157/70

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.

SAMONI MAWEKE & 15 OTHERS

Appeliant.

versus/teen

THE STATE

Respondent.

Appellant's Attorney Ire Dso
Prokureur van Appellant

Respondent's Attorney A.G. (G/stown)
Prokureur van Respondent

Appellant's Advocate T.M. KUHN
Advokaat van Appellant

Respondent's Advocate K MARAIS
Advokaat van Respondent

Set down for hearing on 11 - 3 - 71
Op die rol geplaas vir verhoor op

2 7 . 0 1

(E.C.D.) CORAM VAN BLERK, A.R., MILLER, A.J. KOTZÉ, INNES et RA

APPELLANT } NIE CAROLUS NIE
RESPONDENT }

AD TAMPORA UITSPRAAK

appel teen o die skuldigbevinding
en vonnis word toe gelê gestel

REGISTRAR, APPEAL COURT.
GRIFFIER, APPÈLHOF.
BLOEMFONTEIN.

11 -3- 1971

IN THE SUPREME COURT OF SOUTH AFRICA.

APPELLATE DIVISION.

In the matter between:

SATONI MAWEKE AND FIFTEEN OTHERS ..... APPELLANTS

AND

THE STATE ..... RESPONDENT

Coram : Van Blerk, J.A., Miller et Kotzé, A.JJ.A.

Heard : 11 March 1971 Delivered: 12 March 1971

J U D G M E N T .

Miller, A.J.A. :

This appeal was allowed and the conviction and sentence in respect of each of the appellants set aside, for the reasons which follow.

The sixteen appellants were charged in the Umtata Circuit Local Division with the murder of a Bantu woman. According to the record of the proceedings, they pleaded not guilty. The State thereupon led the evidence of Saloni Gebu, who claimed to have been a member of a group of young men, which included the appellants, who accompanied the deceased

to ..... /2

to the place where she was fatally assaulted. He was the sole witness for the State. The defence closed it's case without leading any evidence. The learned trial Judge convicted the appellants of murder and, extenuating circumstances having been found, sentenced each of them to imprisonment for five-and-a-half years. They appealed with leave of the trial Judge.

In granting leave to appeal, the learned Judge fully explained for the information of this Court, the circumstances in which the appellants were convicted, and the circumstances which led to his granting leave to appeal. It appears that the appellants were represented at their trial by pro Deo counsel of considerable experience. After the appellants had pleaded not guilty, their counsel informed the Court that the plea "was a formal one in that all the appellants admitted their guilt on the basis of common purpose". He further informed the Court that he had explained to the appellants that if they had a common purpose, they were all guilty of the crime charged, even though many of them had not physically participated at all in the assault upon the

deceased ..... /3

deceased. The implication was that notwithstanding this explanation, all the appellants admitted to having such common purpose. In those circumstances, the cause of death having been admitted and the evidence of the sole witness having established that the appellants were present at the time of the assault which was committed by one or some of them, the Court convicted them all. A day or two after sentence had been passed, the learned Judge began to entertain some doubt as to the ambit of the appellants admission of common purpose. The doubt arose out of a reconsideration of the facts of the case. It appeared from Saloni Gebu's evidence that he and the appellants, all young men, suspected the deceased of having been concerned in the death, by means of witchcraft, of a young woman who was their friend. They went together, armed with sticks, to the deceased's kraal to tell her that she had been smelt out as a witch. They persuaded her to accompany them to the spot where she said the body of the girl had been left. While they were on their way to that spot, the deceased said that she had lied to them and that the body was not where she had said it was.

This ..... /4

This angered the young men, some of whom attacked her, with fatal consequences. The doubt which the learned Judge entertained was whether, in admitting that they had a common purpose, the appellants had intended to say that that common purpose was to kill the deceased or merely that their common purpose was to expose her as a witch and to persuade her to take them to the place where the body of the dead girl was. The learned Judge has explained that after careful consideration, he decided to inquire of appellants' counsel what the precise nature of their instruction to him was. It then emerged from his discussion with counsel that the appellants had not gone further than to admit that they had a common purpose to drive the deceased from the location and that counsel had deduced therefrom that they also had a common purpose to assault her. Hence his intimation to the Court, at the commencement of the trial, that the appellants admitted "their guilt on the basis of common purpose". In these circumstances, the learned Judge granted leave to appeal and has intimated that had he been alive to the true nature of the admission, he would not have

convicted .... /5

convicted the appellants.

The record of the proceedings in the Court a quo is entirely silent regarding any admission as to common purpose made by counsel on behalf of the appellants. If regard is had to the record only, it is clear that the appellants, who pleaded not guilty, could not be properly convicted, for the only evidence against them was that of Saloni Gebu. His evidence neither established a common purpose by the appellants to kill or assault the deceased nor the identity of those of the appellants who in fact assaulted her. It is clear that only a few of them, at most, participated in the assault. The formal admission made by counsel (I should explain that appellants' counsel on appeal was not their counsel at the trial) was presumably made in terms of section 284(1) of the Code and ought to have been fully and accurately recorded. (See S. v. W, 1963(3) S.A. 516 (A.D.) at p.522; S.v.D, 1967(2) S.A. 537(N) at p.538). Where such an admission has not been recorded, it is questionable whether, in the absence of proper amendment or reconstruction of the record in the approved manner, the Court,

on ..... /6

on appeal, is entitled to take cognisance of the fact that an admission was made, even where the State and the appellants have agreed on that score, unless they have also agreed on the precise terms of the admission.

But, however that may be, even if the appeal is to be considered, in the circumstances revealed by the learned Judge, on the footing that a formal admission as to common purpose was made on behalf of the appellants, substantially in the terms described in the judgment granting leave to appeal, the convictions cannot stand. Where an admission made by an accused person is equivocal or ambiguous, and permits of more than one interpretation, that construction which is more favourable to the accused must be adopted. (See R. v. Becker, 1929 A.D. 167 at p.171; R. v. Ruzwidzo, 1963(1) S.A. 714 at p.715) The admission made by the appellants that they acted in concert in going to seek out the deceased and drive her from the location falls short of an unequivocal admission that they shared a common purpose to kill the deceased, or even to assault her, whether with sticks or at all.

Mr. Marais ..... /7

Mr. Marais, who appeared for the State in the appeal, acted properly, in my judgment, in not supporting the convictions and he was correct, too, in conceding that the absence of clear and convincing evidence regarding the identity of those who actually assaulted the deceased, had as a necessary consequence the acquittal of all the appellants, not only on the charge of murder but also in respect of any lesser offence of which some of the appellants might have been convicted if their identity had been established.

This Court is indebted to the learned Judge for his very full account of the circumstances which gave rise to what he later realized was a verdict which the evidence could not sustain.

S.Miller, A.J.A.

Van Blerk, J.A.)
and
Kotzé, A.J.A.)
concur