108/75

HALSSAAK

G.P.A.

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

(Appèl DIVISION). AFDELING).

APPEAL IN CRIMINAL CASE.
APPÈL IN STRAFSAAK.

1. FISH MSELANGO, 2. ANDRIA SITHOLE

Appellant.

versus/teen

DIE STAAT

Respondent.

Appellant's Attorney / Prokureur van Appellant: [illegible] SELBST.

Respondent's Attorney / Prokureur van Respondent: A.-i. P.G.(Jhb.)

Appellant's Advocate / Advokaat van Appellant: M. Selbst

Respondent's Advocate / Advokaat van Respondent: Dr. P. Yutar S.C.

Set down for hearing on / Op die rol geplaas vir verhoor op: 3-9-75

(W.P.A.)

Coram: Jansen, Trollip, Corbett (AJJ)

Selbst - 9.45 - 10.55

Yutar - 10.56 - 11.00; 11.15 - 12.10.

C.A.V.

The Court allows the said appeal in respect of both appellants and the convictions and sentences are set aside -

IN THE SUPREME COURT OF SOUTH AFRICA.

(APPELLATE DIVISION)

In the matter between:

FISH MSIMANGO ..... 1st Appellant.

ANDRIA SITHOLE ..... 2nd Appellant.

and

THE STATE ..... Respondent.

Coram: Jansen, Trollip et Corbett JJA.

Heard: 3 September 1975.

Delivered: 30 September 1975.

J U D G M E N T.

JANSEN JA :-

The appellants were convicted in the Witwatersrand Local Division of murder without extenuating circumstances and sentenced to death (per Hiemstra J.). They appeal against conviction and sentence by leave of

the / .....

The Court a quo.

On Sunday morning, 15 September 1974, the body of one John Tshabalala was found in the veld, some distance from factory premises at Heriotsdale, near Johannesburg. He had died of multiple injuries, the most serious being: a sprain of the joint which joins the spine to the skull, causing haemorrhage over the base of the brain; a rupture of the right lobe of the liver; a wound on the neck and another on the right eyebrow. The sprain of the atlanto-occipital joint was consistent with being caused in the course of a severe struggle; the rupture of the liver, with being caused by a blunt force, such as a kick; the wounds on the neck and eyebrow, with being caused by "a blunt tomahawk" (but not a knife). It is unlikely that the neck injury would have resulted from the deceased merely falling, and the deceased was probably dying or dead when the liver was ruptured. It is common cause that the deceased sustained the injuries and died during the

night of Saturday, 14 September 1974.

The appellants concede in evidence that on that night they and a third man, Thomas Mashaba, were walking in single file along a footpath when they met a man, who, admittedly, must have been the deceased. The first appellant says that he was walking in front, carrying a guitar; the second appellant followed and Mashaba was at the rear. Shortly after the deceased and the first appellant had walked past each other, the first appellant heard "a noise - a noise like people fighting" behind him. The second appellant and Mashaba then came up to him - they had lagged behind because they were urinating or intending to do so. The second appellant then explained that there had been a quarrel about money between the Mashaba and the deceased, that Mashaba had struck the deceased with an axe and that the deceased had run away. The three of them then went on to their destination, a shebeen they often visited. According to the first appellant he carried no weapon,

nor did the second appellant; but Mashaba carried something (obviously the "axe") in a paper bag. In his evidence the second appellant changes the order in which they walked. He says that the first appellant was in front, followed by Mashaba; he himself made up the rear. He and Mashaba stopped to urinate whilst the first appellant went ahead. The deceased appeared and when he came up to Mashaba, Mashaba demanded R10 from him, which he said the deceased owed him. The deceased replied that he did not have the money on him. In the result Mashaba produced an "axe" from a paper bag and he struck the deceased on the shoulder; the deceased then ran away. The three of them then proceeded to the shebeen.

The Court a quo considered the two appellants to be "very poor witnesses". Not only are their stories at variance, but there is also ample material on record to justify disbelieving them. Particularly in the case of the first appellant there is his statement to the

investigating officer - rightly admitted in evidence - to the effect that Mashaba was walking in front in the footpath, followed by himself, with the second appellant at the rear. According to this statement the second appellant attacked the deceased, apparently with the tomahawk he was carrying all the time "covered in paper". The first appellant and Mashaba ran ahead when they became aware of this, and only later did the second appellant again join them. Incidentally, the first appellant falsely said in his evidence that he was not "aware" that he had ever made this statement.

As has been mentioned, the Court a quo considered the appellants to be very poor witnesses, but - as so aptly put by the court - "a liar is not yet a murderer". The court was fully aware of the difficulty facing the State in bringing home the killing to both or either of the appellants. There were, however, a few other snippets of evidence. Later that Saturday night one Phillip Mlambo, so he says, saw a knife in the

possession / ....

possession of the first appellant and a tomahawk in the possession of the second appellant - both weapons apparently blood-stained. Mashaba then had the guitar. The next morning, having seen the body of the deceased, Mlambo demanded the knife from the first appellant in the presence of the second appellant, whereupon both appellants ran away. The first appellant is also said to have admitted, during the course of the Sunday, to one Sonyas Sibija, a grandson of the deceased, that "hy en twee ander het n persoon doodgemaak". The Court a quo obviously believed Mlambo and Sibiya - it is at pains to emphasize the excellent impression all the State witnesses made upon it and that they were believed - but it is noteworthy that the Court did not appear to place any great reliance on these aspects in arriving at its decision. It obviously considered possession of the tomahawk and knife not to be of any real significance - the knife, because it was not used in the attack on the deceased; the tomahawk, because it was "reasonably pos-

sible that that he (the second appellant) took it over from Thomas after the deed". Some support for accepting this as a possibility may be found in the fact that Thomas Mashaba was carrying the guitar when seen by Mlambo and the guitar was, admittedly, the first appellant's property. The court mentions the alleged admission to Sibiya, but not apparently as a crucial factor. It would, in any event, not have been justified in considering it to be such. The circumstances under which the admission is said to have been made, involved some physical violence by Sibiya and others upon the first appellant, and it may well be questioned whether the admission has been proved to have been freely and voluntarily made. Moreover, what the appellant actually said, could easily have been misunderstood in the circumstances. It is significant that the very next day the first appellant mentioned to the investigating officer, in the statement referred to above, that he had told those who had "assaulted" him, that not he, but the second appellant, had done the killing - as he at that stage still maintained.

The Court a quo held that in all the circumstances a common purpose between the appellants and Mashaba was to be inferred, and on that ground convicted the appellants. A basic proposition involved in the reasoning is that it could not be accepted "that one of the three would on his own attack a man, give him savage wounds with a tomahawk and kick him viciously on the body completely on his own initiative". But it is not at all inconceivable that, walking along in single file, at night and not necessarily at each other's heels (that they might have been conversing, does not establish that they were very close to each other), any one of them for some unknown reason, on a sudden impulse and on his own initiative, could have attacked the deceased as he met the deceased in the footpath. Nor is it uncommon for an assault, once it is under way, to be carried on even after the victim has been brought to the ground. If the basic proposition relied upon by the Court a quo is suspect, very little remains to establish a common

purpose to kill. It is true that the two appellants met each other that afternoon by appointment, with the object of going to a shebeen together, that the first appellant on his own showing knew that Mashaba, whom they had met fortuitously and who then joined them, carried a tomahawk; but all this falls far short of proof of such common purpose. The injuries sustained by the deceased do not necessarily speak of a combined assault; there is no evidence that the physique of the deceased was such as to have required more than one to overpower him; in any event, a single blow on the eye-brow with a tomahawk might well have sufficed to fell the deceased. Neither can the fact that the three men remained together after the killing clinch the matter for the State. There is reason for strong suspicion, but that is not enough.

The appeal is upheld in respect of both appellants and the convictions and sentences are set aside.

E. L. JANSEN,

JUDGE OF APPEAL.

TROLLIP JA.)
CORBETT JA.) Concur.