

JOHN DLAMINI

Appellant

and

THE STATE

Respondent

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

JOHN DLAMINI

Appellant

and

THE STATE

Respondent

Coram: JOUBERT, SMALBERGER, JJ A et BOSHOFF, A J A

Heard: 20 February 1987

Delivered: 26 February 1987

J U D G M E N T

BOSHOFF, A J A :

The appellant was convicted of murder by

Nienaber, J sitting with two assessors in the Durban and Coast

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Local Division, and extenuating circumstances not having been found, sentenced to death.

Mr Rand for the appellant is now challenging the correctness of the conviction mainly on the ground that, having regard to the scene of the killing and the persons involved, the trial court should not have convicted the appellant on the evidence of the single witness Bongani Ngcongo. He also raised several questions about the conduct of Ngcongo at the time when he is alleged to have seen the appellant kill the deceased, questions which he should have put but did not put to Ngcongo in cross-examination.

The deceased, sergeant Nicholas Mbhekeni Ntshangase, was a warder at the Durban Central Prison and his duties included the locking and unlocking and the inspection of the cells in block E of the prison where the awaiting trial prisoners were housed. Block E comprises cells on the ground floor and 6 cells along a passage about two to three metres wide on the first floor. The staircase to the first floor leads to the one end of the passage and on looking down the passage from that end cells nos 8, 9 and 10 are on the left side of the passage and cells nos 13, 12 and 11 in that order, on the right side of the passage. The doors on the right side of the passage are opposite the doors

on the left side of the passage with the result that cell no 10 is opposite cell no 11 at the bottom end of the passage. About 120 prisoners were housed in the cells along the passage. The prisoners, being awaiting trial prisoners, were allowed to move freely from one cell to another on that floor when the cells were unlocked. They were also allowed to leave their cells to fetch their food at mealtimes.

The prisoners had organised themselves into gangs and in block E most of the prisoners belonged to a gang known as "26".

Ngcongo was an awaiting trial prisoner in cell

9 and a member of the gang known as "Big Five". The appellant was an awaiting trial prisoner in cell 8 and an important member of "26". According to sergeant Cronje, who was also a warder in block E, the appellant had the rank of a general. The appellant in cross-examination denied that he was a general and stated that he was a "moundan"; it was his function to search all the new arrivals in prison for money and watches. It does however appear from his statement to the magistrate in the section 119 proceedings that he was a general and it also appears from his own evidence that he was regarded by the prison authorities as a leader amongst the prisoners. In fact he was employed by the prison

authorities...../6

authorities as a cleaner in the passage on the first floor in block E.

According to Ngcongo there was no animosity between the Big Five's and the 26's. According to Cronje however there was hostility but there were no signs of it, whatever that may mean.

It is now necessary to refer to the acts and circumstances which have some bearing on the killing of the deceased and which appear from the evidence of Ngcongo and Cronje.

On Saturday morning, 13 July 1985, the deceased was on his rounds and unlocked the cells. According

to...../7

to Ngcongco he asked why the blankets of the prisoners in cells 9 and 10 were not properly arranged. Awaiting trial prisoner Somnyama replied that the blankets were arranged as they always had been arranged before. The deceased left and returned with Cronje. According to Cronje he found that cells 9 and 10 were dirty and gave the inmates 5 minutes to clean up if they wanted to avoid being deprived of their three meals that day. Cronje locked the cells and left. When he returned a little later he found that the cells were clean and told them that they could go and have their food. They went to where the food was but did not help themselves to any by way of a silent protest.

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In the meantime, after Cronje had locked the cells the appellant who was a cleaner in the passage, came to cell 9 and called Somnyama, who was also a member of the 26 gang, to the door to ask him why the cells were locked. Somnyama replied that it was because the prisoners had not arranged the blankets in the prescribed order and asked the appellant what they were to do. The appellant replied that the warder, evidently referring to the deceased, was insolent and that they should all grab him and hit him when he returned to unlock the cells and that Somnyama should tell all the other members of the 26 gang to do so. A little while later Nkosinathi, who also was a member of the 26 gang, enquired from

Somnyama...../9

Somnyama what they intended doing about the matter. He replied that they had decided to grab and hit the warder when he came there again. Nkosinathi was not satisfied with this decision and said that he wanted all the members of the 26 gang to meet in cell 11 the following day, that is to say, the Sunday. On Sunday morning, 14 July 1985, Sergeant Sibisi visited the prisoners to hear complaints from them. Ngcongco asked for permission to go to cell 2 in block D on the ground floor and this was granted.

At about 12h10 Cronje was on the first floor of block E and he noticed the appellant sitting with other prisoners in a circle behind the door in cell 11. He called the appellant to the door and asked him as the

leader...../10

leader of the gang why they were all sitting in a circle. He replied that they were only talking. He returned to the other prisoners and they all stood up, went to the centre of the cell where they stood in a circle and gave the salute of the 26 gang by holding up their hands with their thumbs bent in the shape of a 6. A prisoner, one Bheki, stood in the centre of the circle and the appellant struck him 6 blows on the cheek. In reply to a question by Cronje, the appellant said that he was being punished for something he had done wrong in the gang.

The cells on the ground floor were unlocked first to allow the prisoners out to collect food. After Ngcongo had finished his meal downstairs he went up the

stairs...../11

stairs to go to his cell 8 on the first floor. In the meantime the deceased had gone upstairs to unlock the cells so that the prisoners could fetch their food. When Ngcongco got to the top of the stairs he saw a person in a warder's uniform at the bottom end of the passage being surrounded by about 20 to 30 prisoners. He could see that they were fighting and he saw the warder brandishing his baton and driving the prisoners towards the stairs where Ngcongco was standing. Eventually the warder, who turned out to be the deceased, fell down and the prisoners fled to their cells. The appellant who was one of the prisoners involved in the fight with the deceased, remained behind and called upon Nkosinathi, who was also one of the prisoners...../12

prisoners involved in the fight and who had an open knife in his hand and was then running away, to come back. He remarked that the warder was not dead and would cause them to be arrested and that he should be killed. Nkosi-nathi did not heed his call. The appellant then took the fire-extinguisher from its mounting on the wall and struck the deceased, who was on his knees in the act of getting up, on the head. The deceased fell down and when he raised his head in order to get up again, the appellant struck him another blow on the head. He left the fire-extinguisher next to the deceased and ran into his cell.

This assault took place 6 metres away from Ngcongco where he was next to the stairs. He was afraid

that...../13

that he might be involved if he remained on the first floor of block E and immediately returned to the ground floor.

The prisoners on the first floor in block E then all ran downstairs. Somebody blew a whistle. Cronje who was on the first floor in block C heard the whistle and ran down the stairs to the ground floor of block D. From there he ran up the stairs to the first floor of block D which adjoins block E. There is a trellis-gate leading from the passage in block D into the passage in block E. Cronje went to this gate, looked into the passage in block E and saw the deceased lying in the passage with the fire-extinguisher next to him. Cronje blew his

whistle...../14

whistle to summon assistance. At that stage all the prisoners of the cells on the first floor of block E had gone downstairs and had started rioting. The assistance of the police was called in and they made use of the authority which the appellant had over the prisoners to restore order.

The fire-extinguisher weighed 10 to 12 kg and the deceased died of a head injury. He had a fractured skull, involving both parietal bones, temporal and occipital. He had 15 lesions to the head and face caused by blunt force. Blood was found on the fire-extinguisher and it is common cause that the head injury, which caused the death of the deceased was inflicted with the fire-extinguisher.

The appellant gave evidence in his defence and there is much in his evidence that corroborates the versions of Ngcongco and Cronje. Much of this evidence which is inconsistent with their evidence was not put to them in cross-examination. As far as the attack on the deceased was concerned, he denied that he had any part in it. When cross-examining Ngcongco, the appellant's counsel put to Ngcongco that the appellant was there amongst the prisoners who were attacking the deceased and did nothing. In the section 119 proceedings before the magistrate he said:

"I had went to room number 11 to smoke dagga because I had heard that people there had some dagga. We smoked

dagga and went to sleep for a short while. --- I was lying on my back on my clothing and I had my hat covering my face, as I indicate by putting my hand on the eyes . I then heard a noise. I heard people calling out, saying 'Hebe usotho'. I got up and went outside and I saw all the prisoners coming towards my direction, to a corner. They went back again in front. I joined them. ---

I couldn't see what was really happening because others were coming down and others coming from the above - from the other side of these premises and the dishes were flying on the air - in the air. I then saw the sergeant lying down, the same sergeant who had imposed the sentence on us, telling us that we will not receive our meals, the three meals. That was Sergeant Shangase. But he did not sentence me. I walked down after I have seen him lying down there. I proceeded to E - to E section. We all met at E section. They were blowing their

whistles...../17

whistles. We saw the warders approaching us. They were armed with sticks."

In his evidence-in-chief he gave the following evidence:

"And then when did trouble start? --

It was in the afternoon when we were being taken out to fetch our food.

Where were you at that moment? -- I was in number 11.

Doing what? -- We were just sitting down and smoking dagga.

And what did you hear, and what did you see? -- I was lying down at a corner, and there were others also lying down. I heard a noise. I cannot remember whether I had a hat or a towel over my eyes. I removed it, and discovered that the door was open, and there was a commotion, and there were dishes being thrown inside. I saw them running down the flight of stairs, and the warder lying down. I also went down with the others to

the lower floor. When we were on the lower floor, the other prison warders arrived and tear-gassed us. ---

Now, to get back to this Sunday, when the trouble started whereabouts was the deceased when you saw him? -- He was lying down at the steps leading down.

Was he moving, or did he appear to be unconscious or dead? -- He was just lying down flat.

And when you went out of that cell, that passage, was he still lying there? -- Yes, I was in the room when I heard the noise. When I came out I saw people running away. There were others in front and behind me. There was just a commotion.

Now, did you see the prisoner who is now dead, Nkosinathi, there?

-- No, I did not see him.

Did you see the State witness, the prisoner there? -- No, I did not see him."

Under cross-examination he gave the following

evidence...../19

evidence:

"Did you have lunch before you heard the noise on the Sunday that led to you running downstairs? -- Yes.

So this occurred after the luncheon meal? -- The afternoon, the last meal.

What sort of noise attracted your attention? -- There were footsteps and sounds of dishes, noise, people crying.

When you heard the noise what did you think was going on? -- I just took fright, I had been sleeping there. I had been smoking dagga.

What did you think was happening? -- I just thought a fight was taking place. This is the usual occurrence, stabbings, fightings, inside and outside.

When you came out of the cell, what did you see, what is the first thing you perceived? -- I got to the crowd that was running away and I

also ran away. I also ran down and saw the sergeant lying down.

Just a minute. You came out of cell number 11 which is at the end of the corridor, correct? -- Yes.

And when you came out of the cell did you see anything happening besides people running away? -- I did not see anything else happen.

Did you see anybody fighting when you came out? -- I did not see anybody fighting.

Did you see anybody throwing dishes, plates, anything of that nature? -- That was the noise that frightened me, and also footsteps.

Please listen to the question. I am asking you did you see anybody throwing eating utensils around? -- I did not see anyone throw them, but I did see dishes and also food, like samp, being spilt there.

Why did you run after these prisoners? -- Just going to where they were going to.

Why? -- Why would I remain when

I saw a warder lying down there?

Did you see the warder as soon as you came out of the door? -- No.

You only saw him after you ran after the people that were running away? -- Yes, when I came to the flight of stairs, and it is narrow, the passage is narrow, others were coming out of the other rooms.

Yes, I will ask you again. Why did you run away when you came out of cell number 11, what was the purpose?

-- I was running away with the people who were running away.

What for? -- I saw the warder lying down there.

But you have just said that you only saw the warder after you started to run away. So what was the reason initially to run after these people?

-- When I came out of the room I saw people running, so when they ran away I also ran away with them. I would not remain behind.

Why not? Why wouldn't you remain behind? -- (intervention)

NIENABER J Just a moment, just a moment, I think the accused still wanted to add something to his reply. -- I would not remain there when I saw people running away and a warder being dead there.

MR HUTCHINSON Mr Dlamini, you said a few minutes ago that you only saw the warder lying down after you had begun to run away when you got to the steps. Is that correct? -- When I came out of the cell when there was a noise. I saw people running away. I saw the warder lying down there, and I ran away with the people who were running down.

So are you saying that before you ran away you already saw the warder lying on the ground? Is that what you are saying? -- It was the noise which made me come out. How many times have I to explain to you?

NIENABER J Yes, well you still haven't answered the question. The question is quite simple. Did you see the warder before you started running?

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-- It was before I ran away. I ran out of the room when I heard a noise and came up to the crowd.

MR HUTCHINSON So before you decided to flee down the lower level you had already seen the warder, am I correct?

-- Yes, I saw him.

Well, you see, about five minutes ago you said exactly the opposite. You said you only saw the warder after you began to run when you neared the steps. Now, which is the correct version? -- I say it was the noise that made me come out of the room. I got to the prisoners who were running away. I looked and saw the warder lying down and I also ran away.

Then why earlier did you say that you only saw the warder after you had begun to run away? -- When I got up I ran away. I got up, ran out when I heard the noise.

Yes, I understand that. But now my question is why did you earlier say that you only saw the warder when you ran away and when you were

approaching the stairs? -- No, I stand by what I have told you."

The trial court accepted the evidence of Ngcongo.

In the view of the trial court he did not contradict himself in any material respect and was not contradicted by any of the other witnesses for the State. There were no inherent improbabilities in his evidence and he did not appear to endeavour to exaggerate the appellant's role in the death of the deceased. The trial court regarded it as unlikely that Ngcongo would have fabricated a false story against the appellant, a prominent member of the 26 gang which was in control of block E. To falsely implicate the appellant could expose him to revenge

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in a fairly violent form as appeared to have happened to Nkosinathi who was subsequently murdered in prison.

The trial court appreciated that Ngcongco was a single witness as far as the killing was concerned and that it had to approach his evidence with caution and to decide the guilt of the appellant on the totality of the evidence.

The trial court for good and sufficient reasons given by it had no hesitation in accepting the evidence of Cronje in preference to that of the appellant where there was a conflict in their evidence.

The trial court dealt with the various aspects

of the appellant's evidence and for good and sufficient reasons came to the conclusion that it was false where it conflicted with that of Ngcongo and Cronje. As far as the killing of the deceased was concerned, it discussed and considered the contradictions and inconsistencies in the evidence of the appellant and concluded that he was an evasive and untruthful witness.

The trial court finally came to the conclusion that, looking at the evidence as a whole and weighing up the performance of the State witnesses against that of the appellant, it had no hesitation in preferring the evidence of the State witnesses to that of the appellant; that there was no reasonable possibility that the evidence

of the appellant could be true and that he was guilty of murder.

Mr Rand has not succeeded in persuading this court that the trial court had in any way misdirected itself or that its judgment was not correct. The appeal against the conviction can consequently not succeed.

Mr Rand also contends that the trial court should have found extenuating circumstances. His main argument is that the appellant acted on the spur of the moment. The learned trial court for good and valid reasons rejected this argument and Mr Rand is unable to show that the learned trial court misdirected itself in

any way or that no other court could reasonably have
come to the conclusion to which the trial court came
as far as extenuating circumstances are concerned.

The appeal on this ground can also not succeed.

In the final result the appeal is dismissed.

BOSHOFF, A J A

JOUBERT, J A)
SMALBERGER, J A) concur