

124/58

124/1958

G.P.S.1568732-1956-7-9,000. S.

U.D.J. 445.

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

Appellate

DIVISION).
AFDELING).

P/2 Record

APPEAL IN CRIMINAL CASE.
APPEL IN STRAFSAAK.

MFUNINA XOLO

Appellant.

versus, teen

REGINA

Respondent.

Appellant's Attorney
Prokureur van Appellant

Respondent's Attorney
Prokureur van Respondent

12 Dec

Appellant's Advocate
Advokaat van Appellant

P.E. Lude

Respondent's Advocate
Advokaat van Respondent

L. v.d. Heever

(Leave D.C.L.)

Set down for hearing on: Tuesday, 11th Nov., 1958.
Op die rol geplaas vir verhoor op:

1.3.4.5.8. (A) 9.45 - 10.10.

Appeal dismissed (No written judgment.)

Coram: Schreiner, A.C.J., Steyn, de Beers, Beyers et Ogilvie Thompson, J.J.A.

Modestinus

REGISTRAR

11/11/58.

1. 10th May, 1958.

JANSEN, J:- We are unanimous in finding the accused guilty of murder with extenuating circumstances.

On the day in question a wedding was to be held at the kraal of Jula, and a number of Induna Kosheni's people congregated there. On the slope above the kraal a number of Induna Timela's people also gathered. Before the wedding ceremony started a skirmish took place between the two groups, but this was broken off before any serious fighting took place. After that, but still before the ceremony, a 10 situation arose where the two groups were each spread out in a line, the two lines facing each other on the hill-side. They were some distance apart, the Timelas above and the Koshenis below. Stones were being thrown by the two groups. Deceased, who was among the Koshenis, left his line and advanced upon the opposing group. A stone struck him and he fell on his back. One of the opposing group ran forward and stabbed the deceased with an assegai in the groin. Deceased died shortly afterwards. After the stabbing the two opposing lines closed and an engagement followed, re- 20 sulting in the flight of the Koshenis.

Three witnesses say that the assailant of the deceased was the accused: Tolo Ndhlovu, Mtovo Mbali and Belina Silobi. Tolo Ndhlovu, a tribal policeman of the Kosheni group, an elderly Zulu, knows the accused well; he is actually related to him. When the stabbing took place he says he was about 20 feet away. He is certain that the assailant was the accused. His demeanour and personality impressed the Court very strongly. He spoke with conviction, his observation and memory and recall appeared to be 30 excellent. He was frank, he freely conceded that the Koshenis also carried assegais. He appears to have no motive to implicate falsely the accused. He is a tribal

policeman of Kosheni, but this can hardly explain the selection of the accused, a relative, as a scapegoat. He could have seen what he testifies to. He could have recognised the accused. Belina Sikobi, the deceased's wife, also impressed the Court in respect of demeanour and personality. She knew the accused by sight. She, also, is certain that the assailant was the accused. Mtovo Mbali, who assisted the tribal policeman, was less impressive, but nothing unfavourable appeared from his demeanour or personality. He grew up with the accused. He is also certain 10 that the assailant was the accused. He says that he was about 8 ft. away when the stabbing occurred.

There are certain discrepancies and contradictions between these witnesses, and between what some of them said at the preparatory examination and in this Court. Some discrepancies and contradictions are to be expected in a case such as this, but some of these have entailed our careful consideration and must be mentioned. Belina says that she ran up to her husband when he fell and was actually holding him by the arm when he was stabbed. Mbali says 20 she was close to the deceased but had not touched him yet. Tolo Ndhlovu says she was not near the deceased at all at that stage; if she had been he would have seen her. Mbali in this Court said that he did no fighting. When faced with what he had said at the preparatory examination he admitted fighting with another at the time the deceased was stabbed. This other person had followed the accused. Ndhlovu did not see this other person. Belina at the preparatory examination said that the accused wore long trousers and no shirt. In this Court she said that he wore 30 shorts and a vest.

Do these discrepancies and contradictions negative or case any doubt on Ndhlovu's evidence, or does the evidence

of Mbali and Belina support it? After careful consideration we have come to the conclusion that it does support it in its salient aspects. We feel that both Belina and Mbali could have seen and did see the stabbing. Their demonstrations in Court fitted in with the angle of entry of the assegai as determined at the post-mortem, an angle not merely determinable by viewing of the body. Belina may well be mistaken as to how close she was to her husband when the actual stabbing took place. She must have been distraught at the time, but the one thing that would impress itself upon her would be the identity of the assailant, particularly if he was known to her. Other details such as his dress may not have struck her, accounting for her varying versions of that dress. Mbali may well have difficulty in describing the exact sequence of events, as they appear to have followed up each other quickly. His minimising of his fighting, in this Court, may be due to desire to emphasise how well he was discharging his duties as assistant to the tribal policeman. On the evidence, his fighting consisted merely of exchanging a couple of blows. He knew the accused well. No special motive has appeared for him to falsely implicate the accused in preference to any other of the opposing group.

As against this stands the evidence of the accused, denying that he was the assailant. Though not, in our opinion, as impressive in demeanour or personality as Ndhlovu or Belina, he gave his evidence reasonably well in general. We accept that he told Sgt. Ohlson, when arrested, that he would speak in Court and did not protest his innocence. To this we attach no significance. What may be of greater significance is the fact that he denied in this Court that he did so. But by itself it cannot be conclusive. He is on trial, and possibly falsely, foolishly, through ignorance,

is trying to improve his case. But quite apart from this, we gained the impression from what he said that he was not speaking the truth in respect of his part in the events of the day. He concedes that he was on the slope above Jula's kraal on the day in question; he took part in the fight which led to the fleeing of his group, this group being that of Timela. This must have been the second and final engagement that took place on that day. But he saw nothing that the Crown witnesses saw. He was innocently sitting with the others on the hill merely to see the girls and 10 watch the wedding. His whole version appears far too ingenuous.

We have weighed up the evidence of the accused against that of the Crown. We reject the possibility of a conspiracy between the Crown witnesses, falsely implicating the accused, or of a mistake in identification on their part. We feel that in all the circumstances of the case the accused's version cannot even reasonably be true. Despite the blemishes in the Crown case, we come to the conclusion that we should accept it and reject the version 20 of the accused. We accept, therefore, that the accused stabbed the deceased in the groin. We accept that he unlawfully caused the deceased's death. We are satisfied that when he committed this act he had the intention to kill. He must at least have known that he was about to cause a grave risk to life, and yet recklessly he proceeded. This was a cold-blooded and despicable act, but we feel that in the circumstances then existing, particularly the tension existing between the two factions and the inflammable atmosphere, that the accused's mind was temporarily clouded 30 to some extent and his judgment impaired. We feel that this constituted extenuation. The Crown conceded this.

Mr. Terblanche: (For the Crown): Accused has no previous convictions.

Mr. Allaway addresses on the question of sentence: