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WLD 87/87

JOSEPH NGCOBE .....1st APPELLANT

JEROME DEBISHIRE ..... 2nd APPELLANT

JAMES DLADLA ..... 3rd APPELLANT

and

THE STATE .....RESPONDENT

J J F HEFER JA

IN THE SUPREME COURT OF SOUTH AFRICA

APPELLATE DIVISION

In the matter between

JOSEPH NGCOBE ..... 1st APPELLANT

JEROME DEBISHIRE..... 2nd APPELLANT

JAMES DLADLA ..... 3rd APPELLANT

and

THE STATE ..... RESPONDENT

CORAM : HEFER, JACOBS JJA et NICHOLAS AJA.

HEARD : 10 NOVEMBER 1987.

DELIVERED : 23 NOVEMBER 1987.

J U D G M E N T

HEFER JA :

During June 1985 the three appellants together

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with some forty other prisoners were inmates of cell A23 in the Johannesburg gaol. On the evening of 4 June 1985 a new prisoner, Kenneth Phakamele, was admitted to the cell. He was murdered there early the next morning. In due course the appellants were charged with and convicted of the murder. No extenuating circumstances were found and the death sentence was imposed on each of them. Leave to appeal against the convictions and sentences was granted by the trial court.

The deceased was stabbed to death. It emerged at the trial that he sustained more than seventy incised wounds, one of which transfixed the jugular vein whilst others penetrated his lungs. He died of asphyxia

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and loss of blood. It was common cause that first appellant had stabbed him with the sharpened handle of a spoon. The issues were, firstly, whether first appellant had acted in self defence as he claimed to have done and, secondly, whether second and third appellants had joined in the attack with similar instruments, as alleged by some of the state witnesses but denied by the appellants. The trial court found against the appellants on both issues.

In this court several reasons were advanced for challenging the trial court's findings. The main contention was that the court erred in accepting the evidence of the eyewitnesses who testified for the state,

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despite the fact that it contained material contradictions and despite the fact that there was not one of them whose credibility was beyond question in all respects. In order to deal with this contention it is necessary to refer in some detail to the evidence and to the contradictions revealed therein.

Cell A23 is rectangular in shape and is divided into two sections, the larger of which houses the prisoners' beds and lockers and the smaller their washroom and toilet. There is an interleading door in the dividing wall. Entrance to the cell is by means of a door situated in one of the long walls of the sleeping section close to the dividing wall. Both long walls of the

sleeping.....5

sleeping section are lined with bunks. The witness Adams used the bunk next to the door and the witness Phokojoe slept a few bunks further down the row. The witnesses Sithole and Msibi used adjoining bunks about half-way down the row of bunks along the opposite wall. The appellants' bunks were the ones furthest from the door. Two of them (there was a dispute as to which two) slept next to each other against the one wall and the other directly opposite them against the other wall. Some prisoners had no bunks and slept on the floor. So did the deceased. He slept on the floor close to the entrance, between Adams's bunk and the dividing wall.

Broadly speaking the state's case was that

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the appellants attacked the deceased at about 5 h00 on 5 June 1985 while he still lay sleeping; that he managed to flee to the washroom where he was followed by the appellants and where the attack continued and eventually ended in his death; that shortly thereafter a prison warder, Mgogodlo, entered the cell and,having discovered the deceased's body in the washroom, reported the murder to sergeant Dlamini who in turn reported it to his superiors; and that a number of officers, including lieutenant Marais, then proceeded to the cell and removed the appellants after second appellant had admitted to Marais his and the other appellants' involvement in the murder and after first appellant had surrendered a sharpened

spoon.....7

spoon to him. It was part of the state case that the appellants also surrendered their prison indentity cards as a token of admitting their involvement.

In presenting its case to the court the state encountered a major problem. Two of its witnesses, of which the warder, Mgogodlo, was one, were discredited for departing from their police statements. Counsel who appeared for the state made their statements available to the defence and cross-examination revealed that there were indeed serious departures which eventually caused the court to largely discard their evidence. That was only part of the problem. Three of the witnesses referred to earlier, Adams, Sithole and Msibi, described the deceased's death

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and subsequent events in terms which tallied only in the very broadest outline but differed very materially in almost every detail. Thus, referring to the way in which the deceased had been killed, Sithole testified that the appellants first went into the washroom and then to the place where the deceased slept. There third appellant stabbed him in the neck with a sharpened spoon. The deceased jumped to his feet and, with third appellant's spoon still stuck in his neck, ran towards Sithole's bed. The appellants pursued him and stabbed him while he ran. Third appellant blocked his way. He turned round and ran into the washroom. The appellants followed him. . . Second appellant then emerged shouting "Shove kop" (a

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direction to the occupants of the cell to cover their heads) and immediately returned to the washroom. After a while he and third appellant emerged again and went to their bunks leaving first appellant in the washroom. Later Sithole saw first appellant washing his hands at the basin in the washroom and eventually returning to his bunk.

Msibi, who was watching from the bunk next to the one on which Sithole lay, described the incident as follows. The appellants proceeded directly to where the deceased lay (without first going into the washroom as Sithole said). They all knelt next to the deceased. Third appellant pulled away the blankets and first appellant stabbed the deceased in his neck. Thereafter the other appellants

repeatedly.....10

repeatedly stabbed him. He jumped to his feet and moved into the passage between the rows of bunks. Third appellant (without blocking his way as Sithole said) stabbed him from behind in the neck, causing him thereby to turn round. The deceased walked into the washroom followed by the appellants. On the way the appellants kept stabbing him. They all went into the washroom where Msibi could not see what was happening. Second appellant emerged and shouted "Shove kop". He did not return to the washroom but stood near the door watching the prisoners in the sleeping section. After a while Msibi saw first and third appellants washing blood from their trousers at the basin in the washroom. Third appellant came out

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and said :"No one should take part in this for we (the other occupants of the cell) must not think that they (appellants) are the only three which belong to gang 28. 28 Gang has a large membership". All three appellants then returned to their bunks.

Adams had another version. According to him third appellant, upon arriving with the other appellants at the place where the deceased lay, pulled the blankets from the deceased's head and stabbed him several times while the other two appellants stood looking on. The deceased rose to his feet and ran to the bunks in the opposite row. He tried to climb onto one of the bunks but all the appellants stabbed him. He turned and ran to

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the washroom. Still stabbing him, the appellants followed him. Inside the washroom the deceased mounted a low wall which serves to screen the toilet basin. Second appellant pulled him down. He fell and in falling his head struck the floor with a thud. He was apparently unconscious. All three appellants kept stabbing him until eventually they went back to their bunks together. Later second appellant, walking up and down the passage between the beds, told the other prisoners that what they had witnessed was none of their business and warned them that any-one who would talk about it, would follow the same way.

The discrepancies in this part of the evidence

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are self-evident and no elaboration is required. I turn, therefore, to the evidence relating to the events after the discovery by Mgogodlo of the deceased's body, in the course of which the appellants allegedly admitted their involvement in his death and surrendered their cards.

According to Sithole, Mgogodlo, after seeing the body, asked: "Have you killed a person already?" No-one answered. Mgogodlo left and returned later with his superiors. Lt Marais was among them. Marais asked:"Wie het dit gedoen?" Second appellant stood up with his prison card in his hand. Handing his card to Marais he said: "Is ons, ons is 28." First and second appellants were immediately behind him when he said this. They said

nothing.....14

nothing but also produced their cards and handed them to Marais. First appellant also handed a spoon to Marais. Msibi's version was that first appellant handed his card and a spoon to Mgogodlo when the latter first visited the cell. Later, when Mgogodlo returned with the officers, and when Marais asked: "Who did this thing?",second appellant said: "Is ons,28's". This witness did not see anything being handed to Marais. Adams had a third version. According to him second appellant first tendered his card to Mgogodlo when the latter had asked: "Het julle nou iemand doodgemaak". Mgogodlo ignored him and did not take the card. Later, when the officers came, the major (not Lt Marais) asked: "Wie het dit gedoen?". whereupon

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all three appellants approached him. Second appellant surrendered his card. Third appellant surrendered his own and first appellant's card and, when told to do so by third appellant, first appellant handed over a spoon. Phokojoe (whom I have mentioned but with whose evidence I did not deal because he claimed to have been asleep while the deceased was killed) saw the handing over of the cards. His evidence was that Marais asked: "Who killed this person?"; that second appellant then said: "Dis ons 28" and produced his card, and that the other appellants then surrendered theirs. Marais' own evidence is not in accordance with any of this. It is to the effect that all three appellants' cards were handed

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to him by sergeant Dlamini and were already in his possession when he went to cell A23. In the cell he asked the occupants: "Wie het dit gedoen?". Second appellant then approached him followed by the other two. He asked them: "Het julle die daad gepleeg" whereupon second appellant said: "Ja ons het die daad gepleeg." He then asked: "Waar is die lepel" and, at second appellant's direction, first appellant produced a spoon and handed it to him. He, ie Marais himself, then produced the cards and identified each appellant.

The discrepancies in the evidence relating to this aspect of the matter are so glaring that again no elaboration is required. The trial court was not

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unaware of their existence nor of the ones referred to earlier. How then did it justify the conviction? The answer emerges partly from two passages in the court's judgment which I shall quote. Referring to Sithole's and Adams' account of what the appellants had done to the deceased, the learned judge said:

> "It will be seen that Sithole's account differs in its detail from the account of Adams. We have given consideration to those differences. After taking them into account, we concluded that the essentials of both versions are the same. Both recount a concerted attack on the deceased by the three accused, each wielding a sharpened spoon, starting at the deceased's sleeping place, proceeding across the cell, and terminating in the washroom."

The differences between the evidence of these two witnesses

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and of Msibi were disposed of in the same manner:

> "Again it will be seen that Msibi's version, also differing in details from that of Adams and Sithole, has the same essentials relating to the concerted attack by all three accused on the deceased at his sleeping place; their pursuit of the deceased, and the running attack on him, as he fled across the cell and changed direction to the washroom; the completion of the attack in the washroom; and the warning by accused 2 to "shove kop" and to keep out of the matter."

Another remark by the learned judge elsewhere in the judgment reveals why the court regarded the "essentials" of the state witnesses' evidence as decisive despite their utter inconsistency in what the court regarded as "details". Before he commenced his discussion of the state witnesses' evidence the learned judge said:

"There.....19

"There were a number of discrepancies between their respective versions. Such discrepancies were fully explored in cross-examination and emphasised in argument on the part of defence counsel. We have considered them carefully. I do not propose to set out all the details. I shall select the main considerations that have led us to the conclusion we have reached.

It is convenient to begin with the defence version of how the deceased met his death. If that could reasonably possibly be true at least accused 2 and 3 must be acquitted.

The defence version also provides a perspective against which the materiality of the discrepancies between the versions of the state witnesses can the judged."

The defence version, I may mention, was that first appellant was pushed aside by the deceased while he (first appellant) was washing in the washroom. At that stage only the deceased and first and second appellant were in the

washroom.....20

washroom. When first appellant enquired from the deceased why he had pushed him, the deceased slapped him in the face. The deceased was a much bigger man than first appellant and, fearing a further attack, first appellant went to his bunk and armed himself with a sharpened spoon which he kept hidden there. He advanced upon the deceased who was standing near the washroom door. The deceased tried to gain possession of the spoon and a scuffle ensued which took the combatants back into the washroom. First appellant stabbed the deceased repeatedly but the latter would not desist from attempting to get hold of the spoon. Each time he rushed at first appellant, first appellant stepped aside and

stabbed.....21

stabbed him "in the manner of a matador inflicting wounds on the neck and shoulders of a charging bull" (as the learned judge aptly described it). While this was going on second appellant stood trapped in the washroom, unable to get to the door. When eventually het did get an opportunity, he slipped out and went to his bunk. Thereafter third appellant went to the washroom to find out what was happening. He managed to stop the fight and he and first appellant left the deceased in the washroom where he subsequently died of his wounds.

Bearing in mind that this was the defence version it now becomes clear why the court was interested in the fact deposed to by the state witnesses that the deceased

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was attacked while he lay sleeping and that all three appellants joined in the attack and stabbed the deceased while he fled from them, rather than in the details of exactly what each of the appellants allegedly did to him or precisely how the concerted attack was carried out. However, in doing so, scant attention seems to have been paid to the extent of the discrepancies between the state witnesses in relation to what the court regarded as details and in the result the question whether, in view of those very discrepancies, they were to be believed in regard to the "essentials" was not satisfactorily dealt with.

This and certain other features of the court's judgment has left me with the firm impression that the

reliability of the eye witnesses who testified for the state, was not properly considered. The first such feature is the way in which the court dealt with the conflicting evidence relating to the handing over by the appellants of their cards. How the state witnesses differed in that regard has already been described. (The defence version was that first appellant handed his card and a sharpened spoon to Lt Marais when Marais and the other officers went to the cell, whilst second and third appellants later surrendered their cards to Marais in his office.) The court made short shrift of the discrepancies in the following terms:

"This evidence left the question whether any

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> of the accused had handed his prison card to Mgogodlo in great uncertainty. Nevertheless we consider that it was afterwards cleared up by evidence from captain Marais which we found to be acceptable---------."

It is implicit in this remark that the conflicting evidence of the other witnesses was rejected, and the fact that it was rejected and had contributed to the "great uncertainty" of which the learned judge spoke, must surely have had some effect on their credibility in general. Yet there is no indication in the judgment that it played any part.

Having mentioned the appellants' cards there is also the question of the spoons allegedly used by the appellants during the attack. The one which first appellant used, was handed to Marais and was produced in

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court. Not long after the appellants' departure from the cell, it was thoroughly searched for the other two. The search yielded nothing. Sithole and Adams explained, however, that the missing spoons were discovered a day or two later in a drain in the washroom. Msibi had a completely different version which was to the effect that third appellant had disposed of them before Mgogodlo opened the cell, by passing them through a window to a prisoner in an adjoining block of cells. The court accepted Msibi's evidence. Of Adams and Sithole's evidence relating to the discovery of the spoons the learned judge said :

"We consider that this evidence of the alleged

finding.....26

> finding of additional spoons in the cell constitutes a feature of the state case which casts some suspicion on the witnesses who testified to it. It is not impossible that Sithole, Kubeka and Adams have sought to strengthen the state case by adding this feature to account for the missing spoons. If that is so it is a disturbing feature of the state case which must give cause for concern." (Kubeka is another witness who was discredited for departing from his police statement.)

There is no explanation for Adams's and Sithole's evidence other than the one to which the learned judge referred. There can be no doubt that having told the police of an attack on the deceased in which three spoons had been used, and realizing that only one spoon had been accounted for, they invented the discovery of two additional ones. The additional ones were discovered, so they said,

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by the prison authorities and, as the court rightly found, it is inconceivable that they could have been found without Marais coming to know of it. Marais knew nothing of their discovery. It is clear, therefore, that Adams and Sithole deliberately perjured themselves in order to strengthen their account of what had happened. That they did so was indeed a disturbing feature of the state case which must give cause for concern. Yet it received no further attention in the court's judgment and in the end their evidence on the crucial part of the case was accepted.

As already mentioned, Msibi's evidence relating to the disposal of the spoons by third appellant was accepted. The court considered whether it could not

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have been a "fabrication subsequent to his statement" to the police but decided that it was not since counsel who conducted the prosecution had disclosed the departure from their statements by two other witnesses to the defence and, had Msibi departed from his statement, the prosecutor "would have drawn our attention to such departure". Sight was lost, however, of Msibi's own admission that there was no reference in his statement to the disposal of the spoons. It came to his knowledge that two spoons were missing, so he explained, only after he had already made his statement. Apart from the fact that this part of his evidence was thus considered on an incorrect basis, Msibi's evidence about the disposal of the spoons is most unconvincing.

His.....29

His assertion eg that he only came to know that two spoons were missing after he had already made his statement is in conflict with an earlier one that he knew that the spoons were being sought when the cell was searched, and was an obviously untruthful attempt to explain his failure to reveal his knowledge of their whereabouts to Marais. (Later in cross-examination he made the ridiculous statement that he did not know that the spoons which third appellant had passed through the window "were used in attacking the deceased and we also have spare spoons there inside the cell"). It is clear that when the search was conducted, he knew exactly what was being sought; he knew, so he said, that the spoons were no longer there

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and had already been transferred to the adjoining cell and he knew that it was third appellant who had done this. Yet he stood by without revealing his knowledge. Nor did he reveal it in his statement to the police or, as far as one can gather from the record, to anyone else until he revealed it to the court. And how it came about that no-one else in the cell - at least no one who came forward - noticed the incident, he did not explain. His evidence was that third appellant knelt on his bed and called to his "brothers" in the other cell in order to draw their attention and then swung the bag containing the spoons across to that cell at the end of a bandage. That a man like Adams who claimed to have watched the appellants after

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their return from the washroom did not see the manoeuvre or at least hear third appellant shouting, is inconceivable.

The learned judge referred in the judgment to the shortcomings in Msibi's evidence. His assertion that he had only heard that two spoons were missing after making his statement, was described as "puzzling" and "incomprehensible". But, simply because the court held the view (wrongly, as already indicated) that his evidence regarding the passing of the spoons to the other cell could not have been a recent fabrication since the prosecutor did not make his police statement available to the defence, the shortcomings were condoned and his evidence was

accepted.....32

accepted. In my view the court erred in doing so.

The general probabilities relating to the alleged disposal of the spoons do not seem to have been considered since they are not mentioned in the judgment. Had they been considered, the court would no doubt have realized that it was highly unlikely that the spoons had been disposed of. The whole tenor of the state case was that all three appellants came forward and admitted their involvement in the deceased's death at the earliest opportunity which presented itself. That being so, one may ask why they would have disposed of the spoons in the first place. And if it is suggested that second and third appellants might only have decided to

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admit their complicity after disposing of their spoons, one may ask why they did not tell Marais what had become of them when Marais pertinently asked: "Waar is die lepel" and why third appellant merely told first appellant to "gee die lepel vir die luitenant" without informing him that two additional ones had been used in the murder.

Taking all this into account, I am of the opinion that the court erred in finding that the disappearance of the two spoons which second and third appellants had allegedly used in murdering the deceased, had been explained. The absence of an acceptable explanation for their disappearance constituted a serious flaw in the state's case against second and third appel-

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lants which, together with the other unsatisfactory features to which I have referred, should have raised a reasonable doubt in the court's mind as to their guilt.

Before turning to consider first appellant's position I shall deal briefly, for the sake of completeness, with four further points which were raised in argument. The first two stem from the evidence of Prof Scheepers, the pathologist who conducted the post mortem examination on the deceased's body. Prof Scheepers was of the opinion that the injuries which he had found, were indicative of a fight against a single opponent rather than of an attack upon him by several assailants. Slight though the value of his opinion might have been, it

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should have been considered as part of the general body of evidence. Amongst the injuries which Prof Scheepers found, were two head injuries (bruises) which could have been caused by blunt force. These injuries played a vital part in the court's consideration of the appellant's evidence and weighed heavily against them since, on the court's finding, they could not have been sustained if the deceased had died in the way described by the appellants, but was compatible with Adams's description of the deceased's fall from the wall in the washroom. The short answer is to be found in Prof Scheepers's evidence that the injuries could have been caused by the deceased bumping his head against something hard. This

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could have occured when the deceased succumbed and fell to the ground.

The third point relates to the probabilities. The court found it highly improbable that the deceased would have persisted in his attempts to gain possession of first appellant's spoon despite the injuries inflicted on him. It is conceivable, the learned judge said in his judgment, that the deceased might, after receiving a few injuries, have had the strength and courage to persist in the attack in a desperate hope of taking possession of the spoon. But to suggest that "the deceased had the unflagging strength, and showed the indomitable courage, or incorrigible folly, to go on and on and on

attacking.....37

attacking accused 1, until he had received 78 wounds from which he was bleeding to death, and which were preventing him from breathing properly ------is to stretch credulity well beyond breaking point". Although first appellant's version of how the struggle progressed is admittedly improbable, sight should not be lost of the fact that most of the 78 injuries were superficial and amounted to no more than cuts in the skin, which deprives the court's argument of much of its strength and which, in any event, appears to be more compatible with first appellant's description than with a concerted attack by all three appellants with intent to kill. In my view the court overestimated the improbability of the defence version.

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The last point concerns the evidence of Lt Marais who was found to be an entirely reliable and acceptable witness. As mentioned earlier his evidence was to the effect that second appellant had admitted to him in the presence of the other two appellants that the three of them had killed the deceased. In different circumstances this evidence might well have been decisive but, undoubtedly due to the large measure of confusion and uncertainty created by the other witnesses, the court did not base the conviction on the admission alone. I have no doubt that this was the correct approach. I have dealt with the other evidence on which the court relied and, where it now appears that that evidence was unreli-

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able, all that remains is the admission to Marais. Bearing in mind the trial court's reluctance to convict the appellants on the admission alone I do not consider it proper to do so now.

Finally first appellant's position must be considered. On his own admission he killed the deceased. And on his own evidence he did not do so in self defence. I do not propose discussing his evidence in detail since it appears plainly from the account thereof earlier in this judgment that he did not ward off an attack. After being slapped in the washroom he went to his bunk, armed himself and became the aggressor. His defence cannot possibly succeed.

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As to extenuating circumstances, which we are obliged to consider anew on the basis of first appellant's own version, there is only the fact that he had been slapped and thus provoked into attacking the deceased, and his relatively youthfulness (he was 20 or 21 years old when the offence was committed) to consider. The provocation was obviously not of a serious nature and there is no indication that his youthfulness played any part. The cumulative effect of these factors do not, in my view, diminish his moral blameworthiness. I am accordingly unable to find that there were extenuating circumstances.

The result is that the appeal of second and third appellants succeeds and that their conviction and

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sentence are set aside, but that first appellant's appeal is dismissed.

J J F HEFER JA.

JACOBS JA)
NICHOLAS AJA) CONCUR.