CRIMINAL APPEAL 37/96

In the matter between:

THEMBA METHULA

VS

REX

CORAM

: STEYN JA

: SCHREINER JA

: LEON JA

FOR THE APPELLANT : IN PERSON

FOR THE CROWN :

JUDGMENT

Steyn JA

Appellant was charged with a crime of murder of Dumsani Matsebula on the 7th October 1994. The Crown conceded that there were extenuating circumstances and he was sentenced to 6 years' imprisonment. He appeals against both conviction and sentence.

The deceased met his death at the homestead of Ntethe Khumalo where liquor was sold. On the evening in question a number of people had gathered in a room set aside for the sale and consumption of liquor. However at the time of the stabbing dealt with hereafter the liquor had run out and it appears from the evidence that liquor played no material party in the events leading to the death of the deceased.

The Crown case is there was a quarrel between the appellant and one Chicco, a Mozambican, arising out of Chicco's behaviour in regard to the appellant's girlfriend. The deceased intervened in the quarrel and the appellant stabbed him once in the chest inflicting a wound which caused haemorrhage of the heart. Not very long afterwards he died from the consequent bleeding.

The only issue in the case is whether the fatal wound was inflicted by the appellant. He denies that he had any part in the death of the deceased but he does not place blame for the killing upon any other particular person. He merely denies any part in it himself. The view of the people who were present at the time was not to the same effect because after stabbing the deceased a large number of them chased the appellant. The purpose of chasing him was to take him into custody and deprive him of possession of a knife which had been used in the killing.

The Court which consisted of Matsebula J delivered a short judgment. The learned Judge was very much aware of the discrepancies between the evidence of the Crown witnesses concerning the detail of the event. In his judgment he says and I quote:

'the defence through Mr. Howe had addressed the court and argued that there were discrepancies

about where one witness was standing and what happened first and the sequence of the happening but the court views this as very insignificant in the light that when things are happening witnesses are not in the habit of giving the order of the sequence exactly as each and every

witness say.'

The learned Judge goes on to indicate that he was very much aware that the onus always rests on the Crown to prove its case beyond reasonable doubt but also draws attention to the fact that truth beyond any doubt is not required. The learned Judge quotes from a judgment of Denning J as he then was, MILTON VS THE MINISTER OF PENSIONS 1947(2) ALL E.R. 327/373 which is a civil case dealing with pensions. The definition of 'reasonable doubt' by Denning J is probably an as accurati as any which may be formulated. (See STATEGATE GLEGG 1973 (1) SALR @34 & 38: SA HOFFMAN AND ZEFFARD S.A.L.E. 4ED 525/526.

There is a collection of South African authorities on the subject in STATE VS KUBHEKA 1982 (1) SALR 534(W) at 536, 539. The learned Judge did not make any findings as to the demeanour of the witnesses of the Crown or the appellant or a witness called by the Court. It must be assumed that any conclusions on demeanour would not be helpful in reaching a decision as to which of two appellent's conflicting versions should be accepted. Similarly, it would appear that in most instances conflict of evidence, the probabilities of little assistance.

There were a substantial number of people present at the moment of the stabbing. The Crown chose a few witnesses who seem to be able to give positive evidence of the surrounding circumstances of the killing. There must have been one or more persons who were responsible for initiating the chase which followed the stabbing. They were not called. It must be assumed that they were not identified by the police who

were investigating the matter or by the representatives of the appellant. There is no indication on the record that the Crown has withheld any evidence which may have been favourable to the appellant.

The witness Ntethe Khumalo who was the proprietor of the drinking premises was not called by either party. He was called by the Court and gave evidence which supported the Crown although it was not consistent with everything that has been said by all the Crown witnesses. This could not have been so, because the witnesses for the Crown were not consistent as between themselves in all aspects of their evidence.

The ultimate question in this appeal seems to be whether the Court was justified in overlooking the apparent discrepancies in the evidence of the Crown witnesses and that this evidence was sufficient to warrant a finding that notwithstanding what the appellant said the Crown witnesses should be believed on the central issues.

Sifiso Sithole who was reluctant to give evidence said that the customers were leaving the drinking room and he came out with the appellant's girlfriend. The appellant was in front of him and the deceased was behind him. The deceased said to the appellant whom he addressed as "cousin" that he should not come with his wives to a drinking place because 'they talk to us' presumably meaning the male drinkers. The appellant started quarrelling with him. The appellant then produced what looked like a knife and stabbed backwards through the space between the witness and the appellant's girlfriend. He says that the appellant struck at the deceased many times below the middle of the chest towards the stomach. This version seems prima facie inconsistent

with the medical evidence from which it appears that there was only one stab wound which was said about the doctor to be obliquely placed over the front of left the chest from midline and 6cm medial to

the nipple. However it may be all of the blows struck many times, using the words of the witness, missed the target altogether and only one directed above the general area following the target of the blows struck the deceased. It was dark and the opportunity for accurate observation could not have been good.

The second Crown witness a lady by the name of Thabsile Luthuli related how she was with the deceased and the appellant. When Chicco came up and spoke to the appellant's girlfriend. The appellant from a kneeling position spoke to Chicco,. They stood up and the conversation continued and the witness did not hear what was said. Saying that Chicco denied that he was inlove with appellant's girlfriend, the appellant left the room and when he came back he started to quarrel again with Chicco. At this stage the deceased intervened and tried to prevent violence. He took the appellant by the shoulders guided him out of the room saying that he did not wish to fight with him.

The deceased then came back holding the lower part of his chest. The accused must on this version have come back with the deceased because the witness says that the accused went out again and the girlfriend was also outside together with other people who were in the house. The witness says that he did not see Sithole with the deceased behind him and the appellant infront of him.

The version of Sithole and Thabsile Luthuli cannot be reconciled and the observation or recollection of one or

both of them must be assumed to be faulty. Richard Msibi says he was sitting in a corner of the drinking room watching what was going on. He says he saw the appellant and the deceased talking and heard part of the conversation, when the appellant said, 'cousin we are not fighting with you we know this is your girlfriend.' He then saw the deceased going to where the elders were sitting, took a knobstick saying that this person had injured him. The deceased then went to the door where he fell down. The witness went outside and saw the appellant with a knife or something which appeared to be a knife. It was then that the chase took place. This witness's evidence is by no means clear. He did not see the appellant strike the deceased and it is not apparent whether this took place inside or outside the drinking room.

Ntethe Khumalo proprietor of the bar and uncle of the deceased was called to the defence. He did not see the stabbing. If his evidence is accepted it would appear that the deceased was stabbed inside the house. It is apparent he did not know who stabbed the deceased because before chasing after him when the killing had been effected, he had to ask others who were present at the scene who had stabbed his nephew.

After some hesitation I have reached the conclusion that notwithstanding the discrepancies in the evidence including the evidence of the witness called by the Court, the appeal should be dismissed.

The witnesses were trying to describe what they saw and heard and there is nothing to point to the possibility of some other person having stabbed the deceased. What proves the Crown case beyond reasonable

doubt, is, in my view, the fact that after the stabbing the appellant was wielding a knife. This fact was, I believe, proved beyond any doubt and there is no doubt that it was he who was being chased by the crowd to dispossess him of the knife. No question arises as to any other person having a knife.

I am therefore of the view that the appeal against conviction should be dismissed. The sentence of 6 years' imprisonment is in the absence of any particular circumstances not by any means excessive.

The Court took into account the fact that the appellant was a first offender and a sole breadwinner of his family. One cannot but feel very sorry for the family when a person is sentence to imprisonment and deprived of the opportunity of providing for the family. However a very important consideration in

a decision as to the appropriate sentence is its deterrent effect. This deterrent effect will affect both the accused and the society generally and discourage the use in the community of knives or similar dangerous weapons.

I am therefore of the opinion that the sentence was

appropriate and the appeal against the sentence is dismissed.

J.H. STEYN JA

I agree :

W. H. R . SCHREINER JA

I agree :

R.N.LEON JA

Delivered on 4th April 1997.