221/1958

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).

221/1958

APPEAL IN CRIMINAL CASE.
APPÈL IN STRAFSAAK.

CAPITAL

SAMSON MBETHE
Appellant.

versus/teen

THE QUEEN
Respondent.

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

Rec Doc

Appellant's Advocate L.W.H. Ackerman *Respondent's Advocate* _____
Advokaat van Appellant *Advokaat van Respondent*

(Leave - TPD)

Set down for hearing on: Friday, 14th Nov, 1958
Op die rol geplaas vir verhoor op: (9.45-11.45) — CAV

1.3.6.7.8 (A)

21 November 1958: Appeal dismissed and Conviction & sentence confirmed.

Registrar 21/11/58.

Record

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

SAMSON MBETHE ..... Appellant.

and

REGINA ..... Respondent.

Coram: Schreiner, A.C.J., Steyn, Malan, Van Blerk et Ogilvie Thompson JJ.A.

Heard: 14th November, 1958. Delivered: 21st November, 1958.

J U D G M E N T

OGILVIE THOMPSON, J.A.:

Appellant, an adult native male, was convicted of murder at the Lydenburg Circuit by a Court presided over by THERON, J., sitting with two Assessors and, no extenuating circumstances being found, was sentenced to death. The Presiding Judge granted leave to appeal on the question whether the appellant had been duly proved to have intentionally caused the death of the deceased.

The charge against the Appellant was that of having murdered a native male named James Mashigo on 23rd March, 1958. The body of James Mashigo was discovered, in circumstances hereafter to be mentioned, on 29th March, 1958

lying ...../2

lying hidden under pine needles, among thickly planted pine trees at a spot (marked X on the Plan put in at the trial) some little distance from where Appellant lived in the compound of Messrs Veldman and Thom near Spitskoppie, district Nelspruit. When discovered, the body was in an advanced stage of decomposition and, no doubt for that reason, post-mortem examination failed to reveal the cause of death. There was no bone injury and, save for a wholly inconclusive scratch on the upper part of the sternum, there were no indications whatever to show that the deceased had met a violent death.

At the trial the Crown called no eye witnesses to the crime, but led a considerable body of circumstantial and other evidence from a number of witnesses. The only witness for the defence was the accused himself and his testimony comprised a denial of virtually everything that had been said by the witnesses for the Crown. The Trial Court declined to "accept a single word of the accused's evidence", and a mere perusal of the record makes that conclusion readily intelligible. In view of this, and having regard to the nature of the only issue raised before

us, it is unnecessary to do, more than to outline the salient facts of the case as revealed in the evidence, without detailing Appellant's denials as reflected in his testimony at the trial.

While deceased was attending a beer-party on Saturday 15th March 1958, his bicycle was stolen. According to Appellant, the bicycle was stolen by the principal Crown witness Elias Ngutshane. According to the latter, Appellant stole the bicycle. Various portions of the stolen bicycle were later found in Appellant's possession or in the near vicinity of his home: in particular, the wheels of the deceased's cycle, distinguishable because of their large tyres, were discovered to have been fitted to the frame of a black bicycle found in Appellant's possession. The Trial Court's finding that it was Appellant, and not Elias, who stole the deceased's cycle was fully warranted.

On Saturday 22nd March and Sunday 23rd March 1958, the deceased was searching for his stolen cycle and, prompted thereto by Elias, endeavoured to make contact with Appellant. Fairly early on the Sunday morning the deceased, travelling on a borrowed red bicycle, arrived at Appellant's

home ...../4

home and there taxed the latter with having stolen his cycle at the beer-party. Appellant denied the theft. In the course of the ensuing altercation the deceased asserted that the wheels, but not the frame, of the black bicycle were his property. The deceased also asked a bystander (the witness Iwan Choka) whether there was an induna or a European nearby, to which he received a negative reply. Eventually Appellant and the deceased departed together in the general direction of the latter's home and - as stated by Appellant to the witness Simon Mapanga from whom he borrowed a bicycle-pump - with the object of Appellant's pointing out to the deceased the man from whom, as he maintained, he had purchased the black cycle. It may here be mentioned that evidence led at the trial revealed that Appellant had, some time previously, purchased the frame of the black cycle from one Frank Ngwenya and a pair of wheels from one Piet Mabusa. After his arrest, Appellant told the police that he had purchased the frame of the black bicycle from Frank and its wheels (i.e. those proved to have in fact belonged to deceased's stolen cycle) from Piet.

When, as stated above, the deceased and Appellant departed

together ...../5

together from the latter's home, they were riding the red and the black cycles respectively. This was the last time, according to the Crown case, that the deceased was seen alive.

About 10 a.m. on the morning of Sunday 23rd March the Appellant - identified by a variety of circumstances which it is unnecessary to detail - was seen alone and pushing two cycles, the red and the black, at a spot (marked D on the plan) in the vicinity of the Nelspruit-Sabie Main Road. It was observed that his trousers were torn and, according to one witness, the trousers appeared to be wet. Shortly thereafter, and a little more to the South than spot D, Appellant was met by the Crown witness Timothy Mokwena, who had at an earlier date left some trousers with Appellant for the latter to repair. Appellant now informed Timothy that those trousers had been stolen, and he suggested that Timothy should take the red cycle and sell it for £10, after which he (Appellant) would reimburse Timothy for the loss of the trousers. Upon Timothy enquiring about the red cycle's "papers", Appellant said he declined to ~~###~~ hand them over for fear that

Timothy ..../6

Timothy would abscond with the cycle. Timothy thereupon parted from Appellant, taking with him the red cycle which was later found in his possession by the police. In his evidence Timothy stated that he had, on this occasion, also noticed the tear in Appellant's trousers. Not long after his talk with Timothy, Appellant mended the tear in his trousers at a stat near Sibthorpe, which latter is also on the Nelspruit-Sabie main road but more to the South than the spot where the conversation with Timothy had taken place. The mending of the trousers was done with white cotton which Appellant obtained at this stat. In reply to an enquiry, made while he was mending the trousers, Appellant said that the tear had been caused by the pedal of the black cycle, which latter he still had with him.

Towards noon on the same day (Sunday 23rd), Appellant arrived at the home of Elias' father on Rooiuitsig which is South from Sibthorpe along the Nelspruit-Sabie main road and is thus further away from Appellant's home than Sibthorpe itself. At Rooiuitsig Appellant asked Elias to sell him some rice, which was refused: Elias however gave Appellant some food. Appellant then said he

wished ...../7

wished to speak to Elias privately and the two of them then retired to Elias' room. When they were alone in the room, Appellant, according to Elias' testimony at the trial, stated that he had killed the deceased and, referring to his trousers, repaired with the white cotton, added: "Kyk hoe het die oorledene my broek stukkend geskop". A little later in his evidence Elias said that he first thought Appellant was joking, but that the latter, in addition to referring to the tear in the trousers, then went on to say that the trousers had had blood on them but that he had washed them. In reply to a question from one of the Assessors as to whether he had not asked Appellant why he had killed the deceased, Elias deposed:

> " Hy het my gesê hy het hom aan die keel gevat en hom verwurg. As gevolg van die verwurging het die oorledene geskop en met die skop het die broek geskeur ..... Hy het die lyk naby die rivier weggesteek."

When Appellant returned home - which, according to his reputed wife Eliza Khoza, was about midday on Sunday 23rd - he told her that he had been wrongly accused of stealing a cycle, that two natives had wanted to assault him in the vicinity of the shop at Sibthorpe, and

that ...../8

that he had run away from them. In reply to his wife's enquiry about his torn trousers, he said that the tear had occured when he fell off his cycle.

On the following Tuesday (25th March) January Mashigo, another brother of the deceased, spoke to Eliza at Appellant's home enquiring about the deceased. When Appellant declined to believe Eliza's report of this, she accompanied Appellant to Abdulla Matsekwe, the induna of Veldman and Thom's compound, who confirmed that he had referred January to Eliza. In response to enquiry from Abdulla, Appellant said that he had parted from "die persoon wat met 'n fiets daar gewees het" at Sibthorpe after an assault upon him (Appellant) there by that person and another native, and that he had then run away in the direction of Rooiuitsig. Upon Abdulla's asking why he had run away in the opposite direction from that in which his home lay, Appellant became angry and asked Abdulla whether he thought that he (Appellant) had killed the man.

On 29th March 1958 Appellant, after having first denied all knowledge of deceased to the latter's brother-in-law Solomon Mabuka, eventually agreed - according to

Solomon's ...../9

Solomon's evidence - to show him where the deceased's body was. Solomon and Appellant, followed by the police, then went into the pine forest and at a certain spot Appellant said "Hier het ons baklei". In reply to Solomon's enquiry as to where the body was, Appellant answered: "Dit is bietjie voorentoe, maar ek het vergeet". After proceeding a little distance, and after some further search, Appellant ultimately pointed to a spot where, hidden as described earlier in this judgment, the deceased's decomposing body was found.

In the light of the foregoing it is clear that the Crown established that Appellant unlawfully killed the deceased: indeed, the contrary was not argued before us. Mr. Ackermann, stressing the absence of any medical evidence establishing the cause of death and relying upon R.v. Mlambo 1957 (4) S.A. 727 (A),submitted, however, that the Trial Court had erred in concluding that the only reasonable inference from the proved facts was that Appellant had intentionally killed the deceased. Developing this submission, counsel argued that the Trial Court was not

justified ...../10

justified in taking the view that, when the deceased and Appellant were last seen together, Appellant had decided to take the deceased "to a place of solitude and loneliness in a thick pine-forest where he could easily dispose of the dead body"; and, relying upon the remarks of GREENBERG, J.A. in R. v. Dube 1948(3) S.A. 360 at 362 (A) cited by SCHREINER, J.A. in R. v. Mlambo (supra) at 728, counsel argued further that on the issue of intention the Trial Court had erred in drawing inferences unfavourable to the Appellant from the latter's subsequent conduct: the evidence - so the argument continued - is equally consistent with the deceased having been killed by Appellant in circumstances amounting to culpable homicide.

Now, as was pointed out by SCHREINER, J.A. in R. v. Mlambo supra at p. 729, the absence of any evidence establishing the cause of death is always a most important feature in a murder case. That situation obtained in Mlambo's case. The position is however materially different in the present case; for, although the medical evidence failed to assist the Crown, the latter was able to adduce, through the medium of the witness Elias, the Appellant's own

statement ...../11

statement of how the deceased had met his death - a statement in no way inconsistent with the medical evidence. Elias' evidence in relation to ~~these statements~~ what exactly was said by the Appellant is open to the criticism that, as appears from the summary of Elias' evidence given earlier in this judgment, he did not initially mention that Appellant had said anything about having strangled the deceased, but only that he had killed him. This might conceivably be due to the manner in which Elias' evidence was led; but, however that may be, the Trial Court found Elias to be a truthful witness and specifically accepted his evidence that ~~this~~ the statement concerning the strangling had in fact been made by Appellant. This appeal accordingly falls to be decided upon the basis that, although at the trial falsely denying all knowledge of the deceased's death, Appellant had in fact previously told Elias, in the terms set out earlier in this judgment, that he had strangled the deceased.

This last mentioned feature, in my opinion, effectively distinguishes the present case from Mlambo's case (supra); there the accused, although also persisting at the trial in his, as the Court found, false denial of

having ...../12

having killed the deceased, had made no previous statement as to the cause of her death. Mlambo's case being thus distinguishable, I do not find it necessary for the decision of the present appeal to express any opinion on the differing views reflected in the judgments in that case. In the present case I am, for the reasons hereafter set out, of opinion that the requisite intention on the part of the Appellant was duly proved by the Crown.

The dangers inherent in the application of pressure to the throat of another have not infrequently been mentioned by this Court (see e.g. R. v. Sikepe & Others 1946 A.D. 745 at 755/6, R. v. Lewis 1958(3) S.A. 107 (A)). In Lewis' case at p.109 MALAN J.A. delivering the judgment of the Court, said:

> " The inherent danger of the application of pressure to the throat and neck for even a very brief period must be present to the mind of even the most dull-witted individual and, apart from explanation, in performing such

> " an act the assailant either realises, or recklessly disregards, its probable consequences. The application of pressure manually, as in the case before us, is an aggravating circumstance because the assailant is throughout not only fully alive to the degree of force exerted by him but he is, by reason of his manual contact with the throat, warned of the victim's reaction to the pressure applied."

In the present case, and as was rightly emphasised by Mr. Page for the Crown, there is a very significant absence of any exculpatory feature whatever in Appellant's statement to Elias of how he killed the deceased. Indeed, the statement is, on the face of it, a bald declaration of having deliberately strangled a victim coupled with what almost appears to be some slight indignation that the victim should have so resented the strangling that he kicked and thus accasioned a tear in the assailant's trousers. It may here be mentioned that at the trial Appellant departed from his earlier statements that his trousers were torn by the pedal of his cycle, and deposed that the tear in question had occured a long time before while he was working with some wood. I am not unmindful of Solomon's evidence that, shortly before reaching the body on 29th March 1958,

Appellant said "Hier het ons baklei". But this statement - assuming it to be admissible in Appellant's favour - was made only after his arrest: it was not expanded upon by Appellant to Solomon and, on the record, Appellant never said anything at all about a fight to Elias. There is, in my opinion, no warrant for assuming that, because Elias - as explained earlier - initially only testified to Appellant's having said that he had killed the deceased, it is reasonably possible that Elias may in his evidence have omitted to add that Appellant had also told him that he had strangled the deceased in the course of a fight, or in any other situation which might perhaps be regarded as justifying a verdict of culpable homicide. Any such assumption would, in my opinion, constitute mere speculation. If the throttling of the deceased had in truth occurred in circumstances which mitigated, even if they did not entirely exculpate, Appellant's actions, the one person who was in a position to relate those circumstances was the Appellant himself: and the normal ~~rational~~ natural thing would have been for him to have communicated those circumstances when advising Elias of the killing. Similarly if - as was suggested by

Mr. Ackermann - the"throttling" was in fact no more than a light pressure which fortuitously caused an occlusion of the Carotid arteries (see Lewis' case supra at p.109), only the Appellant could have disclosed that fact. Even if Appellant had refrained from telling Elias of any such mitigating features, it was of course open for him to have related them to the Trial Court in the course of his evidence: instead of which, he, as already stated, insisted in his evidence at the trial that he had no knowledge whatever of the deceased's death. Without here entering upon the divergence of view which revealed itself in Mlambo's case (supra) concerning the correct inferences to be drawn, in relation to the issue of intention, from the persistence by an accused person in such a false denial, the Appellant's failure to give in the witness box any account of the throttling - which, on the Trial Court's finding, he had himself reported to Elias - is, at the very lowest, a very material factor in the present enquiry.

Having regard to all the circumstances I have mentioned, the proper inference to be drawn from all the evidence is, in my judgment, that the requisite intention

to ...../16

to kill was duly established by the Crown.

On the view that I take of the evidence, it is unnecessary to examine in any detail Mr. Ackermann's criticism of the Trial Court's view that Appellant designedly took the deceased to a lonely place. We are concerned, not with premeditation, but with whether an intention to kill was duly proved. It may conceivably be that, notwithstanding the deceased's large-tyred wheels in the black cycle, Appellant initially hoped to put the deceased off by taking him to Frank or Piet. On the other hand, it is manifest that, as Appellant had in fact stolen the deceased's bicycle at the beer-party, some motive - however inadequate by civilised standards - for Appellant's making away with the deceased may be said to have been shown by the Crown. Nor do I find it necessary to make any close examination of the inferences drawn by the Trial Court from the Appellant's subsequent conduct in concealing the body and so forth. Even if the fullest weight be given to the view, expressed by GREENBERG, J. in R. v. Dube supra, that such subsequent conduct may be explicable merely by consciousness

of ...../17

of having unlawfully killed (as distinct from an intentional unlawful killing) there was, in the present case, adequate proof of an intention to kill from the Appellant's own statements to Elias when read against the general background of the rest of the evidence. The adequacy of that proof is not in any way impaired by Appellant's subsequent conduct in concealing the body, in disposing of the red cycle and in persisting at the trial in his total denial; for that conduct can, at lowest, hardly be said to be more consistent with culpable homicide than with murder.

In my judgment, the Crown proved beyond reasonable doubt that the Appellant killed the deceased and, in law, intended to kill him. It follows that the appeal is dismissed and the conviction and sentence are confirmed.

(Signed) N. OGILVIE THOMPSON.

SCHREINER, A.C.J.
MALAN, J.A.
VAN BLERK, J.A.
} Concur.

IN DIE HOOGGEREGSHOF VAN SUID-AFRIKA

(Appélafdeling)

Insake:-

SAMSON MBETHE Appellant

en

R E G I N A Respondent

Verhoor deur:Schreiner W.H.R.,Steyn,Malan,Van Blerk en Ogilvie Thompson RR.A.

Verhoordatum: 14 November,1958. Leweringsdatum: 21 - 11 - 58

U I T S P R A A K

STEYN R.A. :- Volgens die getuienis, wat in sy wesenlike trekke in die meerderheids-uitspraak uiteengesit word, ly dit geen twyfel nie dat die appellant die oorledene om die lewe gebring het. Die vraag is of die Staat moord of slegs strafbare manslag bewys het.

Om 'n antwoord op genoemde vraag te vind, is dit belangrik om in eerste instansie te bepaal of dit bewys is dat die appellant, toe hy op die oogend van die gebeure tesame met die oorledene van sy hut af vertrek het, reeds besluit het om die oorledene te vermoor. Indien dit nie die geval was nie, dan is daar sekere afleidings uit die bewese feite waarna ek aanstons verwys, wat nie oor die hoof gesien

kan/.....

kan word nie.

Volgens Iwan Choka het die appellant en die oorledene daardie oggend, toe laasgenoemde sy fiets by die appellant kom soek het en hom van diefstal beskuldig het, 'n struweling gehad. Dat daar onder die omstandighede 'n struweling plaasgevind het, is seker nie onwaarskynlik nie. Die oorledene wou die diefstal gaan aanmeld maar daar was niemand in die nabyheid by wie hy dit kon doen nie. Hy en die appellant is saam daar weg, elk op 'n fiets. Die verhoorhof het aangeneem dat dit nie die appellant se bedoeling was om die oorledene na Frank Ngwenya of Piet Mabusa te neem nie, by wie hy onderskeidelik 'n fietsraam en twee fietswiele sou gekoop het, maar om die oorledene te gaan vermoor onder die voorwensel dat hy hom by die verkopers of een van hulle wou bring. Nou is dit waar dat die twis waarskynlik gegaan het, in die eerste instansie eltens, oor die twee wiele wat die oorledene as sy eiendom uitgeken het, en dat die appellant sou moes verwag het dat Piet, by wie hy twee ander wiele gekoop het, die verkoop van die betrokke wiele sou ontken, maar dit is ook waar dat hy die polisie later in verband met dieselfde wiele na Piet geneem het. Vermoedelik wou hy die polisie ~~xxx~~ mislei deur Piet tot leuenaar te maak en homself voor te doen -

as/.....

as 'n persoon wat te goeie trou gehandel het. Dit is ewegoed moontlik dat hy dieselfde met die oorledene wou doen. Dit blyk nie uit die getuienis dat die rigting wat hulle gevolg het, hul nie na Frank of Piet sou geneem het nie. Die enigste getuienis betreffende die doodsoorsaak is verder dat die appellant die oorledene verwurg het. Daar is geen aanduiding hoegenaamd van enige ander doodsoorsaak nie. As hy die oggend by sy hut reeds besluit het om hom van kant te maak, is dit meer waarskynlik dat hy hom nie op sy blote hande sou wil verlaat nie. Die uitkoms daarvan sou meer onseker wees as met 'n doeltreffende wapen. Waar twee persone op fietse is, sou dit ook minder maklik vir die een wees om die ander onverhoeds aan die keel te pak. Die geleentheid daarvoor sou geskep moes word sonder om agterdog te wek. Ek kan my, met hierdie oorwegings in gedagte, nie met die sienswyse vereenselwig dat dit bewys is dat die appellant reeds by vertrek van die hut af met ~~dit~~ voorbedagte rade moord op die oorledene wou gaan pleeg nie; en as dit nie die geval was nie, soos ek by ontstentenis van voldoende bewys moet veronderstel, dan volg dit óf dat hy moes afgesien het van die voorgenome besoek aan Frank en Piet en besluit het om die onsekere aan te durf in 'n aanslag op die oorledene sonder wapen, óf dat iets anders moes gebeur het, moontlik 'n hervatting van die stryweling by die hut, as gevolg waarvan hul handgemeen geraak het met noodlottige verloop vir die oorledene. Dit is die voor-die-hand-liggende moontlikhede en daar skyn geen derde moontlikheid te wees nie. Die vraag is dan of die getuienis die

eerste/.....

eerste gebeurlikheid meer waarskynlik dan die tweede maak. Na my mening gee die getuienis van Elias geen uitsluitsel wat hierdie aspek van die saak betref nie. Indien dit duidlik was dat die appellant aan hom geen melding van 'n bakleiery gemaak het nie, dan sou dit 'n sterk aanduiding ten gunste van die eerste gebeurlikheid gewees het, want die appellant sou na alle waarskynlikheid 'n verwysing daarna nie wou weggelaat het nie, aangesien dit sou kon dien om sy handelwyse enigsins te verskoon teenoor die persoon wat na sy wete daarvan bewus was dat hy die oorledene se fiets gesteel het en sy optrede anders vir koelbloedige moord sou kon aansien. Maar hierdie duidelikheid kan ek nie in Elias se getuienis vind nie. By sy ondervraging deur die vervolger het hy verklaar dat die appellant aan hom sou gesê het "ek moet nie daarvan praat nie "maar hy het die oorledene doodgemaak." Daarop is hy gevra of die appellant onigiets gesê het van die fietswiele. Sy antwoord was: "Nee, hy het net daar gesê dat hy die man dopd- "gemaak het. Daarna het hy nie lank vertoef nie en hy is weer "weg." Nóg deur die advokaat vir die ver~~dediging~~volging, nóg deur die advokaat vir die verdediging, is hy gevra of die appellant iets omtrent 'n bakleiery gesê het. Dat hy nie met die uitdrukking "hy het net daar gesê" kon bedoel het dat die appellant hom hoegenaamd niks verder meegedeel het dan alleen

dat/.....

dat hy die oorledene doodgemaak het nie, blyk uit die volgende vrae en antwoorde onder kruisverhoor en by ondervraging deur een van die assessore :

"Waarom dink jy sou die beskuldigde jou kom vertel het dat hy die man doodgemaak het en jou gevra het om stil te bly ?..... Ek het maar gereken hy speel, dat hy maar 'n grap maak, en toe wys hy my die broek waar die broek geskeur gewees het. Hy het verder gesê dat die broek ook bloed aangehad het maar hy het die broek gewas. // Was die broek nat ?.....Die broek was droog.

Deur Assessoor Kuit: Het jy nie die man gevra hoekom hy die man doodgemaak het nie ?..... Hy het my gesê hy het hom aan die keel gevat en hom verwurg. As gevolg van die verwurging het die oorledene geskop en met die skop het die broek geskeur. Het hy gesê wat hy met die lyk gedoen het ?.....Volgens wat hy my gesê het, het hy gesê hy het die lyk naby die rivier weggesteek. "

Hieruit is dit duidlik, meen ek, dat Elias in die eérste gedeelte van sy getuienis slegs 'n greep gedoen het uit wat die appellant hom vertel het. Verdere besonderhede omtrent die gesprek is hom aan die lig gebring alleen as gevolg van die verdere vrae, en omdat hy nie volledig ondervra is nie, kan ek sy getuienis nie as 'n volledige weergawe van die gesprek beskou nie. Dit kom my voor 'n ongeregverdigde veronderstelling te wees dat hy, indien hy gevra was of die appellant iets van 'n bakleiery gesê het, ontkennend sou moes geantwoord het.

Dat/.....

Dat daar geen vaste grond vir so'n veronderstelling is nie, is geen blote bespiegeling nie. Die aard van Elias se getuienis en die manier waarop dit voorgelê is, toon dit aan. En as genoemde veronderstelling eenmaal verval, dan verval ook die sterkste aanwysing dat die eerste moontlikheid wat ek hierbo genoem het, die regte is. Ten gunste van die tweede moontlikheid bly daar nog die getuienis van Solomon Maluka dat die appellant, terwyl hul in die bos na die lyk van die oorledene gesoek het, op 'n sekere plek aan hom gesê het : "Hier het ons "baklei." Oor die toelaatbaarheid van hierdie getuienis is bedenkings uitgespreek, maar na my mening is dit wel toelaatbaar as 'n erkenning deur die appellant wat die strekking het om hom met die dood van die oorledene te verbind. Wat die bewyswaarde daarvan met betrekking tot die onderhawige vraag ook al mag wees, dui dit desnietemin eerder op die tweede as op die eerste moontlikheid. Dit is waar dat die appellant geen dergelike verklaring by die verhoor gedoen het nie. Hy het getuienis afgelê en eenvoudig alles ontken. Hy wou homself klaarblyklik heeltemal loslieg. Sy leuens kom met reg in aanmerking as teken dat hy skuld het aan die dood van die oorledene, maar ek sou aarsel om hom die dwaasheid van sy ontkennings, wat xx verklaar sou word deur 'n verstaanbare begeerte -

om/.....

om alle straf vry te spring, meer bepaald toe te reken as aanwysing van die nodige opset om moord te pleeg. Sy leuenagtigheid is, in die omstandighede van die saak, nie beter bestaanbaar met moord as met strafbare manslag nie.

Ek kan niks anders in die getuienis vind wat met voldoende ~~aa~~ee~~n~~duidigheid die deurslag ten gunste van die eerste moontlikheid kan gee nie. Die getuienis laat bygevolg na my mening 'n redelike moontlikheid dat die appellant die oorledene in die loop van 'n bakleiery verwurg het en bewys daarom nie met die vereiste sekerheid dat hy inderdaad moord gepleeg het nie.

L. C. [illegible]

(On resuming at 2.15 p.m.)

- JUDGMENT -

THERON, J.: The accused is charged with the crime of murder. It is alleged that on the 23rd March, 1958, at Spitskop, in the district of Nelspruit, he wrongfully, unlawfully and maliciously killed and murdere James Mashigo.

We accept as a proved fact that on the 29th March the body of the deceased James Mashigo was discovered in a pine plantation where it was well concealed under pine needles. The body was identified by the brother of the deceased, who was able to identify the body by the fact that certain front teeth were missing and, probably more accurately, by the clothing which the deceased was wearing - clothing that he knew him to be wearing at the time he last saw him during his lifetime. Not only is there that evidence of identification of the deceased but there is other evidence testifying to the clothing worn by the deceased on the last day he was seen alive and thereafter when it was seen on the body of the deceased.

The Crown alleges that the accused is the person who is responsible for the death of the deceased and for the concealment of the body.

The Crown has called a witness by the name of Elias who described how the deceased attended a beer drink at Matebula's stat at Rooiuitsig sometime towards the middle of March, 1958. The deceased arrived at the beer drink on a bicycle. This bicycle he left in the enclosure surrounding the stat. Elias testified to being present when the accused, having arrived at the stat where the beer drink was being held, did not enter the stat but took the cycle left by the deceased and left. Elias left the stat in the company of the accused. Elias also des-

The accused, however, denied being anywhere near the beer drink on the evening in question, and he also denied being in any way associated with the bicycle. He claimed that he saw the Crown witness Elias taking the bicycle to his, Elias's, hut, and he stated that Elias dismantled the cycle and did the damage to which I have referred.

We have no hesitation in rejecting the accused's denial as false and his evidence about Elias handling the cycle. We accept as a proved fact that the accused was the person who brought the cycle to his own hut, that he dismantled the cycle and that that is how the handlebars came to be concealed in his hut.

Furthermore there is the evidence of other witnesses proving that the accused subsequently rode this bicycle now before the Court to which are fitted the two wheels which were clearly identified as wheels coming from the dismantled cycle of the deceased. The accused has denied that he used the cycle at any time. We again reject his evidence as false. This leads us, therefore, to the irresistible conclusion that, on facts proved beyond all reasonable doubt, the accused stole the cycle of the deceased. He dismantled it, and used the wheels in a frame which he probably purchased from Frank; he certainly did not fit the wheels that he purchased from the Crown witness Piet Mabusa.

In the setting which we have accepted the accused knew that the one witness who was aware of his having stolen the cycle was Elias. So that, insofar as a possible allegation of cycle theft was concerned, the man who it was vital for the accused to guard against was the Crown witness Elias. That the accused knew because

of his knowledge that Elias was with him when he took the bicycle.

We also accept as a fact that the deceased commenced searching for his lost cycle, and we accept the evidence that the deceased borrowed from his brother a red bicycle, now before the Court, in order to proceed to Rooiuitsig to search for his missing bicycle. He contacted Elias, and we accept Elias's evidence that he, Elias, gave the deceased certain directions. According to the evidence of Elias, which we accept, the deceased proceeded in the direction of the accused's hut on the Saturday. Elias saw the deceased again on the Sunday. They obviously had some discussion about the cycle, and the deceased again proceeded to the house of the accused.

Now when analysing the evidence we find that there is corroboration of the evidence of Elias in regard to the visit on the Saturday, and the following facts are the facts which afford the corroboration. The one is that the deceased's brother apprcached the accused's wife in search of the deceased. Not only did the deceased's brother approach the accused's wife but also another native by the name of Abdulla. The accused was not present on the first occasion when the deceased's brother visited the accused's wife and made enquiries, but on a subsequent occasion when the accused's wife was approached she told the accused that a search was being made for the deceased. We accept as a fact that the deceased returned on the Sunday, because he was looking for the accused, and on that Sunday there is the evidence of one of the Crown witnesses who was present at the hut of the accused that the accused and the deceased quarrelled

about the cycle. That was the witness Iwan Choka. According to that witness the deceased claimed that the accused had wrongfully taken his cycle. When accused of the theft the accused remained silent. The witness had occasion to ask the accused whether it was true that he had taken the cycle, and again the accused remained silent. The accused, thereafter, is proved to have visited the house of Simon Mapanga. We accept the evidence of Simon that the accused approached him in order to borrow a bicycle pump. The accused explained that he was needing the pump to pump up his bicycle as he was taking a man to point out to him where he, the accused, had purchased this bicycle, as this man was claiming the bicycle as his property. The accused had previously purchased a bicycle frame - the frame into which the two wheels which obviously belonged to the deceased's cycle were fitted - and whether the accused intended taking the deceased to Frank, from whom the frame was bought, is uncertain on the evidence. But we have the evidence of Simon, who could obviously not have fabricated this evidence because it cannot be associated with his type of mentality that he would be capable of fabricating evidence of so slender a nature, but so well fitting into the picture.

We accept as a proved fact that the accused was wearing black trousers and a grey sleeveless pullover on the Sunday in question and, as I have already said, the deceased was visiting the accused's hut that day riding this red cycle borrowed from his brother. We accept it as proved that the accused and the deceased, after the quarrel and probably after the accused had told him he was taking him to show him from whom he had bought the bicycle, left the hut and proceeded in a

certain direction. Thereafter the deceased was not seen alive again.

But where the Crown evidence takes the matter further is that certain witnesses thereafter saw the accused wheeling both bicycles, Exhibits 4 and 7; and the important fact is that he was wheeling the red cycle now clearly identified as the property of the deceased's brother, borrowed by the deceased on that particular Sunday. The Crown has, therefore, produced this complete link of events, that the deceased visited the accused's house that morning with this bicycle, that the deceased was with the accused when they left the house, and not very far from this house, and in the same area, the deceased was no longer seen but the accused was seen with both bicycles, i.e. the black one and the red one. This leads to the irresistible conclusion that the deceased was disposed of in some way between the time the accused left the hut and the time he was subsequently seen wheeling the red cycle.

There is the evidence of the one Crown witness, Timothy Mokwena, who testified to having left some clothing with the accused previously in order to have it repaired. It is by coincidence (a factor which we have to assess in considering whether Timothy's evidence is reliable or not) that on the particular Sunday the accused met Timothy while the latter was returning home on foot having left his punctured bicycle elsewhere. A discussion took place between the accused and Timothy, and according to Timothy the accused then handed him this red bicycle with instructions that Timothy should sell it for £10, that he should hand the £10 to the accused and that he, the accused, would then pay Timothy for the

loss of the clothing which the accused no longer had in his possession. The accused was not prepared to hand over the papers relating to the cycle - a request which Timothy had made - because the accused told him that he feared that if he armed him with the papers he would not bring the money to the accused. We have no hesitation in accepting Timothy's evidence, because it fits in once again with other factors; his evidence is a link in the chain of circumstantial evidence.

As I have said, it was proved that the accused and deceased were together that morning, the deceased was in possession of that red cycle, and, by independent testimony, the accused is proved to have been in possession of a red cycle on that Sunday morning, and later this very cycle proved to be the property of the deceased's brother which had been borrowed by the deceased for the purpose of searching for the cycle. This cycle was found in the possession of Timothy. There is, therefore, no reason at all for not accepting Timothy's evidence.

Then there is the evidence of Scotch Mnisi. He saw the accused wheeling this black cycle, which must have been at a time subsequent to his having parted with the red cycle. The accused was wearing black trousers and these black trousers were torn in the way the black trousers before the Court are torn. He says he saw the accused busy repairing the trousers, using some white cotton. An examination of the black trousers before the Court indicates that they have been sewn with white cotton. That evidence is confirmed by the evidence of Malivase Kambula, a very old lady who created a very strong impression upon us in giving her evidence.

The question is how did the accused's trousers come to be torn in the manner in which it is clear they have been torn? The accused testified to having been employed in some timberyard or timber plantation; these clothes, he says, were worn by him daily, and in the course of his duties his trousers were torn by the timber. That statement has to be tested in the light of other statements the accused made to the various witnesses.

We find that the evidence of the accused's wife is the truth when she says that the accused explained to her that the trousers were torn in the way they are now torn by being caught in the pedal of a cycle. He gave the same explanation to Scotch Mnisi, and, I think, to some other witness, but it is immaterial. The accused, when speaking to his wife about the brother of the deceased coming to enquire after the deceased, did not believe her about the enquiry. He then went to a headboy or induna to ask him whether there was any truth in the statement, and to the headboy or induna, Abdulla, the accused gave a certain explanation of how he went to a certain shop to point out someone from whom he was alleged to have bought a bicycle; there the man with whom he went was joined by another person, and they threatened to assault him. He also told the induna that he then fled from there, pursued by these two. Obviously Abdulla was not satisfied with the explanation given by the accused and he stated asking him questions which, in a sense, annoyed the accused. He no doubt realised that he was suspected, and his first remark was rather important, namely whether he was suspected of having killed this person, and he was met with the reply 'Yes'.

Then we have to consider whether we accept the very strong evidence of Elias that after he saw the deceased

on the Sunday morning the accused arrived at his hut. He served him with some stamp mealies, whereafter the accused invited him to accompany him to his, Elias's, room in order that he could make some confidential disclosure to him. According to the evidence of Elias the accused took him into the room and there told him that he had killed this other person. His evidence is to the effect: "Moenie daarvan praat nie - ek het daardie man doodgemaak." He stated later "Ek het hom verwurg en hy het toe geskop; hy het so geskop dat hy my broek geskeur het." And if my memory serves me well on the facts testified to by the various witnesses I think it was Elias who also mentioned that the accused told him that some blood came upon his trousers and that he washed his trousers thereafter. There is corroboration of this statement, because the one witness who saw the accused wheeling the two cycles (I think it was Amos Matebula), although he was unable to identify the person who was wheeling the cycles because that person had his hat pulled well down over his eyes, did say that he noticed that that person was wearing the clothing before the Court, which has been identified as the accused's, and that the black trousers were torn and, significantly, he also noticed that the trousers were wet from below the knees downwards. That evidence creates very strong corroboration of the evidence of Elias that the accused told him that he had washed his trousers. The only circumstances under which he could have told Elias that, was if he had made this disclosure to Elias, which we find the accused did make. There is a clear reason why the accused should make this statement to Elias, namely because he knew that the one person who was aware of the theft by him of the deceased's bicycle was Elias, and,

the deceased now having been disposed of, to the knowledge of the accused Elias would be the first man able to give the police information of the theft of the cycle and of the search by the deceased for his cycle. But Elias's evidence is further confirmed by the evidence of his father, who testified to seeing the accused arriving and taking Elias into the room. He was too far to hear what was being discussed.

The accused emphatically denied being at Elias's stat or ever disclosing anything of this kind to Elias. That evidence is untrue, and that untruth is further corroboration of the evidence of Elias and brings us to the irresistible conclusion that we accept Elias's evidence that this statement was made.

The accused was taken subsequently on the 29th March to search for what was then clearly suspected to be the body of the deceased, and we accept unequivocally the evidence of Solomon and Sergeant Erasmus that the accused is the person who led Solomon to the place where the deceased's body was concealed and there pointed it out. We do not for one moment accept a single word of the accused's evidence, and very much less his statement that he was taken by a large number of policemen and without further ado the police discovered the body. Sergeant Erasmus gave his evidence in a very straightforward manner, and so did the witness Solomon.

The accused, therefore, pointed out the body of the deceased. That body was subsequently examined by the district surgeon, who was unable to certify the cause of death. That, of course, is a matter for very serious consideration in determining whether the Crown has succeeded in proving the case against the accused

beyond all reasonable doubt. But, as I have said before, on the evidence that we accept, we conclude that the accused caused the death of the deceased that morning, that the accused concealed the body in the manner that I have described, that the accused thereafter told Elias that he, the accused, had killed this person by strangling. One would have expected, if there had been any resistance by the deceased or any attack by the deceased upon the accused, that the accused would have disclosed it to Elias, because there was some evidence to bear out that explanation by the fact that the clothing worn by the accused was torn. But the explanation given by the accused to Elias for the torn clothes was that while he was strangling the deceased the latter struggled and kicked and the clothes were torn in that way.

I should revert to one other factor which requires consideration, namely the manner in which the accused took the deceased away from his hut. The accused knew that he had not bought any bicycle from Frank or anybody else, and his statement that he did buy it from somebody could not stand the test of being taken to a person who would deny that statement, because the cycle in the possession of the accused had been built up from a frame purchased from Frank and the wheels of the stolen cycle. In our view the irresistible conclusion is that the accused was not going to take the deceased to any place where he was going to point out any person, but he was going to take him to a place of solitude and loneliness, in a thick pine forest, where he could easily dispose of the dead body, and there the dead body was disposed of. The difficulty in finding the body is clearly proved by the long search that was carried out before it was eventually pointed out by the accused.

All these facts lead to one irresistible conclusion, namely that the accused wrongfully, unlawfully and maliciously killed the deceased, and we have no hesitation on all the evidence in coming to the conclusion that the Crown has proved beyond all reasonable doubt that the accused is guilty of murder.

VERDICT: GUILTY OF MURDER.

(Mr. Ackerman requests that the Court take a short adjournment to enable him to consult the accused).

(Court adjourns for five minutes).

(On resuming)

Mr. Ackerman: I regret that the accused has nothing further whatsoever to add to the evidence he has given under oath today. In those circumstances there is very little I can say on the question of extenuating circumstances; I can merely point to the single fact that the accused gave evidence to the effect that he had had something to drink that morning. I can take the matter no further.

THERON, J.: We have considered all the evidence and we are unanimous in our view that there are no extenuating circumstances in this case.

(On being asked if he had anything to say why sentence of death should not be passed upon him, the accused replies: "As jy my tot die dood veroordeel dan word ek verniet tot die dood veroordeel. Niemand het my gesien n hand op die persoon sit nie en ek het nie my hand op die persoon gesit nie. Dit verbaas my. Die mense druk die saak op my. Nie een van hulle het die ding gesien nie. Hulle sê ek het gesteel, maar die persoon

wat gesteel het het hulle gelos. Aangesien ek niks gedoen het sê hulle nog dit is ek. Ek kan nou nie tot die dood veroordeel word nie aangesien ek niks van die ding af weet nie. Ek vra dat jy namens my moet praat, want ek weet niks daarvan nie."

(Silence is called for)

- SENTENCE -

THERON, J.: Samson Mbethe, the sentence of the Court is that you be returned to prison where you will be hanged by your neck until you are dead.

- CERTIFICATE -

I certify the foregoing to be a true transcript of my shorthand notes, as correctly recorded, of the proceedings in the case of Regina v. Samson Mbethe.

(Sgd.) N. R. Walker.

OFFICIAL COURT STENOGRAPHER
TRANSVAAL PROVINCIAL DIVISION.
