

331/87/AV

IN THEI AFRICA(APPELLATE DIVISION)

In the matter between:

HENEN HENRY MASIMANGA

Appellant

AND

THE STATE

Respondent

CORAM: VILJOEN, JA, NICHOLAS et STEYN, AJJAHEARD: 17 November 1987DELIVERED: 23 November 1987

J U D G M E N TNICHOLAS, AJA

On the afternoon of Saturday 10 May 1986

Nomajaji Gladys Mavundla (to whom I shall refer as "Gladys")

was

was sitting in the diningroom of her house at Driefontein, an African township with some 100 houses in the district of Ladysmith, Natal. With her were her 28-year old daughter, Grace Miya ("Grace"), a neighbour, Cetshwayo Moffat Mbhele ("Moffat"), and a Mr and Mrs Ndhlovu. Shortly before 4 p.m. Mr and Mrs Ndhlovu left the house. Grace also went out, in order to fetch water from a nearby water-hole in the veld. Gladys and Moffat were then the only two persons in the house. Grace was not away for many minutes. When she returned, Gladys and Moffat had been shot, and were either dead or dying. On post mortem examination, it was found that three bullets had entered Gladys's chest, two of them penetrating her heart; and two bullets had entered Moffat's abdomen,

one

one of them lacerating the abdominal aorta.

Arising out of the deaths, Henen Henry

Masimanga ("the accused") was charged on two counts of murder

before a sitting at Ladysmith of the Northern Circuit. He

pleaded not guilty, but was found guilty of murder without

extenuating circumstances on both counts, and sentenced to

death. He was granted leave to appeal by WILSON J (who sat

with two assessors). It appears from the judgment on the

application, that leave was not granted because it was con-

sidered that there were any prospects of success on appeal:

the learned judge said that the members of the court were

satisfied as to the verdict. The reason for granting leave

was that

"... there

"...there have been so many unsatisfactory features concerned with the investigation of this case that we feel it a proper matter in which leave to appeal should be granted."

None of those features had, however, any bearing on the trial court's factual findings on the issues in the case.

There was no witness to the actual shooting.

The State relied in the main on the evidence of Grace, and that of her brother, Sitha Griffon Mavundla.

Grace said that when she left the house to go for water she did not see anybody "hanging around". While she was at the water-hole (about 150 paces from the house) she twice heard "something" - "some sound as though somebody was knocking a nail on a corrugated iron". On her return,

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when she was about 10 to 15 paces away from the fence, she saw two men come out of the gate to the yard of the house. One was Henen, the accused, whom she knew well - they had both grown up in the area. He was wearing grey trousers and a yellow shirt. The other was a stranger who was wearing clothes of the colour worn by South African Transport Services employees. After emerging through the gate, the men turned to the right and walked along a foot-path. She placed the bucket of water she was carrying on the stoep of the house, and entered through the front door. She then saw Moffat, who was on the floor of the dining-room, leaning against a bench. She gained the impression that "he was on the verge of dying". She came out of the house and raised the alarm.

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Her brother Sitha came out of a neighbouring house. The two men were still to be seen. They had been walking on the foot-path, but when Grace raised the alarm they started running. They were pursued by Sitha and others. She went back into the house, and then saw her mother, covered in blood, leaning up against the sideboard in the dining-room. She telephoned the police. On their arrival they went after the two men, who were then sitting at the top of a ridge behind the township. The police were, however, unable to apprehend them.

Sitha said that on the afternoon in question he was at the house of Xaba, listening to music recorded on cassettes. Xaba went out of the house and came back saying, "Sitha, something is going on at your house". Sitha went

outside

outside, where he met his sister Grace, who told him,

"Something wrong has happened to our home. There are two people over there". He said that he and others ran after

the men she had pointed out. One of them was Henen, the accused, who was his cousin. He was wearing grey trousers.

Sitha could not give the colour of his shirt because he is colour blind. He did not know the other man. The two men were running slowly, and Sitha and his companions chased after them. At one stage the men stopped, and Sitha could hear some explosive sounds. Then they continued to run and stopped at the top of the hill. Sitha called to the accused, "I have recognized you". When the police arrived, Sitha and Constable Ngcobo proceeded towards the hill, but when

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the two men saw the police van they fled. Sitha was present when the accused was arrested by Constable Ngcobo the following day (Sunday the 11th). Sitha pointed him out. The accused was wearing the same grey trousers and shirt.

The accused himself gave evidence. He raised two defences (a) an alibi, and (b) a defence that the murders were committed by one Elliot Bish Mazibuko, who, he said, had confessed to the murders while the two of them were in prison.

The trial court rejected the accused's alibi, and his counsel conceded that it was correct in so doing. Counsel also conceded the correctness of the trial court's finding that the accused was an unsatisfactory witness - "a sorry figure" in the witness box.

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The alleged confession by Mazibuko was hearsay and inadmissible, but he was called as a witness by the State. He denied having made any confession. In the view of the trial court it was inconceivable that he would have behaved as he is alleged to have behaved. The court rejected the defence that Gladys and Moffat were killed by Mazibuko. That finding, too, was not challenged on appeal.

The trial court came to the conclusion that it was safe to accept the identification by Grace and Sitha. They were honest and reliable witnesses, who gave their evidence well and who knew the accused and had ample opportunity to observe the two men who left the yard to Gladys's house

house.

In my view there is nothing in the record to cast any shadow of doubt on the correctness of these findings.

There can be no doubt in my view that the two men whom Grace and Sitha saw were the persons responsible for the killings. They were the only persons in the vicinity at the crucial time, and their conduct in running away showed a consciousness of guilt.

The appeal against the convictions must accordingly fail.

So far as the question of extenuating circumstances is concerned, there is nothing on the record from

which

which such circumstances could be found. The accused did not give evidence in extenuation. An argument that the accused was intoxicated on the day in question got no support from the accused himself. A suggestion by defence counsel that a possible motive for the killing of Gladys was family jealousy and quarrels was properly rejected by the trial court. WILSON J accepted that there was probably a real and pressing motive for the killing, but said that unfortunately the accused had not taken the trial court into his confidence and explained what that motive was. The accused himself said in his evidence that he was on good terms with Gladys.

This appeal has no merit. It is dismissed.

H C NICHOLAS, AJA

VILJOEN, JA }
STEYN, AJA } Concur