224/56

224/56

G.P.-S.117539—1954-5—5,000. ~~U.D.J. 445.~~

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

(Appellate DIVISION).
AFDELING).

APPEAL IN CRIMINAL CASE.
APPÈL IN STRAFSAAK.

(1) ALFRED KUPEKA,
(2) DAVID ZINANE,
(3) HERMAN MAKOBO,

Appellant. 5

versus/teen

THE QUEEN

Respondent.

Appellant's Attorney — *Respondent's Attorney*
Prokureur van Appellant — *Prokureur van Respondent*

Appellant's Advocate M. A. Wemburg *Respondent's Advocate* D. P. Yutar
Advokaat van Appellant — *Advokaat van Respondent*

Leave granted.
Set down for hearing on:— Friday, 2nd Nov, 1956.
(WLD) *Op die rol geplaas vir verhoor op:—*
1, 2, 4, 6, 8.

(9.45 — 12.30
2.15 — 2.55) CAV

Appeal dismissed.
Centlivres, C.J., Schreiner, Fagan, de Beer, v.d. Heever } JJ.A. — Registrar 13/11/56

Record

IN THE SUPREME COURT OF SOUTH AFRICA.

(APPELLATE DIVISION)

In the matter between :

ALFRED KUPELA & OTHERS Appellants

&

REGINA Respondent

CORAM : Centlivres C.J., Schreiner, Fagan, de Beer et de Villiers JJ.A.

Heard : 2nd November 1956. Delivered : 12.11.56

JUDGMENT

CENTLIVRES C.J. :- The three appellants were convicted of murder by Ludorf J. sitting with assessors in the Witwatersrand Local Division. They were sentenced to death and were granted leave to appeal. They were charged with two other natives who were acquitted. For the sake of convenience I shall refer to the appellants as accused Nos. 1,4 and 5 respectively.

It appears from the evidence that during the night when the deceased was killed a party of native police consisting of two sergeants and ten constables patrolled Moroka Township in a military van which was covered with a tarpaulin but was open at the back. The engine of the van stalled and before the engine could be re-started a crowd of natives attacked the occupants of

the van with firearms. Several shots were fired by the assailants. The deceased, who was one of the police in the van, was killed by rifle fire and two other policemen were wounded. The police had no firearms.

On the night in question there was moon-light and the police had torches which produced a bright light. Several witnesses identified accused No. 1 as one of the assailants and I can find no reason for differing from the trial court in its finding that he was one of the assailants. As the case against him was clear, he should not have been granted leave to appeal.

Accused Nos. 4 and 5 were identified by only one witness, Paul Lahlabane, who was one of the native constables in the military van. Paul had a bright torch and he shone the torch on the assailants. He said that among them he recognised accused Nos. 4 and 5. The two last mentioned accused he had known before. A trial court must be very careful before it accepts the evidence of a single identifying witness. I cannot take ~~take~~ exception to the method of approach adopted by the trial court. In its judgment it said :-

" We were aware of the requirements that such a witness must fulfil before he can be relied on. His evidence must be clear and satisfactory in every respect, he must be free

"from bias and he must have had a proper opportunity for observation. And, bearing these requirements in mind, we test the evidence of Paul. "

Having tested the evidence of Paul, the trial court went on to say :

" We have given this aspect very careful consideration and in our view Paul complies with what is required of a witness when the evidence of a single witness is to be relied upon. We find him completely satisfactory in every respect and despite what happened he apparently was one of those who was calm up to the point when he realised that it would be folly to continue in the face of this attack and we accept the evidence of Paul. "

Apart from an aspect of the matter to which I shall refer presently I may at once say that Paul's evidence reads very well and that sitting as a court of appeal we would not be justified in differing from the view taken by the trial court which had the advantage, which we did not have, of observing the manner in which Paul gave his evidence.

The main line of attack both at the trial and on appeal against the credibility of Paul was based on an alleged inconsistency between the evidence given by him at the preparatory examination and the evidence he gave at the trial. At the

preparatory examination Paul, whose evidence was given through an interpreter, was recorded as having said :-

" We jumped off the lorry to arrest them..... And we had our torches flashed on them and they also advanced to us. We stopped. We rushed at them again and they still came forward, shooting. I saw the first person No. 4 accused. He had a revolver in his right hand.... (Question : You saw him firing and then what happened ?) I retreated, and on the extreme right of this group I saw another one shooting..... Yes, I recognised him..... It was accused No. 1. "

At the trial Paul said :-

" I saw only Accused No. 1 from the lorry, who he was. I was still in the lorry when I recognised him."

He denied that he had said at the preparatory examination :-

" I saw the first person accused No. 4."

At the trial he said :-

" After I saw accused No. 4 shoot, I saw nobody else whom I could identify. "

Before dealing with the alleged discrepancy between Paul's evidence at the preparatory examination and his evidence at the trial it is convenient to refer to the following remarks made by the trial judge in the judgment which he delivered :-

" As I pointed out to counsel during the argument, when evidence at a preparatory examination is put to a witness, the cross-examiner is bound by the reply unless the evidence given at the preparatory examination is proved before this court in the proper way. And that was not done. So that, although counsel was allowed to cross-examine on the point, there is no evidence before the court as to what was said by the witness Paul at the preparatory examination. "

In view of the learned Judge's ruling that there was no evidence before the trial court as to what was said by Paul at the preparatory examination, the appellants petitioned this Court for leave to adduce the evidence of (1) the official who interpreted Paul's evidence at the preparatory examination and (2) the official who transcribed the electrical recordings of the evidence given by Paul at that examination. In paragraph 7 of the petition it is alleged that the learned judge stated at the trial that "even if the Crown wished to do so, it was not "competent for the Crown to admit the correctness of the preparat-"ory record." In a report on the petition the learned judge stated that "the facts set forth in paragraph 7 of the petition "are correct to the best of my recollection. "

The petition was not proceeded with, because at the

hearing of the appeal Mr. Yutar very properly admitted the correctness of the record of the preparatory examination, subject to the qualification that it must be remembered that, owing to the fact that the quality of interpretation in inferior courts is often poor, errors do occur.

In my opinion the learned judge was mistaken in his view that it is not competent for the Crown to admit the correctness of a preparatory examination record. It is a very common and recognised practice to allow counsel at the trial to put to a witness in cross-examination evidence which he gave at a preparatory examination in order to show that the evidence he gave at the trial conflicts with his former evidence. And in the absence of any suggestion by the Crown that the evidence given at the preparatory examination was incorrectly recorded, it may be taken that the Crown tacitly admits the correctness thereof. Only when the Crown challenges the correctness of the transcript does it become necessary to prove by formal evidence that the transcript is correct. No such challenge having been made at the trial, the learned judge should have treated the record of the evidence given at the preparatory examination as correctly reflecting the evidence given by Paul.

Returning now to the alleged conflict between Paul's

evidence at the preparatory examination and his evidence at the trial, counsel for the accused laid great stress that at the trial Paul denied that he had said at the preparatory examination that "he saw the first person accused No. 4". One must bear in mind that these words were not Paul's ipsissima verba : they are a translation of what he said and are obviously a clumsy translation at that. We are now called on to interpret what appears to be an inept interpretation of what Paul said. Counsel for the accused recognised this inherent difficulty. He suggested that the words recorded might mean either that accused No. 4 was in front of the attackers or that Paul saw accused No. 4 before he saw accused No. 1; if it bore the first meaning it contradicted Paul's evidence at the trial to the effect that accused No. 1 was in front of the attackers, and if it bore the second meaning it contradicted Paul's evidence at the trial that he first saw accused No. 1. In considering this alleged discrepancy, it must be borne in mind that Paul's evidence at the trial was given in much greater detail than his evidence at the preparatory examination. At the trial he was asked whom he saw when he was still on the van. He was not asked at the preparatory examination whether he saw any of the accused while he was still on the van. It is clear from the record of the preparatory examination that when he saw "the

"first person, No. 4 accused" he had already dismounted from the van, whereas at the trial he said that he saw accused No. 1 when he was still on the van. The statement made at the preparatory examination and the statement he made at the trial do not therefore conflict with one another and the fact that the learned judge did not accept the preparatory record as being correct has no bearing on the result.

It was contended on behalf of the appellants that the Crown failed to prove a common purpose on behalf of the attackers. It is sufficient to say that I agree with the finding reached by the trial court that there is an irresistible inference "that "this was a murderous attack upon the police and that everybody "proved to have been associated with the attack must have had "the common intention to kill. "

The appellants gave evidence of an alibi. That evidence was rejected by the trial court and I can see no reason for differing from that Court on this point.

The appeal is dismissed.

Rumpff J.A.

Schreiner J.A.)
Fagan J.A.) Concur.
de Beer J.A.)
de Villiers J.A.)