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C.P.d. A 448.

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

(Ciskei DIVISION).
AFDELING).

APPEAL IN CRIMINAL CASE.
APPÈL IN STRAFSAAK.

Z. Nyalwa
Appellant.

versus/teen

The State
Respondent.

Appellant's Attorney mr Instagno v.d. Post
Prokureur van Appellant

Respondent's Attorney A.G (Umtata)
Prokureur van Respondent

Appellant's Advocate A.P. Beckley
Advokaat van Appellant

Respondent's Advocate A.R. Erasmus S.C.
Advokaat van Respondent

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

T.H.C

Coram: Holmes, Rabie, JJA et Lyalgut AJA
Beckley - 11·15 - 12·00; 12·25 - 12·30;
Erasmus - 12·00 - 12·25;

The Court allows the said C.A.V.
appeal and sets aside the
conviction and sentence.
(Judgment to follow)

Rabie JA
13/11/25

Reasons by Corbett J.A (8/25)

Registrar

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

ZISEBENZELE MYOLWA.....Appellant

and

THE STATE.....Respondent

Coram: Holmes et Rabie, JJA., et Galgut, A.JA.

Heard:	Delivered:
4 November 1975.	13 November 1975.

J U D G M E N T

RABIE, JA.:

Appellant was accused no. 3 at a trial in the High Court for the Transkei (before Munnik, C.J., and an assessor) in which he and two other men, Mtanjelwa Tyalaligwejwa (accused no. 1) and Mbekeni Hatoni (accused no. 2), were charged with having on 19 March 1973, in the district of Flagstaff, murdered Mketwa Mnqanqeni (count 1),

and...../2

and attempted to murder Masiwela Mketwa (count 2). Accused nos. 1 and 2 were found guilty as charged on both counts, and, on extenuating circumstances having been found in respect of their conviction on count 1, both were sentenced to death. Appellant was found guilty of murder on count 1, but extenuating circumstances were found in his case and he was sentenced to 12 years' imprisonment. He was found not guilty on count 2. Accused nos. 1 and 2 appealed to this Court, leave to appeal having been granted in terms of the provisions of sec. 363(6) of Act 56 of 1955, read with sec. 50(3) of Act 48 of 1963. Their appeals were allowed, and their convictions and sentences were set aside. The judgment of this Court (per Corbett, J.A.) was delivered on 28 March 1974. After his co-accused's successful appeals, appellant applied to Munnik, C.J., for leave to appeal to this Court. The application was refused, but appellant was subsequently granted leave to appeal in terms of the abovementioned statutory provisions.

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The deceased and the aforementioned Masiwela Mketwa (who was the wife of the deceased and to whom I shall refer as Masiwela) lived in a kraal in a rural area in the Transkei. On the day in question, Masiwela testified, she and the deceased went to bed at about 9 p.m. in a hut which formed part of their kraal. Shortly thereafter, she said, after the light in the hut had been put out, footsteps were heard outside. The deceased called out: "Who is this walking like this in my kraal?" There was no reply, but immediately thereafter the two windows of the hut were knocked out from outside, and the door of the hut was forced open. She reached for a stick that was near a window and, on looking through the window, she saw the appellant and another man standing near the window, outside the hut. While she was near the window, she said, she was struck in the face by a stone which someone had thrown through the window. (Her evidence was contradictory as whether this happened before or after she saw the appellant outside the window.) After

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seeing the appellant, a man (she said it was accused no. 2) entered the hut. She grappled with him. He broke loose and ran out of the hut. Thereafter other men entered the hut. She could not say how many they were. One of them (she said it was accused no. 1) attacked and injured her. She did not see the appellant inside the hut. She did not see what happened to the deceased after the men had entered the hut. (The dead body of the deceased was later found at a spot about 37 yards from the hut. His skull had been battered in and there were, also, several stab wounds on his body.) It was put to Masiwela in cross-examination that the appellant was at home on the night in question and that she could not have seen him outside her hut. She was adamant that she had seen him. I shall refer to her evidence on this point in more detail a little later on when I deal with the submissions of counsel for the appellant. The appellant, it may be said at this stage, did not give evidence.

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The trial Court, in finding that the appellant was at the deceased's kraal on the night in question, relied on the evidence of Masiwela, and also on that of Detective-Constable Bernad Ntlokwana concerning a written statement he had taken from the appellant. The State made no attempt to prove the contents of this statement. Ntlokwana merely stated that he had taken such a statement and said no more about it. Munnik, C.J., while cautioning Ntlokwana not to disclose the contents of the statement, put certain questions to him as to what he had not been told by the appellant, and in answer to these questions the witness said that the appellant did not tell him that he had been at home on the night in question, and, also, that the appellant did not tell him that he had not been at the deceased's kraal.

In addition to the evidence referred to above, the State also led certain evidence in order - so it would seem - to establish a motive for the attack on the deceased's kraal and to show that the three accused were members of

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a gang who had plotted to kill the deceased. This evidence, given mainly by Masiwela, was to the following effect: (i) that the deceased, who was a sub-headman in the area in which he lived, had remonstrated with a group of men, including the accused, for arranging certain dances during a period of mourning for a chief who had died; (ii) that this group resented the deceased's action; (iii) that on the afternoon of the day in question they held a meeting in a vacant kraal, about 250 paces away from the deceased's kraal; and (iv) that at this meeting it was decided to attack the deceased's kraal and to kill him. The trial Court accepted the evidence that there had been such a meeting and that the three accused had been present thereat. Referring to the evidence given by accused nos. 1 and 2 at the trial, the judgment of the Court a quo says:

> "Now, while it is true that people sometimes tell lies because they are afraid for other reasons than their guilt, in this particular case it seems that the only reasonable inference to draw

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> from the lies they told about not being together that afternoon and attending that meeting, is that they did attend the meeting and they had all plotted the attack that evening on the deceased. It is for that reason that they wish to pretend that they were not in the vicinity at all or had not attended the meeting. They have lied on this point, where there is a direct conflict between them and the complainant, and we reject the evidence in so far it relates to an alibi or the absence from that hut that evening, and we accept the evidence of the complainant that she saw these three men there that evening."

In his judgment in the appeal of accused nos. 1 and 2, Corbett, J.A., held that the evidence as summarised in (i) and (ii) above was hearsay and inadmissible. As to the evidence referred to in (iii) and (iv), he said:

> "Evidence that a meeting took place is somewhat conjectural and, while the accused were seen by the complainant in the vicinity, her evidence that she saw them enter the kraal is contradictory and, therefore, suspect. There is no evidence as to what the purpose of the meeting was, if indeed it took place".

Mr. Erasmus, who appeared for the State before us, did not

question...../8

question this assessment of the evidence in question, and he did not argue that there was evidence that the appellant attended a meeting at which the killing of the deceased was discussed. In my view he was correct in taking up this attitude. The case against the appellant must accordingly be dealt with on the basis that there was no acceptable evidence before the trial Court that the appellant attended a meeting at which an attack on the deceased's kraal was plotted.

Counsel for the appellant contended that this Court should hold that the trial Court erred in finding that the appellant was at the deceased's kraal on the night in question. It was argued (a) that Masiwela's identification of the appellant was unreliable, and (b) that the trial Court committed an irregularity in relying on the aforementioned evidence of Ntlokwana. With regard to (a), Masiwela's evidence in chief on the point reads as follows:

> "Where did you see accused No. 3? —— Outside and next to the window.

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Under what circumstances did you see him? How did you come to see him there? —— I saw him because there was the moon, it was light.

When? Before they broke into the house, after they broke in? Before you went under the bed or after? —— After the window had been broken.

Before you grappled with No. 2? —— Before.

Had you gone to look through the window when it was broken in? —— I was reaching for a stick that was near the window.

Did you look through and then see him? —— Yes.

Shortly after that did accused No. 2 come and grapple with you, and you two grappled? —— Yes.

Can you give the Court some idea how far you were away from accused No. 3 when you recognised him? —— (Witness indicates the distance.)

About 2 paces. Was he standing there in the moonlight? —— Yes, with Mkonkile.

Are you sure it was Zisebenzele, accused No. 3? —— Yes, I saw them quite clearly.

Did you say anything to him? Did you use his name at any stage? —— I said: 'Zisebezele, whatever have we done?'

Did...../10

Did he reply to that? —— No.

Did you at any stage see him inside the hut? —— No".

Her cross-examination on the same issue reads as follows:

"It was by that moon only that you will able to recognise them? —— Yes.

That was only shone outside? —— Yes.

It did not shine inside the hut? —— No. Now, the first person you noticed, you say it was accused No. 3? —— Yes, and Mkonkile.

They were outside your hut? —— Yes.

Did you recognise their faces? ——

Did you recognise their clothes? —— Yes, I saw the blankets they had on.

What blanket did No. 3 have on? —— Blue with red stripes.

In that moonlight? Blue like the sky or blue like the grass? —— Blue blue.

In that moonlight you noticed these blue blankets? —— Yes.

Did you also notice his face? —— Yes.

You see I am asking these questions to test the truthfulness of your evidence. —— I saw them clearly.

And you saw him as clearly as you swear to recognise his blanket in that light? —— Yes.

BY THE COURT: Was it the same blanket that he

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had been wearing that afternoon? —— It had been worn in the afternoon.

You are as certain of seeing his blanket there that night as you are seeing his face? —— Yes, I know them.

MR. ROGERS: I am suggesting that you are being untruthful in this regard. No. 3 was not there at all that night. —— He was there.

He says he was at home fast asleep that night and he did not hear of this until the next morning. —— He was not asleep".

Masiwela's evidence that she had known the appellant for a long time and that she was, also, distantly related to him, was not disputed. Counsel argued, however, that she was not a reliable witness, and he referred to the criticism of her evidence by Corbett, J.A., in his aforementioned judgment. This criticism relates, in the main, to her evidence regarding the identity of the men who attacked her in the hut. It was dark inside the hut, save for such light as was provided by the moon shining in through the windows, and her evidence as to how she was able to recognize

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her attackers was demonstrably unsatisfactory. Her identification of the appellant was not in issue in the previous appeal, and was not dealt with in the judgment of Corbett, J.A. Counsel argued, also, that because Masiwela had been injured in the face by a stone thrown through the window, she might not have been able to see properly. I have already pointed out that her evidence is not clear as to whether she was injured before or after she saw the appellant, but, however this may be, I am not persuaded that her evidence that she saw the appellant standing near the window ought to be rejected. As already stated, she knew the appellant well, and her evidence was that he was only about two paces away from the window and that there was sufficient moonlight to see him clearly. (The moon was full on the night in question, although there would seem to have been clouds in the sky. Masiwela's evidence was that there was a "half moon"). A further factor to take into account is that the appellant did not give evidence to contradict

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the evidence given by Masiwela. In my view his failure to do so appreciably lessens the danger of a wrong identification by Masiwela, unless it can be said that her evidence was so unsatisfactory that it did not call for an answer by the appellant. Counsel for the appellant submitted that her evidence was indeed so unsatisfactory that it did not call for a reply, but, for the reasons indicated above, I do not agree with this submission. My view is, therefore, as already stated, that there is no sufficient reason for not accepting Masiwela's evidence that she saw the appellant outside the hut.

Wit regard to (b) above - i.e., the contention that the trial Court erred in relying on Ntlokwana's evidence as to what the appellant had not told him at the time when the written statement was made - the point raised has a bearing only on the question whether the appellant was present at the deceased's kraal on the night in question. In view of what I said in regard to (a) above, it is not necessary to discuss the counsel's argument with regard to (b). It is sufficient to say that the statement was

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handed into Court by defence counsel when he addressed the trial Court on the question of extenuating circumstances in the case of the appellant, and that Mr. Erasmus submitted that, because of this fact, and in view of what is contained in the statement, the appellant was precluded from contending at this stage that he was not present at the deceased's kraal on the night in question. As stated, my finding ad (a) renders it unnecessary to consider this submission.

It follows from what has been said above that the only real evidence against the appellant is that he was seen outside the deceased's hut shortly before people rushed into it, as aforesaid. Mr. Erasmus, for the State, contended that the fact that the appellant was present at the scene and that he did not give evidence to explain his presence there necessarily leads to the inference that the appellant was one of the men who assaulted the deceased, or, alternatively, that if he did not himself take part in the assault, he was

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a member of the gang which assaulted the appellant and that he made common cause with them. In my view the evidence is insufficient to sustain either of the inferences contended for, and I do not think that the appellant's failure to give evidence can supply the deficiency. With regard to the contention that he was one of the men who assaulted the deceased, there is no evidence that he remained at the scene after he had been seen by Masiwela, or, generally, that he performed any physical act in furtherance of the attack on the hut or of the assault on the deceased. As for the alternative suggestion that he was a member of the gang which took part in the assault and that he made common cause with them, there is no evidence to support it. As stated before, there is no acceptable evidence of a prior plan, or plot, to attack the deceased's kraal, and no acceptable evidence of the appellant's having been a party to any such plan or plot. In the absence of such evidence, it seems to me, there is no ground for

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saying that it should be held that the appellant was a member of a gang which assaulted the deceased and that he associated himself with their actions. Mr. Krasmus contended, finally, that there are three features about the case which rule out the possibility that the appellant might have been merely a spectator of the events at the deceased's kraal, viz., (i) his presence at the scene of the crime, (ii) at night, (iii) in a rural area. I do not agree with this contention. The evidence provides no information about such matters as the number of kraals in the vicinity, their distance from each other, the number of people inhabiting them, and, generally, the way of life of the inhabitants of the area, and it seems to me that, in the absence of evidence relating to such matters, one cannot say with any certainty that the presence of a stranger near, or outside, someone else's kraal at night time is necessarily indicative of some sinister purpose. To put the matter in another way, the evidence on record

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does not rule out the reasonable possibility that the appellant might have been on a lawful mission of his own when he saw a group of men going to, or gathered at, the deceased's kraal, and that he then went there to see what was going on.

My view is, therefore, that there is insufficient evidence from which to infer the appellant's guilt. The appeal accordingly succeeds, and the conviction and sentence are set aside.

P.J. Rabie

Judge of Appeal.

Holmes, JA.)
Galgut, A.JA.) Concur.