

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

QUALITY VUSI ZWANE

Appellant

and

THE STATE

Respondent

CORAM: HOEXTER, JACOBS, JJA et
NICHOLAS, AJA

HEARD 21 November 1986

DELIVERED: 28 November 1986

J U D G M E N T

HOEXTER, JA

HOEXTER, JA,

In the Circuit Local Division for the Northern Circuit, held at Ladysmith, the appellant pleaded not guilty to a charge of murder (count 1), a charge of robbery (count 2), and a charge of murder (count 3). He was tried by a Court consisting of THIRION, J and two assessors. The appellant was represented by pro Deo counsel and at the close of the State case he testified in his own defence. He was found guilty as charged. No extenuating circumstances were found in respect of the murder on count 1. In respect of the murder on count 3 extenuating circumstances were found. On count 1 the appellant was sentenced to death. On counts 2 and 3 he was sentenced respectively to two years and nine years imprisonment. With leave of the trial Judge the appellant appeals against the convictions on all three counts.

Some

Some 20 to 30 km from Ladysmith there is the rural residential area of Matiwanoskop where the appellant's mother, Elsie Zwane, has a kraal ("Zwane's kraal"). The appellant is a man in his thirties. He spent his youth at Matiwanoskop but later worked for various periods on the Reef. He appears to have returned to Matiwanoskop in order to settle there during December 1980, and for some time thereafter he looked for work in Ladysmith. During the month of May 1981 the appellant was sleeping at Matiwane's kraal but spending most of his days in Ladysmith. It is common cause that towards the end of May 1981 the appellant travelled by train from Ladysmith to Johannesburg; and that thereafter he was not seen again in Ladysmith until the year 1985.

Early on the morning of Saturday 30 May 1981 the corpse of a black man (one Mateu Makuluzu) was discovered in a donga which lies some 800m from Zwane's kraal. Makuluzu's death had been caused by a stab-wound to the chest. The

State

State case is that the appellant murdered and robbed Makuluzu at the donga during the night of Friday 29 May 1981. Crucial to counts 1 and 2 is the precise date of the train journey to Johannesburg undertaken by the appellant at the end of May 1981. The State case is that the appellant did not leave Ladysmith until Saturday 30 May. The appellant's version is that he left Ladysmith by train on Friday 29 May. Some 1¹/₂ km distant from Zwane's kraal there is to be found Twala's kraal. Here there lives a young woman called Thandi Twala. Thandi and the appellant had once been lovers, but by September 1985 Thandi had a new lover, a man called Khoza. Thandi last saw Khoza alive at Twala's kraal during the evening of 5 September 1985. Early on the morning of 6 September Khoza's dead body was found lying in a pool of blood at a spot some 40m from Twala's kraal. He had been stabbed in the face, neck and chest, the cause of death being penetrating chest-wounds. Specks and trails of blood discovered in the immediate vicinity suggest that the fatal attack

attack took place some 20 or 25 paces away from the spot at which Khoza's body was found. The State case is that Khoza was thus fatally wounded on the evening of 5 September 1985, shortly after Thandi had last seen him alive; and that his attacker was the appellant.

A man called Themba Sithole was the chief witness in regard to counts 1 and 2. Sithole grew up at Matiwaneskop and he was living there in May 1981. He claimed that the appellant was well-known to him. After work on an afternoon towards the end of May 1981, so testified Sithole, he boarded in Ladysmith a taxi bound for Matiwaneskop. The passengers in the taxi included the appellant. The taxi's last three passengers alighted at a spot some ,5 km from the donga in question. These three were Sithole, the appellant and a black man whose identity was not known to Sithole. The stranger carried a paper bag. It was then already dark. The three men walked together until they

came

came to the donga where, according to Sithole, the appellant stabbed the stranger in the chest. The stranger fell to the ground whereupon the appellant first removed the contents of the paper bag, which he handed to Sithole, and thereafter proceeded to remove money from the stranger's pockets. The appellant then suggested that Sithole should accompany him to Zwane's kraal and spend the night there; and that on the following day they should travel by train to the Reef. At the insistence of the appellant Sithole went with him to his room at Zwane's kraal and slept there. On the next day they went into Ladysmith and the appellant gave Sithole R10 for his train fare. Sithole explained, however, that he had had no intention of travelling to Johannesburg. At the Ladysmith railway he managed to slip away from the appellant. On the following Monday he went back to his place of employment in Ladysmith. Sithole failed to report to the police the murder and robbery that he had witnessed. Some suspicion

suspicion that he had been involved in the matter nevertheless fell upon Sithole, and some days later he was arrested at his place of work on a charge of murder. Following a statement made by him he was later released.

The appellant's mother, Elsie Zwane, was a witness for the prosecution. She remembered a Saturday on which the news reached her that a dead body had been found in a donga at Matiwanoskop. On the Friday night immediately preceding the Saturday in question she was in bed when she heard a noise in her yard. She looked out of her window and in the yard she saw two men walking towards the appellant's room. The one was a stranger to her but she recognised the other as her son, the appellant. Thus reassured she went back to sleep. When she rose on the Saturday morning the appellant and his companion had already left the kraal. She did not see the appellant again until August 1985 when she met him by chance in Ladysmith. Elsie Zwane told the Court that

that on previous occasions when the appellant left her kraal to travel to Johannesburg it had been his habit to inform her of his movements. On this occasion he did not tell her of his intention so to travel.

In support of count 3 the chief witnesses called by the State were Thandi Twala, a woman called Zensile Leteha, a schoolgirl called Buyisele Khumalo, a man called Roy van Niekerk, and the investigating officer in the case, Const. Venter of the South African Police at Elandslaagte. Zenzile Leteha and Buyisele Khumalo live at a kraal close to Twala's kraal at which Thandi lives. Zenzile Leteha told the trial Court that during the day of Thursday 5 September 1985 and in Ladysmith the appellant asked her to deliver to Thandi a message to the effect that the appellant was coming to see Thandi. After dark on the same evening the appellant arrived at the home of Zenzile Leteha. He had with him a large paper bag but she was unable to see what it contained. The
appellant

appellant asked Buyisele to fetch Thandi. Buyisele went off on this errand and on her return she reported that Thandi had refused to come. The appellant remained sitting quietly at Zenzile's home for an hour or two and then left. Buyisele, a standard nine pupil, recalled the precise date of the appellant's visit and confirmed that at the appellant's request she had gone to Thandi. She told Thandi that a male visitor was waiting for her at Zenzile's home but Thandi said she was busy. Buyisele went back and reported Thandi's reaction. Buyisele also said that the appellant was carrying a large paper bag. The effect of Thandi's evidence is the following. In August 1985, many years after she had broken off her relationship with the appellant, he visited her at Twala's kraal. He told her that he wished to set up a kraal for himself and Thandi, and to find work. In response to this suggestion Thandi remained silent. She saw the appellant again in September 1985 on the night before the day on which Khoza was found dead. She was having a conversation with

Khoza

Khoza in front of her home when the appellant arrived.

Wrapped around him was a blanket underneath which he was

carrying a cane knife. In an aggressive fashion the appellant

demanded to know who the person was with whom Thandi was

speaking. From his manner of speech Thandi thought that the

appellant had been drinking. Thandi replied that Khoza was

her boy-friend. Thereupon Khoza walked away. After a

brief interval of time during which the appellant kept asking

"Who is this person you have been standing with?", the

appellant ran off in the direction in which Khoza had gone.

It was dark and she was not able to see where Khoza had gone.

Thandi remained standing at the same spot for some time but

heard nothing. Thandi admitted that when she was first

approached by the police after Khoza's death she disavowed any

knowledge of the matter. She explained that her initial

response was inspired by a fear of reprisals from the appellant.

During

During the latter half of September 1985 the appellant was being detained in the Ladysmith gaol in connection with some other matter. During the same period Van Niekerk was also a prisoner at the gaol. Van Niekerk is a coloured man. He testified that for a day or two he and the appellant had been cell-mates at the gaol. According to Van Niekerk the appellant told him in gaol that it was being alleged that he had killed a person at Matiwanoskop; and he asked Van Niekerk to testify on his behalf and to say that the appellant had been in Van Niekerk's company on the evening of 5 September. Van Niekerk was released from the Ladysmith gaol on 26 September 1985. On the same date Const. Venter took the appellant from the gaol and asked him where he had been on the evening of 5 September 1985. The appellant replied that he had been working at the Crown Hotel in Ladysmith. Having made inquiries at the said hotel Const. Venter told the appellant that he had established that

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the appellant had in fact been discharged from his employment at the hotel at noon on 5 September 1985, whereupon the appellant claimed that during the afternoon and evening of 5 September he had been in the company of Van Niekerk; and that he had spent the night at Van Niekerk's house in Ladysmith.

When the appellant testified he denied any knowledge of the crimes with which he was charged. He told the trial Court that he had left Ladysmith for Johannesburg by train at 10 pm on Friday 29 May 1981. In Johannesburg he had stayed with a relative at Fordsburg when, in respect of some other alleged offence he was arrested, charged, convicted and gaoled for four years. Upon his release from prison he returned to Ladysmith in June 1985. In regard to counts 1 and 2 the appellant said that Sithole was a complete stranger to him and that the evidence of his mother was untrue. In regard to count 3 he denied that he had been anywhere near

Zensile

Zensile or Buyisele or Thandi on the night of 5 September 1985. He said that Khoza was completely unknown to him.

On 5 September 1985, so testified the appellant, his services at the Crown Hotel were terminated at about 12.30 pm; and in the afternoon he met Van Niekerk with whom he spent the rest of the day drinking. After dusk he accompanied Van Niekerk to the latter's home in Ladysmith and there he remained until the next day. The appellant denied that he had met Van Niekerk in gaol and he described Van Niekerk's evidence as a pack of lies.

In weighing the evidence against the appellant the trial Court bore in mind that in relation to the events at the donga on the evening of 29 May 1981 Sithole was a single witness. Moreover it treated his testimony -

"....with the same caution with which we would have treated his evidence if he had been an accomplice."

In

In its judgment the trial Court gave detailed consideration to the credibility and the reliability of every witness in the case. It believed the evidence of Sithole and Elsie Zwane, and the learned Judge pointed out that the evidence of the latter that she had seen the appellant at her kraal in the company of another man on the night of 29 May 1985 provided some support for the evidence of Sithole. The trial Court recorded its impression that Sithole was a rather subdued person whereas the appellant seemed to be "a far more forceful type of person." The witness Thandi Twala appeared to the trial Court to be "a somewhat reticent witness". However, commenting upon Thandi's initial denials to the police the learned Judge correctly pointed out that if this witness had wished falsely to saddle the appellant with responsibility for Khoza's death she could easily have implicated him more directly than she in fact did. The trial Court described Zenzile Leteha and Buyisele Khumalo as excellent witnesses; and it accepted the evidence of

Thandi,

Thandi, supported as it was by the evidence of Zensile and Buyisele. It also accepted the evidence of Van Niekerk and Const. Venter. The appellant, on the other hand, was found by the trial Court to be a bad and lying witness. On counts 1 and 2 the trial Court rejected as false the appellant's denial that he knew Sithole and that he had been in Sithole's company on the night in question; and it accepted as the truth Sithole's version that the appellant murdered and robbed the stranger who had alighted from the taxi with them. The trial Court likewise rejected as false the alibi set up by the appellant on count 3.

Before this Court counsel for the appellant conceded that in regard to the events both of 29 May 1981 and 5 September 1985 the alibi raised by the appellant was palpably false; and in his attack upon the validity of the conclusions reached by the trial Court he contented himself with two brief submissions. While recognising that the

trial

trial Court had displayed caution in assessing the worth of Sithole as a witness, counsel urged upon us that the learned Judge had nevertheless not been sufficiently critical of Sithole. I am unable to accept that submission. A careful reading of the record entirely bears out the impression recorded by the trial Court that Sithole was a good and frank witness. Such imperfections as are to be found in his evidence are trivial and, in any case, the trial Court took notice of them. That Sithole did not report the matter to the police may reflect adversely upon his sense of civic duty but it neither renders his account of what happened at the donga less probable nor points to any proclivity on his part for lying. By the end of the trial the falsity of the appellant's alibi in regard to counts 1 and 2 had been completely exposed. In consequence there was no acceptable evidence to gainsay the eye-witness testimony of Sithole. In my opinion no good grounds exist for doubting the correctness of the convictions of the appellant

on

on counts 1 and 2.

Dealing with count 3 counsel for the appellant contended that while all the proven facts were no doubt fully consistent with the appellant's guilt, they did not exclude as a reasonable possibility that Khoza had fallen victim to some assailant other than the appellant. I cannot agree. Khoza walked away from Thandi and the appellant. Very soon thereafter the appellant ran after Khoza. The inference that within a very short distance the appellant overtook Khoza is, so I consider, an irresistible one. In this connection the following remarks in the judgment of the Court below are pertinent:-

"Not only did the Accused not take the Court into his confidence about what he did after he left Thandi, but on the contrary he devised the most elaborate lie to prove that he was not anywhere near Matiwaneskop on the evening in question."

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The appellant obviously bore Khoza ill-will, and he was armed with a lethal sharp instrument. The place at which Khoza was stabbed to death was a very short distance from where Thandi had been left standing. Looking at the totality of the proven facts the suggestion that Khoza's attacker may have been somebody other than the appellant stands to be rejected outright as groundless and fanciful conjecture. In my judgment the trial Court was rightly convinced that no such reasonable possibility existed.

The appeal is dismissed.

G G HOEXTER, JA

JACOBS, JA)
NICHOLAS, AJA) Concur