

MICHAEL MFEKA vs THE STATE

IN THE SUPREME COURT OF SOUTH AFRICA
(APPELLATE DIVISION)

In the matter between:

MICHAEL MFEKA

Appellant

and

THE STATE

Respondent

CORAM: VILJOEN, HOEXTER et GROSSKOPF JJA

HEARD: 22 August 1986

DELIVERED: 12 September 1986

J U D G M E N T

HOEXTER, JA

HOEXTER, JA,

In the Durban and Coast Local Division the appellant, a man aged twenty-eight years, was charged with the crimes of murder (count 1) and rape (counts 2 and 3). His trial was heard by a Court consisting of BROOME, J and two assessors. The appellant was defended pro Deo by counsel. He pleaded not guilty and in terms of sec 115 of the Criminal Procedure Act, 51 of 1977, he confirmed the correctness of a written statement prepared by his counsel to indicate the basis of his defence. The effect thereof was to disclaim any knowledge on the part of the appellant of the crimes set forth in the indictment. At the conclusion of the State case the appellant closed his case without testifying himself or calling any witnesses on his own behalf. However, after having been found guilty as charged the appellant did testify in regard to the issue of possible extenuation affecting his conviction for

for murder on count 1. In his evidence in extenuation the appellant, while persisting in his denial of guilt, explained his movements and described what intoxicating liquor he had consumed on the date of the alleged offences mentioned in the indictment. The trial Court found that there were no extenuating circumstances and on count 1 the appellant was sentenced to death. On each of counts 2 and 3 the appellant was sentenced to six years imprisonment, the trial Judge ordering that four years of the period of imprisonment imposed on count 3 should run concurrently with the sentence on count 2. With leave of the trial Judge the appellant appeals (a) against his convictions on all three counts and (b) against the finding of no extenuating circumstances on count 1 and the sentence of death consequent thereon.

The deceased on count 1 was an adult male who was stabbed to death at about 6 pm on Sunday 7 October 1984.

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The complainant on counts 2 and 3 was a young woman aged twenty-two years who was the mother of two children. The scene of the alleged crimes was a stretch of gravel road in the Tongaat district on the farm of a Mr Bob Rodgers. The stretch of road in question is flanked by cane-fields and is roughly 3 kms long. It begins at a point some 500 m west of the compound on the farm of Rodgers and ends just beyond the road-side barracks (also referred to in the evidence as "the security compound") which houses security guards employed by the Tongaat/Hulett Group.

The substance of so much of the evidence as is material to the appeal against the convictions may be shortly stated. The complainant was the chief witness at the trial and she was also the sole eye-witness in regard to the commission of all three crimes. Her version of the events was the following. Shortly before dusk on the evening in question the deceased and the complainant were walking

walking together on the road described above. There came upon them a man who was a stranger to the complainant and to whom I shall refer as "the assailant". The assailant wore a white T-shirt under a two-piece green overall. There was a woollen cap on his head and a towel around his neck. His footwear consisted of home-made sandals fashioned from motor-car tyres. In addition he was wearing sun-glasses, but as he approached he took them off and put them in a pocket of his overalls. The assailant carried a home-made dagger or knife. Without saying a word either to the deceased or to the complainant the assailant proceeded to stab the deceased somewhere on his body with the dagger and the deceased then fell to the ground. The complainant tried to run away but she was prevented from doing so by the assailant who grabbed her and stabbed her on the left shoulder-blade. The assailant then walked away from where the deceased lay in the road, at the same time forcing the complainant to accompany him by tugging at her blouse.

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In this fashion they proceeded for some considerable distance along the road until they reached a clearing in a cane-field. Here the assailant, having threatened the complainant with the knife, forced her to have sexual intercourse with him against her will. Thereafter the assailant dragged the complainant further along the road. He told her that he was taking her to a place called Emona. When they reached a spot next to a cemetery the assailant again forced the complainant to have sexual intercourse with him against her will. During both acts of intercourse the complainant was hysterical and she wept. She detected no smell of liquor on the breath of the assailant and noticed no other indication that he had consumed liquor. After the second act of intercourse the complainant managed to get away from the assailant. She ran to the nearby barracks where she encountered security guards. To them she reported what had befallen her. She told them that the assailant was "tallish" and dark and she described to them what the

assailant

assailant was wearing and that he was in possession of a dagger. A number of the security guards took the complainant in a light delivery van and they proceeded in search of the assailant. They travelled first in the direction of the compound on the farm of Rodgers and, finding no trace of the assailant, turned back and drove in the opposite direction. After some distance the complainant spotted the appellant whom she pointed out as her assailant whereupon he was arrested by the security guards. The complainant testified that the assailant was the appellant.

In regard to the events subsequent to the complainant's escape from the assailant, the search for the latter, and the appellant's arrest shortly thereafter two security guards from the barracks aforementioned testified for the prosecution. These were Victor Mzimela and Dumisani Mthiyane. Mzimela told the trial Court that when the complainant reported to him that she had been raped and stabbed her clothes were covered in dust; her face was
tear-stained;

tear-stained; and that there was an open wound and also blood on her back. As they drove along in search of the assailant the complainant described him as being "fair but not very tall" and she detailed the clothes worn by him. These were described as a white T-shirt, an overall and a woollen hat. The complainant did not mention his footwear. According to Mzimela the search for the assailant lasted some twenty minutes. It proved abortive in the direction in which they had initially set off and they then turned back and proceeded in the opposite direction. Some thirty paces from their barracks they came upon the appellant in the road, whereupon the complainant said "that is the person who raped me." At this particular spot there is a cane-field on one side of the road and the Iwewe river runs next to the cane-field. The appellant crossed the road and entered the cane-field where Mzimela arrested him. At the time of his arrest the appellant was wearing a white T-shirt,

T-shirt, a greenish overall, and sandals made out of tyres.

He had a towel about his neck and he carried a balaclava

in his hand. By running his hands over the appellant

Mzimela satisfied himself that the appellant was not armed

with a weapon. There was, so testified Mzimela, a

perceptible but not very strong smell of liquor on the

appellant.

Mthiyane said that when the complainant made

her report to the security guards her clothes were blood-

stained and she was crying. She told them that the

assailant was dressed in a two-piece green overall and a

white T-shirt; and that he had a towel around his neck.

She further described him as being "a bit on the tallish

side" and "brownish" in complexion. According to Mthiyane

a search for the assailant as far as the poultry farm proved

fruitless and they then turned back. After they had

travelled past the barracks they saw a male person whom the

complainant

complainant identified as her assailant. Mzimela was driving the vehicle, and he (Mthiyane) had already approached the person so indicated by the complainant while Mzimela was still alighting from the vehicle. The person held an object in one of his hands and he walked briskly across the road. Before he could be arrested he threw the object into the river. The object was heavy enough to cause a splash and a few drops of water landed on Mthiyane. Mzimela ran his hands over the person's body but found no weapon. The description of the assailant earlier given by the complainant fitted this person. The person held a balaclava in his hands. There was a slight smell of liquor on the breath of this person, but according to Mthiyane his speech and gait were normal. Although in his evidence Mthiyane did not identify the appellant as the person so arrested on the evening in question nothing turns on this.

On the morning of Monday 8 October 1984

det const Sikhumba, who was the investigating officer in

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the matter, found the corpse of the deceased next to the road in question some 800 metres from the compound on the farm of Rogers. Post-mortem rigidity had already set in and Sikhuma formed the impression that the body "had spent the night in the veld". A post-mortem examination on the body established that death had been due to an incised wound of the chest which pierced the left lung and penetrated the heart. The correctness of the findings reflected in the report of the district-surgeon who conducted the post-mortem examination was admitted on behalf of the appellant. The spot at which the body was found was also pointed out to Sikhumba by the complainant as the place at which she and the deceased had been stabbed by the assailant. Two kilometres further on, in the direction of the barracks, the complainant pointed out the place at which the first act of intercourse had taken place; and 200 metres further on she pointed out the place where the second act of intercourse had taken place. The place at which the

assailant

assailant was arrested was pointed out to Sikhumba by Mzimela. This was just past the barracks and one kilometre further on from the place where the second act of intercourse had taken place. The locality and the places abovementioned are depicted in a rough sketch-plan, and a key thereto, prepared by Sikhumba and handed in at the trial.

Also on the morning of 8 October 1984 the complainant was examined by a district-surgeon. The latter testified that he found a 1 cm incised wound on the complainant's left shoulder-blade. Mention has already been made of the fact that the complainant had given birth to two children. No evidence of serious injury to the vagina was found by the district-surgeon but a slide of a vaginal smear taken by him and submitted for biological examination produced a test result which was positive for spermatozoa.

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The trial Court rightly concluded that the deceased had been murdered and that the complainant had twice been raped, and it properly limited the inquiry to the issue whether or not it had been established beyond reasonable doubt that the appellant was the man who had committed these three crimes. The appeal against the convictions raises the same single issue.

At the trial the appellant's counsel during his cross-examination of the complainant explored with her the possibility that she might be mistaken in her identification of the appellant as the assailant. When asked whether she had noticed any distinctive facial features of the assailant the complainant replied in the negative. The appellant's counsel then pointed out to the complainant that the appellant bore a facial scar, 90 cm in length, running from below his left eyebrow across his left cheek. To this the complainant responded by saying that she did not recall the scar;

scar; and she added the following explanation -

"Firstly its almost the same colour as that of his complexion and secondly I did not have sufficient time to observe his features because he was pulling me or dragging me along. I wasn't concentrating on his face."

When the complainant was asked whether she had observed the assailant's face while he was having intercourse with her she replied -

"No, I wouldn't say I was looking at him. I was crying and hysterical when the accused was raping me, M'Lord."

At the trial it further emerged that the appellant has his left front tooth missing. The complainant said that she had noticed the absence of this tooth only after the arrest of the appellant. The complainant was adamant, however, that she was not mistaken in identifying the appellant as the assailant.

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The appellant's facial scar was examined at close quarters by the trial Court and the appellant's counsel agreed with the impression recorded by the learned Judge that upon a face-to-face confrontation with the appellant the scar in question -

"....would not be visible from straight on."

In its judgment the trial Court proceeded to describe the said scar as -

"..... not very distinctive or obvious or prominent. Certainly in the light of this Court it was not so."

On the other hand the judgment of the Court below refers to the appellant's missing front tooth as "a prominent and distinctive feature". Dealing with the complainant's admission that she had not observed the missing tooth until after the appellant's arrest the learned Judge remarked -

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"Now this, we felt, was perhaps an indication of honesty on her part"

In regard to the aforementioned two facial peculiarities the trial Court made the following finding -

"We do not consider that her failure to observe the scar or the missing tooth detracts from her performance and qualities as a witness."

In argument before the trial Court it was urged that the State evidence affecting the complainant's description to the security guards of the assailant's height and complexion tended to show that the complainant's identification of the appellant as her assailant was untrustworthy. This argument was dealt with by the learned Judge in the following way -

"The complainant said she had told these people that her assailant was tallish and dark. Mzimela said that what the complainant gave up was that her assailant was fair and not very tall. Later in his evidence he changed this slightly. He said that you may call it 'Msundu', which is

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not very dark and not very fair and he gave a lot of other words. Mthiyane said that the complainant had described her assailant as being on the tallish side and brownish. Now it is notoriously difficult in these cases to get exact description of colours. The difference between tallish, not very tall and on the tallish side we have no regard to, but we do have regard to Mzimela's evidence which did vacillate about the complexion."

In the estimation of the trial Court Mthiyane was an excellent witness; and Mzimela was rated as almost his equal. The trial Court found that the complainant, despite her lack of sophistication, was "an honest and reliable witness." In concluding that the State had established the appellant's guilt beyond reasonable doubt the learned Judge expressed the view that at the close of the State case the appellant had a strong case to meet; and he drew an inference adverse to the appellant from his failure to testify.

In his argument before us Mr Cassim, to whom the Court is indebted for his assistance, relied strongly on

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the admitted fact that at the time of the rapes the complainant had not noticed on the face of her assailant two peculiarities (the scar and the missing front tooth) exhibited by the appellant. Having regard to the observations recorded by the trial Court it seems to me that the scar on the face of the appellant was a minor and inconspicuous disfigurement. Different considerations, however, apply to the missing front tooth, which represented a more obvious and distinctive peculiarity. The complainant's concession that she noticed the absence of this tooth only after the appellant's arrest no doubt - as the learned Judge pointed out - proclaimed the honesty of the witness. But, as is widely recognised, the very fact that an identifying witness is patently honest may represent a snare to the court which must allow for the notorious fallibility of identification evidence; and which must satisfy itself as to the reliability of such evidence as a factor independent of the probity of the witness giving it.

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However, while the complainant's aforesaid concession to some extent reflects adversely upon the dependableness of her identification of the appellant as her assailant, it seems to me that in all the circumstances of the present case there are several factors which operate to exclude any reasonable possibility of mistaken identification and which serve significantly to reduce the risk that the appellant was wrongly convicted. The first factor is that the events following shortly upon her escape from the clutches of her assailant provide a useful test of, and a testimonial to, the complainant's powers of observation. Her description to the security guards of the somewhat singular combination of garments worn by her assailant was a detailed one; and it corresponded closely with the garb of the man arrested near the scene of the crimes some twenty minutes after the commission of the last of the crimes (the second rape). The second factor is to be found in the testimony

testimony of Mthiyane, unchallenged on this point, that immediately before his arrest the appellant got rid of an object in his possession by throwing it into the river. The appellant was tracked down by security guards and it is likely that he appreciated at the time that his arrest was imminent. A very ready inference is that what the appellant threw into the river was an object which, if discovered on his person, would incriminate him. The third factor is that the appellant did not himself give evidence to gainsay the direct testimony of the complainant that he was the man who stabbed the deceased and twice raped the complainant. There was, of course, no obligation upon the appellant so to testify. But in shrinking from taking the witness-stand the appellant exposed himself to a risk. I have already mentioned that in the assessment of the trial Court the appellant at the close of the State case had a strong case to meet. I agree with that view of the strength of the case for the prosecution; and in my opinion the appellant's

silence

silence at the close of the State case is hardly explicable on any hypothesis unrelated to his guilt of the crimes with which he was charged. In my view no valid grounds exist for disturbing the convictions and the appeal on the merits must fail.

While not abandoning the appeal directed against the finding of the trial Court that there were no extenuating circumstances attendant upon the murder of the deceased, the only matter relied upon by Mr Cassim in this connection was the evidence given by the appellant subsequent to his conviction that during the day in question he and some twelve companions shared a dozen cartons of African beer. The appellant's own testimony was that in consequence of the drink he had taken he was under the influence of liquor "to a certain extent" but that he was "not very drunk." This evidence by the appellant must be viewed in association with the State evidence in regard to this issue. It will
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be remembered that the complainant herself noticed no sign that her assailant was in any way affected by liquor. At the time of his arrest Mzimela and Mthiyane detected a smell of liquor about the appellant, but Mthiyane testified that the appellant walked and talked normally. In regard to the matter of extenuation the appellant bore the burden of proof. The trial Court considered that the probabilities did not point to the conclusion "that it was intoxication which influenced him to do what he did." In my view that conclusion is not open to criticism.

The appeal is dismissed.

G G HOEXTER, JA

VILJOEN, JA)
GROSSKOPF, JA) Concur