HALSSAAK

212/76

G.P.A. K.Y.K. 143/76 A. 448.

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

(APPÈL DIVISION).
AFDELING).

APPEAL IN CRIMINAL CASE.
APPÈL IN STRAFSAAK.

K TYIKITYA + N BOVA
Appellant.

versus/teen

STAAT
Respondent.

Appellant's Attorney GEDDES + F *Respondent's Attorney* A.G. (BmFtn)
Prokureur van Appellant *Prokureur van Respondent*

Appellant's Advocate Gr. van Coppenhagen *Respondent's Advocate* B. van Zyl
Advokaat van Appellant *Advokaat van Respondent*

12-11-1976

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

(T H H) 10.2.77
Coram: Rumpff CJ. Hoexter JA et Jansen AJA
9.45 am 10 am
Appeals Allowed. Convictions + Sentences set Aside
Reasons to later.

Registrar

VERLOF DEUR: MILLER AR. 21/1/77

IN THE SUPREME COURT OF SOUTH AFRICA.

(APPELLATE DIVISION)

In the appeal of:

KULU TYIKITYA ..... first appellant,

and NKWENKWEYAKE BOVA ..... second appellant,

versus

THE STATE ..... respondent.

Coram: RUMPFF, C.J., HOFMEYR, J.A., et JOUBERT, A.J.A.

Heard: 12 November 1976.

Date when reasons handed in: 25-11-1976

R E A S O N S F O R J U D G M E N T

JOUBERT, A.J.A.:

In the Transkeian High Court the appellants were convicted by WIENAND, J., and an assessor of the crime of murder, in contravention of section 140, read with section 142, of Act 24 of 1886, as amended by Proclamation 17 of 1940. They were sentenced to death, since the trial Court

found/....

found that no extenuating circumstances existed. Leave to appeal to this Court was refused by the trial Judge but leave to appeal against their convictions and sentences was granted to both appellants in terms of section 369(1) of the Criminal Procedure Act, No. 56 of 1955, as amended.

After having heard the appeal this Court upheld the appeal of both appellants, setting aside their convictions and sentences and intimating that written reasons for its judgment would subsequently be filed. Those reasons now follow.

At the trial appellants Nos. 1 and 2 were accused Nos. 1 and 3 respectively. Charged with them was accused No. 2 was Kwekwe Msamelo who was, however, found not guilty and acquitted.

It is common cause that the deceased Maqinga Lunda, a Bantu male approximately 45 years of age, died on the 3rd August 1975 as the result of multiple wounds inflicted on him and as a result of consequential haemorrhage.

The State relied on the evidence of three eye-witnesses to identify the accused as the assailants of the deceased on the evening of 3 August 1975 when he lived in a hut which he shared with the one eye-witness, Colo Beke, and the latter's wife. In view of the fact that the defence of the accused was a bare denial, the crucial issue was whether the State had succeeded in proving the identity of the accused as the actual perpetrators of the murder as charged beyond a reasonable doubt.

The correct approach to be adopted in evaluating evidence of an identificatory nature appears from the following dictum of HOLMES, J.A., in S v Mthetwa, 1972 (3) SA 766 (AD) at p 768 A - C:

> "Because of the fallability of human observation, evidence of identification is approached by the Courts with some caution. It is not enough for the identifying witness to be honest: the reliability of his observation must also be tested. This depends on various factors, such as lighting, visibility, and eyesight; the proximity of the witness; his opportunity for observation, both as to time and situation; the extent of his prior knowledge of the accused; the mobility of the scene; corroboration; suggestibility; the accused's face, voice, build, gait and dress;

> the result of identification parades, if any; and, of course, the evidence by or on behalf of the accused. The list is not exhaustive. These factors, or such of them as are applicable in a particular case, are not individually decisive, but must be weighed one against the other, in the light of the totality of the evidence, and the probabilities; see cases such as R v Masemang, 1950 (2) SA 488 (AD); R v Dladla & Others, 1962 (1) SA 307 (AD) at p 310 C; S v Mehlape, 1963 (2) SA 29 (AD)".

Colo Beke appears to be an old man who claimed that he saw the three accused growing up in front of him. He estimated accused No. 1 (appellant No. 1) to be approximately 45 to 50 years of age, accused No. 2 45 years of age and accused No. 3 (appellant No. 2) a little younger than accused No. 2. He accordingly conceded that the three accused were considerably younger than he was. He claimed to have known them well ever since their boyhood and that he could make no mistake about their identity. This is rather odd since the accused have been living for many years in different kraals which are situated a considerable distance away from his own kraal.

On the evening of 3rd August 1975 Colo Beke was in/.....

in the hut in which a small homemade paraffin lamp was burning after he had gone to bed. The deceased had also prepared to go to sleep. The lamp was probably left burning because Colo Beke's wife had not yet returned from a beer-drinking party. Four men carrying sticks and assegais entered the hut without knocking. Accused No. 1 (appellant No. 1) told the deceased: "We have come because we want you". As the deceased tried to get up he was struck down by accused Nos. 1 and 2 and an unknown fourth man while accused No. 3 (appellant No. 2) held Colo Beke down. The latter claimed that he recognized the three accused but was unable to recognize the fourth man who was not charged before the trial Court. When accused Nos. 1 and 2 and the unknown fourth man commenced to drag the deceased out of the hut, accused No. 3 (appellant No. 2) let go of Colo Beke. The assailants thereupon fled and Colo Beke discovered that the deceased had been killed. ~~Under cross-examination Colo Beke estimated that the attack~~ on the deceased lasted about ten minutes.

A close scrutiny of Colo Beke's evidence reveals that his identification of the three accused was founded

entirely on the fact that he knew them well. He made no attempt to identify accused No. 1 (appellant No. 1) and accused No. 3 (appellant No. 2) for any other reason. The latter, while holding Colo down, had told him not to move otherwise he would be killed. It is also significant that while the Attorney-General, during the course of the trial, drew the attention of the trial Court to the fact that accused No. 1 (appellant No. 1) is much taller than the average male Bantu, that he has an unusually long face and that he has a very dark complexion, Colo Beke made no reference to these physical characteristics of accused No. 1 (appellant No. 1) in his evidence. Nor did Colo Beke allege in his evidence that he identified accused No. 1 (appellant No. 1) and accused No. 3 (appellant No. 2) by reason of their voices. Moreover, the evidence of Colo Beke sheds no light on the brightness or otherwise of the little paraffin lamp; the nature of visibility in the hut while the assailants were there; the distance accused No. 1 (appellant No. 1), accused No. 2 and the unknown man were away from him while accused No. 3 (appellant

No. 2)/...

No. 2) held him down; whether Colo Beke's face was turned in the direction where the deceased was being assaulted or not; the manner in which accused No. 3 (appellant No. 2) held him down during the assault on the deceased; the facial characteristics of accused No. 3 (appellant No. 2); and the opportunity, if any, during the attack on the deceased to observe the latter's assailants as they were facing him or had their backs turned towards him.

It is clear therefore that the trial Court misdirected itself when it found that Colo Beke identified accused No. 1 (appellant No. 1) not only by his appearance, but also by his voice. The trial Court misdirected itself in the same manner when it likewise found that Colo Beke had identified accused No. 3 (appellant No. 2) by his appearance and his voice. This finding by the trial Court in regard to accused No. 1 (appellant No. 1) and accused No. 3 (appellant No. 2), which is based wholly on the so-called identificatory

evidence/....

evidence of Colo Beke, becomes even more inexplicable by reason of the fact that the trial Court rejected Colo Beke's identificatory evidence in regard to accused No. 2. This appears from the record of the trial Court's judgment:

> "Turning now to accused No. 2, although we accept the evidence of Colo in toto, there are not so many features which can strengthen the identification of accused No. 2. The Court is fully aware of the fact that even the most honest witness can make mistakes in identification, and this Court may well be over-cautious in favour of accused No. 2, but it feels that there is not quite sufficient evidence to positively put accused No. 2 on the scene of the crime that Sunday evening."

Two young Bantu women, Nohombile Beke and Nongqumbi Beke, who slept in a hut in close proximity to Colo Beke's hut, also testified that on the evening of 3rd August 1975 four men carrying sticks and assegais entered their hut for a few brief moments. The light in their hut was provided by a small paraffin lamp and a fire in the fireside. On being asked by one of the young women where they came from, one of the men gave an evasive reply, whereupon the men departed

to/.....

to go to Colo Beke's hut. What is of importance, is the fact that the two young women did not know the four men previously. Nohombile Beke frankly admitted that she did not take particular notice of their faces, whereas Nongqumbi Beke did not take particular notice of the colour of the blankets worn by the four men. These two young women furnished no reasons for the identification of the three accused as having been in their hut with the unknown fourth man for a brief few moments at the most. The result is that their evidence is of no corroborative value as regards the identificatory evidence of Colo Beke.

I would like to point out that this result could perhaps have been avoided had the State opportunely availed itself of the valuable aid of having held properly arranged identification parades for the purpose of affording the two young women, as identification witnesses, the opportunity of identifying the accused. It need hardly be stressed

that from an evidential point of view an act of identification by a witness at an identification parade is generally much more valuable than a mere pointing out of an accused in the dock.

In view of the aforementioned misdirections by the trial Court this Court is at large to disregard the trial Court's findings of fact, even though based on findings of credibility. Rex v Dhlumayo & Another, 1948 (2) SA 677 (AD) at p 706. On weighing the evidence as a whole, I am of the opinion that the State has not succeeded in proving the identity of the accused Nos. 1 and 3 (appellants Nos. 1 and 2) as actual perpetrators of the murder as charged beyond a reasonable doubt.

C.P. JOUBERT.

F.L.H. RUMPFF.

S. HOFMEYR.