a threat to kill deceased because of him having the previous month assaulted someone (though according to

appellant this threat was uttered by members of the gang); that outside the bus after deceased had been stabbed he spoke to Johns and told him to get back into the bus; and that there was a conversation between him and the bus driver (in Zulu). Some of these (and others) are referred to in the judgment a quo. It seems to me that on the probabilities they were correctly regarded as providing some support for the finding that Johns was a reliable witness.

The probabilities are, of course, often an important pointer to credibility. It is prima facie a cause for surprise that if, as Johns alleged, deceased was kicked and punched, no resultant injuries were found on him. The point was, however, unfortunately not put to the doctor when he gave evidence. It therefore lacks a firm factual foundation. It may be that there was bruising but that because of the colour of deceased's skin or the protective effect of his clothing, it was difficult to

detect. Similarly, the submission that appellant's co-accused's attack on deceased ought to have caused a far more serious injury must be rejected. It is true that Johns described the weapon used as a home-made sword and that according to the doctor the resultant injury was superficial. But that might have been due to the manner in which the blow was struck. I cannot agree that it is improbable that appellant would admit to the bus driver that he had killed deceased (assuming that he did so admit). Criminals frequently though unwisely out of bravado boast about what they have done. Reference has been made to Gerald Lamlettie. Johns described how he unsuccessfully attempted to stab deceased. I can see nothing improbable (as was suggested) in the witness's account of what Lamlettie did. In the result I do not think there are any improbabilities of any consequence in the State version.

The same cannot be said of appellant's

evidence. A basic improbability in his version is that deceased, being sober, would single-handedly have challenged members of a rival gang whom he knew to be armed and to bear a grudge against him. It is also unlikely that Johns would jeopardise his own safety (for which he feared) by giving false evidence against appellant. More especially is this so when he knew, as he must have, that there were a number of potential witnesses who could contradict him. VAN HEERDEN AJP quite rightly had regard to these factors. He also refers to numerous other unsatisfactory features in appellant's evidence. I shall not list them. Suffice it to say that here too there is no reason to differ from the trial court. Appellant contradicted himself; at times he was evasive; his description of the incident when he allegedly assaulted Johns and his brother-in-law is vague; his account of what happened in the bus was an incoherent one; in particular it

is unclear when deceased was stabbed or by whom; he could not explain why he did not go to the aid of deceased when the bus stopped.

Counsel for appellant did not argue that the evidence of the co-accused could be relied on as supporting appellant's version. He did, however, submit that Davids corroborated appellant. To a limited extent he does. But the court a quo was not at all impressed by Davids. I am not surprised. He contradicted appellant. His account is so lacking in detail, so imprecise on so many matters as to strongly suggest (to use the words of VAN HEERDEN AJP) that he was probably not on the scene at all.

It is true that Johns' evidence was, for the reasons stated, not without blemish and that on the issue of whether it was appellant who stabbed deceased, such evidence stands alone. The trial court, however, did

not misdirect itself and its credibility finding in favour of the State was a strong one. It was made after a careful evaluation of the evidence and the court's impressions of the witnesses. In these circumstances the appeal can only succeed if we are convinced that the conviction was wrong. I am not so convinced. On the contrary, weighing the version of Johns against that of appellant, I think appellant's evidence was correctly rejected. In the result the appeal against the conviction must fail.

This brings me to the appeal against the finding that there were no extenuating circumstances. Four factors were relied on in this regard. They were (i) the fact that deceased had the previous month severely assaulted a friend of appellant; (ii) the offence was not pre-planned; appellant only decided to stab deceased on the spur of the moment when he saw deceased in the bus; (iii)

appellant was under the influence of alcohol; (iv) in stabbing deceased he acted merely with dolus eventualis. The same argument was rejected by the trial court. As to (i), it was pointed out that the process of the law had already been put in motion. Deceased was being charged with attempted murder. Appellant was to have been a witness in the case. In these circumstances, so it was held:

"This is not a matter where the deceased had already been acquitted and the accused had, rightly or wrongly, believed that he had been wrongly acquitted and had thereby escaped his just punishment. The deceased had not killed a relative of or someone near and dear to the accused. It was a fight between rival gangs. There was no provocation in the bus to the accused to resort to this killing. He, as a witness in a case that had already started to take its course, was by his deed in this case interfering with the just process of the law".

It was accepted (as regards (ii)) that the murder was not pre-planned. However, it involved a deliberate attack on deceased. Appellant had first walked past deceased and then returned to him; when he drew out his knife, he said

he was going to kill deceased (because of the incident involving his friend); and he stabbed deceased twice, the first time in a vulnerable part of the body. There was no evidence that appellant was affected by the two beers he had drank shortly before the incident ((iii) above). And (as regards (iv)) appellant had acted with dolus directus. The court's conclusion was that in these circumstances, especially seeing appellant was a mature man of 26, his moral blameworthiness had not been reduced. In my opinion the reasoning is unassailable. Accordingly the appeal against sentence cannot succeed.

The appeal is dismissed.

NESTADT JA

CORBETT, CJ)
) CONCUR
VAN HEERDEN, JA)