

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:-

MANDLENKOSI MTHIYANE APPELLANT

and

THE STATE RESPONDENT

CORAM: CORBETT, TRENGOVE et VILJOEN, JJA

HEARD: 6 MAY 1983

DELIVERED: 19 MAY 1983

J U D G M E N T

VILJOEN, JA

With the leave of the Court a quo the

appellant appeals to this Court against his conviction

of /.....

of murder and the finding that there were no extenuating circumstances present, as a consequence of which the sentence of death was imposed upon him. As accused 2 the appellant stood arraigned with another accused, one Muntomhlope Sabelo (who was accused 1 and to whom reference as such will be made hereinafter), in the Supreme Court of Zululand and North Coast Circuit Local Division at Mtunzini on a charge of having murdered one Themba Mthembu (hereinafter referred to as the deceased) in a plantation in the Mangesi Reserve, Natal, on 13 April 1981. The deceased died as a result of a cut throat.

The case which the State set out to prove

appears /.....

appears from the following summary of substantial facts

furnished by it:-

- "1. The deceased was employed by a certain Alpheus Nene as a forest guard in a plantation of trees in Mangesi Reserve. His duties included selling wood to members of the public.
2. There existed a dispute between the said Alpheus Nene and accused No 2 regarding the ownership of the plantation. On several occasions accused No 2 threatened the labourers of Alpheus Nene whilst they were working in the plantation.
3. Some time prior to 13 April 1981 accused No 2 hired accused No 1 and other unknown person(s) to assist him in killing the deceased.
4. During the morning of 13 April 1981 the deceased was on duty in the plantation.
5. Accused Nos 1 and 2 and the said unknown person(s) went to the plantation where

accused /.....

accused No 2 and the said unknown person(s) hid themselves in a certain place in the plantation.

6. Accused No 1 then went to the deceased and lured him to the place in the plantation where accused No 2 and the said unknown person(s) were hiding on the pretext of pointing out some timber which he intended buying.
7. Accused No 1 selected some trees by marking them with a cane knife which he had in his possession.
8. When the deceased touched a tree in order to seek reassurance from accused No 1 that he was looking at the right tree, accused No 1 dropped the cane knife and grabbed the deceased from behind.
9. Thereupon accused No 2 and the said unknown person(s) appeared from where they were hiding, armed with cane knives.
10. Accused No 2 then cut the deceased's throat whereupon he immediately died."

There was direct evidence against accused 1

and a statement made by him before a magistrate was,
despite an attack by him on the admissibility thereof,
declared by the Court to be admissible against him.

The evidence against the appellant was of a circumstantial
nature only.

The direct evidence against accused 1
consisted of what was related to the Court by the only
eye-witness in the case, one Joseph Mthetwa, who testified
about certain incidents which preceded the killing of the
deceased and the evidence of accused 1 himself which,
even though largely exculpatory, constituted an admission
that he was on the scene. Joseph testified that, on
a certain day, he, accompanied by somebody else, went

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to buy wood from the deceased, who was guarding the plantation and selling wood on behalf of Nene.

While he and the deceased were completing the transaction at a certain spot in the plantation they were approached by accused 1 who lured Joseph to a spot some distance away on the pretext of being interested in buying and cutting certain trees at that spot for the purpose of building a hut. He added that as an additional enticement the deceased was told that there was liquor available at that spot. At the deceased's request Joseph agreed to accompany him and the first accused there. Having arrived there the deceased first partook of some sorghum beer from a half full carton which was offered to him

by /.....

by the first accused and thereafter, while Joseph remained behind, he accompanied accused 1 to a spot where the latter said he wanted certain trees in which he was interested, marked. When the deceased went up to a certain tree and enquired whether that was the tree which accused 1 had pointed out, the latter suddenly grabbed the deceased and pinned his arms behind his back. At that stage two masked men, armed with cane knives, suddenly appeared and proceeded to the spot where accused 1 was holding the deceased. Joseph immediately fled. Accompanied by his parents he reported to the induna what he had seen and some time thereafter, when questioned by the police, he told them what he had witnessed and

accompanied /.....

accompanied them to the spot where they found the deceased's body.

The evidence of accused 1 was that on this particular day he was requested by the appellant to go and assist him in cutting timber in the plantation. He and the appellant went to the plantation and started felling trees there. While they were busy cutting the timber the deceased and Joseph Mthetwa appeared there and came up to them. In fact deceased and Joseph went up to the appellant who was in the firebreak in the plantation. He heard the deceased asking the appellant why they were felling trees in the plantation. The appellant replied that the plantation belonged to him

and /.....

and suddenly struck the deceased with a knob stick which caused the deceased to fall down whereupon the appellant produced a knife and cut the deceased's throat. When accused 1 asked him what he was doing he replied that it was his plantation. Accused 1 then started walking away from the appellant and when he was a little distance away from him the appellant called out: "Hey, hey. Do not report me. I will give you a beast." This evidence differed substantially from the statement he had made before the magistrate which reads as follows:-

"One Mthiyane from Kwa Dlangezwa hired 3 of us and promised to give us a beast each. He said we must kill the deceased. Mthiyane accompanied us to a plantation. We hid in the plantation and Mthiyane send a boy to go and

call /.....

call the deceased. The boy he send was Mfaniseni Chili.

When the deceased came there was liquor in a plastic container. Mthiyane offered him some to drink. Mthiyane was carrying a stick and a knife. He hit the deceased with a stick and then he drew out the knife about 15 inches (indicates) in length and cut the deceased's throat with it.

We then left leaving the deceased like that in the veld. I think that is all.

I did nothing to the deceased. I did not lay my hands on him. I was frightened when he was there.

Mthiyane hired myself and Mfaniseni Chili and John Chili and Mthiyane was the fourth person. We all waited in the bush and was present when Mthiyane killed the deceased.

John Chili and Mfaniseni Chili grabbed the deceased and Mthiyane killed him. I did not do anything. Although I agreed to do this I became frightened when I saw the knife.

That is all I can say."

Therefore, /.....

Therefore, barring an allegation in the statement made by accused 2 before the magistrate (which, of course, is not admissible against the appellant), there is no evidence that, as alleged in the summary of substantial facts, the appellant hired accused 1 and other unknown persons to assist him in killing the deceased, nor was there any admissible evidence, save the evidence of accused 1, that the appellant personally cut the throat of the deceased or, indeed, that he was on the scene at all when the killing took place. The trial Court held that it could not rely on the evidence of accused 1 but held, on the totality of the circumstantial evidence, including a statement which the appellant was held to

have /.....

have made to Nene, and taking into account the failure of the appellant to give evidence, that the appellant had arranged the killing and that it had been executed at the least at his behest.

It is common cause that at the date of the deceased's death Alpheus Nene and the appellant were locked in various disputes concerning the rights to the trees in the plantation. There were various administrative inquiries, the latest outcome of which was in favour of the appellant. At the time of the death of the deceased this outcome was, at the instance of Nene, under appeal to the appropriate authorities. While these legal tussles were in progress Nene was

in /.....

in de facto possession of the plantation concerned and the deceased was employed by him to guard the plantation and was also authorised to sell logs and timber to interested buyers. Before the death of the deceased appellant had on no fewer than three occasions, supported by henchmen on one occasion, physically threatened Nene and attempted to drive him out of the plantation. Nene who was on each occasion armed with a firearm refused to be driven out and threatened to shoot the appellant or anybody else who physically assaulted him. Against this background which prevailed at the time of the killing, the events of the fateful day must be viewed.

There /.....

There is no suggestion that accused 1

or anybody else had a personal motive to kill the deceased.

On being cross-examined as to whether he normally worked

for accused 2, accused 1 replied:-

"Yes. In fact I have worked for him on numerous occasions. At times we would load the timber onto the trucks and at other times we would load logs onto the trucks to be carted away from the plantations there."

On the day in question he was also working

for accused 2, he said. This evidence was not refuted.

In fact, it was not suggested in cross-examination

that that was not the truth. It is true that there

appears to have been no reason why the appellant would

cause the deceased, a mere employee of Nene's, to be

murdered, /.....

murdered, because the proper person upon whom to vent

his rage and frustration would seem to be Nene himself.

As I have pointed out, however, Nene had been threatened

a number of times before but because he carried a gun

the threats were never carried out. The only way

upon which the appellant could exercise his wrath upon

Nene was to do something by which Nene would be mediately

affected: That this was the state of mind of the appellant

appears from a remark he made to Nene. The scene was

a road in the Port Durnford area along which, about a

week after the deceased's death, constable Derick Ntuli,

the investigating officer, was transporting the appellant

in a police van after he had arrested the appellant at

his /.....

his kraal. According to Nene's evidence he stopped the van to find out whether they had arrested anybody in connection with the murder. Ntuli made a report to him whereupon he went to the back of the police van and saw the appellant inside. While Ntuli went off to urinate, a fierce altercation developed between Nene and the appellant. He asked the appellant why he had murdered his labourer whereupon the appellant replied in an aggressive tone: "I killed Shorty so as to make you feel the pain. I will kill you as well.." "Shorty" was the deceased's nickname. The heated argument which followed, said Nene, was only terminated when Ntuli stopped them and drove off. It was put to Nene under cross-

examination /.....

examination that his evidence as to the statement made by the appellant was not the truth and that what happened was that Nene said to the accused: "I am going to chop all the trees down whilst you are in prison." This was denied by Nene. To a question as to why he did not tell Derick Ntuli about this immediately, he replied that, even though Derick Ntuli was some distance away, he nevertheless was within earshot and he took it for granted that Ntuli had full knowledge of it. He said that he told someone at the police station about this statement shortly thereafter (the next day he thought it was) when he went to ascertain how many people had been arrested in connection with the murder. It appears from his

evidence /.....

evidence under cross-examination that he only made an official statement in this regard fourteen or fifteen months after the incident. His explanation was that he made the official statement because he had heard from the appellant's brother that the appellant denied having committed the crime. He went to the police station of his own accord and made the statement to warrant officer Makhatini.

Ntuli's evidence about this Durnford incident was that, after he had stopped the police vehicle along the road to urinate, Nene approached in his vehicle and stopped alongside the police van. Nene spoke to him and asked what progress had been made in the investigation

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of the case. Before he could reply or finish urinating he heard Nene arguing with the appellant at the back of the van. He heard Nene saying: "Hau Mthiyane! Why did you kill my child?" whereupon the appellant replied. "I will also behead you like your child." At that stage he saw Nene touching the rear door of the van and he gained the impression that he wanted to open the door so as to get to where the appellant was. He remonstrated with Nene telling him that he was not to touch a government or police vehicle. He then got into the vehicle and drove off. When he arrived at the police station he took the following statement from the appellant after having properly warned him:-

"I /.....

"I deny the allegations against me. On the said time and place I was drinking beer at Makhathini's place with Mhlophe Sabelo. I did not kill the deceased or tampered with the deceased at all."

The Mhlophe Sabelo referred to was accused 1.

When asked in cross-examination what else was said in the conversation between Nene and the appellant during the Durnford incident Ntuli replied that when he remonstrated with Nene, the latter said to him:

"Do you hear what he is saying?" but he just ignored

Nene and got into his van and drove off. He said that

he did not hear Nene saying to the appellant that he

would cut down all the trees in the plantation while the

appellant was in prison. He could not dispute that that

was said but he was within hearing distance and if it was

1. The first group of people who are not allowed to enter the country are those who are on the "No Fly List". This list is maintained by the Federal Bureau of Investigation (FBI) and the Department of Homeland Security. It includes individuals who are suspected of being involved in terrorism or other activities that could threaten the national security.

...and the ...

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1. The first group of people who are not allowed to enter the country are those who are not citizens of the United States.

It is not necessary to do this.

U.S. DEPARTMENT OF JUSTICE

the 1950s, the 1960s, and the 1970s, and

μ is the mean of the distribution, σ is the standard deviation, σ^2 is the variance, and σ^{-1} is the inverse of the standard deviation.

to be used as a guide.

[illegible]

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[illegible]

1. *Phragmites* 2. *Scirpus* 3. *Eleocharis* 4. *Sagittaria* 5. *Sparganium* 6. *Najas* 7. *Chara* 8. *Alisma* 9. *Sparganium* 10. *Sparganium* 11. *Sparganium* 12. *Sparganium* 13. *Sparganium* 14. *Sparganium* 15. *Sparganium* 16. *Sparganium* 17. *Sparganium* 18. *Sparganium* 19. *Sparganium* 20. *Sparganium* 21. *Sparganium* 22. *Sparganium* 23. *Sparganium* 24. *Sparganium* 25. *Sparganium* 26. *Sparganium* 27. *Sparganium* 28. *Sparganium* 29. *Sparganium* 30. *Sparganium* 31. *Sparganium* 32. *Sparganium* 33. *Sparganium* 34. *Sparganium* 35. *Sparganium* 36. *Sparganium* 37. *Sparganium* 38. *Sparganium* 39. *Sparganium* 40. *Sparganium* 41. *Sparganium* 42. *Sparganium* 43. *Sparganium* 44. *Sparganium* 45. *Sparganium* 46. *Sparganium* 47. *Sparganium* 48. *Sparganium* 49. *Sparganium* 50. *Sparganium* 51. *Sparganium* 52. *Sparganium* 53. *Sparganium* 54. *Sparganium* 55. *Sparganium* 56. *Sparganium* 57. *Sparganium* 58. *Sparganium* 59. *Sparganium* 60. *Sparganium* 61. *Sparganium* 62. *Sparganium* 63. *Sparganium* 64. *Sparganium* 65. *Sparganium* 66. *Sparganium* 67. *Sparganium* 68. *Sparganium* 69. *Sparganium* 70. *Sparganium* 71. *Sparganium* 72. *Sparganium* 73. *Sparganium* 74. *Sparganium* 75. *Sparganium* 76. *Sparganium* 77. *Sparganium* 78. *Sparganium* 79. *Sparganium* 80. *Sparganium* 81. *Sparganium* 82. *Sparganium* 83. *Sparganium* 84. *Sparganium* 85. *Sparganium* 86. *Sparganium* 87. *Sparganium* 88. *Sparganium* 89. *Sparganium* 90. *Sparganium* 91. *Sparganium* 92. *Sparganium* 93. *Sparganium* 94. *Sparganium* 95. *Sparganium* 96. *Sparganium* 97. *Sparganium* 98. *Sparganium* 99. *Sparganium* 100. *Sparganium*

out that the Court should approach the evidence of the witness Nene with caution because he had a clear motive to implicate the accused. It also appears that he, on his own version, mentioned this in a formal statement only some months after the occurrence. It also emerged from his evidence that he went to make this statement of his own accord, not having been asked to do so.

We considered this carefully and we have approached his evidence with caution and circumspection. We found him to be a decisive and impressive witness and also intelligent. These qualities though do not preclude people from not telling the truth and we kept this in mind. Despite these factors though we nevertheless formed the impression that he was telling the truth. His version accorded, in our view, with the probabilities in the sense that one would have expected accused No 2 to feel resentment. And his evidence of accused No 2's statement to him as to why he killed the deceased had the ring of truth. This whole incident was confirmed, of course, by the evidence of Ntuli. It was not put to Nene that he had not

challenged /.....

challenged accused No 2 about having killed the deceased, and indeed it would have been surprising if no such challenge had taken place. Neither, probably in the result, was it put to Nene what the reaction of accused No 2 to the challenge had been. It was merely put in general that accused No 2 had not said what Nene had said he had. It is true, as was pointed out by Mr Lopes, that there were a number of points of conflict between Ntuli and Nene as witnesses, for example, whether Nene stopped Ntuli, whether Ntuli made a report to Nene before Nene approached accused No 2 and as to what precisely it was that No 2 and Nene said to each other. It seemed to us, however, that Nene being more involved and probably more concerned than Ntuli, would probably have a better recollection of what was said. It has not been disputed that Ntuli was urinating during the course of this discussion so it seems to us quite probable that Ntuli would, in all the circumstances, have been most struck by that portion of the altercation in which accused No 2 admitted killing the deceased by implication and threatened to kill Nene as well. Ntuli and Nene are both in-

telligent /.....

telligent persons and if they had wished to frame the accused, as it were, they would certainly not have given this type of contradictory evidence. We find the contradictions to be of such a nature as one would expect of honest witnesses relating such an incident."

On behalf of the appellant it was submitted in this Court that the words heard by Ntuli do not amount to a confession by the appellant that he killed the deceased. The words referred to may be interpreted, suggested counsel, as if they had read: "I will also behead you like your child was beheaded." Thus, argued counsel, the Court had only the evidence of Nene that what appellant said amounted to a confession. Even though, submitted counsel, the Court purported to approach

Nene's /.....

Nene's evidence with caution, it in fact did not do so but paid lip service only to the necessity of doing so.

I do not agree with counsel's submission on the construction of the remark made by the appellant as testified to by Ntuli. In my view, even on Ntuli's version standing by itself, the appellant impliedly admitted that he had personally killed the deceased. When Nene taxed the appellant with having killed the deceased by asking him why he had done so ("Why did you kill my child?") the reply was not a denial but a retort that Nene also would be beheaded, impliedly by the appellant himself (because the question contained a statement that he had killed the deceased), in the same way as the

deceased /.....

deceased had been beheaded. That, in the absence of an explanation by the appellant, is, regard being had to the exchange of words, the only reasonable construction to be placed on the remark.

In developing his argument that the Court a quo merely paid lip service to the necessity to apply caution in its approach to Nene's evidence, we were referred to certain passages in his evidence which illustrated, in counsel's submission, that Nene was evasive and not entirely truthful and therefore not the good and reliable witness he was found by the trial Court to be. I have considered counsel's submissions in this regard and the passages referred to carefully but I am

not /.....

not persuaded that the trial Court erred at all. As appears from the quotation above the Court gave careful consideration to the discrepancies in the evidence of Nene and Ntuli and I agree, with respect, that had the two witnesses wished to frame the appellant, they would certainly not have given the contradictory evidence which they did. The reason which Nene gave why he did not immediately make an official statement about the admission made by the appellant, viz that he did not regard it as necessary because Ntuli must have overheard the remark, is acceptable because from Ntuli's evidence it appears, not only that he had overheard the exchange of words between Nene and the appellant, but that Nene

had /.....

had indeed directed his attention to the appellant's

utterance by remarking: "Do you hear what he is saying?"

And although Nene made a formal statement about the ad-

mission only some 13 to 14 months later there was, in

my view, little scope for embellishment. The admission

by the appellant must have appeared to Nene to be highly

significant because, as the Court said, he was so

vitally concerned. It was a brief statement and not one

which Nene was likely to forget easily. Had the appellant

gone into the witness box and tendered an explanation

which would put a different complexion on the spoken

words, the Court might have taken a different view.

I agree with the trial Court that all the evidence

against the appellant called for an answer which the

appellant did not give. The Court correctly, in my view, regarded the appellant's failure to give evidence as a factor to be taken into account in evaluating the matter in its totality. The totality included evidence of a motive to do Nene harm, the confession, albeit an implied one, referred to above, the evidence of the direct participation of accused 1, the employee of the appellant, and the statement by the appellant made to Ntuli that, at the time of the killing, he was drinking beer with accused 1, which was an obvious lie. The appeal against the conviction cannot succeed.

On the extenuating circumstances issue

it was submitted, on behalf of the appellant, that the

Court /.....

Court a quo failed to give sufficient weight to the fact that the appellant's livelihood and future was threatened by Nene's occupation of the plantation and to the further fact that the appellant had obtained what he considered to be a judgment in his favour on the question of the land dispute, despite which Nene, through the agency of his employee, the deceased, was still in control of the plantation.


In my view, the Court did not misdirect itself. It duly considered the factors referred to by counsel, not only separately but also cumulatively. What weighed heavily with the Court, however, and duly so, in my view, was the fact that the deceased, an innocent young man, was killed after careful planning.

The /.....

The learned trial Judge said:-

"This was, however, a well planned killing of an innocent person just doing his job, a young man twenty-two years old. It was submitted by Mr Lopes that the accused suffered under an emotional stress, stress owing to the lengthy disputes which was accentuated by a decision in his favour which he could not see was being abided by. We accept that he must have felt very annoyed at this and in his mind possibly justifiably annoyed. But he then planned this killing, a deliberate killing of this young man, so that he must have had ample time to consider his actions. Furthermore there is no evidence before us that he has less resistance mentally to this type of stress that he was faced with, namely a successful litigation, but with no effect discernible to him. Whereas we therefore accept that he was annoyed and under some emotional stress, we find that it was not of such a nature as to morally reduce his blameworthiness, particularly because he killed not the person against whom he felt antagonistic but the innocent employee."

The appeal is dismissed.



JUDGE OF APPEAL

CORBETT)
) JJA CONCUR
TRENGOVE)