Death Sentence 153/70

G.P.-S. J. 445.

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

(APPELLATE DIVISION).
AFDELING).

APPEAL IN CRIMINAL CASE.
APPÈL IN STRAFSAAK.

KATAZI[illegible] JACKSON MAYO

Appellant.

versus/teen

THE STATE

Respondent.

Appellant's Attorney Pro Deo *Respondent's Attorney* A. G. (G.town)
Prokureur van Appellant *Prokureur van Respondent*

Appellant's Advocate S. [illegible] *Respondent's Advocate* H. F. Redfearth
Advokaat van Appellant *Advokaat van Respondent*

Set down for hearing on 10-11-70
Op die rol geplaas vir verhoor op

3.10.11

(E.C.D.)

[illegible]

Postea 9-12-70 per [illegible] J.A.
; the appeal is dismissed

[illegible signature]

IN THE SUPREME COURT OF SOUTH AFRICA

APPELLATE DIVISION

In the matter between:

KATAZILE JACKSON MADYO ..... Appellant

AND

THE STATE ..... Respondent

Coram: Jansen, J.A., Corbett, A.J.A., et Muller, A.J.A.

Heard: 10th November, 1970.

Delivered: 9th December 1970.

JUDGMENT

JANSEN, J.A. :-

On Saturday the 14th of March 1970, at about 8 a.m., the body of Leonard John Westcott, was found in one of the rooms of his house on the farm "Felton", in the vicinity of Peddie, Eastern Cape. The body was bound hand and foot and the cause of death was a .38 bullet that had entered above the right eyebrow and had lodged in the brain. Four additional bullets had struck less vital parts,

leaving ..... /2

leaving both entrance and exit wounds.

A man of over 80, the deceased had lived alone and there were apparently not even servants to shed any light upon the circumstances of his death. Examination of the premises produced meagre results. Three spent bullets of .38 calibre were found on the floor of the room and a further two were recovered from where they had lodged in the wall. A search of the house revealed an almost complete absence of any clothing and no trace of two .38 revolvers which the deceased had been licensed to possess, viz. a Ruby Extra and a Webley and Scott, all of which seemed to point to the killing being associated with robbery or theft. No direct evidence, however, was available to establish what articles of clothing, if any, were missing, or whether the two revolvers were on the premises at the time of the commission of the crime. The time of death, also, could not be determined with any precision, as the results of the post-mortem were inconclusive. The deceased had, however, been seen alive on Thursday the 12th of March, and there was some indication that by

sunset ..... /3

sunset on the Friday he might well have been dead. A herd boy, Netile Thanti, had at that time gone to the deceased's house to report a beast missing. He had found the kitchen door ajar. Remaining outside he had coughed diffidently to attract the deceased's attention but there had been no reaction whatsoever. The next morning at 6 a.m. the door was still ajar.

On Sunday, the day after the discovery of the body, at about 5 a.m., the police found the appellant asleep in a room of his father's house on the farm "Premier Pineries", about half a mile as the crow flies from the deceased's house. The appellant was taken into custody and in due course indicted in the Eastern Cape Division for the murder of the deceased. The matter was heard by Jennett, J.P., and two assessors, who unanimously found the appellant guilty of murder with no extenuating circumstances. The appellant was consequently sentenced to death. By leave of the Court a quo he appeals against his conviction.

At the trial the State presented a

strong ..... /4

strong circumstantial case against the appellant, of which the main features were the following:-

(a) At about sunset, or shortly thereafter, on Friday the 13th of March 1970, the appellant, after a long absence from the district, had returned to his father's home with a cardboard box and a suitcase.

(b) When the police arrived early on the Sunday morning, they found the suitcase in the room the appellant shared with his sister, and on the suitcase a white shirt. Upon examination the suitcase proved to contain three jackets, one bearing the trade mark "Albany", and two pairs of trousers.

(c) That afternoon, Sunday the 15th of March, the appellant pointed out two .38 revolvers and sixty-two cartridges of the same calibre hidden on either side of a bush about 100 yards below his father's house. One revolver, a Webley and Scott, was wrapped in a khaki handkerchief; the other a Ruby Special, was wrapped in plastic. The cartridges were in a small carton alongside the latter. During the afternoon the appellant also pointed out two hats hanging against the wall in his father's house.

(d) The deceased had normally bought his clothes from a general dealer's business run by his niece, Mrs. McClean, and her husband at Peddie. All the aforementioned articles of clothing, as also the suitcase, were similar to articles stocked by this shop. Of the three jackets found in the suitcase, one was similar to a jacket sold to the deceased about 7 years before; the second, to one sold to him about 3 years before; and the "Albany"

jacket, ... /5

jacket, to one sold to him about two weeks before his death. The shirt bore Mrs. McClean's code mark and was similar to a shirt sold to the deceased about nine months before his death.

(e) The two revolvers, pointed out by the appellant, bore serial numbers corresponding to those on the licences issued to the deceased. Further, it was established, by ballistic evidence, that the Webley and Scott had in fact fired one of the six spent bullets recovered (including the one retrieved from the body), and could have fired the remainder. In regard to the latter a more positive finding was excluded by damage to the bullets. It was, however, clear that the Ruby Extra could not have fired any of them.

Even disregarding the evidence of the correspondence between the serial numbers on the revolvers and on the licences (the evidential effect and admissibility of which appears to have been questioned at the trial and about which I express no opinion), the aforegoing established a strong circumstantial link between the appellant and the killing of the deceased, particularly his knowledge of the whereabouts of the revolver which had fired at least one of the bullets concerned.

The appellant ... /6

The appellant gave evidence on his own behalf. According to him he had been working for a long time with "the builders" in Port Elizabeth. Intending to return home, he boarded a pirate taxi, the fare being R3.00, at 7 a.m. on Friday the 13th of March 1970. He took with him a suitcase which he had bought in Port Elizabeth. He arrived at Peddie at about 11 o'clock that morning. There he met a stranger who sold him the clothes mentioned above, for R20.00 and the two revolvers and ammunition for R30.00. The transaction was concluded under a large tree where the appellant was sitting at the time (the tree apparently being a place of assembly for Bantus). The stranger had the clothes in a large cardboard box. He opened the box and said: "Here are clothes, take what you want". The appellant took out the items he fancied, one by one. He was then offered the two revolvers and ammunition, which he put among the clothes he had selected. Thereafter he went to borrow a cardboard box at a shop, apparently that of the McCleans'. One Vumisile, an acquaintance, gave him a box,

which ..... /7

which he took to the tree and he put his purchases in it. The stranger, who had sold the goods to the appellant, apparently remained there after the transaction, sitting with the appellant under the tree, because the appellant mentions that at 1 p.m. a certain Gogogo (a brother of Vumisile), who worked for Mrs. McClean at the shop, arrived and spoke to the stranger. The appellant gathered from what was said that they knew each other. Gogogo was known to the appellant and Gogogo remained with them until he went back to work at 2 p.m. When the stranger left is not clear. But be that as it may, at 3 p.m. Gogogo again appeared and said to the appellant: "Are you still here?" The appellant explained that he had been unable to obtain a lift to his home. He then showed Gogogo his purchases, including the two revolvers, and told him that he had bought them from "the person with whom I was sitting there". Gogogo then returned to the shop. They did not meet again, but the appellant saw Gogogo at a distance when, at about 5 p.m., he, the appellant, was near a garage waiting for a taxi. At about 6 p.m. he succeeded in

obtaining ..... /8

obtaining a lift and he arrived at his father's house at 7 p.m. Later he took the revolvers but of the cardboard box and put them at a safe place so that the children could not get" them. He explained that this was the place that he had pointed out to the police, but claimed to have wrapped up the revolvers together and to have put them with the ammunition in one spot.

This story has a number of inherent improbabilities, particularly that the stranger would have disposed of goods of this nature in the manner described, in a relatively public place, and then have remained there at ease, prepared to carry on light conversation, in the presence of the appellant, with Gogogo, who would later be able to identify him. Moreover, if the appellant's story were true in this respect, one would have expected the appellant to have enquired from Gogogo who the stranger was. Questioned about whether he had done so, the appellant most unconvincingly replied "I didn't get a chance to ask him". But quite apart from questions of improbability,

there ..... /9

there were also other unsatisfactory features in the evidence of the appellant. At one stage in his cross-examination he categorically stated that he had not asked the stranger where the latter had obtained the revolvers and ammunition. When asked why he had not done so, he made a complete volte-face and said: "When I asked him he said it was none of my business". Questioned on this, he floundered and then reverted to his original denial and said that he had not asked the stranger at all. Moreover, this was not his only self-contradiction. Asked when he had heard of the death of the deceased, the appellant said that his sister had told him at about one o'clock on the Saturday. However, after considerable hedging under cross-examination, he ultimately stated that she had not told him at all.

It will have been noticed that the appellant's evidence relating to the concealment of the revolvers and ammunition was at variance with the State case, inasmuch as the appellant claimed to have hidden them in one spot and not on both sides of a bush. The evidence of Detective

Constable ..... /10

Constable Willie Ncoko, to the latter effect, was explicitly put to the appellant and he said that the police "were making a mistake". This was, however, not to be the only instance of the appellant's evidence being in conflict with other direct evidence, as will now be explained.

The appellant closed his case without calling any witnesses. Gogogo was available, as also one Vumisile Lukwe (not to be confused with Gogogo's brother), who had been brought to Court from Port Elizabeth at the request of the appellant and who would have said, according to the appellant under cross-examination, that he had met the appellant in Port Elizabeth at about 6 a.m. on the Friday. In the circumstances the Court called both of them.

Gogogo Mdisa confirmed that he had seen the appellant on the Friday. He had met him at one o'clock in a Bantu cafe just below the shop. The appellant had a string bag slung over his shoulder. They shook hands and upon enquiry the appellant stated that he had come from Port Elizabeth. Gogogo left him there and returned to the

shop ..... /11

shop to eat what he had bought at the cafe. Later, still during the lunch hour, he noticed the appellant "sitting on the grass where everybody sits" and where there is a tree. There were many people there, because that is the place "where all the people sit". He saw the appellant talking to Vumisile (Gogogo's brother) and he noticed a cardboard box next to the appellant. At 5 o'clock he again saw the appellant who was then carrying the cardboard box. Recalled at a later stage, Gogogo explained that the appellant had the cardboard box under his arm and the string bag slung over his shoulder, but no suitcase. Gogogo also said that he had seen no suitcase alongside the appellant when the latter was sitting on the grass with the cardboard box next to him. Gogogo, in general, denied all knowledge of the clothes and the revolvers and said that he had not seen them.

Vumisile Lukwe testified that he knew the appellant and that at one stage they both had been working for certain building contractors at Port Elizabeth. He was still working there but the appellant had left "long ago" and he

had last ..... /12

had last seen the appellant the year before: "This year I did not see him at all."

Apparently in an effort to avoid any misunderstanding, the Court then recalled the appellant and put Lukwe's evidence to him. In effect he said, in denial of Lukwe, that he had worked for four weeks in January of this year (1970) for the same contractors as Lukwe and that he had earned R8.00 per week. As a result of further questioning it then came out that the appellant had only been released from goal on the 2nd of February. Asked at a later stage about the source of the money he had paid for the taxi and his purchases from the stranger, he explained that after he had left the contractors he had worked at the docks, off-loading iron and loading coal, at R2.00 a day, until he left for home. When it was pointed out to him that four weeks with the contractors, from the 2nd of February, left very little time for him to have worked at the docks, the question obviously leading up to an enquiry as to how he could then have earned his keep and still have

had ..... /13

had R53.00 on the Friday, the appellant suddenly said that he had won money gambling. The impression created was that of an afterthought.

Where the appellant's evidence was at variance with that of Detective Constable Ncoko, Gogogo Mdisa and Vumisile Lukwe, the Court a quo rejected his evidence and accepted that of the latter. On the basis, therefore, that the appellant was untruthful in these respects, the Court then approached his "improbable, fantastic story that that person in a public place in Peddie offered the goods for sale to him, a complete stranger" and came to the conslusion that it could not, reasonably, be true. Having thus rejected the appellant's explanation, the Court a quo then drew the inference that the appellant had murdered the deceased.

It would be difficult to fault the Court a quo in any of the stages of its reasoning. Bearing in mind the absence of any suggestion that Ncoko, Gogogo Mdisa or Lukwe were biased or had an interest, as opposed to the real deficiencies of the appellant as a witness, the finding that

the ..... /14

the latter was untruthful in material respects can hardly be called in question. Rejection of his whole story, a story at best highly improbable in many respects, then appears to be inevitable. Consequently, the only remaining question is: what is the proper inference to be drawn in all the circumstances? Despite uncertainty about the precise time the deceased died, it seems clear that the appellant had opportunity enough to kill the deceased. On Gogogo's evidence the appellant was at Peddie over the lunch hour and at 5 p.m. on the Friday. He arrived home at sunset, or shortly thereafter (on his own version at 7 p.m.). If the distances involved and the time factor, in view of Ntile Thanti's presence at the deceased's house some time before sunset, appear to make it somewhat improbable that the appellant could have killed the deceased after leaving Peddie that afternoon, it is at least clearly possible that he could have done so some time between Thursday and 1 p.m. on the Friday, when he was first seen by Gogogo. His insubstantial ipse dixit that he had only returned to the district at 11 a.m. on

Friday ..... /15

Friday, being that of a totally discredited witness, can carry little weight - he may well have returned much sooner; the suitcase he did not have when seen by Gogogo, but carried when arriving home, could have been hidden some other time and collected on the way. But not only did the appellant have the opportunity to kill the deceased; there is also evidence linking him with the crime. It is clear that no later than the time of his arrival home, on the Friday evening, or on his own admission as early as about 11 a.m. that morning, the appellant had in his possession the suitcase, the articles of clothing the two revolvers and the ammunition. Despite an initial weak identification of individual articles as being the property of the deceased, it could well be argued, on a conspectus of all the evidence at the end of the trial, that it is a valid inference that most of the articles, if not all, were such, and had been taken at the time of his death. But it is unnecessary to go so far. It is at least clear that the Webley and Scott had in fact fired one of the bullets involved in the killing and could have fired the other five. The appellant's

possession ..... /16

possession of that revolver so soon after the commission of the crime, coupled with his inability to explain how and where he acquired it, as evinced by his untruthful evidence, appears to allow of only one reasonable inference in the circumstances, viz. that he had killed the deceased with the intent necessary to constitute murder.

The appeal is dismissed.

E.L. JANSEN, J.A.

Corbett, A.J.A.)
Muller, A.J.A.) Concurred.