

In the Supreme Court of South Africa
In die Hooggeregshof van Suid-Afrika

DIVISION).
AFDELING).

**APPEAL IN CRIMINAL CASE.
APPEL IN KRIMINELE SAAKI.**

Appellant.

versus

Respondent.

Appellant's Attorney—
Prokureur van Appellant

Respondent's Attorney.....
Prokureur van Respondent

Appellant's Advocate.....
Advokaat van Appellant

Respondent's Advocate
Advokaat van Respondent

Set down for hearing on:—
Op die rol geplaas vir verhoor op:—

[illegible]

Defendant - 8/4/55

Original Version

Amelia

Registered
1/4/55.

IN THE SUPREME COURT OF SOUTH AFRICA

(Appellate Division)

In the matter between :-

WELLINGTON MTONZE

Appellant

and

R E G I N A

Coram: Centlivres, C.J., Fagan et Steyn, JJ.A.

Heard: 25th. March, 1955.

Delivered: 1 - 4 - 1955

J U D G M E N T

STEYN J.A. :-

The appellant was convicted by de WET J., sitting with assessors, of the murder of Ephraim Molambo, and sentenced to fifteen years imprisonment with hard labour. It is common cause that the appellant inflicted certain wounds on Ephraim's head with an iron bar and that these wounds resulted in his death; but according to the appellant, Ephraim had first attacked him with the bar, he (the appellant) had wrested it from him and had struck the fatal blows in an attempt to free himself from Ephraim's grip. If that is true, or may reasonably be true, he would not be guilty of murder. The court a quo rejected the appellant's version of what had taken place and the question

on/.....

on appeal is whether it erred in doing so.

It appears that the appellant and the deceased lived in Orlando in houses which are thirty yards apart, separated by a lane about five yards wide. The front door of the appellant's house faces the back door of the deceased's house and there are gates giving access from each house to the lane. There are electric lights in a street passing in front of the deceased's house, but in this lane there are none.

On the night in question the appellant visited the deceased's house. The appellant says that he was invited by Jemima, a woman living in the same house, but she denies the invitation. It is admitted that there had been some unpleasantness between the appellant and the deceased over unripe peaches which the former had picked from the latter's trees, a considerable time before 20th August, 1954, the day of the alleged murder. The suggestion is that the appellant came to settle this quarrel.

There is no clear evidence as to what happened inside the house, but it is not disputed that the deceased ordered the appellant to leave the house. He left, going through the back door, and after a while the deceased came through the same door and went into the back

yard,/.....

yard, either to close and lock the back gate or because he had been challenged to come out by the appellant. According to the witnesses for the prosecution, the deceased was ~~threatened~~ ^{unarmed} and the appellant attacked him at or near this gate with an iron rod which he had brought with him into the deceased's house, felled him to the ground and thereafter inflicted further injuries, moving in an agitated manner to and from the body and uttering words to the effect that he wanted to finish off the dog.

This version rests upon the evidence of Jemima and of two other witnesses, Trifina and Maisie, a girl twelve years of age. Both Trifina and Maisie are related to the appellant. Trifina was a visitor in his house at the time and Maisie was living with him. On the night in question both of them were with Jemima in the deceased's house when the appellant arrived there. All these witnesses say that the appellant, when he entered the deceased's house, had an iron rod in his hand.

Maisie's evidence as to what transpired thereafter, is somewhat confused. In her evidence in chief she began by saying that the appellant left the deceased's house with herself and Trifina, but then continued to say, almost in the same breath: "When we were

"in/.....

"in the house we heard the gate making a noise and we came
"out and we found the deceased lying on the ground." She
stated further that the appellant struck the deceased one
blow with the iron rod while he was on the ground, that he
then took a stick at his house, after he had put the iron
rod down, presumably also at his house. She and Trifina
then walked home. She got there first. Under cross-
examination she said that they did not walk together -
"I went home first and she came afterwards." When Trifina
got home she did not ^{say} ~~see~~ anything. She (Maisie) did not
again leave the house until shortly after when she went
with Trifina, by the back door, to report at the municipal
offices. Before she left and whilst standing on the inside
of the door, she saw the appellant hit the deceased with a
stick at the gate. That~~x~~, she said, was the only time she
actually saw the appellant strike the deceased. That
means, of course, that she did not see him strike the de-
ceased with the iron rod. When it was put to her that at
the preparatory examination she had said that on her way
to the police she saw the deceased lying at the gate and
the appellant hitting him with the iron rod, she denied
having said so, and maintained that she first saw him hit
the deceased with the rod and then with the stick, denying
that/.....

that she had stated in evidence that the only time she saw him hit the deceased was with the stick. When recalled by the court at a later stage she first of all denied that she and Trifina told Winnie ^{the wife of the appellant,} anything of what had happened at the deceased's place, then admitted that Trifina did do so, and thereupon concluded this part of her evidence by stating that she was crying outside and did not know what Trifina said to Winnie. In view of all this I can only regard her evidence as altogether unreliable. It is intrinsically of so little value that it would hardly be of any assistance in deciding whether or not the appellant struck the first blow or took the bar from the deceased.

Trifina is the only other witness who claims to have seen the commencement of the assault. After describing how they had left the deceased's house, how the appellant, when outside, had sworn at the deceased, saying "Come along, follow me out", and how the deceased, on coming out, took a lock to secure the gate, she proceeded to say : "We all got through the gate and the deceased came "up to the gate and the deceased pushed me away and I fell "into the passage and the accused then struck the deceased "on the head." She was then just over a pace away from the appellant/.....

appellant and saw him lifting his hand and striking with a length of iron. The deceased fell to the ground and she did not see him rise. She thereupon ran home to tell her mother i.e. Winnie, and then went to the municipal offices to make a report. ^{i.e. after her return from the municipal offices,} Later she again saw the appellant hitting the deceased while he was lying on the ground, and heard him saying : "Wait, let me finish off the dog." Jemima was then on the scene trying to assist the deceased. Maisie had gone home. She had already run home when the first blow was struck. Trifina denied that the appellant had ever used a stick upon the deceased. Under cross-examination she stated that she went straight to the municipal offices from the appellant's house and did not at that stage again look at the deceased. Asked whether she saw the appellant make any further assault, other than the first blow, she replied : "I only saw the one blow and then I went inside to report to my mother, and he may have struck him more blows after I left." On leaving the house to go to the municipal offices, she went nowhere near the deceased. It was put to her that at the preparatory examination she had stated that after having made the report to her mother, she again went outside to the gate, and had described what took place there

at/.....

at that stage. This she admitted, but continued: "When
"I did go back to the deceased it was not after I came from
"the house, it was after I had gone from the house to the
"offices and from the offices I came back to where the de-
"ceased was and it was then that I found Jemima trying to
"prevent the accused from further assaulting the deceased
"and it is then that the accused said 'Let me finish off
"this dog.' "

From the above it will be apparent
that there are a number of inconsistencies in the evidence
of Trifina and Maisie, and that both departed from similar
statements made at the preparatory examination as to what
they saw immediately after the report made to Winnie. In a
case such as the present, discrepancies are, of course, to be
expected, and do not necessarily cast any doubt on the
truthfulness of the witnesses. It was dark, there must have
been great excitement, and it would be nothing unusual if
the accounts given displayed marked divergences. In so far,
also, as the discrepancies may affect the credibility of
Trifina, they are of less consequence than they would have
been if Maisie had not on her own evidence shown herself to
be an unreliable witness. What is more serious is the
change in Trifina's evidence as to the occasion on which

she/.....

she observed the continuance of the assault upon the deceased. That change, and the fact that also Maisie went back on a similar statement made at the preparatory examination, cast some doubt upon the credibility of that part of her evidence, and suggests that, so far as these events are concerned, she may merely be repeating what she had heard from Jemima. That in itself, however, does not necessarily mean that her evidence, to the effect that the appellant was the first to strike a blow, must be rejected. She says - and she is supported in this by Jemima - that she not only left the deceased's house with the appellant but pulled at him to get him out of the house. If that ~~is~~ accepted, it is not unlikely that she accompanied the appellant to the gate, and she may then very well have been with him when the first blow, which, according to her ^{felled the deceased,} evidence, was struck. It is true that according to Jemima, Trifina was already about to enter the appellant's house, or at any rate on her way to ^{it} when she (Jemima) came out of the deceased's house and saw him in the act of falling on to his back. But it was dark, she was excited and frightened, and admits that she was in such a state that, in regard to ^{the} subsequent movements of the appellant at any rate, she cannot say what happened. In these

circumstances/.....

circumstances, although Trifina's evidence may legitimately be criticised, it cannot be said that the trial court could not without error have accepted her statement that she was in the immediate vicinity when the assault commenced and saw the appellant strike the first blow.

Jemima does not claim to have seen the first blow that was struck. She merely saw the deceased fall to the ground. When she reached him, the accused was standing in the lane. He came back to the deceased several times and further assaulted him with the iron bar, saying "I want to finish off this dog." He chased her away from the deceased with what she took to be a knife. Also her evidence is not faultless. She contradicts herself in regard to the exact whereabouts of Trifina and Maisie, the time at which the deceased arrived at his house, the movements of the appellant after the deceased had fallen to the ground, and in regard to other minor details. These defects in her evidence are not, however, of such a nature that no reliance at all should have been placed upon it. It may well be that she is speaking the truth when she says that the appellant came to and left the deceased's house with the iron rod, and that the deceased came out of his house unarmed. It may be contended that it is unlikely that he would have come out

unarmed/.....

unarmed on being challenged by the appellant, who, to his knowledge, was armed with an iron ~~kn~~ rod. But Trifina was making an attempt to take him away, he had left the house without serious resistance, and it is not improbable that the deceased may have seen him moving towards the gate. The deceased may, therefore, in fact not have ^{anticipated} ~~attempted~~ an attack.

There is further evidence which in my view strongly supports the salient features in the evidence of Trifina and Jemima, and weighs heavily against acceptance of the version advanced by the appellant. He stated that he threw the rod into the deceased's yard after he had struck him to the ground. The rod identified as the one which the appellant had with him, was not found in the yard, but in the appellant's house. According to native constable Louisan Makhoak, who was sent to stand guard over the body of the deceased, he found no iron rod there, but made enquiries of Trifina and Maisie. They entered the appellant's house with him and Trifina there took the rod from behind a door and handed it to him. According to Trifina she handed it to him outside the house, but however that may be, it is ^{clear} ~~not disputed~~ that the rod came out of the appellant's house after the assault. It has been

suggested/.....

suggested that Trifina, who is not on good terms with the appellant, may have picked it up in the deceased's yard and put it in the appellant's house, either to manufacture or conserve evidence against him. This suggestion meets with various difficulties. In the first place, Trifina was not on such bad terms with the appellant that she found it necessary to avoid him ^{or his} ~~in his~~ house. She was staying at his house on a visit. In the second place, she must have acted with cool and deliberate calculation when everyone else was in a state of excitement, and in the third place she did the unlikely thing, according to her own evidence, of handing the rod to the native constable outside the house, when, if she desired to manufacture evidence against the appellant, she would have wanted it to be found in his house by the police. The appellant denies that any such rod was left in his house, but Winnie admits that she had an iron rod in the house, albeit one of a different appearance. In these circumstances the suggestion that Trifina placed the rod in the appellant's house does ^(apart from Maisie's evidence) not appear to me to negative the inference that the appellant himself must have placed it there. In fact, even Maisie may be speaking the truth when she says that he did do so. It is unlikely that he would have left it there,

had/.....

had it belonged to the deceased, or had the deceased attacked him with it. He did himself go to the municipal offices, and what he took with him was not this rod, but a small stick. There he told George Mtembu that that was the stick with which he had struck the deceased, and gave as the reason for the assault, that the deceased had sworn at him. According to George Mtembu that was all he said. It is highly improbable that he would have given a reason without mentioning any assault upon himself by the deceased with the iron bar, if in fact such an assault had taken place.

On this evidence the trial court came to the conclusion that although there were a number of details on which the ~~former~~^C witnesses for the prosecution ~~may~~^{might} not be telling the truth, the salient points in the case against the appellant had been proved beyond reasonable doubt, "that is that the accused arrived at the house of the deceased armed with this iron bar and that at all relevant times up to the time that the accused was lying dead, or practically dead, he had the iron bar in his possession," and accordingly rejected the evidence of the appellant.

For the reasons indicated above, I am unable to find that this conclusion is not justified.

The/.....

The appeal ~~was~~ is also against the sentence, but no argument was addressed to this Court in that regard.

In my opinion the appeal should be dismissed.

L. C. Steyer

Centlivres, C.J.)	} Concur.
Fagan, J.A.)	

Trifina Mtetwa.
(Recalled).

hitting Mambo, i.e. the deceased, at the gate, and she kept quiet about it.

FURTHER CROSS-EXAMINATION BY MR. SPITZ: Was Maisie there when you told Winnie this? --- Yes, she was present inside the house.

And she was present there within hearing? She could hear what you were telling her? --- Yes, she heard it.

Counsel address the Court.

The Court retires to consider its verdict.

10 On resuming at 3.15 p.m.

JUDGMENT.

DE WET, J: The accused is charged with the crime of murder. There is no dispute about the fact that the blows which killed the deceased, were struck by the accused, and there is no dispute about the fact that a blow on the head caused a fracture of the skull and caused the death of the deceased.

It appears that the deceased lived opposite the accused, there being a small lane about five yards
20 wide inbetween the two houses. On the evening in question the daughter of the woman with whom the accused was living, i.e. Winnie, and another girl who had been living with him for a little while named Trifina, had gone over to the house of the deceased to visit Jemima,

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a woman who lived in the deceased's house as a lodger. Jemima says that the accused came to their house and sat down. He was carrying an iron rod, and he had that with him when he sat down. Jemima says that the deceased asked the accused why he was armed with an iron rod, and told him that he did not want him in the house and he must go. It appeared that there had been some minor trouble between the accused and the deceased, and they were bad friends. According to Jemima's evidence the
10 accused then said "If you don't want me in your house, I will leave", and he left with Trifina and Maisie. They went out of the back kitchen door, and as they went towards the gate the accused turned round and swore at the deceased by his mother's private parts, and the deceased then told the accused to leave his yard so that he could close the gate. At the time Jemima says she did not go out and did not see what happened next, but a moment or two later she heard a noise and went out, and she saw the deceased falling to the ground. The accused was then in
20 the lane. As she went up to the deceased the accused again came into the yard, and while she was attending to the deceased who had fallen down, the accused again hit him in the region of the head a few times. At this time she was screaming for help. She says a little later the accused left and came back again with a knife and said he wanted to cut the deceased's throat like a goat. Now, Jemima's evidence is supported to a certain extent by the two young girls. Trifina, who is an adult girl, although quite young - her age is about twenty years - corroborates
30 everything that Jemima says. She says when the accused turned round and swore at the deceased, she tried to

Judgment.

pull him out, but at the gate he jerked away from her and she says he hit the deceased over the head. She says she ran home and reported the matter to her mother.

I don't propose to deal with subsequent events because to my mind they are not relevant, except for one thing and that is that Trifina says that the iron rod with which the accused had been armed was found in the accused's house behind the bedroom door, and later that evening she and Maisie handed that iron rod to the police, i.e. a
10 native police constable. This police constable also says that these two girls handed him the iron rod. Maisie also supports Jemima in regard to the happenings. She says that the accused was armed with this iron rod, and she says that she knew that iron rod and it was kept in the house.

Maisie's mother, who lives with the accused, gave evidence for the Crown at the Preparatory Examination, but she gave evidence for the defence here. She says that Trifina did not report that she had seen the accused
20 hit the deceased, and it is suggested that Trifina may be reconstructing that part of her evidence, but on the other hand Winnie is obviously not an impartial witness, and she may be trying to assist the accused.

The accused's story in short is that when he got outside the gate near his own gate, he felt a blow on the back of his shoulder, and he says he was attacked by the deceased. He says he had a stick in his possession, and at no time he had that iron bar in his possession. He says he wrestled the iron away from the deceased, but he
IL. cannot/....

cannot say how many blows he in fact gave him with the iron bar.

Now, if the evidence for the Crown is accepted it is quite clear that at some stage that evening the accused had substituted this stick for the iron rod and left the iron rod in the house, because he went to the police station and he had the stick in his possession, which he handed to the police. It seems to us that although there are a number of details on which we cannot
10 be sure that the Crown witnesses are telling the truth, and although Maisie is not a satisfactory witness, we still think that the salient points in the Crown case are proved beyond reasonable doubt, and that is that the accused arrived at the house of the deceased armed with this iron bar, and that at all relevant times up to the time that the deceased was lying dead, or practically dead, he had the iron bar in his possession. If that is so, then we cannot possibly accept his story that the deceased attacked him with this iron bar. It is possible
20 that even on his own story he is guilty of murder, and certainly if one accepts that he had that iron rod in his possession, and that he attacked the deceased when the latter was not armed - and we do accept that that was the position - then there is no room for any other verdict but guilty of murder, because there is not sufficient provocation to reduce the crime. The only provocation that there was, and which we accept as such, was that he was ordered out of the house of the deceased. We also accept his own evidence, supported by the evidence of
30 Winnie, that he was to some extent under the influence of
IL. liquor/....

Judgment.
Sentence.

liquor. It is clear from the blood test of the deceased that he was very well under the influence of liquor, but at the same time we do not believe that there was any provocation apart from the fact that the accused was ordered out of the house by the deceased.

As far as extenuating circumstances are concerned, it is conceded by counsel for the Crown that we should find that there are extenuating circumstances, taking into account the fact that the accused was under
 10 the influence of liquor to some extent and that there was some provocation. In the case of a more civilized person we would probably not have regarded that as an extenuating circumstance, but in the case of a more primitive person as the accused appears to be, I think we are justified in finding that there are extenuating circumstances. The verdict therefore is that the accused is guilty of murder with extenuating circumstances.

MR. SPITZ addresses the Court on the question of sentence.

SENTENCE.

20 DE WET, J: Tell the accused that he is fortunate that he has been found guilty of murder with extenuating circumstances, so that he will not be sentenced to death. There are so many killings in Johannesburg, and it is becoming a problem to the Court how to deal with them. In a more civilized community, they might all be hanging cases, but the Court has to take into consideration that the accused has not had the education or the upbringing that other

IL.

people/.....