

Case number : 59/84

WHN

EDWIN NDLOVU Appellant

and

THE STATE Respondent

JOUBERT, J.A.

The appellant was charged in the Witwatersrand Local Division before GOLDSTONE J. and two assessors with having murdered the deceased Phahlane Cliff Modiba on 25 March 1983 at or near Dube Railway Station in the district of Johannesburg (count 1). He was also charged with attempted robbery of the deceased on the same date and at the same place (count 2). He was found not guilty in respect of count 2 because the trial Court held that the fact that the pockets of the deceased were found turned inside out did not prove attempted robbery beyond a reasonable doubt. With leave of the trial Judge the appellant now appeals to this Court against his conviction and the imposition of the death sentence.

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The relevant circumstances relating to the
perpetration of the murder may be briefly summarized as
follows. At approximately 7 p.m. on Friday, 25 March
1983, the local train from Johannesburg to Soweto arrived
at Dube Station. Passengers who alighted in disorderly
commotion from a particular coach screamed and shouted
for the police. Constables Ramotsei and Dlomo who
testified on behalf of the State boarded the train as
it was already in motion on its way to Ikwezi Station.
They could not, however, proceed to the coach in question
because an engine placed between the coaches barred
their way. At that stage the witness Phekinkosi Ntshangase was

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a passenger in a coach where he noticed at the other end thereof two persons stabbing with knives at a person who was seated and who wore blue overalls. He was unable to identify the two assailants or the victim. It could not be gathered from his evidence whether that was the coach in question. He alighted hurriedly from the coach at Ikwezi Station. As the train started to pull away from this station constables Ramotsei and Dlomo managed to enter the coach in question. They noticed that the deceased was lying inside the coach while the appellant and his companion stood about 3 paces from him. Both the appellant and his companion had knives in their hands

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which they were holding in a stabbing position. There were no other people in the coach. Dlomo drew his service revolver and ordered them to drop their knives and to raise their hands. The appellant obeyed his commands. The appellant's companion who stood behind the appellant next to an open window jumped out of the window onto the platform with his knife. Ramotsei handcuffed the appellant while Dlomo picked up his bloodstained knife. The appellant made an exculpatory statement that he had been assisting his companion during a fight. The deceased was unable to speak. At Inhlazane Station they removed the deceased, who was unable to walk, and

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the appellant from the coach. They then returned with them in another train to Dube Station. As they passed Ikwezi Station on their return trip Dlomo and Ramotsei noticed a person lying on the platform. They subsequently identified the dead person (Philip Sipuwe Zwane)^{from} photographs of him as the companion of the appellant who had escaped through a window of the coach. At Dube Station they alighted from the train. The deceased died and was removed to the Government Mortuary.

According to the evidence of Dr Steenekamp who on 28 March 1983 performed a post mortem examination on the body of the deceased the latter sustained 23 stab wounds.

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The penetrating incised wounds on his neck, chest and abdomen collectively caused the death of the deceased.

The evidence of the appellant bristled with contradictions. The tenor of his version was that he was travelling alone in the train on 25 March 1983. When the train moved from Dube Station to Ikwezi Station a general fight developed in the coach in which he was travelling. He was beaten up by a mob despite the fact that he had done nothing wrong. He did not carry a knife on his person. At Ikwezi Station the police came to his assistance but the assault on him continued until they arrived at Inhlazane Station. He alleged that the police

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arrested him at Ikwezi Station. He also claimed that he only realised afterwards that he had been arrested when he was in hospital. He never saw the deceased and he never saw an injured person on the train. He never saw a firearm. Philip Sipiwe Zwane was unknown to him. The police also arrested another person who was unknown to him.

The trial Court without hesitation rejected the evidence of the appellant as unreliable, ridiculous and false beyond a reasonable doubt. On appeal before this Court appellant's counsel, rightly in my opinion, conceded the correctness of this finding. Before

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this Court appellant's counsel, rightly in my opinion,
did not challenge the following matters :

1. the correctness of the approach by the trial Court

in its adjudication of the case, viz. to decide

the case on the evidence of the State witnesses in

conjunction with the false evidence of the appellant, and
2. the correctness and veracity of the evidence of the

State witnesses as accepted by the trial Court.

In the absence of direct and positive testimony

of eyewitnesses concerning the attack on the deceased

the trial Court had to decide the question of the appellant's

participation in the perpetration of the murder by

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reasonable inference from the accepted circumstantial evidence as a whole. When the two constables came on the scene of the crime the appellant stood in the immediate proximity of the deceased with a bloodstained knife which he held in a stabbing position. His exculpatory statement was that he assisted his friend. The two constables in their evidence made the concession that the appellant and his friend had no reason to remain on the scene of the crime after they had attacked the deceased. Dlomo suggested that the appellant and his friend feared the angry mob of passengers who alighted from the coach at Ikwezi Station. The trial Court regarded that as a partial

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explanation since nothing prevented the appellant and his friend from escaping from the off-side of the coach, i.e. the side of the coach away from the platform, while the train was stationary at Ikwazi Station, as Dlomo conceded in reply to questions put to him by the Court. The trial Court considered the fact that the appellant and his friend waited in the coach after the deceased had been stabbed as a prima facie improbability in the version of the State but it found that such improbability did not amount to a reasonable doubt. The 23 wounds which the deceased sustained are, in my opinion, indicative

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of a prolonged, vicious attack upon the deceased. There

is no evidence when the attack on the deceased commenced.

It is possible, as the trial Court found, that the appellant

and his friend had not yet completed their attack upon

the deceased when the two constables appeared on the scene

of the crime. The proved facts are, in my opinion, such

as to exclude every reasonable inference save the one

sought to be drawn from them by the trial Court, viz. the

participation of the appellant in the perpetration of the

murder. The trial Court found that the appellant and

his friend "acted together with common purpose in their

attack upon the deceased and that they intended to kill him".

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In his argument before this Court the appellant's counsel, in my opinion rightly, conceded that there was common purpose as found by the trial Court.

It is clear from the accepted evidence as a whole that the trial Court did not misdirect itself on fact.

Nor am I convinced on the accepted evidence as a whole that the trial Court was wrong in coming to the conclusion that the State had proved the guilt of the appellant on the charge of murder beyond reasonable doubt.

The question of extenuation remains to be dealt with. The onus is on the appellant to establish the existence of extenuating circumstances on a balance

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of probabilities. In order to do this, there must be a factual basis from which the existence of extenuating circumstances can be deduced. In my opinion there is no factual basis from which the trial Court could have deduced the existence of extenuating circumstances as contended for by the appellant's counsel. His contention that the appellant did not attempt to leave the scene of the crime and avoid apprehension when he could have done so lacks a factual basis inasmuch as there is no evidence when the attack on the deceased commenced. It is possible, as the trial Court found, that the attack had not completed when the two constables appeared on the

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scene of the crime. At that stage the appellant held his bloodstained knife in a stabbing position in the immediate presence of the deceased. His other contention was that if the motive of the appellant and his friend was robbery then it was unlikely that they would inflict 23 stab wounds upon the deceased. This is a conjectural contention which is wholly devoid of a factual basis. The trial Court correctly found that there was insufficient evidence to substantiate a finding that the motive was robbery. Moreover, the trial Court's finding of the absence of extenuating circumstances is not vitiated by misdirection or irregularity, nor is it one to which no reasonable court could have come in the

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circumstances of the present matter.

Application for leave to appeal was sought only against the imposition of the death sentence as appears from the judgment of the trial Judge. The main grounds on which the application was brought were twofold, viz. (1) that the appellant did not attempt to make a get-away from the scene of the crime at the time when he could have done so, and (2) that one would not expect the deceased to have been stabbed 23 times if the only motive for the attack was one of robbery. I may interpose here to state that I have dealt with these aspects supra in considering the

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question of extenuation. The trial Judge in deciding to grant leave to appeal against the conviction and the death sentence approached the matter along the following lines:

"I must confess that if this was not a matter in which a death sentence was imposed, I would not feel constrained to grant leave to appeal. However there are these difficulties, to which I have referred in the judgment, and it is as well for another court to reconsider the matter."

The difficulties to which the trial Judge referred are the aforementioned two main grounds on which the application for leave to appeal was brought.

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The attention of the trial Judge is directed to the fact that where an accused has been convicted of murder with or without extenuation the Legislature has not granted an appeal as of right but has empowered a trial Judge to grant leave to appeal. That power should always be exercised judicially and leave to appeal on facts should not be granted as a matter of course. The test to be applied in considering an application for leave to appeal to this Court on facts, as in the present matter, has repeatedly been stated to be whether the trial Judge is satisfied that the applicant has a reasonable prospect of success on

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appeal or not. Leave to appeal should therefore not be granted unless the trial Judge is satisfied that the applicant will have a reasonable prospect of success on appeal. See Rex v Ngubane & Others 1945 A.D. 185 at p. 186, Rex v Baloi 1949(1) SA 523 (AD) at p. 523-524, S.v. Ackerman & n Ander 1973(1) SA 745 (AD) at p. 766-767. It should also be borne in mind that a trial Judge's refusal to grant leave to appeal against a conviction of murder and/or the death sentence is not final because an accused has a right to apply to this Court for leave to appeal in terms of section 316 of the Criminal Procedure Act No. 51 of 1977.

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In the result the appeal against the
conviction of murder and the death sentence is dismissed.

C.P. JOUBERT, J.A.

HOEXTER, J.A.)
SMALBERGER, A.J.A.) concur.