

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

(APPELLATE DIVISION).
AFDELING).

**APPEAL IN CRIMINAL CASE.
APPEL IN STRAFSAAK.**

MJAMELA

NDHLOVU

Appellant.

versus/teen

THE STATE

Respondent.

Appellant's Attorney Pro Deo
Prokureur van Appellant

Respondent's Attorney Dep. A.G. (Jhb.)
Prokureur van Respondent

Appellant's Advocate
Advokaat van Appellant

Respondent's Advocate
Advokaat van Respondent

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

23-11-70

5-3-11

(W.L.D.)

10.12.70 per de Voorzitter d. S.A.

appeal dismissed

[Signature]

IN THE SUPREME COURT OF SOUTH AFRICA.

(APPELLATE DIVISION)

In the matter between:

MJAMELA NDLOVUAppellant.

AND

THE STATERespondent.

Coram: WESSELS, J.A., DE VILLIERS ET CORBETT, A.JJ.A.

Heard: 23rd November, 1970.

Delivered: 10th December, 1970.

J U D G M E N T.

DE VILLIERS, A.J.A.:

Appellant, along with Themba Twala, Mfaneni Radebe and Solomon Msimanga, stood trial in the Witwatersrand Local Division on a charge that they murdered Eunice Mbayise on the afternoon of the 29th November, 1969, in Alexandra, near Johannesburg.

The facts, as found by the Court a quo, which led up to the alleged murder are the following: The deceased lived with her reputed husband in a room in a yard in Alexandra. There were several other rooms in the yard occupied by other families. In some of these rooms, including possibly that of

2/ deceased

deceased and her husband, illicit trading in liquor was carried on and people came there to drink. On the day of her death deceased wore a pair of red slacks and was alone at home with her baby, her husband being away. Men visiting in the yard baited and teased her, possibly because they believed her to be a woman of easy virtue. She went out on one occasion to buy coal and a man struck at her with a stick which she took away from him. Mfaneni Radebe came to her door and warned her that his brothers had gone to arm themselves and that she should prepare herself to fight and added that she would sleep in the graveyard at the Jukskei river that night. Solomon Msimanga teased her when she entered the room of Julia Linda. He was sprawled across the doorway and tripped her whenever she wanted to pass. After this introductory period of teasing, belittling and threatening, there was a brief pause. Then a gang of about 7 men, including appellant, Mfaneni Radebe and Solomon Msimanga, most of whom were armed with sticks, arrived on the scene. They threatened, challenged and cursed deceased, threw stones at her room and broke the window. Eventually she emerged from the door of her room with her baby tied on to

her back and was immediately stabbed in the chest with a knife by appellant as a result of which she died within minutes.

The Court found appellant guilty of murder with extenuating circumstances and sentenced him to 9 years imprisonment. Mfaneni Radebe and Solomon Msimanga were found guilty of lesser crimes in respect of the parts played by them in the concerted attack on the deceased, and sentenced, and Themba Twala was acquitted.

In convicting appellant the Court relied principally upon the evidence of three witnesses, Charlotte Mbayise, Grace Ditabe and Julia Linda. Charlotte, a cousin of deceased, said that from her room opposite that of deceased she saw appellant, who was wearing overalls, move along the wall and stab deceased with a knife as she emerged from the door of her room. Grace ^o corroborated the evidence of Charlotte. Both these witnesses admitted that they had not known or seen appellant previously and claimed to identify him as the person who stabbed appellant from having seen his face and from his general appearance. Julia stated that her room was near that of deceased, that she was ill in bed, that she went

to the toilet, that when she came back she heard a noise and saw appellant at deceased's door. He had an object in his hand which she could not identify. He was making stabbing movements in the direction of the door but she did not see deceased being stabbed. She then went into her room. She stated that she clearly saw appellant's face and the whole of his body and that she had previously known him very well by sight.

Appellant denied that he took part in the attack on deceased and pleaded an alibi. He stated that he was arrested in Johannesburg because he was not lawfully entitled to be there, brought before a Bantu Affairs Commissioner's Court, and deported on the 17th November, 1969, under escort, to Ladysmith, Natal. This was admitted by the State to be true. He further stated that he remained at the kraal of his parents at Ladysmith until he was arrested late in December, 1969, and brought to Johannesburg. This part of his evidence was rejected. The Court found that appellant must have returned to Johannesburg, taken part in the attack on deceased, gone back to Ladysmith and pretended, when arrested, that he had been living there continuously from the time of his deportation

to the date of his arrest.

Mr. Viljoen, who appeared on behalf of appellant admitted that deceased was murdered by the person who stabbed her as she emerged from her room, but contended that the Court should have had a doubt whether the State had proved beyond reasonable doubt that appellant was that person. He attacked the evidence of Charlotte and Grace and said that the Court should have rejected it. Neither of them had ever seen appellant previously. The person who stabbed deceased was dressed in a nond^escript overall. At the time of the attack it was overcast and there were many other persons in the yard. They were not called upon to attend an identification parade and next saw appellant at the Police Station after his arrest or at the preparatory examination, where they identified him as being the person who stabbed deceased from his face and general appearance. In these circumstances, he argued, the reasonable possibility that they were at least mistaken in their identification of appellant cannot be excluded, especially in view of the fact that they mistakenly identified Themba Twala, who was acquitted, as also having been present during the attack on deceased.

In regard to the evidence of Julia he admitted that the fact that she had previously known appellant, made her identification of him more reliable. He pointed out, however, that she was ill at the time, that she did not see deceased being stabbed, that she only saw appellant making attacking movements towards the door of deceased's room when she was returning from the toilet, and immediately afterwards entered her room. He contended that appellant's statement that he was in Ladysmith at the time of the murder, standing "as it does against that of Julia ~~alone~~ alone", should not have been rejected, more especially since at least part of his testimony was accepted by the Court as the truth.

There is no ^{real} merit in Mr. Viljoen's contentions.

There is no reason to suppose that the Court misdirected itself in regard to the incidence of the onus in this case or that it overlooked the fact that no onus rested on appellant to prove his alibi. (See: R. v. Biya 1952(4) S.A. 5 814 (A.D.)). It considered the evidence carefully and accepted that of Charlotte, Grace and Julia, rejected that part of appellant's evidence which conflicted with theirs and, in doing

so, nowhere misdirected itself on any point of fact. Moreover it scrutinised the evidence of Charlotte, Grace and Julia carefully with a view to excluding the reasonable possibility of error in their identification of appellant. (See: R. v. T. 1958(2) S.A. 676 (A.D.)).

As far as Charlotte and Grace are concerned there is no evidence that they had any reason to give false testimony against appellant. Although the sky was overcast at the time, the attack on the deceased took place in the afternoon when the visibility was apparently good. They were obviously concerned about the safety of the deceased and would, therefore, have taken notice of what was happening to her. They viewed the attack from vantage points close by and, although the person who stabbed the deceased was dressed in a nondescript overall, they had occasion to see his face and ^{take note} ^{of his} general appearance. The suggestion that Charlotte and Grace mistakenly identified Themba Twala as also having been present during the attack, is unfounded. The Court did not find that to be the case. All that it did was to give Themba Twala, in the light of other evidence tendered on his behalf,

the benefit of the doubt whether he was present or not. It may be conceded that it would have been better had the police arranged for an identification parade to be held, but the reason why this was not done was not investigated at the trial.

Conceivably such a parade was not held because of the fact that appellant, on arrest and on being apprised of the charge against him, did not disclose his defence of an alibi, and that Charlotte and Grace saw him at the Police Station and in Court during the preparatory examination before it became known that ^{that} was to be his defence. Be that as it may, the evidence of Charlotte and Grace was, in the circumstances disclosed above, certainly not of such a nature that the Court should have discarded it entirely. On the contrary theirs was cogent evidence which the Court was bound to take into consideration, even though it might not by itself - as indicated in the Court's judgement^{me} - have been sufficient on which to convict appellant.

In so far as Julia is concerned no good reason has been advanced why the Court should not have accepted her evidence. Not only did she say that she had seen appellant

on several occasions not long before the 29th November, 1969, but appellant admitted that that was so, and added that he knew where she lived, that he had on one occasion visited her and been served with liquor by her personally and that he had never had any trouble with her at all. The fact that Julia did not see the actual stabbing does not necessarily make her evidence suspect. She was ill at the time and would not have tarried outside on her way back from the toilet. The important fact remains that she saw the person who made the stabbing movements towards the door of deceased, and was positive that appellant was that person and, as already mentioned, she had every reason in the circumstances disclosed to be certain as to his identity.

In the premises it cannot be said that the Court erred in accepting the evidence of Julia, supported by that of Charlotte and Grace, and rejecting that of appellant. Appellant only disclosed his defence of an alibi at the trial and called no evidence to support his own testimony and, as the Court pointed out, having once before entered the Johannesburg area illegally, there was no reason to suppose that he would not have done so again and ~~re-visited~~ revisited his old haunts in

Alexandra. Moreover he stated in evidence that when Grace saw him at the Police Station on the 23rd December, 1969, she exonerated him and stated in the presence of Sergeant Baai that the person who stabbed deceased had some of his front teeth missing. This evidence was strenuously denied by Grace and Sergeant Baai. It is implicit in the Court's findings that Grace's evidence on this point was accepted, supported as it was by that of Sergeant Baai, and this fact no doubt also weighed with the Court in rejecting the evidence of appellant.

The appeal is accordingly dismissed.


DE VILLIERS, A.J.A.

WESSELS, J.A.)
CORBETT, A.J.A.) concur.