HALSSAAK 217/78

G.P.-S. J 445

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

(APPÈL DIVISION)
AFDELING)

APPEAL IN CRIMINAL CASE
APPÈL IN STRAFSAAK

C. G. MBONAMBI
Appellant.

versus/teen

DIE STAAT
Respondent.

Appellant's Attorney ..... *Respondent's Attorney* Mnr P.C. DBN
Prokureur van Appellant *Prokureur van Respondent*

Appellant's Advocate J. Theodore *Respondent's Advocate* S. Schoeman
Advokaat van Appellant *Advokaat van Respondent*

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

(De - D)
Coram: Wessels, Hofmeyr AR R. Hoexter Wnn / J J
9.45 vm —— 10.15 vm
C. A. V.

The Court allows the
State appeal in respect of
Count 1 and sets aside
both the conviction and
sentence on that Count. The
appeal against the conviction
on Count 1 is dismissed. The
matter is referred back to
the trial Court in order
that sentence may only be
passed in respect of the conviction
on Count 1.
Conviction of Pol

CASE NO. 89/78
WHN

CHRISTOPHER GIDEON MBONAMBI ..... Appellant

and

THE STATE ..... Respondent

HOEXTER, A.J.A.

IN THE SUPREME COURT OF SOUTH AFRICA

APPELLATE DIVISION

In the matter between:

CHRISTOPHER GIDEON MBONAMBI ..... Appellant

and

THE STATE ..... Respondent

Coram: WESSELS, HOFMEYR, JJ.A. et HOEXTER, A.J.A.

Date of Hearing: 26 SEPTEMBER 1978

Date of Delivery: 29 September 1978

J U D G M E N T

HOEXTER, A.J.A.

In the Zululand and North Coast Circuit Local Division the appellant, an adult Zulu male, was convicted by a Court consisting of BROOME, J. and two assessors on one count of robbery and one count of murder.

On the count of murder the appellant was sentenced to death. With leave of the trial Judge the appellant appeals against his convictions aforesaid and the sentence of death.

The facts of the case are simple. Late in the afternoon of the 27th August 1977 one Johannes Zondo and the deceased were walking to a mens' hostel in a township adjoining the town of Stanger in the district of Lower Tugela. Because he had stopped to urinate the deceased had lagged some seven paces behind Zondo when the latter was accosted by two robbers. One of the robbers wore a balaclava cap and he was a stranger to Zondo. According to Zondo the other robber was the appellant, a man well-known to the appellant by sight. The appellant demanded money of Zondo who said that he had no money. Thereupon the appellant produced from his pocket a canister and, presumably in order temporarily to blind

/Zondo ....

Zondo, sprayed a substance into Zondo's eyes. The robbers then tripped Zondo who fell to the ground. While Zondo was lying on the ground a packet of cigarettes and a 50 cent coin were removed from his hip pocket. Thereafter the two robbers devoted their attentions to the deceased who was still some distance behind Zondo. Zondo was the only eye-witness for the prosecution. The evidence as to what was done to the accused by the one or the other or both robbers is unfortunately very meagre. In his evidence-in-chief Zondo gave the following terse account of his own impressions :

> "They went to the deceased. When I rose from the ground there I saw them with the deceased who was then on the ground. They then left the deceased lying down on the ground and they rushed at me. I fled and they pursued me .....right up to the entrance into the mens' hostel and they abandoned the chase."

/At .....

At about 9.30 p.m. on the same night the dead body of the deceased was discovered at the spot where Zondo had last seen him. An open knife was lying next to the body. The deceased had a one inch stab-wound just below the left nipple which penetrated his heart and caused his death. Three days later Zondo was at a bus-rank next to a beerhall in Stanger when he saw the appellant. Zondo pointed out the appellant to a security constable on duty at the bus-rank and the latter arrested the appellant. In due course the appellant was charged with robbery and murder. There were three counts in the indictment. Count 1 laid a charge of robbery in respect whereof Zondo was the complainant. Count 2 was a charge of robbery with aggravating circumstances in respect of the deceased as the victim. Count 3 was a charge of murder based on the killing of the deceased. The appellant pleaded not guilty. He was represented at his trial by counsel, and

/at .....

at the close of the State case the appellant testified in his own defence. His defence was an alibi. At the time when Zondo was robbed and the deceased done to death, so testified the appellant, he was at a place near Clover Dairies in Stanger, and far removed from the scene of the crime.

No evidence was adduced to show that before, during or after the killing of the deceased any property of the deceased had been removed from him. Accordingly the trial Court acquitted the appellant on count 2. In regard to counts 1 and 3 the trial Court fully appreciated that the case for the prosecution hinged on the identification of the appellant by a single witness. Bearing in mind the cautionary rules applicable in such a situation the trial Court was nevertheless satisfied that the evidence of Zondo was truthful and reliable and that the appellant's story was plainly false. It is clear that Zondo was an

/excellent .....

excellent witness and that the appellant was a lying and thoroughly unsatisfactory witness. In these circumstances counsel for the appellant wisely decided to abandon the appeal against the appellant's conviction on the first robbery count, and to confine his argument on the merits to an attack on the conviction of murder on count 3. We are indebted to Mr Lubbe who, at the request of the Court, argued the appeal on behalf of the appellant.

Pointing to the absence of any evidence that the appellant himself had in any way attacked or injured the deceased Mr Lubbe submitted that the evidence as a whole failed to exclude as a reasonable possibility: (1) that the appellant's companion had been in possession of the knife and had used it to inflict the fatal stab-wound on the deceased; (2) that the appellant himself had had no weapon in his possession and had been unaware of the fact that his companion was in possession of a

/knife; .....

knife; and (3) that such common purpose to rob as might have existed between the robbers encompassed the use of no greater violence against their victims than that which had in fact been used in the case of Zondo.

Having regard to the paucity of the evidence the learned Judge in the Court a quo correctly approached the matter on the footing that the fatal stab-wound might have been inflicted by the appellant's companion, and without the appellant himself having laid a finger on the deceased. The appellant's conviction on the count of murder rested on the following findings made by the trial Court, namely :

(a) that when the robbers accosted Zondo the appellant was the spokesman and "leader" of the two robbers;
(b) that throughout the two robbers remained together;
(c) that the appellant must have seen the stabbing of the deceased by his companion;
(d) that the appellant "associated himself" with the stabbing of the deceased-

/"because ....

"because he did not protest, remonstrate, object, he did not run away, instead he and his companion rushed at Zondo and pursued him ...."

The passage from the judgment of the trial Court just quoted is at least susceptible of being construed as a statement that the appellant attracted criminal liability by ratification for the act of his companion in killing the deceased. Since it is a well-established principle of our law (see S. v. Thomo and Others, 1969(1) S.A. 385 (A.D.)) that it is not possible to become liable for a criminal act by ratification, it is more likely, I consider, that the trial Court relied on the appellant's conduct subsequent to the stabbing of the deceased simply as proof of the appellant's prior state of mind, and in support of a finding that there existed between the robbers and antecedent common purpose to rob by killing if necessary.

/That the .....

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That the trial Court in fact so viewed the matter is further suggested, I think, by what was said by the learned Judge in granting leave to appeal to the appellant. It appears that such leave was granted chiefly for the reason -

> "that another Court might conclude that ..... a common purpose was not established and that the subsequent conduct relied on by the Court as one of the circumstances was given too much weight."

The evidence clearly does not support a finding that there existed between the two robbers any express agreement that in robbing they would, if necessary, resort to killing or even seriously wounding their victims. Indeed, it is not without significance that in the robbery perpetrated upon Zondo the only violence used was the temporary blinding and the tripping of the victim. On the assumption - which it is necessary to make - that it was the appellant's

/companion ....

companion who fatally injured the deceased, the only remaining question is whether the State proved that before his companion stabbed the deceased the appellant subjectively appreciated the possibility that his companion might mortally wound the deceased; and that the appellant was reckless as to whether or not this would come about. Such a state of mind on the part of the appellant is not to be inferred, in my opinion, from the fact that after the stabbing the appellant joined his companion in pursuit of Zondo. In pursuing Zondo the two robbers were doubtless bent on effectively discouraging Zondo from reporting what he had experienced and seen to the police. But on the part of the appellant such a desire would be just as consistent with a guilty state of mind in regard to the robbery on Zondo, in which the appellant had played a leading and active role, as with a guilty state of mind in regard to the assault

on the deceased. So much was conceded by Mr Schnetler, in the course of an argument fairly presented by him on behalf of the State. It seems to me that in the present case a subjective appreciation on the part of the appellant that his companion might kill the deceased can hardly be inferred in the absence of some acceptable evidence suggesting that the appellant knew, before his companion stabbed the deceased, that his companion had a knife in his possession. In fact there was no evidence at all to indicate that the appellant had such prior knowledge. In these circumstances I agree with the submission of the appellant's counsel that there was no proof beyond a reasonable doubt that the appellant was party to that common purpose without which the conviction of murder cannot be sustained. It follows that in regard to the charge of murder (count 3) both the conviction and the sentence should be set aside.

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Before passing the death sentence in respect of count 3 the learned Judge postponed the passing of sentence in respect of count 2. The appellant was tried and convinced on the 1st May 1978, on which date the judg= ment handed down in this Court in S. v. Mathebula and Another, 1978)2) S.A. 608 (A.D.) had probably not yet appeared in the reports. In the light of what is said in the judgment in that case it is clear that the proper course which the learned Judge should have observed in regard to the matter of sentence was to have sentenced the appellant also on count 1 despite the fact of the imposition of the death sentence in regard to count 3.

In the result the following orders are made:

(1) The appeal in respect of count 3 succeeds, and both the conviction and sentence on that count are set aside.

/(2) The .....

(2) The appeal against the conviction on count 1 is dismissed.

(3) The matter is referred back to the trial Court in order that sentence may duly be passed in respect of the conviction on count 1.

HOEXTER, A.J.A.

WESSELS, J.A.)
HOFMEYR, J.A.) CONCUR