

135/1958

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

AppellateDIVISION).  
AFDELING).

APPEAL IN CRIMINAL CASE.  
APPEL IN STRAFSAAK.

1. TAMI ZWANE,  
2. WILLEM ZOYO

Capital

Appellant.S

versus/teen

THE QUEEN

Respondent.

Pro Deo

Appellant's Attorney  
Prokureur van AppellantRespondent's Attorney  
Prokureur van RespondentD.M. WilliamsonAppellant's Advocate  
Advokaat van AppellantJ.H.B.Respondent's Advocate  
Advokaat van RespondentA.J. Krag

(Leave W.D.)

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

2.4.6.8.11

(B)

Wednesday, 24<sup>th</sup> Sept, 1958.

9.45-12.50; 2.15-3.55

C.A.V.

Coram: Houtcher, de Beer, Malan, Ogilvie Thompson JJA  
et Smit a ja.

JUDGMENT: THURSDAY, 2<sup>nd</sup> OCTOBER, 1958.

Appeal of both Appellants allowed; Convictions and  
Sentences set aside.

W. de KlerkL REGISTRAR

*Record.*

IN THE SUPREME COURT OF SOUTH AFRICA.

(APPELLATE DIVISION)

In the matter between :-

~~Appellants~~

TAMI ZWANE AND OTHERS

Appellants

&

R E G I N A

Respondent

CORAM : Hoexter, de Beer, Malan, Ogilvie Thompson JJ.A.  
et Smit A.J.A.

Heard : 24th September 1958. Delivered : 2<sup>nd</sup> October, 1958

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J U D G M E N T

SMIT A.J.A. : The appellants, to whom I shall refer as accused Nos. 1 and 3, were together with accused Nos. 2 and 4 charged with the crime of murder on two counts ; firstly, in that on the 17th September, 1957, at Johannesburg they murdered one Roux, a European male and, secondly, in that, on the same day and place, they murdered one John Haluba, a native male. At the end of the Crown's case accused No. 2 was found not guilty and discharged for want of evidence and the trial proceeded against the other three accused. Accused No. 4 was found not guilty, whereas Nos. 1 and 3 were acquitted on the second but convicted on the first count and sentenced to death.

The evidence is that on the morning of 17th September, 1957, the deceased Roux left his <sup>home</sup> ~~house~~ in La Rochelle to go to work at the Kazerne workshops where he was employed by the South African Railways. That evening he did not return <sup>at</sup> ~~to~~ his usual hour. His family became perturbed and Botes, his son-in-law, went to look for him. The search ended that night when Botes, in crossing a railway bridge on the road <sup>to</sup> ~~at~~ Wemmer Pan, which is in close proximity to the Kazerne workshops, saw bloodmarks on the road across the bridge. He stopped and then discovered dragmarks on the road ; when he found the lunch tin and milk bottle which he identified as belonging to the deceased Roux, he reported the matter to the police. Their investigations that same night revealed the dead body of the deceased Roux lying just off the road at the bridge where it had obviously been dragged. It was without the trousers and shoes the deceased was wearing when he left home that morning. On the other side of the railway bridge and also off the road they found clothing, a pedal cycle and a blood spot next to a storm water drain. This clothing and the pedal cycle were later identified by the witness Wingrove Malisa as belonging to him and have no direct bearing on this case. The next day further investigations were conducted by the police and they found the dead body of John Haluba, the victim of the murder

alleged in count 2, about 242 paces from this bridge where the deceased Roux was found. Later that morning Elizabeth, the wife of John Haluba, identified his body, still lying where it had been found and she noticed that the overcoat and balaclava cap which he was wearing when he left home the previous morning to go to work, ~~at Kazerne workshops~~, were missing. The missing articles of clothing of the two deceased and the other articles found at the scene of the crime play no part at all in the identification of the assailants. The clothing found in Mary's room which <sup>a</sup>Accused No. 1 and Billy had left there on Thursday night the 10th October and the articles of clothing referred to by <sup>a</sup>Accused No. 1 in his statements to the police, with which I shall deal later, were also not identified as belonging to either of the deceased.

The post-mortem examination of the body of the deceased Roux revealed extensive bruising and injuries to the head, face and body and the cause of death was stated to be a fractured skull and intra-cranial ~~bleed~~ haemorrhage, probably caused by numerous blows with heavy blunt instruments. The attack on the deceased Roux must have taken place on the afternoon of the 17th September when he was on his way home.

The road over the Wemmer Pan bridge was a short cut between Kazerne, where he worked and La Rochelle, where he lived.

Van Vuuren stated that on that day he and the deceased stopped work at 5.30 p.m. and that he gave him a lift to a spot about 700 yards from this bridge where he left him at about 5.35 p.m. The cause of death in the case of John Haluba was found to be manual strangulation. Walter Biyana was working with him on the 17th September and testified that when they stopped working at about 5.20 p.m. they left the premises together and parted company near the compound.

<sup>one</sup>  
~~He~~ does not know how long John Haluba took to walk the distance to where his body was found but if it took about five minutes by car to a spot near the bridge it would appear that these two deceased must have been in the vicinity of the bridge at about the same time. Wingrove Malisa who worked at the goods shed at Kazerne and whose clothes and pedal cycle were found at the bridge, related how he returned home from work that same afternoon, following the road which took him over the <sup>Wemmer Pan</sup> bridge. ~~xxxxxx~~ When he was on the bridge at about 5 p.m., two natives caught hold of him and they were joined by two others, lighter in colour. They threw him to the ground and robbed him of his money, cycle

and certain articles of clothing. His torch was also taken but this was not found at the bridge with the other articles. He stated that he was struck several blows on the head, ~~robbed~~ and thrown over the bridge where he fell into a storm water drain. There he lay for some time until the water revived him. He then reported the matter to the police. A torch was found (Exh. No. 1) in Mary's room which ~~having~~ <sup>has</sup> been brought there by accused No. 3 and Billy. This the Crown tried to prove was Wingrove Malisa's torch but he could say no more than that it was similar to his own torch and the trial court did not accept as proved that the torch did belong to the witness. Wingrove Malisa also said that he would recognise the native who caught him first but that he was not one of the accused. The position then is that there were no eye-witnesses to these brutal assaults and robberies which resulted in the death of the two victims and nothing was discovered at the scene of the crimes to connect either of the accused with these crimes. And, as I have already said, the missing clothes were never found and identified. The evidence thus far, however, does establish the unlawful killing of these two deceased persons and that a gang of at least four natives were, according to Wingrove

Malisa, in the vicinity of the Wemmer Pan bridge round about 5 p.m. on the afternoon of the 17th September. The Crown, however, relied on statements which each accused was alleged to have made more than three weeks after the crimes had been committed and it was on these ~~statements~~ <sup>statements</sup> that they were convicted.

Accused No. 1 was alleged to have made three statements ; one to Johanna his mistress, when he was courting her in the veld on Tuesday night the 8th October ; the second to native detective Johannes after his arrest and the third was a written statement taken down in the form of question and answer by Detective Sergeant Potgieter and interpreted by Head Constable Joyner. This statement is referred to as the Joyner statement. In order to understand these statements properly and especially the one alleged to have been made to Johanna it is necessary to state briefly the events which relate, and according to Johanna, led up to this statement to her. On Saturday, the 5th October, according to accused No. 1, he was assaulted and thereafter taken to hospital where he stayed the night. He was released on Sunday, given an outpatient's card and told to report back for further treatment. The truth of this was not contested but his

evidence that accused No. 3 gave him £2 on this Sunday to pay his bus fare to and from the hospital was in dispute. It was common cause that accused No. 1 was the lover of Johanna, that both were friendly with Mary, the mistress of Billy and frequently visited her at her place of employment. <sup>Thus</sup> ~~There~~ we find Mary, Johanna and the two accused in Mary's room on Tuesday evening, the 8th October. Billy was also there and a girl called Constance. This was the night <sup>on which</sup> they all went to the Haarlem Bioscope where they had intended going the previous night. Before they left for the bioscope the evidence is that the men were playing cards while conversing among themselves. The women were together on one side of the room talking to one another. The conversation which took ~~place~~ <sup>place</sup> among the men that evening <sup>is</sup> of importance because, according to Johanna, it was what she overheard the men saying in the room which prompted her to question accused No. 1, her lover, in the veld later in the evening and <sup>which</sup> ~~which~~ led to his statement to her implicating himself in a crime. Johanna's evidence with regard to the conversation is this :-

" What was the conversation that you heard ?.....  
 Accused No. 1 started speaking in Tsotsi language which I don't understand very well, although I did understand some of it. I heard him say that he was in the company



" of the police from Marshall Square and that Billy and accused No. 3 had given him money and told him to run away.

Was that said in <sup>the</sup> conversation that he had with Billy and accused No. 3 ?..... Yes they had a conversation together there in the room.

Did any of the other two Billy or accused No. 3 say anything ?..... Accused No. 1 spoke thereafter he again said 'we must not run away.' Accused No. 1 said this to Billy and No. 3, 'they have already found us let's all go together to gaol.' They spoke some more and I then gave an answer.

Did any of the other two, Billy or accused No. 3 chip in ?..... They then spoke in Tsotsi language which I did not understand very clearly. I then asked a question I said 'what money is this and why has he to run, what have you people done ' ?

Was there any reply ?..... Yes Billy then answered and said ' look you <sup>at</sup> a woman and this does not concern you you keep quiet.' I then kept quiet. "

" Was any mention made of any of the other accused there that night during the conversation before you went to bioscope ?..... Yes they were mentioned.

Which of them No. 2 and 4 both ?..... These people told us that they were six in all ; they mentioned these two people's names as well as the other two.

HIS LORDSHIP : When you say 'these people told us', who do you refer to as 'these people' ? .....

No. 1 said that they were six in all.

When were they six ?..... He mentioned six ; he said that we were six together and he mentioned the names. It ended there. At a later stage I again questioned No. 1 as to what this money was that they were talking about."

Johanna stated that it was their reference to money and his having to run away that prompted her to ask accused No. 1 about it when they were alone in the veld after the bioscope, to which he replied as follows :-

" Accused No. 1 said 'this gang is silly'. He said that he found them holding a European male and they were hitting him. He told me that he accused No. 1 came up and caught the European by his clothes on his chest and he slapped him with his open hand in his face.

Who did the slapping ?..... No. 1 accused, and that the European's clothes was taken away from him and they ran away with the clothes.

Did he tell you where this was alleged to have taken place ?..... He mentioned it was on a bridge. He didn't tell me which bridge it was.

And did he say when this was alleged to have taken place ?..... No he didn't tell me when it was.

And when he mentioned the word 'gang' did he give you the number of the gang ?..... Yes he mentioned how many they were together. "

" Did he say how many ?..... He said they were six together including himself.

You also said that they ran away with the clothing? .....Did he mention the articles of clothing ?.... He said it was a European's clothing which was tied up in an overcoat. I don't know whether this overcoat also belonged to the European or not.

But did he say what articles of clothing belonging to the European they had taken ?..... No he did not give a description of the clothing.

" Anything else said that night out in the v<sup>l</sup>ed ?..... I then asked him what happened to the European and he said he did not know but he thinks he is dead. Thereafter we parted I went back to my place of employment and he left me he went away.

Did accused No. 1 mention anybody else except the European ?..... Yes he mentioned a native male. He said immediately after they had finished with the European, as the gang ran away from the European they came across a native male and they also attacked him. He said they caught him and accused No. 1 walked off.

Was anything else said that night ?..... No that is all that was said ; he then left me. "

The trial court accepted Johanna's evidence and actually used part of it to corroborate part of the statement testified to by Johannes. But before I deal with Johanna's evidence it is convenient to refer to the whole statement alleged to have been made to Johahnes, who assisted in the investigation of these crimes, and the Joyner statement. Although accused No. 1 denied having made certain parts of <sup>The Joyner</sup> ~~this~~ statement, the trial court on the evidence of the European policemen quite rightly rejected his denial and found that he did make the statement as recorded. In this statement, however, accused No. 1 <sup>did</sup> ~~was~~ not implicate himself but tells of information which he was supposed to have obtained from his friends and associates. This the trial court fully appreciated. The material parts of this statement are as follows :-

" Have you heard of the death of a European male and a Native male and also of a Native male who was assaulted and robbed during the evening of 17 - 18/9/57, near the railway bridge at Wemmer Pan ?..... Yes I have heard.

What did you hear ? Tell me the story.....

I heard on the day when I was present on an identification parade at Booysens.

What did you hear ?.....

I heard when it was being explained to us by the European in charge of the identification parade.

Was that the first time you heard about this case ?.....

That was not the first time I have heard about these cases.

What prior information did you have about this?.....

Native Detective Shadrack asked me about these cases and also asked me if I knew Thomas, Marks and Zebelon. I told him I knew them. He asked if they are my friends. I said, 'No, but they are known to me.' He told me that he was looking for them in connection with these cases. I told him that I had met them, meaning Thomas, Marks and Zebelon. I had met them at Mazawane's. Zebelon had some things with him. He was carrying an overcoat and a hat. He wanted to sell the overcoat to me. I asked him why he was selling the overcoat and where he got it from. He said it was things they had found near the Wemmer Pan. I asked him whether they got the articles from European houses or Native houses. He said, 'No we got these things from persons we met on the road.' I asked them how they got these things from the people and whether they did not hurt the people. Zebelon said that I am asking many questions and that I must buy the articles should I want to buy them.

Thomas then joined in and said that 'If Temba buys these things or the overcoat, I also want my share of the money.'

" I laughed and said to Thomas, ' You say you want your share of the money, should I buy the overcoat, but I have no money. '

We bought 5/- worth of liquor and drank it. After it was finished, Thomas, Marks and Zebelon said they were going to town. I accompanied them a short way and then returned to the drinking place and remained there.

Was that the last you heard about these cases ?....

No.

When did you hear again ?.....

Another Saturday, during another week, I went to play dice at a dairy above Mazwane's place. I had a fight with another man at this place over dice money. I was injured and went to hospital. I returned from hospital on a Sunday and came to Regents Park Police Station to report that I was out of Hospital. I was then sent to Kenilworth Police Station and from there I was sent home.

On the Monday I returned to the Police at Kenilworth and was again told to go home.

Is this all you can tell me about this case ?....

Yes I know nothing else about this case.

This statement has been read over to you. Is it correct ?..... Yes, but I wish to add that when I asked them if they did not injure these people, they informed me that they had assaulted the people but did not know if they had injured them or not. I also said to them, 'Were the three of you together ?' and they said that the three of them, Thomas, Marks, Zebelon were together and that they had also assaulted Natives and Europeans who were on the road, and not in houses. "

Accused No. 1 denied that he made any statement to Johannes.

The latter, however, said that when he arrested accused No. 1 on Thursday the 10th October he made the following verbal statement to him :-

" What did he actually tell you ?..... No. 1 then told me that he had information, that three of his friends came to him, that they had in their possession an overcoat and that they had it rolled up with the inside of the coat being outside the way it was rolled, and the colour of it was brown ; that was the lining it was brown. I then said 'Who are those friends of yours ?'

HIS LORDSHIP: And he told you ?..... He told me.

And then what else did he tell you ?..... He said that the overcoat was offered to him for sale and his answer was that he had no money to buy the overcoat ; then one of his friends said 'if you buy this overcoat I will get a share out of the proceeds.' He said he then asked me if you are to have a share out of this where did you people get these articles from ? Then one of his friends said 'look you are talking too much, if you want to buy the coat buy it.' He said I could not buy anything if I did not know where it had come from. Again I said 'where did you get these articles from ?' He then again said we took it from people whom we had beaten up at the dam at Regents Park.

What articles were there ?.....That was the overcoat. He said that the coat was folded up but you could see that something was rolled inside the coat ; he could not see what was in the inside of the coat. He said this was at Mazwani's where they came to him. He then accompanied them back to town. He saw them off and

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he went back to Mazwani's. He said on a later date he was again.....

HIS LORDSHIP: I did not catch his statement where they explained to him where this was. Did they tell him where this took place ?..... His answer to me was at the Regents Park Dam, which is known to be the Wemmerpan. Why they call it Regents Park, it is between La Rochelle and Regents Park.

And then ?..... He said on the subsequent occasion he was again at Mazwani's place drinking when two of his friends again arrived. These two friends were two of the three he had already mentioned. I then asked him, I said 'look tell me the names of these people who offered the coat to you for sale.'

Then he told you the names ?..... Yes

Then after that ?..... I also myself had already information about these friends of his which I did not want to disclose to accused No. 1. He said when these friends of his came on the second occasion he said to them that 'the police were here looking for me I don't know why they were looking for me.' He said 'I think they were after me for the occasion where I assaulted and stabbed a person in the dairy, now I have information that the police are looking for me in connection with the European that has been murdered at Wemmerpan.' He said he also told his friends that he himself would go to the police station to find out why they were looking for him and whether they were looking for him in connection with this person that he had assaulted. He told me he said, he did not go to the Kenilworth Police Station to make an inquiry he went to hospital. "

The trial court found that the evidence of Johannes was justifiably open to criticism and I think only accepted that the statement was made to him because it was substantially the same as the one made to Joyner and was corroborated in part by what was said to Johanna. Johannes was, however, shown to be wrong with regard to the date on which he arrested accused No. 1 and the charge on which the latter was arrested on Thursday the 10th October. He also went back on what he had said at the Preparatory Examination in this regard. He was contradicted by Mary on the question where the torch (Exh. 1) was found in her room ; whether it was found on the table as she said or in the jacket pocket of accused No. 3, as Johannes ~~contended~~ *testified*. He was generally vague about dates and I cannot be persuaded that he remembered the details of the conversation that he had with accused No. 1 without having refreshed his memory. He made no notes himself and it is not unlikely that he refreshed his memory from the written Joyner statement which he had witnessed and that was why his evidence was substantially the same as ~~the written~~ *in that* statement. Shadrack, the native detective who was with Johannes when they interrogated accused No. 1, was quite unable to remember anything that the accused had said. It is of the utmost importance, however,



to be satisfied that Johannes was capable of remembering accurately and in detail the verbal statement to him without having refreshed his memory from the Joyner statement because he added something which accused No. 1 was supposed to have said to him but which was not said in the Joyner statement, namely, that the police were looking for him in connection with the European who had been murdered at Wemmer Pan and that he had told his friends "that he would himself/<sup>go</sup>to the police station<sup>to</sup> find out why they were looking for him and whether they were looking for him in connection with this person that he had assaulted." The trial court accepted that this was said by accused No. 1 to Johannes because, according to Johanna, he had said something similar in her presence in Mary's room on <sup>Tuesday</sup>~~Friday~~ night, the 8th October.

I make this point to show that the trial court did not use Johannes's evidence to corroborate that of Johanna but only accepted his on this part of the statement because it found ~~some~~ corroboration thereof in the evidence given by Johanna. I have referred at length to the two statements made to the police to show that they in themselves do not implicate accused No. 1. The trial court appreciated this of course and only used these statements to determine the part played by accused No. 1 in the commission of these crimes in the light of his confession to

Johanna that he was himself at the scene of the crime but had only slapped the European. The evidence that implicates accused No. 1 is that of Johanna and her evidence stands alone both in regard to the making of the statement and the contents thereof.

Although a conviction may follow on the evidence of a single, competent and credible witness, in a case like this, and mindful of the cautionary remarks referred to in Rex v Mokoena (1956 (3) S.A. 81 at p. 85), where the guilt of the accused depends on the contents of a verbal confession made in the veld to his mistress in the course of lovemaking, the Court must be ~~perfectly~~ satisfied not only that Johanna was a truthful witness but also that she was reliable, accurate and well able to remember the terms of the confession made to her; ~~because~~ it is easy to fabricate such a confession or to twist an innocent or exculpatory one into a confession of guilt or even innocently to make material mistakes in its reproduction. This does not of course mean, as was said by Centlivres C.J. in Rex v Bellingham (1955 (2) S.A. 569) quoting what Schreiner J.A. had said in Rex v Nhlapo (A.D. 10th Nov. 1952), "that the appeal must succeed if any criticism, "however slender, of the witness's evidence were well-founded."

The trial court was unanimous in its view that Mary was

a very satisfactory witness but made no similar finding with regard to Johanna. On the contrary, the learned judge in his reasons observed that Johanna was "somewhat vague and uncertain about days and dates of the events and discussions" <sup>to which</sup> ~~but found~~ she testified " but found that her vagueness with regard to ~~that her vagueness~~ these events lost their importance because the evidence of Mary and accused No. 1 put the events in their proper order. That may be so but her vagueness and uncertainty on these matters nevertheless show that she was not a reliable witness. Johanna was, however, not only inaccurate with regard to dates and events but also with regard to the conversation which she overheard on Tuesday night. The trial court found that her evidence was justifiably open to criticism because she had said that <sup>accused No.</sup> ~~number~~ 3 ~~accused~~ in the course of this conversation had mentioned that he was going to stab the one who had run away with the goods. In examination-in-chief she said that accused No. 3 mentioned the name of the man he was going to stab, that she had forgotten the name but that he was a stranger whom she had never seen before. In cross-examination, however, she admitted that she had said at the preparatory examination that accused No. 3 had mentioned that he was going to stab Mosco, accused No. 4, whom she knew. In her attempt to extricate herself from the difficulty of explaining this

contradiction she did not admit having made a mistake but said that accused No. 3 had mentioned two names, which was obviously an untruth<sup>h</sup>, and she ended up by blaming the interpreter in the lower court. The trial court did state that because of this criticism care was exercised in assessing Johanna's evidence but it seems to me it should have gone further and found that Johanna was untruthful on this part of her evidence. Another point which reflects on her ability to reproduce an accurate version of what she overheard is her evidence with regard to this money talk on ~~Friday~~<sup>Tuesday</sup> night. Johanna at first said that she heard the men ~~mention~~ the fact that accused No. 3 had given accused No. 1 this money to enable him to run away, whereas her question to accused No. 1 in the veld later that same evening and to accused No. 3 on Thursday evening in Mary's room was that she wanted to know about the money that was to be given to accused No. 1. Later she gave the exact words in Afrikaans which accused No. 3 was supposed to have used in the room on Tuesday evening namely, "Ek sal jou geld gee dat jy wegheol." Apart from the fact that these contradictions are a reflection on her accuracy as a witness it is material to know whether accused No. 3 had said that he had given the money or would give the money to accused No. 1, because if no money had as yet been given

to accused No. 1 by the Tuesday night, then accused No. 1 could be right when he said that he knew of no money other than the £2 which accused No. 3 had given him for his bus fare to the hospital. Another example of Johanna's inaccuracy is this : In examination-in-chief she said that in the ~~view~~<sup>veld</sup> accused No. 1 told her he did not know what had happened to the European "but he thinks he is dead." Later on in cross-examination she stated "Accused No. 1 told me that they had killed a European." With regard to the arrest of accused No. 3 she could not remember on what charge Johannes said he was arresting the accused when this was done in her presence.

Notwithstanding this criticism of Johanna's evidence Mr. Krog, who appeared on behalf of the Crown, contended that her evidence should be accepted because she was corroborated by Mary on a salient point, namely, that she says she heard Johanna ask the men in her room before they went to the bioscope on Tuesday night "what is that that you are saying" and that she was told to be quiet as it had nothing to do with her. This, if true, does, of course, corroborate Johanna that she did make an interjection ; but Mary does not confirm Johanna's evidence that she asked "what

money is this and why has he to run, what have you people done." Furthermore, Johanna said that Billy told her to keep quiet whereas Mary at first said it was accused No. 1 who told her to keep quiet but later in cross-examination said all three men told her to keep quiet. This is weak corroboration and it only relates to what <sup>was supposed</sup> ~~accused No. 1~~ to have happened in Mary's room and is no direct corroboration of what accused No. 1 is supposed to have told Johanna in the veld. What, however, is ~~to me~~ <sup>in</sup> significant of Mary's evidence is that she is unable to corroborate Johanna with regard to the important facts which Johanna says she overheard during the men's conversation. I have quoted at length what Johanna said she overheard of this conversation and it is incredible that if all this was said in Mary's presence that all she heard was Johanna's interjection without even being able to remember what Johanna actually said. The absence of corroboration by Mary of Johanna's evidence on these points rather outweighs the slight corroboration on the fact of the interjection. According to Mary the first time she heard about the money was on Thursday night, 10th October, when accused No. 3 was supposed to have said to her and Johanna, when he heard of accused No. 1's arrest, that he, accused No. 1, was foolish ("dom") because he had given him

money to go away. Johanna did not confirm that she also had heard this. She was admittedly ~~mixed up~~ <sup>confused</sup> with her dates and if she in fact only heard about the money on Thursday, when Mary heard of it for the first time, and not on Tuesday night as she thought, then her reason for questioning accused No. 1 in the <sup>V</sup>eld on Tuesday night, falls away. And if she got "full information as to what money it was" from accused No. 1 in the veld on Tuesday night, as she said she did, then why did she again ask Billy and accused No. 3 on Thursday night "what money is this you people mentioned that you are ~~giving~~ <sup>going to</sup> give accused No. 1 and you wanted him to run away ? " This rather suggests that she is confused about the course of events and that she probably only heard about the money on Thursday evening when Mary heard of it.

What is ~~to me~~ also improbable in Johanna's evidence is that she says she overheard accused No. 1 mention to Billy and accused No. 3 in Mary's room on Tuesday night, the names of the six men who constituted the gang. Accused No. 1 was not talking to the women but to Billy and accused No. 3. In fact the women had been told to mind their own business. Billy and accused No. 3 were ~~her~~ <sup>his</sup> friends and accused No. 1 was urging them not to run away

from what had been found out but to stay and go to gaol together. This clearly indicates that these two were also members of the gang involved in this crime from which they should not run away. That being so why should accused No. 1 have mentioned to them the names of all six members of the gang? If they were all members of the gang who had committed the crime under discussion they must have known who the other members were, but in any case it seems quite improbable that accused No. 1 would have mentioned their own names to them.

When one considers the lack of corroboration by Mary of the material parts of Johanna's evidence where one would have expected corroboration, the improbabilities and contradictions in her evidence, her vagueness, uncertainty and untruthfulness, then it seems to me that the trial court should <sup>have</sup> a reasonable doubt whether accused No. 1 did make a statement to Johanna in the terms in which she says he did and whether what she overheard of the conversation in Mary's room on Tuesday night was what she says she heard, especially in view of her admission that the men were talking in the Tsat'si language which she did not understand very <sup>well.</sup> ~~well.~~ The question which at once suggests itself is why should Johanna have given false evidence which might send her lover to the gallows?

There is however, against Johanna on this aspect her own



evidence which ~~to me~~ casts a serious doubt on her loyalty to accused No. 1 and his friends. When accused No. 3 was arrested by Johannes on Monday, the 14th October as she firmly maintained, but actually it was on Tuesday the 15th October, at her place of employment where he was visiting her that afternoon, she of her own accord took the police with accused No. 3 to Mary's room where she knew Billy and accused No. 3 had brought clothing on Thursday night, under very suspicious circumstances. Accused No. 3 was the intimate friend and cousin of accused No. 1. This she knew and she must have realised from the contents of accused No. 1's alleged confession to her, which contained a reference to stolen clothing, and his alleged conversation on Tuesday night, that if she connected accused No. 3 with these clothes that her lover might also become involved if these clothes turn<sup>-ed</sup> out to belong to the murdered man, especially as accused No. 1 was already under arrest and Johannes said that in Johanna's presence, he told accused No. 3 that he was arresting him in connection with the death of a European and a Native male. Johanna was not forced into the position that she had to tell about Mary's room and this clothing. She actually volunteered the

table when the detectives entered the room. If Mary's evidence ~~is correct~~ is correct and she is supported in this by Johanna, then it does look as if the native detectives were trying to create evidence implicating accused No. 3 if not also accused No. 1, because Johanna<sup>e</sup> said that accused No. 3 said that the torch belonged to accused No. 1, whereas Mary says that accused No. 3 denied all knowledge of the torch when questioned about it. It is not unlikely that Johanna may have realised after the arrest of accused No. 1 and 3 that her association with them might involve her in their crimes, one of which on the evidence was probably housebreaking, possibly as an accomplice or a receiver of the stolen goods for which the police were searching and that she then of her own accord or under suggestion made incorrect statements to the police to put her in as good and innocent a light with them as possible.

Apart from this conclusion it seems to me that the trial court misdirected itself on a material aspect of this case. In considering the case against accused No. 1 the trial court found it necessary to determine in connection with what it was that accused No. 1 was given the money with which to run away and took into consideration the statement which accused No. 3 is supposed to have made to Mary and

Johanna in the former's room on Thursday evening when accused No. 1 was not present and already under arrest.

This statement by accused No. 3 was made when he heard that accused No. 1 had been arrested and was to the effect that accused No. 1 "was foolish "dom" because he, accused No. 3, had given No. 1 money to get away and go home."

This evidence was considered to be important by the trial court who inferred from this statement by No. 3 accused that No. 1 accused was "'dom" because he did not run away from what he has now found himself in, namely, being arrested in connection with these crimes."

Taking this statement by accused No. 3 into consideration the trial court came to the conclusion that in Mary's room on Tuesday evening the men were talking about money given to accused No. 1, not to run away from other possible danger, but to run away and not be arrested in connection with these crimes. That this finding based on inadmissible evidence against accused No. 1, was of importance to the trial court and consequently prejudicial to accused No. 1, is clear from the fact that in his judgment the learned judge relies on this conclusion as one of the reasons for not disbelieving the evidence of Johanna about the statement

made to her by accused No. 1 in the veld and her evidence and Mary's of the incidents which took place on Tuesday evening in the latter's room. In connection with this misdirection I find it impossible to say that the trial court, if it had not made use of this inadmissible evidence, would inevitably have come to the same conclusion with regard to Johanna's evidence as it did.

From what I have said I am of opinion that the trial court was not justified in accepting the evidence of Johanna and ~~was convinced~~ <sup>convinced</sup> that had due weight been given to these considerations it ~~must inevitably~~ <sup>ought to</sup> have had at least a reasonable doubt about accepting her evidence. Without Johanna's evidence there is no case for accused No. 1 to meet and his appeal must succeed.

The only evidence implicating accused No. 3 in the murder of Roux is that of Bobby. He knew accused No. 3 and Billy and stated that on a Thursday, sometime in September or October 1957, he was working on the pavement at his place of employment in Mondeor, when he noticed accused No. 3 and Billy in the street. They saw him, greeted and stopped to speak to him. What happened thereafter he described as follows :

" ..... They asked me how I was getting on and I said

"

I was getting on fine. I then told them that I was still on duty. I was then on the pavement the two of them then kept on talking to each other.

Refer to the accused by name ?..... Masco  
accused No. 3 spoke to Whity and Whity is not in Court today.

What did accused No. 3 speak to Whity or Billy about ?..... Whity said that he did not expect this European to die. Masco said he expected him to die the way they had treated him. So I said to them what are you talking about.

Who did you address ?.... I addressed Masco, I asked him.

And what did you ask him ?..... I said 'what are you talking about chaps?'

Did you receive a reply ?..... Masco then said that we are talking about a matter of our own ~~our own matter~~. I then said that I had heard some of the conversation a little of the conversation. I said 'one of you said that you expected this European to die' so I said 'what are you talking about' ? Masco then said that they had caught a bull in Rustenburg way.

What bull ?.... Meaning a European whom they had robbed.

What is the meaning of the word 'bull' ?.... They meant a European when they said 'bull'. 'Mkunzi.'

HIS LORDSHIP : How did you know when they said they had caught 'Mkunzi' that they meant a European man ?..... I asked Masco, he then said that they had robbed a European.

Did he tell you what they had robbed him of ?  
.....He said that they had robbed him of his trousers and shoes.

" Did he say where ?.....When I asked him he  
 said it was towards Rusten<sup>ville</sup>~~burg~~ (Rosettenville.)

Is that all you know about the area where  
 this was alleged to have taken place that it was  
 Rusten<sup>ville</sup>~~burg~~ ?..... Yes he told me Rusten<sup>ville</sup>~~burg~~

Did he say when ?..... He said it was on  
 the 17th he did not say what day it was.

The 17th but without mentioning the day ?...  
 Yes the 17th without mentioning the day.

Did he mention the month ?.... I have for-  
 gotten the month but I think he said September.

And did he give you any further particulars  
 of what they were alleged to have done on the 17th  
 September ?..... No he did not say anything more  
 but then they walked away. "

Later he added that accused No. 3 and Billy also told  
 him that the shoes and trousers they had taken from the  
 European were black and grey respectively.

Accused No. 3 admitted that he and Billy saw Bobby on  
 that  
~~that~~ day but denied that he made any such statement to or  
 in the presence of Bobby as alleged by him and explained that  
 that was the day he and Billy received for safe-keeping from  
 Bobby the articles of clothing found in Mary's room by the  
 detectives. When the d-etectives questioned accused No. 3  
 about this clothing after his arrest, he immediately replied  
 that he had obtained it from Bobby, whereupon, ~~Bobby~~ and  
 Bobby corroborates him in this respect, the detectives took  
 him to Bobby who denied all knowledge of the clothing.

Now ~~to me~~ the story told by Bobby of how he obtained his information from accused No. 3 is extremely unlikely, to say the least of it. Bobby said that accused No. 3 was no friend of his and it is <sup>incredible</sup> ~~inevitable~~ that he and Billy, after speaking to Bobby, should then break off this conversation with him and in his presence start discussing between themselves this robbery and <sup>murder</sup> ~~murder~~ of a European which had taken place three weeks previously and then allow themselves to be questioned by this chance acquaintance in such a way that they confess their guilt and provide him with the exact details of the crime with regard to the colour of the shoes and trousers, the place - Rustenville - where and the time - 17th September - when it took place and that it was a European who had been robbed. <sup>It is equally incredible that</sup> ~~And that~~ after the <sup>A</sup> information had gratuitously been supplied to this chance acquaintance, accused No. 3 and Billy should have passed on without even enjoining <sup>Bobby</sup> ~~Billy~~ not to talk about what had been told him. He was obviously the type who needed such a warning because he stated that he mentioned this murder to an informer soon afterwards. The whole story of how this statement came to be made to Bobby is, as I have said, so incredible that one could only begin to consider it if it

were told by a witness whose credibility was above reproach.

And

~~XX~~ Bobby was certainly not such a witness. The trial court

found that his evidence was "subject to criticism with justification" and had the gravest doubt about the truth of his

statement ~~that~~ <sup>that</sup> although he had been convicted and sentenced

to four months imprisonment and six cuts with a cane, on the complaint and <sup>as he maintained,</sup> perjured evidence of accused No. 4, he bore him

no ill-feeling and thereafter treated him like a brother.

He said that accused No. 4 actually gave him 10/- when he came out of prison. This the trial court found hard to

believe and because it could not exclude the possibility that

Bobby might have a grudge against accused No. 4, found that they had a doubt as to whether Bobby's evidence with regard

to the conversation he was supposed to have had with accused

No. 4 in the street <sup>in which</sup> the latter <sup>was supposed to have</sup> implicated himself in this

crime, could be accepted and acquitted accused No. 4. This

finding is in itself a serious reflection on Bobby as a wit-

ness not only in so far as accused No. 4 ~~ix~~ was concerned but

also with regard to accused No. 3. Now Bobby is a man

with at least one previous conviction for theft, although he

protested his innocence in this regard, and a witness who

obviously did not impress the Court. Furthermore, he also



had grounds for bearing a grudge against accused No. 3 because the latter had, according to him falsely, told the police that the clothing which was found in Mary's room and which had obviously been stolen, belonged to Bobby with the result that the police actually went to see Bobby and he was thus again, although ~~although~~ innocent, drawn into the matter of ~~the~~ stolen goods. Although there was no evidence that Bobby was prosecuted in connection with this clothing he could justifiably have been annoyed with accused No. 3 for falsely trying to pin the blame on him.

The trial court found that the undisputed facts of this case were confirmed in what was contained in accused No. 3's alleged statement to Bobby and asked itself whether Bobby obtained this information from somebody else, merely substituting accused No. 3 for the person who had told it to him or whether Bobby was truthful, when he says accused No. 3 made this statement to him. The Court favoured the latter view, mainly because it felt that if Bobby were making up a case against <sup>accused</sup> ~~xxxxxxx~~ No. 3 he could have done better and mentioned the attacks on the other persons in the vicinity. That is true but on the other hand it was not necessary to go so far to implicate accused No. 3 and it could be that Bobby reasoned that he might not be believed, if he displayed too

great a knowledge of the details of the crime, <sup>if he said</sup> that it was somebody <sup>else who had</sup> ~~else who~~ told him about it and not first hand information. The probability that Bobby got his information from persons other than accused No. 3, <sup>he himself stated that he got some from accused No. 4,</sup> cannot reasonably be excluded nor the possibility that Bobby was himself a member of the gang who participated in the crime, hence his knowledge of details. He could also have got information about it from the informer to whom he says he reported the crime. In assessing the truth of Bobby's story the trial court had no hesitation in accepting that Bobby <sup>and accused No. 3</sup> ~~had no conversation~~ and Billy were on friendly terms despite Bobby's evidence that accused No. 3 was no friend of his but a person he knew. If accused No. 3 were implicated in these crimes without accused No. 1 it is strange that he did not run away after accused No. 1's arrest, something which he had so strongly advised accused No. 1 to do. There is no corroboration of Bobby's evidence about the conversation he overheard between accused No. 3 and Billy and even if Johanna's evidence with regard to the conversation on Tuesday night in Mary's room were to be accepted as against him, it would still afford no corroboration of this evidence. Bobby gave most unsatisfactory evidence with regard to when

and to whom he reported what accused No. 3 had told him and I am of opinion that Bobby was not shown to be a truthful, reliable and uninterested witness and that his evidence should not have been accepted without substantial corroboration.

considering  
But in ~~considering~~ the case against accused No. 3 the trial court also ~~misconducts~~ <sup>directed</sup> itself. It stated certain facts found to have been proved. These were that accused No. 3 with Billy and accused No. 1 took part in a conversation on Tuesday night in Mary's room and that accused No. 3 mentioned having given accused No. 1 money for the purpose of running away. The trial court found as against accused No. 1 and No. 3 that the irresistible inference was that the money had been given for the purpose of avoiding the arrest of accused No. 1 in connection with these murders. In arriving at that conclusion ~~it~~, however, <sup>the learned Judge could only have taken</sup> ~~took~~ into account the statement which accused No. 1 was supposed to have made to Johanna in the veld and the statements made by accused No. 1 to the police. These statements were, however, not admissible as against accused No. 3. His purpose in giving money to accused No. 1 had therefore to be gathered from the conversation on Tuesday night when he was present and what he was supposed to have said to Mary on Thursday night that accused No. 1 was "dom" because he did not run away. From these statements

alone no inference could be drawn that he had given accused No. 1 money to run away from these crimes. They could just as easily have referred to some other crimes, like housebreaking, of which there was much talk in the evidence, in which they were both involved. The advice, supposed to have been <sup>given</sup> ~~given~~ by accused No. 1 on Tuesday evening that they should not run away but rather go to gaol together, rather suggests to me that he was referring to a far lesser crime than these two brutal murders and robberies. Accused No. 3 was therefore clearly prejudiced in the finding made against him based on inadmissible evidence.

The trial court also found that accused Nos. 1 and 3 were related to each other, that they were living together and were constantly out together. It then asked <sup>itself</sup> ~~xxxxx~~ whether <sup>the</sup> ~~there was sufficient~~ <sup>was such that</sup> evidence ~~on which~~ the only inference to be drawn ~~was~~ that accused No. 3 was with accused Nos. 1 in a gang operating at Wemmer Pan bridge on the late afternoon of the 17th September 1957. This question, however, accepted <sup>to</sup> ~~as~~ against accused No. 3, <sup>what</sup> ~~which~~ the trial court had already found against accused No. 1, namely, that he was on that date and place operating with others in a gang at Wemmer Pan bridge and it was only concerned with the question whether there was sufficient

evidence to connect accused No. 3 with this gang. But the trial court found that accused No. 1 had been operating with others in a gang at Wemmer Pan bridge mainly on his supposed statement to Johanna in the <sup>veld</sup> ~~land~~ and statements to the police. But these statements were not evidence against accused No. 3 so that as far as the case against him is concerned there is no proof of the existence of such a gang of which accused No. 1 was a member and the trial court erred in accepting as against him the existence of such a gang. On Wingrove Malisa's evidence one could find that a gang was operating at Wemmer Pan bridge that afternoon but not one of which accused No. 1 or any of the accused was a member because he could not identify any of them. Another fact referred to by the trial court in considering accused No. 3's complicity in this ~~gang~~'s activities was that he showed "obvious fear", according to Johanna, when he heard from her of the arrest of accused No. 1. But not one of them at that time knew on <sup>what</sup> ~~which~~ charge accused No. 1 had been arrested. If he had been involved in murder and accused No. 3 showed obvious signs of fear one would have expected him to have run away himself. His fear could have been for the welfare of accused No. 1 who had been arrested or because he was involved with him in some other crime. The trial court could not, in my view, have come to these conclusions with

regard to accused No. 3 if it had not taken into consideration evidence inadmissible against him.

I feel convinced, in view of the trial court's attitude towards Bobby as a witness, that had these conclusions not been arrived at and taken into consideration as factors fitting in with what was supposed to have been <sup>told</sup> ~~seen~~ to Bobby, his evidence would not have been accepted and accused No. 3 could not possibly have been convicted. His appeal must therefore also succeed.

The appeal of both appellants accordingly succeeds and their conviction and sentence are set aside.

Hoexter J.A.

de Beer J.A.

Malan J.A.

Ogilvie Thompson J.A.

Concur:

~~Smit A.J.A.~~

*A.J. Smith*