

MHLANGENQARA APRIL DALIWE

First Appellant
(Accused No 1 in the
Court a quo)

ZIMINISILE MOSES MYACA

Second Appellant
(Accused No. 2 in the
Court a quo)

and

THE STATE

Respondent

IN THE SUPREME COURT OF SOUTH AFRICA
(APPELLATE DIVISION)

In the matter between:

MHLANGENQARA APRIL DALIWE

First Appellant
(Accused No 1 in the Court a quo)

ZIMINISILE MOSES MYACA

Second Appellant
(Accused No 2 in the Court a quo)

and

THE STATE

Respondent

CORAM: JANSSEN, JOUBERT, HOEXTER, BOTHA et
VAN HEERDEN, JJA

HEARD: 14 September 1984

DELIVERED: 19 November 1984

J U D G M E N T

HOEXTER, JA

This

This is a criminal appeal. The appellants are two black men whose ages are given in the indictment as 34 and 37 years respectively. In the South Eastern Cape Local Division the appellants stood trial on the following charges: murder (count 1); robbery with aggravating circumstances (count 2); attempted murder (count 3); unlawful possession of a firearm (count 4) and unlawful possession of ammunition (count 5). Both appellants pleaded not guilty on all counts and at the trial each was represented by counsel. At the conclusion of the State case neither appellant took the witness-stand and each closed his case without adducing any evidence whatever. The trial came before CLOETE, JP., and two assessors. The trial Court found each appellant guilty on the first three counts and the second appellant also guilty on counts 4 and 5. As part of the inquiry into the possible existence of extenuating circumstances affecting count 1 each appellant testified under oath. The trial

Court

Court found, however, that extenuating circumstances had not been established by either appellant. Each appellant was (a) sentenced to death on count 1 (murder); (b) sentenced to imprisonment for fifteen years and ten years respectively on count 2 (robbery with aggravating circumstances) and count (3) (attempted murder), such sentences to run concurrently; and (c) the second appellant was sentenced to imprisonment for one year on counts 4 and 5 (contraventions of Act 75 of 1969), both counts being taken together for the purposes of sentence.

With leave of the trial Judge each appellant appeals against the convictions and sentences aforesaid. Their appeals were argued by the same counsel who had represented them, pro Deo, at the trial. This Court is indebted to Mrs Saunders (counsel for the first appellant) and Mr Horn (counsel for the second appellant) for their assistance.

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The facts of the case fall within a small compass. The Vukuzake Cash Store ("the shop") is situated on Stofile Street in the township of Kwazakele within the district of Port Elizabeth. Stofile Street is a wide thoroughfare consisting of a narrow tarred mid-section flanked on either side by a very broad sidewalk. Immediately adjacent to the shop there is a cafe. Shoppers gain entrance to the shop by its front door which abuts on the sidewalk. At the rear of the shop there is a door affording access to living quarters in the yard of the shop. Within the shop there are electric fluorescent lights. On the sidewalk immediately before the shop electric light is provided by a wall lamp some $2\frac{1}{2}$ metres from the ground. This lamp is attached by a bracket to the external wall of the shop at a point roughly midway between the front door of the shop and the adjacent cafe. On the night of Sunday 22 August 1982 two armed assailants entered the shop, inflicted a fatal gunshot wound on the proprietor, took

cash

cash from the shop; and, in fleeing from the shop, fired a further shot at three men pursuing them. The State case is that the guilty persons involved are the two appellants.

At about 8 pm on the night in question three men were standing in front of the cafe adjacent to the shop. They were Solomon Nyanti, Tanduxelo Ngotya and one Mswandile. For the sake of brevity I shall refer to them collectively as "the threesome". The threesome was approached by a man clad in a grey coat who was wearing a balaclava cap on his head. The man in the grey coat inquired of them what the closing-time of the shop was. At or about the same time there were within the shop the deceased, a man in his seventies, and various of his female employees including Christina Mfengu and Deborah Jwaga. The deceased was about to shut up shop. Before he could do so two black men entered the shop by the front door. One held a large knife in his hand and his

confederate

confederate was armed with a handgun. The man with the knife closed the front door of the shop behind him. Speaking in Xhosa the man wielding the firearm demanded money. Before the firearm was discharged first Christina and then Deborah slipped out of the shop by using the back-door mentioned earlier. Shortly thereafter the man with the firearm shot and mortally wounded the deceased and thereupon the intruders rifled the till. I shall refer to the shot which fatally wounded the deceased as "the first shot". The first shot was heard by Christina who had just telephoned the police from a room at the back of the shop. The first shot was also heard in the street outside by the threesome. They had meanwhile moved away from the cafe and had walked across the tarred section of Stofile Street. After the first shot the threesome saw emerging from the front door of the shop on to the sidewalk two men, one of whom was wearing a grey coat. The threesome gave chase whereupon

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the fleeing men fired a shot ("the second shot") at them.

The second shot missed the threesome but induced them to abandon their pursuit of the two men.

The deceased had a son nicknamed "Stunkie".

At midnight on the Sunday following the slaying of the deceased (29 August 1982), sgt. Ntabeni of the Port Elizabeth Murder and Robbery Section of the South African Police and Stunkie paid a visit to the single quarters at No 265 Kwazakele. They were in the company of a man who took them to a room in which they found the first appellant sitting on a chair. Sgt. Ntabeni was a state witness at the trial. He testified that when the first appellant saw him the first appellant said:

"Ons was met Basie gewees toe die ou man van Vukuzake geskiet was."

whereupon sgt. Ntabeni arrested him. "Basie" is a name by which the second appellant is known. According to Ntabeni the first appellant requested Ntabeni to take him to Zwide

Township

Township in order to fetch a coat belonging to the first appellant. Ntabeni acceded to this request. A coat handed in at the trial as exhibit '1 was identified by Ntabeni as the coat in question. From Zwide the party proceeded to the shop at Vukuzake where Ntabeni showed the first appellant to Deborah Jwaga. On the following day (Monday 30 August 1984), and at a house pointed out to him by the first appellant, sgt Ntabeni arrested the second appellant.

Apart from sgt Ntabeni there testified as witnesses for the prosecution, inter alios, Christina Mfengu, Deborah Jwaga, Nkosinathi Jwaga, Tanduxelo Ngotya, Solomon Nyanti, the deceased's son Stunkie and certain police officers involved in the holding of identification parades to which reference will be made hereafter. It is necessary next to consider the effect of the testimony of those witnesses upon whom the trial Court chiefly relied in convicting the appellants.

It

It is convenient to begin with the witness

Solomon Nyanti. According to this witness the man in the grey coat who addressed the threesome outside the shop wore his balaclava rolled up in such a fashion that his face was exposed. In making his inquiry, moreover, the man in the grey coat stood directly in front of Nyanti. When the man spoke to the threesome Nyanti noticed that he was toothless and that his cheeks were sunken. Nyanti said that when they heard the first shot they stopped in their tracks, directly opposite the front door of the shop. The two persons who emerged therefrom wore balaclavas covering their faces. Nyanti nevertheless recognised one of the two men. He said in his evidence in chief -

"Ek het hom herken aan die grys jas wat hy aangehad het toe hy ons gevra het om hoe laat die winkel toemaak."

Nyanti said that the threesome pursued the two men until the latter fired at them. In response to the second shot the

the threesome retreated to the shop. On 9 September 1984 Nyanti attended a police identification parade at which he pointed out the second appellant as the man who had inquired of the threesome when the shop was due to close. In what fashion Nyanti so pointed out the second appellant will be considered presently. In connection with the events of this identification parade Nyanti was closely cross-examined by counsel for the second appellant. In a brief re-examination the following question and answer appear from the record:

"Om watter rede het jy vir nr. 2 uitgewys?----

Ek het beskuldigde nr. 2 herken as die persoon wie met ons gepraat het daar naby die winkel wat sonder tande was en wat sy balaclava op sy kop gehad het en dit laat hang het bokant die oë."

The identification parade in question was described to the trial Court by det. sgt. Fourie, who had recorded in writing what transpired thereat. Fourie said that Nyanti was the fifth person summoned to view the parade. The reactions

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of Nyanti was described thus by Fourie in his evidence in chief:

"Die getuie is gevra om die verdagtes indien op die parade uit te wys deur hulle skouers aan te raak, wie [sic] hy op 22 van die agste maand 1982 om ongeveer 20h30 in Vukuzake winkel sien staan het en gevra het hoe laat maak die winkel toe. Die getuie het voor die parade gestaan en gevra dat die parade hulle monde oopmaak. Die getuie wys toe die verdagte op nr. 3 uit. Dit is Ziminisile Myaca, beskuldigde nr. 2."

In cross-examination it was suggested to Fourie by counsel for the second appellant that at the parade Nyanti had betrayed uncertainty; and in particular that Nyanti had walked up and down several times before the row of people before making his identification. Fourie repudiated this suggestion. He said:

"Hy het van links na regs op die parade beweeg, as hy heen en weer geloop het, sou ek dit aangeteken het."

According

According to the witness Christina Mfengu,

she first noticed the first appellant on the evening in question at a stage when there were still customers in the shop engaged in making purchases. Christina said that at that stage the first appellant was standing within the frame of the front door to the shop. He was smoking and looking at the customers within the shop. Although he had a balaclava cap on his head it was rolled up to a position above his ears. The witness was unoccupied at the time and she had the opportunity of observing the first appellant in this situation for some fifteen minutes. Christina told the trial Court that as the deceased left his place behind the shop counter and moved towards the front door in order to close it, two men entered the shop by the front door. The man who led the way proceeded to the shop counter. He wore a long greyish coat and a balaclava which left uncovered only his eyes and his nose. The man following also wore a coat and a balaclava; and save for his

his eyes and nose his face likewise was obscured. He held a long knife in his hand. Christina said that her attention was concentrated on this man, and that he remained at the front door until she ran from the shop. Meanwhile, so testified Christina, the other intruder who had walked up to the counter, spoke in fluent Xhosa asking "Where is it?". At the same time he produced a handgun, whereupon Christina moved backwards and made a quick exit from the shop through the door at the rear. She reported to Nkosinathi Jwaga that there were "tsotsis" in the shop. According to Christina she noticed that the two intruders were not white men but while they were in the shop she had been unable to see whether they were Africans or Indians. Before the night in question the first appellant was a stranger to her, but at an identification parade held on 9 September 1982 she had pointed him out. It appears that the first appellant has a physical peculiarity

peculiarity in the form of a raised scar or weal above his right cheekbone and immediately below the corner of his right eye. The learned Judge-President described this facial feature of the first appellant as "obvious and prominent." To this distinctive feature Christina alluded for the first time in cross-examination. She was adamant, however, that the intruder with the knife was the same man who had stood earlier in the doorway of the shop. I quote from her cross-examination:

"Toe ek kyk na die persoon wat inkom en die deur toemaak het ek gesien dat ja, die persoon is dieselfde een wat ek gesien het voor dit. daar by die deur staan en na binne die winkel kyk.

So u het hom uitgeken aan sy oë en sy neus die tweede keer toe jy hom goed dopgehou het?---

Die oë - ek het hom aan die oë, die neus, die merk, sy gesig, kleur en sy lengte."

It was put to Christina by Mrs Saunders that first appellant was not at the scene of the crime on the night in question.

Thef....

The witness insisted that he had been there. Christina told the trial Court that after the intruders had departed it was established that some R400 was missing from the till.

Det. W/O Strydom of the South African Police was in charge of an identification parade at which Christina pointed out the first appellant, and the proceedings thereat were recorded by him in writing. He says that Christina was asked to point out the person, should he be present on the parade, whom she saw entering the shop "met wapens" at approximately 8.30 pm on the night in question. Strydom described the reactions of the witness as follows:

"Sy loop van links na regs en terug en gaan dan en wys nr. 5 uit. Dit was binne een minuut gewees..... Nr. 5 is beskuldigde nr.1 nou voor die Hof."

The witness Deborah Jwaga gave an account of the entry into the shop of the two intruders which in essential respects coincided with the version of Christine.

Deborah

Deborah described the colour of the coat worn by the intruder who carried the knife and who closed the front door as "greenish or bottle-green"; the colour of the coat worn by the other man was grey, said Deborah, and she identified it as exhibit 1 before the trial Court. Deborah testified that on a subsequent occasion, late at night, sgt. Ntabeni brought a man to her and asked her whether this man "was the one". She says that she recognised this man as the intruder who had come into the shop with the knife in his hand and had closed the door. She pointed out the first appellant as being the man in question.

Nkosinathi Jwaga is the husband of Deborah Jwaga. Having been alerted by Christina after the latter had made good her escape, Nkosinathi hurried to the shop and peeping from the back door he witnessed the actual shooting of the deceased by the intruder carrying the firearm. Nkosinathi confirmed that both intruders wore

balaclava

balacclava caps; but he was so shocked by what he had witnessed that he failed to notice any further details concerning the dress of the intruders.

The evidence given by sgt. Ntabeni in regard to the circumstances surrounding the arrest of the first appellant was confirmed by the testimony of the deceased's son Stunkie. Concerning the words uttered by the first appellant at the time Stunkie testified that the first appellant said:

"Ek was saam met Basie gewees"

and that he went on to speak of -

".....die dood van die ou man asook die roof op 'n ou man te Vukuzake".

Stunkie corroborated sgt. Ntabeni's account of the first appellant's request for his coat, the journey to Zwile to fetch the coat; and the further journey to Stunkie's parental home behind the shop. Stunkie also confirmed

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the evidence of Deborah relative to her identification of the first appellant when the latter was brought by Ntabeni to Deborah.

The last witness for the prosecution was det. sgt. Els, the investigating officer in the case. He told the trial Court that after he had warned the second appellant the latter stated that he had an alibi. The following passage in the evidence in chief of Els indicates the nature of the alibi mentioned to Els by the second appellant:

"Wat was sy alibi gewees? ----Sy alibi was dat hy by sy oom Elliot, te 700 Erf en Diens was te Kwazakele.

Het u dit ondersoek hierdie alibi? Dit is korrek en ek kon geen staving vind nie."

During cross-examination by counsel for the second appellant Els told the trial Court that in investigating the alibi mentioned to him by the second appellant he had not taken

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the latter with him and that he had been accompanied only by a black interpreter whose identity he was not then able to recall. After the State and defence had closed their respective cases, but before argument, the trial Judge deemed it necessary to call as a witness the second appellant's uncle, Elliot. The learned Judge inquired of Elliot whether at about 8.30 pm on 22 August 1982 the second appellant had been in the company of the witness. Elliot replied that at that particular time the second appellant had been in his (Elliot's) house after the funeral of Elliot's child. Elliot was then subjected to a lengthy cross-examination by counsel for the State, at the conclusion of which the trial Judge considered it necessary to recall det. sgt. Els. In response to questions by the learned Judge-President Els gave the following account of what had taken place between him and Elliot at the time when Els had investigated the second appellant's alibi -

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"....die doel van my besoek was om vas te stel of beskuldigde Nr. 2 wel by Elliot was en ek het hom gevra of die man daar was en hy het net vir my gesê 'ek weet niks van die man af nie, ek kom ook nie hof toe nie, en ek maak nie 'n verklaring nie.'

'Hy het 'n baie aggressiewe houding ingeneem toe ek by die huis was."

From further questions put to Els it emerged that his visit to Elliot had taken place shortly after the robbery at the shop. This prompted the learned Judge-President to ask Els whether any written record of the visit to Elliot might not exist, and in this connection Els undertook to consult his pocket-book. The further hearing of the trial was then postponed. At the resumed hearing counsel for the State informed the Court that Els had found his pocket-book covering the relevant period and that the interpreter who had accompanied Els upon his visit to Elliot was also present at Court. Having refreshed his memory from his pocket-book Els told the trial Court that during the early morning of

27 October 1982

27 October 1982 he had fetched det. const. Oliphant from his home and that shortly after 6 am they had spoken to Elliot at the latter's home. He was informed by Elliot:

"....dat Basie lieg en dat hy nie sal saamgaan om 'n verklaring te maak nie."

The Court then called const. Oliphant who confirmed the substance of the conversation between Elliot and Els as deposed to by the latter. Having regard to such further evidence by Els, and the evidence of Oliphant, the learned Judge-President found it necessary to recall Elliot. The evidence of Els and Oliphant was put to Elliot and he was asked to comment thereon. Elliot denied that their evidence was true.

In the Court below much cross-examination and a good deal of argument on behalf of the appellants was directed at establishing that the identification parades

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at which the appellants were pointed out had been marred by irregular and unfair procedures. So far in this judgment there has been reviewed the evidence of those State witnesses upon whom the trial Court relied. Here brief mention should be made of one State witness, Tanduxelo Ngotya, whose evidence was rejected by the trial Court. This witness, it will be recalled, was a member of the threesome on the sidewalk in front of the shop. In cross-examination Tanduxelo conceded the commission of various irregularities in the holding of both the identification parades in question. In particular there was extracted from Tanduxelo an admission that in a passage near the room in which the identification parades were held the appellants were displayed beforehand to the identifying witnesses and the latter were informed by the police that the appellants were the suspects. This evidence by Tanduxelo was completely contradicted by the witnesses Christina Mfetu, Solomon Nyanti and all the police

witnesses

witnesses who testified in regard to the conduct of the identification parades. The trial Court accepted the evidence of the witnesses just mentioned and rejected the evidence of Tanduxelo whom it described as an unreliable and unacceptable witness. It is not necessary to consider the evidence of Tanduxelo in any detail. Suffice it to say that Tanduxelo was manifestly an unsatisfactory and untruthful witness upon whose testimony no reliance whatever can be placed. The trial Court found that the identification parades in question had not been vitiated by any irregularity. On all the facts of the present case that finding is, in my view, an unassailable one.

An examination of the record reveals a number

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of minor imperfections in the evidence of Christina Mtefu and Solomon Nyanti, but none of these was, I think, overlooked by the trial Court. A few examples will suffice. During her evidence Christina had some difficulty in describing the colour of the coat worn by the intruder identified by her as the first appellant. Initially she was hesitant to name any colour at all. Later she described the colour as being "greyish". This evidence differs from the evidence of Deborah who said that the man with the knife wore a green coat. In truth the colour of the coat in question appears to be somewhat nondescript. The judgment of the trial Court describes the coat as having an "in-between" or a "greenish/greyish" colour. I agree with the view expressed by the learned Judge-President that little in the case turns on Christina's evidence as to the colour of the coat. Again, at one stage during his cross-examination Solomon Nyanti made a mistake by identifying exhibit 1 as the coat worn by the second appellant

appellant. Immediately thereafter, however, he corrected himself and made plain that the man who had addressed the threesome on the sidewalk had worn a grey coat. Despite such blemishes as may be noticed in the evidence of these two State witnesses, each made a distinctly favourable impression upon the trial Court. The trial Court recorded its impression that Christina was an intelligent person and a truthful, fair and convincing witness. The learned Judge further observed that Christina had had an adequate opportunity for observing the episode in the shop and of identifying the intruder with the knife. Solomon Nyanti was described in the judgment of the Court a quo as being intelligent and alert, and a candid witness who stood up well to cross-examination. That Nyanti fared well in cross-examination is, I think, fully borne out by the record.

It was not suggested that the trial Court had erred in its conclusion that in relation to (a) the

slaying

slaying of the deceased (b) the robbery and (c) the shooting at the threesome, the actual miscreants involved had acted with common purpose. Before this Court the main argument addressed to us by counsel for each appellant was that his failure to testify could go into the scale against him only if at the close of the State case the prosecution had made out a prima facie case against him. On behalf of the appellants it was properly conceded that since against each appellant there was direct evidence of the commission of the offences by him, if such direct evidence were sufficiently cogent to establish a prima facie case, the appellant's failure to testify would ipso facto reinforce such direct evidence. The chief contention advanced on behalf of each appellant was that upon a proper appraisal of the matter the evidence adduced by the State was so lacking in cogency as not to amount to a prima facie case requiring an answer. It was stressed that the case against the first appellant hinged largely on the sufficiency of the

identification

identification by the single witness Christina; and that the case against the second appellant depended exclusively on the sufficiency of the identification by the single witness Nyanti.

I deal first with the case against the first appellant. In weighing the position of the first appellant the trial Court took into consideration against him neither Deborah's spontaneous identification of the first appellant when on the night of his arrest he was displayed to her by sgt. Ntabeni, nor the fact (to which both Ntabeni and Stunkie testified) that the first appellant had failed to evince any reaction to such identification of him by Deborah. The trial Court, exercising caution, disregarded the evidence of Deborah's identification of the first appellant. It is indeed undesirable to take to a potential witness to the commission of a crime a suspect who has been seen by such witness only once, in order to determine whether the suspect is connected with the commission of

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the alleged offence. See: R v Madudube, 1958(1)

SA 297 (O). However, the trial Court was satisfied that Christina was a credible and reliable witness; and it further accepted the evidence of sgt. Ntabeni and the witness Stunkie as to the admissions made by the first appellant at the time of his arrest. In my judgment these admissions significantly strengthen the case against the first appellant. At face value the words attributed to the first appellant serve to establish a clear link between the first appellant and the crimes committed in and about the shop on the night in question.

For the first appellant it was urged that inasmuch as some brief interval of time separated Christina's observation of the man standing in the doorway and the actual entry into the shop by the intruders, there existed a risk that Christina might simply have assumed that the

intruder

intruder with the knife was the same man whom she had earlier seen standing in the doorway. The answer to this argument is that the evidence of Christina that she positively identified the intruder with the knife as the man she had observed in the doorway stands uncontradicted, and no particular reason for doubting such evidence exists. Next it was suggested that something sinister should be seen in the fact that Christina's reference to the distinctive feature of a scar below the first appellant's right eye was made for the first time in cross-examination. But cross-examination was pertinently addressed to this very feature of her evidence and there is no reason to suppose that the trial Court overlooked this matter in trying to assess Christina's merits as a witness. Then it was said that Christina's version is suspect on the ground that she estimated that some five minutes elapsed between the entry of the intruders until her escape through the back door

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to the shop, whereas, so the argument proceeds, it is clear that the whole episode to which she was a witness could hardly have lasted more than a few seconds. I am not swayed by this argument. It is, I think, a matter of common knowledge that in situations of stress estimates of time tend to be inaccurate. Giving due attention to everything urged by counsel for the first appellant, I am not persuaded that any substantial flaw mars Christina's evidence. In my judgment the evidence on which the Court below properly relied represented a strong prima facie case against the first appellant and his failure to testify reinforced the case against him sufficiently to afford proof beyond reasonable doubt of his guilt at the end of the trial. In my view the first appellant was rightly convicted.

In the case of the second appellant, as already pointed out, the State case rests solely on the accuracy

accuracy and reliability of the pointing out of him by the sole witness Nyanti. On behalf of the second appellant it was urged that Nyanti was prompted to point out the second appellant at the identification parade for no reason other than that the second appellant was toothless. Whether or not Solomon was moved to point out the second appellant on this narrow ground is a question of critical importance in the case. Logically the position was correctly formulated thus by Mr Horn: Were the intruder armed with the firearm in fact toothless, the fact of the second appellant's toothlessness hardly excludes the inference that some other toothless man may have been the intruder; or alternatively: assuming that the intruder with the firearm were a toothless man, then while the toothlessness of the second appellant is consistent with the second appellant having been the intruder, it cannot sustain the conclusion that the second appellant was in fact the armed intruder as the only reasonable inference to be drawn.

Now

Now it is true that in cross-examination Nyanti conceded that at the identification parade in question the second appellant was the only toothless person. But this concession by the witness does not, I think, necessarily - or even probably - entail the further consequence that it was this physical peculiarity alone which induced Nyanti to point out the second appellant. It is important to notice, in the first place, that during cross-examination it was never specifically suggested to Nyanti that in pointing out the second appellant he had relied solely on the fact of such toothlessness. As mentioned earlier in this judgment, in re-examination Nyanti was specifically asked for what reason he had pointed out the second appellant at the parade. Nyanti answered this question by saying that he recognised the second appellant as the toothless person who had spoken to the threesome at the shop. In these circumstances, so I consider, it is mere speculation to

suggest

suggest that in pointing out the second appellant Nyanti relied only and exclusively on the second appellant's toothlessness. Bearing in mind, further, the trial Court's assessment of Nyanti as an alert and intelligent person, it should be remembered that the identification parade was held little more than a fortnight after the robbery at the shop had taken place. In considering whether the prosecution made out a prima facie case against the appellant it is moreover not out of place to examine the precise line of attack upon Nyanti's evidence upon which the second appellant's counsel embarked. In the course of such cross-examination the possibility of irregular procedures at the identification parade was vigorously explored with the witness, but it appears not to have been directly put to Nyanti that he was mistaken in pointing out the second appellant as the man who had addressed the threesome on the sidewalk on the night in question. The case of the second appellant admittedly presents greater difficulty than

than that of the first appellant. . Upon anxious consideration of all the facts, however, I remain unpersuaded that the trial Court was wrong in concluding that after the prosecution had led its evidence the case against the second appellant clearly called for an answer by him; and that by reason of his silence there was, at the end of the trial, evidence beyond reasonable doubt of his guilt.

In a further submission advanced on behalf of the second appellant his counsel urged that in any case the trial Court had misdirected itself in regard to the matter of the second appellant's alibi. By way of preface I mention that the second appellant's uncle, Elliot, proved to be a thoroughly mendacious witness. His evidence was rightly disbelieved by the trial Court. The submission of Mr Horn in regard to the alleged misdirection is summarised thus in the written heads of argument:

"In the instant case the Court a quo deemed it necessary to call Elliot after the

close

close of the State case. Having heard Elliot's evidence who supported the appellant's alibi defence, the Court a quo then proceeded to mero motu conduct its own enquiry into the validity of this defence. In its endeavour the Court a quo called Elliot; then in rebuttal sgt. Els (twice), constable Oliphant, sgt. Els again and lastly Elliot again in order to finally destroy his testimony."

In the Court below counsel for the second appellant advanced a like argument in support of his application for leave to appeal. In response to such argument the learned Judge-President remarked as follows in his judgment on the application for leave to appeal:

"It was not the purpose of the Court to call any rebutting evidence to counter what Elliot had said in the witness-box The purpose of it was to get on full record the conversation which had taken place with Elliot, because all that was before the Court was that the investigation into the alibi was inconclusive and did not substantiate the alibi. That was a matter for the Court to judge.

Having called Elliot it was necessary in the circumstances to hear, in the interests of

justice

justice, the full story of what transpired at that interview."

Now sec 186 of the Criminal Procedure Act, 51 of 1977, invests a trial Court with a wide power to call witnesses of its own accord. In my view it cannot be said in the instant case that the developments in the trial subsequent to the first occasion on which Elliot was called as a witness by the Court resulted in a failure of justice or that the second appellant was in any way prejudiced thereby. Sgt. Els was the very last witness for the prosecution. Not to a single State witness called before Els had counsel for the second appellant suggested even remotely that at the relevant hour on the night of 22 August 1982 his client's presence at a place other than the shop in Stofile Street made it impossible for second appellant to have committed the crimes with which he was charged. When sgt. Els testified, however, the fact emerged that after the arrest of the second appellant

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the latter had mentioned to him the alibi described earlier in this judgment. Notwithstanding such evidence by Els the second appellant was content, upon closure of the State case, to let the matter of his alibi rest there. Can it be said that as a result of the evidence adduced from the witnesses called and recalled by the Court after closure of the defence case the position of the second appellant was any weaker than it had been after he had closed his case? I think not. The second appellant closed his case without seeking either through cross-examination of the State witnesses or by adducing any evidence of his own to establish that on the night of the crime he had been with Elliot. Inasmuch as the second appellant himself elected not to raise at his trial the defence of an alibi the fact that the later evidence complained of demonstrated to the trial Court that an alibi previously asserted by the second appellant on a different occasion was a spurious one did

did not, so I consider, in any way serve to supplement the State case or weaken the position of the second appellant at his trial. After the witnesses called by the trial Court had been heard the evidential material by reference to which the possible guilt of the second appellant fell to be determined was exactly the same evidential material to be weighed by the Court when the second appellant closed his case: the sufficiency of the identification of the second appellant by the witness Nyanti.

For the foregoing reasons the appeal of both appellants are dismissed.

G G HOEXTER, JA

PP

JANSEN, JA)
 JOUBERT, JA) Concur
 BOTHA, JA)
 VAN HEERDEN, JA)