M.P.
(198/79)

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

PATRICK ANTHONY Appellant

and

THE STATE Respondent

CORAM: DIEMONT, TRENGOVE JJA et BOTHA AJA

HEARD: 11 September 1980

DELIVERED: 24 November 1980

J U D G M E N T

DIEMONT, JA

On Sunday night 30 July 1978 a young woman, Pumla Ruth Kolese, was murdered in the Red Location in Port Elizabeth by a political activist group known as

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the "Comrades". Six young men were charged with murder and brought to trial in Grahamstown before a judge and two assessors. It will be convenient if I refer to the accused by their numbers as was done in the Court a quo.

After a lengthy trial two of the accused (Nos. 1 & 6) were acquitted, No. 4 was found guilty of assault with intent to do grievous bodily harm and Nos. 2, 3 and 5 were found guilty as charged. The State conceded that the youth of the accused constituted an extenuating circumstance and sentences of 12 years, 10 years, 8 years and 2 years were imposed on accused Nos. 2, 3, 5 and 4 respectively. In this case we are concerned only with accused No. 5, Patrick Anthony, who was given leave by this Court to appeal against his conviction.

It is common cause that the body of the deceased was found in the Red Location on the morning of Monday 31 July 1978 lying in the ruins of an old shop which had .....

had been burnt down in earlier rioting. According to the post-mortem examination the young woman died of head injuries but would also have died of the stab wounds which were inflicted on her. The district surgeon testified to some 27 separate identifiable injuries. The victim of this savage attack was a woman aged 20 years.

The motive for the killing was revenge on a police informer; it is described in the judgment in some detail:

> 'The background of the State case is that it is alleged that some or all of the accused were members of a semi-political activist group of youths known as the "Comrades" of which they formed members of one "cell" or "caste" as it was called. These cells were alleged to have been involved in arson and other unlawful activities which occurred during the unrest in the Black Townships of Port Elizabeth during 1978. It is not entirely clear whether the deceased herself was a full member of this caste. There was some difference in the evidence on this

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point although the weight of evidence suggests that she was a member. However, it is common cause that at some stage she was arrested for similar activities and that she later became a police informer, an "impiempie" as she was called, and that she co-operated with the police in identifying persons involved in the unrest in question. Among others, she caused accused Nos.1, 3 and 6 to be arrested in April, 1978, and they were later tried (I think, in June, 1978) about a month before her death. The case against No. 6 was withdrawn and non-custodial sentences were imposed on accused Nos. 1 and 3. The deceased had been under police protection in another area until shortly before her death but had apparently returned to the Red Location, in which she originally lived, shortly before she died.

It is the State case that the killing of the deceased was motivated by desire for revenge on the part of the accused because she had informed against some of the members of the group or caste. To this end the State attempted to prove that the accused

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were all members of this caste and that on the 29th July, 1978, a Saturday, (the day before the murder) the accused and certain other companions of theirs had agreed to find and kill the deceased. It was further alleged that this plan was confirmed on the Sunday morning of the murder and that on the Sunday evening a search was commenced (I might more accurately say that a hunt was commenced) for the deceased; and that, after several abortive visits to places where she might have been, she was eventually found on the stoep of the house of accused No. 1. That house, for purposes of record, is shown near point A on EXHIBIT B. It is alleged that she was dragged from the yard of that house and assaulted and then dragged to the ruined shop (point B on EXHIBIT B) where she was further assaulted and left to die.'

After referring to the importance of the motive the trial Judge proceeded to analyse the direct evidence for the State. He pointed out that the majority of the witnesses were accomplices, that all were youthful

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and that their evidence must be viewed with great caution and suspicion.

On appeal Mr McDougall, who appeared for the appellant, launched his main attack on the quality of the evidence given by the accomplices. He contended that although the Judge a quo had warned himself that the evidence of these accomplices must be viewed with circumspection he had failed to give sufficient weight to the serious shortcomings and contradictions in their evidence. In short the learned judge had warned himself but had paid insuffi= cient heed to that warning.

Counsel argued further that the appellant's evidence of an alibi in the earlier part of the evening before the assault was committed was not challenged by the State and that the court had made no specific finding on this issue. Had the evidence of the alibi been accepted, as it should have been, it would have further destroyed the evidence of the accomplices. In any event it was

reasonably .....

reasonably possible that the version deposed to by the appellant was true.

There is some substance in this further argument but I do not deem it necessary to analyse it for the reasons which follow.

As the trial Judge pointed out the State case rests on the evidence of the accomplices. If their evidence is rejected or found to be untrustworthy the case against the appellant must fail. Their evidence is, therefore, of critical importance.

Five accomplices came into the witness box. The first two accomplices, Patrick Felana (a brother of accused No. 1) and Sidima Tshayana, saw little and remembered less and the prosecutor was in each case given leave to discredit his own witness. The court found that these two youths had "patently reneged on their statements to the police" and that the State could place no reliance on their evidence.

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The third accomplice, Mazolisi Somane, was a young man aged 15 years. Despite his youth, he was not afraid to talk and did so at great length. He described in detail the gathering on Sunday morning and again on Sunday evening, the search for the deceased and the attack which was made on her. Somewhat similar evidence was given by the fourth accomplice Mimani Simani. He did not, however, witness the assault. The fifth accomplice, Lebu Sidikwe, was even younger; he was a lad aged 14 years. His evidence was poor. The court found that he made "the most negative impression ..... of the three accomplices" and that he contradicted himself in so many respects "that his evidence must be approached with the greatest caution". He implicated the accused in a manner which was unconvincing and added the name of each accused "almost as an after= thought."

The significant fact is that Mzolisi was the only accomplice, indeed the only witness, who implicated

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the appellant directly as an eye-witness in the assault on the deceased. He claimed that the appellant joined the party early in the evening; that the appellant told them that he had a knife; that the appellant took part in the search in the Red Location; that he was one of those who stabbed the woman and that he overheard the appellant subsequently admit to the police that he had stabbed the deceased. The accomplice Mlamli left the group before the assault began and could not say who the assailants were. Lebu, as I have said, was something of a broken reed, and although he claimed to have witnessed the assault, he did not mention appellant's name as one of the persons who used a weapon. Accordingly it can be accepted that the credibility of the accomplice, Mzolisi, is a critical factor in the case against the appellant. Appreciating this, Mr McDougall appears to have dealt at length with this witness in argument in the trial Court.

After recording that "the general demeanour

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of Mzolisi and Mlamli is not open to serious criticism" the trial Judge stated that:

> 'Both Mr van Rensburg and Mr McDougall contended that the multiplicity and nature of the contradictions and defects in the evidence of these accomplices is such that it is impossible to say where the truth lies and that either no reliance can be placed on it at all, or at least, that it cannot stand up against the exculpatory evidence of the accused.'

The trial Judge stated further that he did not propose to itemize all the contradictions and conflicts referred to but a list of eleven of the matters which were stressed by counsel in argument, were then set out in the judgment. The first four read as follows:

> '(1) Mzolisi falsely concealed that he had made a statement to a magistrate on the day of his arrest.
>
> (2) He falsely said that he had admitted to Scheepers on the day of arrest that he hit the deceased with an axe. This

Warrant Officer Scheepers denies in his evidence on the admissibility of his confession.

(3) Both Scheepers and Mzolisi are shown to be incorrect as to the time Mzolisi was taken to the magistrate on the day of his arrest.

(4) Mzolisi says that No. 5 admitted to Scheepers that he had stabbed the deceased. Scheepers denies this and says that No. 5 admitted only throwing stones and that is indeed what No. 5 told the magistrate on the same day.'

Having catalogued the matters on which there appeared to be contradictory evidence the Judge a quo recorded the court's finding on this credibility issue in the following terms:

'While we repeat that we are aware of the defects in the evidence of these accomplices and the quality of their testimony, as will be apparent when we deal with each of the individual accused, we are of the view that that attack on the accomplices is far too broad. In our view a considerable number

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of the contradictions and deficiencies in their evidence are either minor matters or are attributable to youth; lapse of time; and more important the fact that the main events occurred in the dark, in the concerted assault and in a comparatively short time.'

Warrant officer Scheepers did not give evidence at the trial. How then, it will be asked, did it come about that counsel attacked the evidence of the accomplice Mzolizi by comparing his evidence with that given by Scheepers, (as was done in the 4 paragraphs set out above) and on what basis did the court weigh up these contradictions, consider their merit and then dismiss them as "minor matters?"

In this case there was a trial within a trial in order to enquire into the admissibility of certain written statements made by accused Nos. 2, 3, 4 and 5. This inquiry lasted for some days and was conducted in the absence of the assessors. The State called three police

witnesses .....

witnesses including Coenraad Frederick Scheepers, a detective warrant officer attached to the Security Branch of the South African Police.

During the course of the hearing the State withdrew its application that the statement made by accused No. 5, the appellant, should be admitted but at the same time tendered a brief statement by Mzolisi to the effect that he had appeared before a magistrate on the day of his arrest - 19 September 1978. The State said that this document (Exhibit HH) had been introduced in evidence by Scheepers and was confirmation of what he had said. At the conclusion of the trial within a trial the presiding judge referred to this document and stated: "I have informed the assessors informally but it (Exhibit HH) is in the file and it will be made available - it will be available for purposes of argument." At the same time he ruled that the written statements made by accused Nos. 2, 3 and 4

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would be admitted. In his reasons for admitting these statements the learned judge referred to contradictions between the evidence of Scheepers and that of Mzolisi:

> 'There is a conflict between the two of them on certain matters of fact, some of which are more material than others, but while I do not want to anticipate at this stage findings on fact which may have to be made on the merits, I must say that prima facie it was my view and the view of my learned assessors that in a number of respects Mzolisi was not a satisfactory witness and that his credibility may well be the subject of critical scrutiny at a later stage.'

After this ruling had been given, the trial resumed before the full court and the State closed its case without recalling Scheepers or any of the other police witnesses. I apprehend that the fact that Scheepers had not testified before the assessors was overlooked - were it not so both defending counsel would have been stopped

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in argument from comparing the conflicts between Mzolisi and the witness Scheepers whose evidence had been heard only by the presiding judge. I may add that at no time was the document "HH" which was handed in by Scheepers and which apparently formed part of the record (p.812) formally proved.

In the course of argument on appeal in this Court counsel was asked how the trial Court could in its judgment have had regard to facts deposed to by Scheepers. Mr McDougall submitted that there had been an irregularity in the proceedings but as he was taken by surprise by the question he was unable to develop an argument on this issue. Mr Jurgens, who appeared for the State both at the trial and in this Court, argued that Scheepers's evidence had been alluded to by defence counsel in his address to the trial Court and as the State did not object, he submitted that there had been no irregularity in the trial Judge taking cognisance of such facts in his judgment. At the

conclusion.....

conclusion of the argument in this Court, counsel was informed that judgment would be reserved and that the trial Judge would be requested to furnish the registrar with a report in terms of section 320 of Act 51 of 1977 giving his opinion of the following points which arose during the hearing of the appeal:

> 'At pages 733-734 of the record the learned judge refers in his judgment to evidence, more particularly the evidence of Warrant Officer Scheepers, which was given in the course of the trial within a trial and in the absence of the learned assessors and which was not repeated in evidence before the full court.
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> The learned judge is asked to report on the following:-
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> a) Were the learned assessors apprised of the evidence given during the trial within a trial and if so, by whom, under what circumstances and for what purpose?
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> b) Whether or not the assessors were so apprised, did reference to this evidence not constitute an irregularity?
>
> c) If .....

c) If such reference did constitute an irregularity, was it prejudicial to the appellant, accused No. 5?

d) What was the basis of the finding referred to in par. 4 at p.733 of the record that accused No. 5 admitted to Scheepers that he threw stones at the deceased and that he repeated this fact to the magistrate on the same day?'

Counsel were further informed that they would be given the opportunity to furnish further written heads of argument after the report by the presiding judge had been received by the court.

A report by the trial Judge was in due course forwarded and reads as follows:

'4. Ad question (b):

I cannot appreciate how it could constitute an irregularity for the Court to give consideration to facts introduced and stressed by defence counsel in their argument on the merits. These facts were used by counsel as a basis for attacking

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the credibility of the accomplice Mzolisi and it seems to me, with respect, that the Court was bound to consider, and refer to, facts voluntarily introduced by defence counsel, whether or not those facts had emerged from the evidence in the trial within a trial. To ignore this portion of their argument would have been a mis= direction by the trial Court.

5. Ad question (c):

If I am correct in paragraph 4 above, this question falls away. Again I must stress that the "facts" in question were introduced and relied-on by the appellant's own counsel and if prejudice did result therefrom (which I do not accept) it was prejudice of the appellant's making, in an attempt to discredit Mzolisi and in an attempt to show that Mzolisi had been browbeaten into implicating the accused and was therefore an unreliable witness.

6. Ad question (d):

The contents of paragraph 4 on page 733 of the record is not a "finding". It is a summary of counsel's submissions. My note of counsel's argument on this point reads as follows:

"Mzolisi .....

"Mzolisi says No. 5 admitted stabbing" (to Scheepers).

"Scheepers says "no". "He only admitted he threw stones".
Later that day No. 5 says to the magistrate that he was told to say "I threw stones".

The portion of Scheepers's evidence to which counsel referred, is at page 429 lines 2-5 of the record (volume 5) and page 430 lines 23-29.'

Both counsel submitted further heads of argument.

The Code provides that an assessor must give his verdict upon the issues to be tried "on the evidence placed before him" (section 145(3) of Act 51 of 1977). It follows that information which is not placed before the assessors by way of evidence can play no part in influencing the verdict - even if that information would be legally admissible if led in evidence (R v Solomans 1959(2) S A 352 (A) at 364). Generally speaking it is not necessary for the

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State to repeat before the full court all the evidence which was given before the judge alone; once a statement is ruled admissible all that is required is that it be duly tendered in evidence (per WILLIAMSON, JA in S v Mkwanazi 1966 S A (1) at 743). But where facts are deposed to in evidence given in the trial within a trial the assessors cannot be apprised of such facts either informally or from the bar; the witness who deposed to such facts must then be recalled and must then testify before the full court.

In this case the witness was not recalled but facts to which he had deposed were made known to the assessors. This was, prima facie, an irregularity in the proceedings. I say prima facie because it was conceded by counsel for the State that "this would ordinarily be an irregularity", but he contended there was no irregularity in this case since the assessors were apprised of certain aspects of the evidence of the trial within a trial by appellant's own counsel.

Indeed, ...

Indeed, the trial Judge went further and stated in his report that defence counsel having introduced these facts and used them as a basis for attacking the credibility of the accomplice, Mzolisi, it would have been a misdirection for the trial Court to ignore this portion of the defence argument.

I am not persuaded that the irregularity in this case is one which can be overlooked or that it can be said to be cured by reason of the fact that defence counsel was responsible for the assessors acquiring information dehors the trial. When the two defence counsel argued facts which were not canvassed at the trial and which formed no part of the record they could and should have been stopped. And if they were not stopped it would not have been a misdirection for the trial Judge to have ignored that part of the argument which was based on facts not deposed to in evidence before the full court.

It was contended further that if there were

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an irregularity and if prejudice resulted therefrom it was prejudice of the appellant's own making in an attempt to discredit the accomplice, Mzolisi. This contention is an oversimplification of the facts. It is correct that appellant's counsel must share with the counsel for the other accused the responsibility for alluding to facts proved only before the judge sitting alone and that the motive for so doing was to cast doubt on the credibility of the accomplice. But the prejudice which the appellant suffered must be attributed not to the fact that his counsel introduced extraneous facts into his argument but to the fact that the court took these facts into account in assessing the merits of the evidence given by the chief accomplice. It is clear from the judgment that the trial Judge, having referred to the conflicts between the policeman, Scheepers and the accomplice, Mzolisi, "as stressed by counsel in argument", came to the conclusion that these conflicts and the other contradictions in the accomplice evidence were either

"minor .....

"minor matters" or attributable to youth and lapse of time. The assessors had no opportunity of hearing the evidence given by the police witness. Had they been given that opportunity they might have come to a different conclusion. They might well have decided that the conflicts were not "minor matters" and that Mzolini was too discredited to be believed, more particularly as they had already formed an adverse view of his evidence. It was recorded, as I have pointed out earlier in this judgment, that the trial Judge stated in giving his ruling at the conclusion of the trial within a trial that it was his prima facie view and "the view of the learned assessors that in a number of respects Mzolisi was not a satisfactory witness" and that his credibility would be the subject of critical scrutiny at a later stage (p.568 of the record). That scrutiny might have been even more critical if the assessors had heard Scheepers's evidence and been able to give their attention to some of

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the sharp conflicts between his evidence and that given by the accomplice. So, for example, Mzolisi told the court that after the appellant's arrest, he overheard the appellant admit to warrant officer Scheepers that he had stabbed the deceased. This was an important piece of evidence but at the trial within a trial Scheepers strongly denied that any such admission was ever made to him by the appellant. If Mzolisi was untruthful in making this allegation it must cast a shadow on the value of his testimony. The assessors were certainly in no position to judge where the truth lay as between Mzolisi and Scheepers, nor could they fairly accept the finding that this was a minor matter.

I have accordingly come to the conclusion that the irregularity which occurred may well have caused the appellant to suffer serious prejudice. That being so it is not necessary to consider the further argument addressed to this Court in which counsel for the appellant focussed attention on some dozen or more instances in which Mzolisi's

evidence .....

evidence was in conflict with or was contradicted by the evidence given by the two other accomplices, Mlamli and Lebu.

The appeal succeeds and the conviction and sentence are set aside.

M.A. DIEMONT

TRENGOVE, JA)
BOTHA, AJA) Concur
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