DEATH (CAPITAL CASE) SENTENCE

64/20

64/20

G.P.-A. 5: 448.

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

(APPELLATE DIVISION).
AFDELING).

APPEAL IN CRIMINAL CASE.
APPEL IN STRAFSAAK.

ALSON BLOSE & OSCAR NYUSWA

Appellant.

versus/teen

THE STATE

Respondent.

Appellant's Attorney ~~Pro Deo~~ *Respondent's Attorney* DEPUTY ATT. GEN DIV.
Prokureur van Appellant *Prokureur van Respondent*

I. S. M. Strapolans

Appellant's Advocate B. H. P. Cyster *Respondent's Advocate* W. D. van der Reyden
Advokaat van Appellant *Advokaat van Respondent*

Set down for hearing on 12-9-20
Op die rol geplaas vir verhoor op

(D.C.L.D.) 2.D.9 10.

Coram: Bekker, ~~Rabie~~ JJ.A et Eyselen et A.J.A.

9.40 am ——— 10.30 am

C. Cas. 1/

The Court dismisses the said appeal of both appellants.

(Judgment Per Curiam)

IN THE SUPREME COURT OF SOUTH AFRICA.

APPELLATE DIVISION.

In the matter between

ALSON BLOSE .....FIRST APPELLANT.

OSCAR NYUSWA .....SECOND APPELLANT.

and

THE STATE .....RESPONDENT.

Coram: Botha et Hofmeyr, JJ.A., et Galgut, A.J.A.

Heard: 12 September 1975.

Delivered: 25 September 1975.

J U D G M E N T.

GALGUT, A.J.A.

The two appellants and a woman named Florence Nxumalo were found guilty of murder by a

judge...../2

judge and two assessors sitting in the Durban Coast and Local Division. The appellants were sentenced to death. The said Florence Nxumalo, to whom I will refer as accused No. 3, was sentenced to 12 years imprisonment. I will refer to the appellants as No. 1 and No. 2 accused respectively, or as the two accused, as the context requires. They obtained leave to appeal from the Judge a quo and now appeal against their convictions. There is no appeal against the sentence.

The facts can be shortly stated. On the 21st May 1974, after 7 p.m., the badly mutilated body of one Nkosenye Nxumalo was found in his house. He, during his lifetime, was the husband of No.3 accused. I will refer to him as the husband or as the deceased, depending on the context. The medical evidence is that death was virtually instantaneous and that his injuries had been caused by an axe or tomahawk or panga, or some such instrument. The deceased and No. 3 accused had lived together in the

house...../3

house in which the body was found and which, until the time of his death, had been their joint home. The evidence is that the inhabitants of the township used to buy liquor from this house. It was also said that the deceased was a heavy drinker.

Accused No. 3, after her arrest, made a statement which amounts to a confession, before a magistrate. In this confession, which was made on the 28th May, she states that she and the deceased had had frequent quarrels about his relationship with her sister and, more recently, about a motor car which she had purchased for him; that on the night of 19/20 May they again quarrelled and he ordered her out of the home and told her if she did not go she would leave the house in a box, i.e. as a corpse in a coffin; that the next day, i.e. on the 20th May, she went to the house in which Mary Mbele lived and explained to her what had happened; that she asked Mary Mbele to find someone who would kill her husband and that

she would pay the person or persons for so doing; that she then went to stay in another house; that that afternoon Mary Mbele came and reported to her that she had obtained people who, for payment, were prepared to kill her husband; that on the 21st May, in the evening, Mary Mbele came to where she was staying and reported that the deed had been done and asked for R100; that she had more money than this, but as Mary Mbele asked only for R100 she gave her that amount.

No. 3 accused did not give evidence, but Mary Mbele, who clearly was an accomplice, as she had been involved in the killing, testified for the State. Her evidence is that No. 3 accused came to her house on the 20th May and asked if she could find someone to kill her husband; that she demurred but was persuaded by No. 3 accused, who said she would take all the blame if there was any trouble; that later that morning she met No. 1 accused whom she had known from before, near the railway

station and asked him if he knew of anyone who would do the killing; that No. 1 accused said he and his friend would do the killing as they wanted the money; that that afternoon the two accused came to her house and all three of them, that is the two accused and herself, went to accused No.3's house; that No. 3 accused was not there, so they left; that on Tuesday (i.e. 21st May) accused No. 3 came to her house and asked "Did it take place?" ; that she replied that it had not taken place because she, No. 3 accused, had not been at home when they called; that No. 3 accused told her to tell the persons that they would find the deceased at home, alone; that she, Mary Mbele, later that day gave the message to accused No. 1; that that evening at about 7.30 p.m., the two accused came to her house and told her they wanted their money as the deed had been done; that No. 2 accused had in his hand a weapon (which from her description was a tomahawk);

that...../6

that this weapon had blood on it; that she went to No. 3 accused and reported to her, and asked for R130, being the sum the two accused wanted; that No. 3 accused argued about the money but eventually gave her R100, which she handed to No. 2 accused. The above is a summary of her evidence in chief. She was subjected to lengthy cross-examination by the two counsel who appeared for No. 1 accused and No. 2 accused respectively. It was put to her that No. 1 accused would deny her story, and deny that he had been to the house where she was living. Counsel for No. 2 accused put it to her that No. 2 accused would also deny her story and further deny that he had been to the house where she was living. She remained adamant that her story was correct and that they had been to her house. At the very end of his cross-examination counsel put it to her that No. 2 accused would also deny that he had ever seen her before his arrest on the 28th May. Her immediate and spontaneous reaction was to say

that she had evidence that the two accused had been there on the 20th May. She was then asked by the prosecutor in re-examination who the persons were who could give this evidence. She at first refused to give their names, but eventually, and only after she had been warned, she disclosed the names. They were one Victor Mbuyisa and his girl friend, Anna Makathini who lived in the same house as Mary Mbele. It is obvious from the record that the availability of this evidence came as a surprise to the prosecution. The trial was adjourned till the next day to enable these witnesses to be called. They then testified. There is no need to detail their evidence. Anna described how the two accused came to the house on that afternoon and asked for Mary Mbele, not by naming her, but by describing her, and as she was not there they waited until she arrived, approximately two hours later. Victor described that on his arrival home, he found them there. Both Anna and Victor went on to say that the two

accused went off with Mary Mbele.

Accused No. 1 and accused No. 2 gave evidence. They repeated their denials of Mary Mbele's evidence in so far as it affected them and denied that they had been to the house where Mary Mbele lived.

The findings of the Court a quo in regard to the credibility of the witnesses are important. In his reasons for judgment the learned Judge said

(a) that Victor and Anna were clearly honest and reliable witnesses; that Anna's evidence was of a very high order; that a perusal of her evidence and that of Victor reveals how satisfactory their evidence was;

(b) that "the evidence of Mary Mbele is infinitely more acceptable to us than the testimony of accused No. 1 and No. 2" ;

(c) that the Court had no hesitation in rejecting the testimony of accused No. 1 and accused

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

(4) [illegible]

[illegible]

[illegible]

[illegible]

(5) [illegible]

[illegible]

(6) [illegible]

[illegible]

[illegible]

No. 2 where it conflicted with the testimony of Victor and Anna, and that the evidence of both accused was unsatisfactory in several respects.

It appears from the judgment a quo that both counsel accepted that the evidence of Victor and Anna could not be challenged and that the two accused had been untruthful when they denied that they had been to see Mary Mbele on the 20th May. In this Court also, counsel accepted these findings. Furthermore they did not challenge the findings of credibility in respect of Victor, Anna and the two accused.

The ground of appeal argued in this Court is that in as much as there was no direct evidence implicating the two accused in the actual commission of the offence, the Court a quo had erred in holding that the evidence of the accomplice, Mary Mbele, partially corroborated by the witnesses Victor and Anna, was sufficient to im-

[illegible]

plicate accused No. 1 and accused No. 2 with the commission of the crime.

It was submitted that the very fact that No.3 accused went to Mary Mbele to obtain hired assassins and the latter's acquiescence to do so, and her speedy accomplishment of her task, all strongly suggest that she was a person who was ready to engage in unlawful activities; that she would want to protect the persons who aided her in her nefarious activities and that she would thus not hesitate to implicate others. It was also submitted that the Court a quo had convicted the two accused because they had lied on a material point, viz., the visit to Mary Mbele on the 20th May, and that it had attached too much weight to the untruthfulness of the accused. We were referred to the dicta in Goodrich v. Goodrich 1946 A.D. at p. 396 where the danger of attaching too much importance to the fact that an accused had given untruthful evidence, was stressed. It was pointed out that Mary Mbele testi-

fied that she had asked No. 3 accused for R130 and the latter gave her only R100, whereas the latter, in her statement said that the arranged figure was R100, and that was all that was asked. This conflict, so it was urged, was an additional factor for not accepting Mary Mbele's evidence.

The Court a quo appreciated that the evidence of Victor and Anna did not provide direct corroboration of the implication of the two accused in the crime itself. That it was fully aware of the dangers of convicting on the evidence of an accomplice in such circumstances, appears from the following passage in the judgment:

> "Now we realise of course the great caution we have to exhibit in this case in making the approach to the acceptance or otherwise of Mary Mbele's evidence, and we quote from the locus classicus on the question of the acceptance of accomplice evidence------"

The learned Judge a quo then quoted the passage from the well known case of R.v. Ncanana 1948 (4) S.A. 399 (A.D.)

appearing at pages 405 - 406. That passage sets out the special danger inherent in convicting on the evidence of an accomplice and emphasized that the "special danger is not met by corroboration of the accomplice in material respects not implicating the accused". It also refers to section 285 of Act 31 of 1917 (i.e. the present section 257 of Act 56 of 1955) and points out that that does not sufficiently protect an accused. The passage then continues:

> "The risk that he may be convicted wrongly although sec. 285 has been satisfied will be reduced, and in the most satisfactory way, if there is corroboration implicating the accused. But it will also be reduced if the accused shows himself to be a lying witness or if he does not give evidence to contradict or explain that of the accomplice. And it will also be reduced, even in the absence of these features, if the trier of fact understands the peculiar danger inherent in accomplice evidence and appreciates that acceptance of the accomplice and rejection of the accused is, in such circumstances, only permissible where the merits of the former as a witness and the demerits of the latter are beyond question."

In addition to the above the Court a quo also had regard to the dicta in S.v.Hlapzula and Others 1965 (4) S.A. 439 (A.D.) at p. 440. These dicta detail the reasons why it is dangerous to convict on the evidence of an accomplice and the safeguards brought about by the adherence to the cautionary rule even where the requirements of section 257 have been met.

The Court a quo, having fully cautioned itself, was careful to ensure that it had regard to all the factors which have to be considered when dealing with the evidence of an accomplice. It found, firstly, that the evidence of Victor and Anna, whilst not directly implicating the two accused in the commission of the crime, corroborated Mary Mbele's evidence in a material respect; secondly, that the untruthfulness of the two accused in regard to the visit to Mary Mbele, was of such a nature that it greatly reduced the danger inherent in accepting accomplice evidence; thirdly, it was satisfied that the merits of Mary Mbele as a witness and the demerits of the

two accused were beyond question.

We have not been satisfied that the Court a quo erred in any way. The evidence of the two accused was, as has been indicated above, rightly rejected; the evidence of Victor and Anna was correctly accepted; the evidence of Mary Mbele reads well and in itself carries the ring of truth. It must be remembered that Mary Mbele did not mention the availability of the evidence of Victor and Anna in her evidence in chief but only at the very end of her cross-examination. Moreover, she then mentioned it, not to corroborate her story as to the visit, but to show that she had met accused No. 2 prior to the 28th May. The fact that she did not want to divulge their names is also relevant. The untruthfulness of the accused is particularly significant. The evidence reflects that Mary Mbele had not met accused No.2 before the visit. There is also evidence to the effect that No. 1 accused had not seen Mary Mbele for a considerable

time before the visit. This indicates that No. 2 accused, and very probably No. 1 accused, had not come to Mary Mbele's house before the visit. That being so, there can be no good reason for them to lie about the visit unless it was because they were in fact there on the guilty mission testified to by Mary Mbele and wished to put themselves as far away from any link with the crime as they could.

It follows from all the above that the Court a quo, having duly appraised all the evidence, was correct in finding that the ultimate requirement, viz., proof beyond a reasonable doubt was satisfied.

In the result the appeals are dismissed.

O. Galgut

O.GALGUT, A.J.A.

BOTHA, J.A.)
HOFMEYR, J.A.) Concur.