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Case no 736/92

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

VINESH MAHARAJ ..... Appellant

AND

THE STATE ..... Respondent

Coram: E M GROSSKOPF, EKSTEEN et HARMS, JJA

Heard: 24 March 1994

Delivered: 29 March 1994

J U D G M E N T

EKSTEEN, JA :

The appellant was charged before a regional magistrate with murder. He was convicted and sentenced to eight years imprisonment of which three years were conditionally suspended. His appeal to the Natal Provincial Division was dismissed, as was his application for leave to appeal to this Court. A petition to the Chief Justice for leave to appeal against his conviction, brought in terms of section 316(6) of the Criminal Procedure Act 51 of 1977, was however granted.

The allegation in the charge sheet against the appellant was simply that on or about

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23 March 1991 he had unlawfully and intentionally killed one Arthur Naidoo. When this charge was put to the appellant he admitted having inflicted a stabwound to Arthur Naidoo ("the deceased") which had caused his death, but alleged that he had done so in self defence. The onus was therefore on the State to rebut this defence and to prove beyond a reasonable doubt that the appellant's action in killing the deceased was unlawful. (S v Teixeira 1980 (3) SA 755 (A) at 764 F.) In an attempt to discharge this onus the State called two witnesses viz Matthews Naidoo, a brother of the deceased, and a cousin of his called Shamogen Naidoo. Matthews told the court that on the night of

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23 March 1991 at about 11 o'clock he and the deceased were driving down Bombay Road, Pietermaritzburg in a Mazda Rustler bakkie. The deceased was the driver. On the way they came across one Trevor Naicker standing in the middle of the street, apparently under the influence of liquor. The deceased stopped and asked Trevor what he was doing in the middle of the road. Trevor reacted by throwing a beer bottle at the van and kicking the right fender. Trevor appeared to be with "a crowd of people" and so the deceased and Matthews felt it advisable to drive on to their home rather than to confront Trevor there and then. Matthews said that he noticed the appellant at the scene. He was lying on the pavement without his

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shirt on.

At home they asked Shamogen and two of his friends to come with them in the van. They then drove back to the scene of their confrontation to look for Trevor. At first Matthews said that they just wanted to talk to Trevor "and ask him what his problem was" but later he conceded that their intention was to "sort Trevor out" for damaging their van.

Driving down Sheba Road they came across Trevor and his "crowd" of friends. The deceased drove up to them and spoke to Trevor about his behaviour. This time Trevor reacted by throwing a brick at the windscreen,

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at which the deceased drove straight at the "crowd" of people knocking Trevor down. The "crowd" "dispersed" and the deceased reversed back to where the injured Trevor was. Matthews first said that Trevor was "lying", but later that he was "crouching", and eventually that he was "sitting" at the side of the road. They picked him up, put him on the back of the van, and drove off to a nearby shopping centre where they drafted a document for Trevor to sign accepting liability for the damage done to the van and agreeing to pay compensation. While they were busy drawing up this document Matthews saw the appellant come walking down the street towards them. The deceased was, for some

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reason or other, not with the rest of them at the back of the van but was standing in front of the van some 10 metres away from it. Matthews said that the deceased was investigating the damage to the vehicle. This explanation that he should be investigating the damage at a distance of 10 metres seems highly unlikely and most improbable. However Matthews went on to say that when he first saw the appellant he was some 20 metres from the deceased. He then heard the deceased cry out, and when he looked up he saw the appellant some 10 metres away from the deceased. The deceased had been stabbed in the head. Matthews did not see the actual stabbing. In cross-examination Matthews gave a different version of these events and

said that when he heard the deceased cry out he saw the appellant standing right next to him. Deceased then ran away and Matthews and his friends went to the assistance of the deceased. They picked him up and took him to hospital.

Trevor was apparently so badly injured that they considered it desirable that he, too, should be taken to hospital. With regard to the injuries sustained by Trevor the following passage in the cross-examination of Matthews would seem to reflect a certain prevarication and lack of candour on his part. He was being cross-examined on the condition of Trevor after he had been knocked down by the van,

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and after the deceased had reversed back to him when he was sitting or lying in the street.

"Was Trevor injured? - At that moment. At that moment he wasn't? - He wasn't injured.
When was he injured then?- Well I don't know.
You don't know. I see. Did you ever offer to take Trevor to the hospital? - Yes.
And what did Trevor say? - He will go to the hospital.
Did you take him? - Yes, yes that's how he got to the hospital."

If the injuries for which Trevor was taken to hospital were not sustained by being knocked down by the van, it tends to lend support to Trevor's allegation that he was assaulted by

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his captors and sustained injuries as a result of such assault.

At the end of Matthews' evidence, in further cross-examination, he conceded that on his way to the hospital he stopped a police van, that the police then took them to the hospital, and that at the hospital he was arrested for "drunken driving". At the police station he was "taken down for a blood test" and then formally charged with driving under the influence of liquor. He also conceded that earlier that evening he and the deceased had gone to a club where they played pool and "had a couple of beers".

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If therefore Matthews was under the influence of liquor that evening one may assume that in all probability the deceased was too. Neither the district surgeon who presumably tested Matthews and took a blood sample, nor the policeman who arrested him, was called to depose to the degree of his intoxication.

The other State witness, Shamogen Naidoo, also deposed to Matthews and the deceased arriving that night at the place where he and his two friends were, and asking them to accompany them in the van. He says that he was not told where they were going to or what they intended doing. If one bears in

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mind that this was after 11 p m and that both Matthews and the deceased were intoxicated and so incensed at the damage done to their van that they had made up their minds to take Shamogen and his other two friends and to go back at once to "sort Trevor out", it seems most improbable that Shamogen should be so completely ignorant of the mission on which he was being taken. It seems equally improbable that, where Matthews and the deceased knew that Trevor had the support of "a crowd" of friends, and that he was in an aggressive mood, they would have returned to the scene so soon afterwards to "sort (him) out" without arming themselves in some way. Yet

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both Matthews and Shamogen deny that any of them were armed at all.

When the deceased drove up to the group of people in Sheba Road an exchange of words between Trevor and the deceased ensued. Trevor appeared to be aggressive and threw a brick at the windscreen of the van. His friends then threw "many more stones and ... things" at the van and at the people on the back of the van, whereupon deceased drove through the "crowd" "in order to disperse them". In the process Trevor was knocked down. The deceased then reversed back to where Trevor was. All of them got out of the van, went up to Trevor, and began asking him why he

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had damaged the van. Trevor was now completely cowed and agreed to pay for the damage he had caused. He was then taken to the nearby shopping centre to sign a written undertaking to that effect. Shamogen too said that while the document was being drafted at the back of the van, and while the deceased was in front of the van inspecting the damage, the appellant appeared on the scene, walked up to the deceased, and stabbed him in the head.

Shamogen denied any knowledge of either Matthews or deceased being intoxicated. As to his own state of sobriety he denied being drunk but conceded that "maybe earlier on in the

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day" he may have had something to drink - "maybe about 15h00 during that day I had a beer with some friends ... It was after work". This seems to be a somewhat equivocal and unconvincing denial.

The appellant and Trevor also gave evidence. The appellant said that on the night in question he was walking down Bombay Road with Trevor and two other friends, when he was accosted by the deceased and Matthews in their van. They swore at him and he swore back. They then got out of the van and chased him, but when they saw Trevor and his two friends coming to his aassistance, they got back into the van and drove off.

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The four of them then turned into Sheba Road. There the deceased and his friends again drove up to them and knocked Trevor down. He tried to assist Trevor but when the occupants of the van came running towards them, he ran away. When he returned to the scene some short while later he was told that Matthews and the deceased had taken Trevor away. He went to look for them where they lived, but when he couldn't find them there, he went to the shops where he knew they often "hung around". When he got there he was set upon by the deceased and his companions. He was severly beaten with sjam-boks, knobkieries and bushknives. Fortuitously

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he noticed a knife lying on the ground. He snatched it up and lashed out blindly at his attackers. Then he noticed a gap and ran away. He was chased and again set upon. This time the arrival of the police saved him from further harm. By consent a medical certificate was handed in detailing a cut wound across appellant's forearm, several scratch abrasions, deep drag abrasions, a linear abrasion across his left flank and a laceration on the right occiput found by Dr De Maney on 25 March 1991 - i e a day or two after the events referred to above. Neither of the two State witnesses could offer any suggestion as to how

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the appellant came by these injuries. Trevor Naicker's evidence was essentially to the same effect.

Neither the appellant nor Trevor Naicker was particularly good witnesses. It is true that their evidence-in-chief was badly led at the trial, but nevertheless there is much justifiable criticism which may be levelled at their evidence. The onus, however, as I have indicated, rested throughout on the State to prove the guilt of the appellant beyond a reasonable doubt. It was not necessary for the court to have believed the appellant, still less to have believed his evidence in all its details.

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but if that evidence could reasonably possibly have been true, then it could not have been rejected and left out of account. (R v M 1946 A.A. 1023 at 1027.) The trial court was therefore called upon in the first place to examine the evidence of the State witnesses to see how much reliance could be placed on it. In this respect the judgment of the magistrate is not very helpful. All he says about them is :

> "The two State witnesses corroborated each other on material respects of the entire sequence of events up to and including the fatal stabbing of the deceased. The court could find no inherent improbabilities in their evidence."

This cursory treatment is not good

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enough (see Schoonwinkel v Swarts Trustee 1911 TPD 397 at 401; S v Singh 1975 (1) SA 227 (N) at p 228 and S v Guess 1976 (4) SA 715 (A) at p 718 E - 719 A). The magistrate is not correct when he says that the witnesses "corroborated each other on material respects of the entire sequence of events". Shamogen was not a witness to the first confrontation between the deceased and Matthews with Trevor and the appellant in Bombay Road. He could not, therefore, corroborate Matthews on this material link in the chain of subsequent events. There were also other aspects where the two witnesses did not support each other such as Shamogen's allegation that "stones .... and things" were thrown at the

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van just before Trevor was knocked down, and whether Trevor was injured as a result of being knocked down or not. The magistrate, therefore, misdirected himself in this respect.

A more serious misdirection, however, was his finding that there were no inherent improbabilities in their evidence. I have pointed to several grave improbabilities, which the magistrate had clearly not considered. Moreover, he does not seem to have had any regard to the probable intoxication of both Matthews and the deceased, and the effect that this must have had on their behaviour that night. This aspect might well have been

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elucidated had the State called the district surgeon who examined Matthews, and the policeman who arrested him. The policemen who arrested the appellant would also, in all probability, have been able to give material evidence on matters presently in dispute.

Having regard then to all the evidence before the trial court it seems to have been common cause that the appellant was in Trevor Naicker's company at the first meeting with the deceased in Bombay Road. Matthews says he saw him lying on the pavement near the "crowd" of people. Nowhere in the evidence is this "crowd" more closely circumscribed, and

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it would seem to be reasonably possible that it merely consisted of Trevor, appellant and his two friends. At this first confrontation the deceased, who was probably intoxicated, was the driver of the van and was the one who berated Trevor for standing in the middle of the street.

When discretion prompted the deceased to strengthen his position by fetching reinforcements before pursuing his confrontation with Trevor and his friends, he returned to his home where he knew that Shamogen and his two friends were waiting. Probably suitably armed this group immediately set off to find Trevor with the set intention of compelling him to accept

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liability to compensate them for the damage he had caused to the van. Again the deceased was the leader. He drove up to Trevor where he was standing with his "crowd" of friends and started to confront him. When Trevor reacted aggressively the deceased rode him down. Appellant says he was present when this happened, and that had he not jumped out of the way, he too would have been knocked down. Despite Matthews' and Shamogen's evidence that they did not see the appellant on that occasion, appellant's evidence may reasonably possibly be true. When the deceased and his four companions then descended on Trevor appellant ran away.

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So much may reasonably be deduced from the evidence. The next crucial aspect of the case, viz, the infliction of the fatal wound, seems to be less clear. Matthews' version of the deceased standing some 10 metres away from the van apparently inspecting the damage while the rest of them stood at the back of the van extracting a written undertaking from Trevor, is in itself highly improbable. Not only is it improbable that he would have inspected the damage at that distance, but also that he as the leader of the expedition to capture Trevor and compel his submission, should apparently lose interest in the attainment of this goal at the very moment of its realization.

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Deceased knew the appellant and knew that he was a friend of Trevor's. Matthews also knew that he was one of Trevor's friends that evening. Yet when Matthews saw appellant approaching he seems, on his evidence to have paid no further attention to him at all. This also seems improbable. In the light of all these improbabilities there must be a doubt as to the reliability of Matthews' description of how the fatal wound was inflicted. There must be a certain improbability in the allegation that the appellant simply walked up to the deceased and stabbed him in the head without any provocation and without the deceased, who was himself in a somewhat aggressive mood, doing

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anything to defend himself. The appellant's evidence that the deceased and his friends came to him and attacked him, may therefore, reasonably possibly be true. As I have said, it was not necessary to believe the appellant's evidence, but it was necessary to believe that the evidence of the State witnesses was true beyond a reasonable doubt. The magistrate's failure to evaluate the evidence of the State witnesses properly, and his misdirections in this regard, leave a doubt as to the true circumstances in which the deceased sustained his fatal injury. The

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State has therefore failed to prove that the appellant's act was unlawful

The appeal is allowed.

J.P.G. EKSTEEN, JA

E.M. GROSSKOPF, JA)
HARMS, JA) concur