IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between :

BANDANILE NUNU ..... Appellant.

and

THE STATE ..... Respondent.

Coram: Rabie, Miller JJA. et Trengove AJA.

Heard: 2 November 1978.

Delivered: 16 November 1978.

J U D G M E N T.

TRENGOVE AJA. :-

The appellant and one Mzwandile Yenana (who was accused No. 1 at the trial) were charged in the Supreme Court of the Transkei, before ROSE-INNES J., sitting with two assessors, with the crime of murder "in contravention

of section 140 read with section 142 of Act 24 of 1886 (Transkei), as amended by Proclamation 17 of 1940". It was alleged that on Saturday, 9th July 1977, and at or near Umtata, they murdered one Hendrik Wilhelm Truter, whom I shall henceforth refer to as "the deceased". The appellant was convicted of murder. The trial court come to the conclusion that there were no extenuating circumstances and he was accordingly sentenced to death; accused No. 1 was also convicted of murder and although extenuating circumstances were found, namely that he was 25 years of age at the time of the commission of the crime (the appellant was 31), he was nevertheless also sentenced to death. The appellant now appeals against his conviction and sentence by leave of this Court. Accused No. 1 was not granted leave to appeal and it is, therefore, not necessary to consider his position.

The events leading up to and surrounding the murder of the deceased were testified to by two witnesses on behalf of the State. They were Nyameka Maketa, a self-confessed/...

self-confessed prostitute, and Nondyebo Zibi, a shebeen-keeper. Nyameka's evidence was to the following effect. On the Saturday evening in question she was at the Umtata Hotel. During the course of the evening, one Nokwanda Mbali turned up at the hotel accompanied by the deceased. They had met each other somewhere else earlier in the evening and they had come to the hotel because the deceased was looking for another woman to accompany them to a friend of his, who was apparently waiting for them at a caravan park in Umtata. Nyameka and Nokwanda knew each other. Nokwanda approached Nyameka, and she agreed to go with them. According to Nyameka's evidence, the deceased intended having intercourse with Nokwanda, and they fetched her from the hotel to have intercourse with the other white man. They left the hotel in the deceased's car. Before proceeding to the caravan park, they went to a shebeen in the Ngangelizwe Municipal Location, at Nokwanda's suggestion, to buy

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some liquor. This was the State witness Nondyebo Zibi's place. They found two men there, who were busy drinking beer. One of them was wearing a balaclava cap. Nyameka afterwards identified the latter as the appellant, and the other man, whom she knew by name, as accused No. 1. The deceased gave Nyameka some money and she then bought half a bottle of brandy from Nondyebo. The deceased, the two women and the two men then sat around a table, drinking and conversing. Nyameka did not pay much attention to the conversation but, at one stage, she heard one of the men - she said she believed it was accused No. 1 - asking Nokwanda where "this European gentleman" (referring to the deceased) was working. She replied that that he was a professor at the Technical College, and on being then asked whether the deceased had any money with him, Nokwanda replied "how could this gentleman not have money because he is working". After they had finished the half bottle of brandy, the deceased, Nokwanda, Nyameka, the appellant and accused No. 1 left.

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One of the men (Nyameka said she thought it was the appellant) had earlier on asked the deceased whether he would give them a lift and he had apparently agreed, so they all went off together in his car. Nokwanda sat in front next to the deceased, while Nyameka sat in the rear with the appellant and accused No. 1.

On leaving Nondyebo's place, they proceeded in the direction of Umtata. Nyameka was under the impression that they were on their way to the caravan park. However, at a certain point, they turned off into a road, known as Kennmere Way, and the car then slowed down and came to a stop, quite unexpectedly as far as Nyameka was concerned. The deceased and Nokwanda alighted and, without any further ado, they crossed the road and disappeared behind some bushes in the veld, alongside the road. Nyameka, the appellant and accused No. 1 remained in the car. After some 20 minutes had elapsed, the appellant and accused No. 1 also got out of the car,

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and went in the same direction as the deceased and Nokwanda had gone, leaving Nyameka behind. After a further lapse of time - some 30 minutes according to Nyameka - Nokwanda suddenly came running back to the car. She appeared to be in a shocked state. She made a report to Nyameka, and they then both ran back to Umtata. Nyameka did not see the deceased again, nor did she see the appellant and accused No. 1 again until they appeared in court in connection with this crime. So much for Nyameka's account of the events on the evening in question. Her evidence of what had occurred at Nondyebo's place, was corroborated by Nondyebo herself. She also subsequently identified the two men, who had been there, as the appellant and accused No. 1. She knew the appellant and confirmed that he was wearing a balaclava cap at the time.

It is common cause that at about 11 a.m. on the following day, Sunday, 10th July 1977, the police found the deceased's body lying on its back in a furrow, leading

from Kennmere Way, not far from the spot where his car was still parked. The body was fully dressed in a jacket, trousers, shirt, tie and shoes, which were undisturbed. The policeman, who found the body, removed a wrist-watch from the wrist of the deceased, but, unfortunately, he did not search through the deceased's pockets for money or any other valuables. He noticed some blood marks on the right front door and window of the car, and the car keys were still in the ignition switch. The post-mortem examination revealed that the deceased had died as a result of a single 7 cm. stab wound in the chest which penetrated the left chamber of the heart. There were also five superficial cut wounds and an abrasion on the right knee but, according to the district surgeon's evidence, these injuries were of no significance whatever in relation to the cause of death.

This, in broad outline, was the case for the State against the appellant. As far as accused No. 1 was

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concerned, the State also relied on a confession, which he had allegedly made to his girl-friend, the State witness Nokuku Bengeza. According to her evidence, accused No. 1 admitted killing the deceased. This evidence was, of course, not admissible against the appellant. I should, at this stage, perhaps also mention that at the commencement of the hearing in the trial court, Nokwanda Mbali was called as the first witness for the State. She proved to be an entirely unreliable witness. It appears that she had made a sworn statement to the police about the events on the Saturday evening. At the trial, however, she retracted what she had said in the affidavit, and denied that she knew the deceased or that she had ever seen him. The trial court, quite properly, had no regard to her evidence whatsoever.

The appellant's defence was an alibi. He gave evidence and he denied that he had in any way been involved in the murder of the deceased. According to

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his testimony he spent the Saturday-night at the house of his girl-friend, Cynthia Dlova. He said that he arrived there at about 6 or 7 o'clock in the evening and found some of his friends there, busy drinking whisky; he joined them, but he become so drunk that he fell asleep and he did not wake up again until fairly late the next morning. He was supported by Cynthia Dlova, who testified on his behalf. I should mention here that accused No. 1 also pleaded an alibi. He denied that he had had any part in the assault upon the deceased and that he had made a confession to that effect to the witness Nokuku Bengaza.

At the trial the case was fought on the basis that the appellants were not the assailants. There was no dispute with regard to the assault upon the deceased, but the identity of his assailant or assailants was at issue. It appears that as far as the appellant was concerned the main issue was whether he was one of the two men who were at Nondyebo's place when the deceased

turned up there, accompanied by Nokwanda and Nyameka. On this issue, the Court a quo accepted the evidence of the two State witnesses, Nyameka and Nondyebu, and rejected the testimony of the appellant and his girl-friend, Cynthia Dlova, as false. In this Court, counsel for the appellant contended that the trial court erred in accepting the evidence of the two State witnesses as reliable and satisfactory, and he submitted that their identification of the appellant was insufficient in terms of the guidelines relating to sufficient identification, set out in cases such as R. v. Shekelele, 1953 (1) SA 636 (T) at p. 638 - 639. He also criticised the Court a quo's rejection of the evidence of the defence witnesses on a number of grounds. The members of the trial court, quite rightly, approached the evidence of the two State witnesses with particular caution; they were nevertheless impressed by their demeanour, particularly that of the witness Nyameka; and they found their evidence to be truthful and satisfactory. On the other hand, the

trial court commented adversely on the evidence of the two defence witnesses; the court found that the appellant and Cynthia Dlova were unimpressive witnesses both on account of their demeanour and because of the many contradictions in their evidence the court found that "the whole of their evidence is riddled with inconsistencies and contradictions"; the appellant, it was said, made a very poor impression on the members of the court; Cynthia Dlova was found to be a "confused and conflicting witness" and the court gained the impression that her evidence was "a made-up story in order to establish a fictitious alibi" for the appellant. Having carefully considered the various points of criticism levelled at the trial court's judgment, in the light of the evidence, I am not persuaded that the court's findings on the credibility of the witnesses and the identification of the appellant, should be disturbed. The Court a quo was fully justified,in my view, in coming to the conclusion that the appellant's identity as one of the two men who

were in the company of the deceased and the two women, Nokwanda and Nyameka on the evening in question, had been established beyond reasonable doubt.

I must now consider whether, on the State case, the appellant's complicity in the murder of the deceased was established beyond reasonable doubt, as was found by the trial court. And in this regard, it is necessary to bear in mind that the case against accused No. 1 was much stronger than that against the appellant. In the case of accused No. 1 there was evidence, as I have already mentioned, that he confessed to killing the deceased, and in finding that the case against him had been established beyond reasonable doubt, the trial court placed considerable reliance upon this confession, as one can well understand. As far as the case against the appellant is concerned, there is no evidence of this nature. The fact that accused No. 1 had confessed that he had killed the deceased, is however of some importance in the present instance. It will be recalled

that the post-mortem examination revealed that the cause of death was a single stab wound in the chest of the deceased. In view of accused No. 1's confession, it must therefore be accepted that he, and not the appellant, inflicted this injury. The State case against the appellant must accordingly be considered on this basis.

As regards the appellant, the State was faced with the problem that what had actually transpired at the scene of the killing was largely a matter of conjecture. (I have already mentioned, that the one witness who could have enlightened the court on this issue, namely Nokwanda Mbali, made a sworn statement to the police concerning the death of the deceased, which she later recanted at the trial). There is no direct evidence that the appellant actively participated in the attack upon the deceased, and we now know that he was not the one who struck the one fatal blow. It is necessary, in the circumstances, to consider whether the evidence against the appellant, taken as a whole, justifies the inference (a) that he

was party to a common purpose with accused No. 1 to kill the deceased or (b) that he was party to a common purpose with accused No. 1 to commit some other crime, and "foresaw the possibility of one or both of them causing the death of the deceased in the execution of the plan, yet he persisted, reckless of such fatal consequence ....." (S. v. Madlala, 1969 (2) SA 637 (A.D.) at 640 G - H). As to this issue, the trial court found that the evidence established beyond reasonable doubt that the appellant and accused No. 1 had assisted one another in killing the deceased. The trial court came to the conclusion that the following facts and circumstances - found by the court - admitted of no other inference :

(a) the fact that the appellant was with accused No. 1 at Nondyebo's place on the evening in question ;

(b) the fact that the appellant and accused No. 1 were/...

were then in the company of the deceased and the two women;

(c) the fact that there was "a discussion" as to who the deceased was and whether he had any money;

(d) the fact that the appellant, together with accused No. 1, the deceased, and the two women, left Nondyebo's place in the deceased's car and then drove to a spot in the vicinity of which the deceased's body was found the following day; and

(e) the fact that at this spot the deceased and Nokwanda alighted from the car, and disappeared behind some bushes, and that they were later followed by accused No. 1 and the appellant.

From these facts one can possibly draw the inference that the appellant and accused No. 1 were probably acting in concert, but the vital question is whether that is the only reasonable inference to be drawn from the evidence against the appellant. In

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order to resolve this issue, it is necessary to have regard to the effect of the evidence as a whole. There is nothing in the evidence to suggest that the appellant and accused No. 1 had gone to Nondyebo's place with any ulterior motive. It was a shebeen, and they went there to drink. The fact that they met the deceased and his two companions there was purely fortuitous. I have already referred to the evidence relating to the "discussion" between accused No. 1 and Nokwanda Mbali about the deceased. It will be recalled that accused No. 1 asked her where the deceased was working and that Nokwanda replied that he was a professor at the Technical College; accused No. 1 then wanted to know whether he had any money to which Nokwanda replied "how could this gentleman not have money because he is working". That is as far as the discussion went. Accused No. 1 and Nokwanda apparently spoke quite openly, in English, and in the presence and hearing of the deceased. The Court a quo probably relied on

the evidence of this incident as providing some motive for the attack upon the deceased. But looking at the evidence as a whole it is not at all clear what the motive for the assault really was. The evidence on this issue is very meagre, and such evidence as there is raises a doubt as to whether the motive was robbery. It will be recalled that when the police found the deceased's body on the Sunday morning, it was still fully dressed, his clothes had not been disturbed, his wrist watch had not been stolen, his car was still there with the keys in the ignition, and there is no evidence of his pockets having been ransacked for money or any other valuables. I come next to the fact that the appellant left Nondyebo's place in the company of accused No. 1, the deceased and the two women (sub-paragraph (d) above). According to the evidence, the appellant asked the deceased for a lift during the course of the evening. It is not at all unlikely that

he may have been heard that the deceased and his companions were on their way to the caravan park, and that he and the appellant wanted a lift into Umtata. But whatever the position may be, there can be no doubt that appellant and accused No. 1 could not have known in advance, that the deceased would be stopping along the way, at some secluded spot, to have intercourse with Nokwanda. They would most probably have been under the impression that he was going straight to the caravan park. This brings me to the evidence relating to the appellant's conduct after they had stopped at Kennmere Way. When the deceased and Nokwanda got out of the car and left, the appellant and accused No. 1 remained behind with Nyemeka. They sat in the car with her for some 20 minutes before setting off in the direction where the deceased had gone. By now Nyemeka had been in the company of the appellant and accused No. 1 for some considerable time, and it is significant that there is

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no suggestion in her evidence that she had, at any stage, heard them saying anything or making any remarks indicative of some sort of conspiracy involving the deceased. However, it is a fact that the appellant and accused No. 1 went off together in the direction where the deceased and Nokwanda had gone. What was their purpose and what explanation can there be for their conduct? There is no direct evidence on this point, again it is a matter of speculation. They may, of course, have gone there with the object of perpetrating an assault upon the deceased, for some reason or another, but that is certainly not the only reasonably possible explanation for their conduct; they may, for example, have become concerned about the safety of Nokwanda, or they may even have been impatient at being kept waiting at the car for so long. I have already mentioned there is no evidence at all of the circumstances of under which the deceased was assaulted. We know that accused No. 1 attacked and killed him by stabbing him in the chest, but that is all. There is no

evidence that appellant had any part in this attack. There is furthermore no evidence that he was aware at the time that accused No. 1 had a knife or some such dangerous weapon in his possession or that he was still in Accused No. 1's company when he attacked the deceased. So much for the facts on which the trial court based its conclusion.

A further factor telling against the appellant, which may have been overlooked by the trial court, is that he put forward a false alibi. This certainly counts against him and it must be considered along with all the other factors to which reference has been made. But here again, in considering what weight should be attached to this factor, it must be borne in mind, as was pointed out in R. v. Turnhull (1976) 3 All E.R. 550 at 553 H - J, that "False alibis may be put forward for many reasons: an accused, for example, who has only his own truthful evidence to rely on may stupidly fabricate an alibi and get a lying witness to support

it out of fear that his own evidence will not be enough."

I come finally to the crucial question in this appeal and that is whether the facts and circumstances, outlined above, considered cumulatively, point to only one conclusion, namely, that the appellant was party to a common purpose with accused No. 1 to assault, or to attack or to kill the deceased. For the reasons set out above, I am of the view that they do not. In my judgment the evidence falls short of establishing beyond reasonable doubt that the appellant was acting in concert with accused No. 1 in connection with the murder of the deceased.

In the circumstances the conviction and sentence are set aside.

J.J. TRENGOVE,
Acting Judge of Appeal.

RABIE, JA.)
MILLER, JA.) Concur.