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124/87/AV

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

SIMON HLONGWANE

First Appellant

CHRISTOPHER SIMELANE

Second Appellant

and

THE STATE

Respondent

CORAM: GROSSKOPF, SMALBERGER, STEYN, JJA

HEARD: 16 February 1988

DELIVERED: 7 March 1988

J U D G M E N T

GROSSKOPF, JA

The two appellants were convicted in the Witwatersrand Local Division (O'DONOVAN AJ and assessors) of

the

the murder of one Johannes Sponkie Mawita. No extenuating circumstances were found and they were both sentenced to death. The first appellant was also convicted of the unlawful possession of a firearm, and the second appellant of the unlawful possession of ammunition. In respect of the last mentioned offences each appellant was sentenced to two years imprisonment. With the leave of the trial judge both appellants now appeal against their convictions and sentences.

The murder was committed during the night of 10 April 1985. After receiving a report, the police found the deceased at about 22h45 slumped over the steering wheel of his motor car. He had been shot six times - once on the left

left side of the mandible and five times in the back. His death was caused, according to the district surgeon, by multiple bullet wounds, some of which involved the lungs and aorta. Quite clearly he had been murdered, and the only question concerning the murder count is whether the two appellants were responsible. In considering this question it will be convenient to deal with each appellant separately.

The first appellant, a 28 year old man, was arrested on 14 May 1985 at his home at about 04h30. That afternoon, at about 16h25, he made a statement to lieutenant J H de Waal who, as a lieutenant in the S.A. Police, was ex officio a Justice of the Peace. The admissibility of this statement was attacked and it is necessary to outline briefly

the

the circumstances under which it was made.

The evidence for the State in the trial-within-a-trial held to decide on the admissibility of this statement, was that the investigating officer, warrant officer Mpeke of the Protea murder and robbery unit, was accompanied by four other policemen when he arrested the first appellant. The policemen were investigating various offences, and after arresting the first appellant, they travelled together in two vehicles for the greater part of the day. First, following information provided by the first appellant, the policemen sought out the second appellant, and arrested him. Thereafter the police went to look for the witness Caiphas Zulu (alias Three) but they could not find him. They also looked for certain other persons

persons. These persons were not all concerned with the present matter. At about 16h00, the investigations having been completed for the day, warrant officer Mpeke arrived back at his office in the Protea police station with the two appellants. The appellants had been in the company of the policemen for the whole period since their respective arrests. In his office Mpeke had further discussions with the first appellant, and, in the light of what the appellant told him, tried to arrange for him to make a statement to a magistrate. It proved impossible to find a magistrate for this purpose, and it was then decided that the statement would be made before a police officer at Brixton. The appellant was taken to Brixton by two policemen who had not accompanied

accompanied Mpeke during the day. At Brixton the statement was interpreted by a police interpreter and taken down by lieutenant De Waal. At the trial-within-a-trial evidence was given by lieutenant De Waal, his interpreter (warrant officer Ranaka), Mpeke, three of the policemen who had been with him on the day in question (the fourth was made available to the defence, but was not called) and the two policemen who had taken the appellant from Protea to Brixton. These eight witnesses all testified that nothing irregular had happened while the first appellant was in their presence.

The first appellant's version differed entirely from that of the State. He stated that when the policemen came to his room on the morning in question, they first

questioned

questioned him about his motor car, and, in fact, were accompanied by the person who had sold it to the appellant.

After searching the appellant's room, the policemen took him straight to Protea police station, where they assaulted him, and questioned him about an alleged robbery and about how he had obtained his car. They also wanted the firearm which, they said, had been used in the robbery. After a while they left Protea, and took the appellant to a spot in the veld near Naledi. This was about noon. There he was again assaulted and threatened with death. He eventually agreed to produce his firearm. He took them to the place where he was staying, and pointed out a room there. The policemen searched the room but found no firearm. The ap-

pellant

pellant was returned to Protea. There he was again assaulted.

He then asked to see a magistrate but was taken to Brixton instead. At Brixton he was assaulted by the two policemen who had taken him there, assisted by a black policeman from Brixton. This was, the appellant said, on the instructions of lieutenant De Waal. He was then taken to lieutenant De Waal's office. In De Waal's office detective constable Nethonzhe, one of the policemen who had escorted him from Protea, produced a written statement. This statement was discussed by Nethonzhe and the interpreter in a language which the appellant did not understand. The interpreter then interpreted it, and De Waal wrote it down. When this was completed, the policeman forced the appellant to sign the statement. He did not know

what

what it contained since he did not understand the languages used.

At the end of the trial-within-a-trial, the Court held that the statement was admissible. The statement reads as follows:

"Ek bly by kamer 85(a) Dube Mans Hostel. Na Goeie Vrydag terwyl ek in my kamer was. Ek was alleen. Ander onbekende Swartman het by my gekom. Hy het aan my gesê hy is een van die groot kop in die Swallows Sokker Klub. Hy het my gesê sy voornaam was Chabedi.

Hy het my later sy plek gewys te Orlando Wes, Soweto. Hy het by my gesê dat daar mense by die sokker is wat hom pla. Dat hierdie mense hom wil doodmaak. Toe noem hy die naam Sponkie, die ander name kan ek nie onthou nie. Sponkie is een van die trainers. Toe sê hy my hy soek mense wat kan hierdie mense doodmaak vir hom.

Ek het toe vir hom gesê ek kan nie dit alleen doen nie maar ek kan dit doen met ander.

Toe

Toe ek het hom gevra hoeveel hy ons sal betaal vir die werk. Toe sê hy julle sal my sê hoeveel soek julle.

Ons is daar uitmekaar en gesê ek gaan die mense soek, ek sal hom later sien.

Ek het geloop by dieselfde Hostel en vir Simelane en vir Three gekry. Ek het hulle by kamer 38 gekry. Al drie van ons het na Chabedi se huis gegaan by Phefeni. Ons al drie het hom daar gekry by die huis. Ons het daar gepraat. Hy het gesê ons moet help om die mense dood te maak. Hy het Sponkie en twee ander wie se name ek vergeet het genoem wat ons moet doodmaak.

Simelane het gepraat en gesê niks sal ons beat nie. Ons het baie male hierdie werk gedoen. Ek het toe gesê ek was nog nooit gekoop om mense dood te maak nie, alhoewel ek was al betrokke by die bakleiery van die Impies. Toe sê Simelane ek moet nie bekommer daarvan nie, hy sal hom skiet.

Hulle het toe plan gemaak dat ek vir Sponkie moet roep na my kamer toe. Dieselfde dag het ek vir Sponkie by Mketla Garage gekry. Ek het met my kar gery. Ek het hom geroep toe volg hy my na my kamer toe. By my kamer het hy nie

uit

uit sy kar geklim nie. Dit is naas my kamer by Dube Hostel. Terwyl hy voor my kamer was het Simelane en Three gekom. Hulle het by Sponkie se kar ingeklim. Hulle het hom gegryp. Simelane het die kar bestuur terwyl Three hom vasgehou het. Hulle het na Nancefield Hostel gery en ek het hulle met my kar gevolg. Ons het bymekaar gekom by die Hostel. Die twee karre het daar gestaan. Sponkie was uit die kar getrek deur al drie van ons. Toe hy buite was sê Simelane ons moet hom los. Simelane het hom geskiet. Ek verneem hy het hom sewe skote geskiet. Na hy dood is het ons hom terug gesit in sy kar, agter die stuurwiel.

Ek het ook my vuurwapen gehad in my broek. Ek het nie geskiet nie. Ek het my vuurwapen vir die polisie gegee by die plek waar ek gevang is. Ek het gesê dat ek nie geskiet het nie en hulle het gesê dat hulle die vuurwapen sal toets. Ek was gevang by Orlando West. Toe vat ek die polisie na Dube Hostel en gee hulle die vuurwapen in 'n ander kamer.

Die volgende dag na hierdie voorval, die drie van ons het gegaan na Chabedi se huis en hom 'n rapport gegee wat gebeur het.

Voor

Voor ons die werk gedoen het, het Chabedi ons R5000 gegee. Hierdie R5000 was in Simelane se hand gegee in my teenwoordigheid. Die R5000 ons het gedeel voor die werk. Elke man het R1600 gekry. Die orige geld ons het kos gekoop.

Toe ons gaan rapporteer, Chabedi het my R4000 gegee in die teenwoordigheid van Simelane en S/man Three. Ons het ook die geld gedeel. Ons het uitmekaar gegaan. Ek het gewerk. Ek het my werk by Olifantsfontein verloor laas jaar. Dit is al."

The first appellant's statement forms the first important item of evidence linking him with the offence.

Further evidence implicating the first appellant was given by the witness Caiphas Zulu (alias Three). He testified that he knew the first appellant by sight and was a cousin of the second appellant. During April 1985 he shared a room at Dube Men's Hostel with the second appellant. One evening

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he was in the room with the second appellant, when he heard two cars approaching and parking nearby. A person who had apparently arrived in one of the cars, but whom Zulu did not identify, entered the room. Soon thereafter the second appellant asked Zulu to accompany him to Nancefield. Zulu agreed to do so, and after a short delay followed the second appellant outside. There he noticed two cars, one of which he recognized as belonging to the first appellant. He approached that car but was told by the first appellant, who was talking to the driver of the second car, to get into the second car. The second car, it appeared later, was that of the deceased, who was sitting in the driving seat. The second appellant was then already sitting in the back of the deceased's car, and he told Zulu to get in front. Zulu did so, and the deceased drove away.

They

They drove towards Nancefield. For a little while the first appellant followed them, but then Zulu did not see him any more. When they arrived at the new Nancefield hostel, the second appellant told the deceased that he could stop, since they had reached their destination. Zulu and the deceased still continued talking about soccer, until the deceased said "Here is Stule". Stule is the first appellant. As the deceased spoke, a car drove past which Zulu took to be the first appellant's. Shortly thereafter Zulu heard a shot fired. He did not know where, but became confused and ducked down. Thereafter the second appellant fired a number of shots at the deceased. When he had finished, the second appellant left the car and told Zulu to do likewise. They walked

walked for about 200 metres when a car approached from the rear. It stopped, and the second appellant told Zulu to get in. He did so and found that the first appellant was the driver. They drove away. Zulu was dropped at the Dube hostel and the two appellants drove away together.

The final item of evidence incriminating the first appellant is that of a pointing out by him. Constable Kubayi, the first policeman on the scene, indicated on a map of the area the position where he had found the deceased dead in his motor car. Substantially the same point had been pointed out to the police by both appellants and the witness Zulu. In the case of the first appellant, the pointing out was made on 30 May 1985 to warrant officer

Mpeke

Mpeke and sergeant Mc Kenzie, a police photographer.

Mpeke's evidence on what happened, as elicited in cross-examination, reads as follows:

"... the content of that report which the accused made to you, amounted to a confession to the murder concerning which he was arrested and warned? -- Yes, I will call it a confession, because he involved himself in that report.

He told you what happened there that day?

-- Correct.

He told you that he assisted in killing the deceased? -- No.

He did not do that? Well, how then did he link himself with the death of the deceased? -- He said he had driven his car.

You heard the testimony of Caiphas Zulu? -- Yes.

What the accused told you in that report, does it correspond with the testimony of Caiphas Zulu? -- Yes.

Did he go so far as to confirm arrangements between himself and other people before the

murder

murder was committed, planning to commit a murder, arrangements in which he took part? -- He told me that he was only requested to drive the car.

.....
What did the accused say to you when he pointed out point A reflected on photo number 3 of EXHIBIT K? -- He said that was the point where the deceased's car had stopped. Yes, that is accused 1, My Lord.

So, he referred to this as the point where the deceased's car, ... was parked? -- Yes, it was the deceased's car.

Was parked? -- Yes.

Did he add anything further? -- Yes.

What else did he say? -- That is where he parked, where he went past in his way into the hostel. When he passed there the car was parked as it is.

At that stage he made no reference to the killing of the deceased? -- No."

Zulu also pointed out the spot where the first

accused picked him and second appellant up after the shooting.

Without

Without indicating what it signified, the first appellant pointed out the same spot.

The evidence against the first appellant accordingly consists of his statement to lieutenant De Waal, the evidence of Zulu, and the evidence of pointings out.

In his own evidence the appellant raised an alibi. He stated that he left Johannesburg on 4 April 1985 to visit his home in Natal where he was to be married to his second wife. This marriage was registered on 1 May 1985. He stayed in Natal until 13 May and arrived back in Johannesburg on 14 May, the day of his arrest. He denied having been present when the offence was committed on 10 April, and stated that he did not point out any points but was merely told where

he

he had to stand. His mother gave evidence in support of his alibi. The court a quo rejected the evidence of an alibi. It convicted the appellant on the strength of the confession and of the rejection of the alibi. Apparently no reliance was placed on the evidence of Zulu in convicting the first appellant, although, as will be seen, it formed the basis of the second appellant's conviction.

On appeal Mr. Tiedemann, who appeared for the first appellant, contended that on the totality of the evidence the court should have reconsidered its decision on the trial-within-a-trial, and should have ruled the confession inadmissible. In the alternative he contended that the court should have had a reasonable doubt about the reliability of

of the confession. At the hearing Mr. Tiedeman concentrated on the alternative contention, but I propose dealing with both.

The main basis upon which the confession was attacked as being either inadmissible or unreliable was the existence of a number of discrepancies between it and other evidence, particularly that of Zulu. In the first place the confession attributed a much more active role to Zulu than he was prepared to concede. This is of course easily explicable. Zulu may well have attempted to minimize his own involvement. This was indeed so found by the court a quo, as I shall indicate later. What is much more difficult to explain is that the first appellant also ascribed to

himself

himself a much more active role than that suggested by Zulu.

Zulu involved the first appellant only to a limited extent -

he said that the first appellant was present when they left

Dube, that he apparently drove past when they were parked at

Nancefield, and that he picked them up after the murder.

In his confession the first appellant stated that he was the

person who lured the deceased to Dube. This went further than

Zulu's evidence but was not inconsistent with it. In addition,

however, the first appellant stated that he assisted the second appellant

and Zulu to drag the deceased from the car before he was shot. This was

inconsistent with Zulu's evidence, and also, it would appear from

the passage quoted above, with what the appellant later told

Mpeke when pointing out where the deceased's car was parked

prior

prior to the shooting.

What makes the first appellant's confession even more puzzling is that certain aspects are clearly wrong, or at least are contrary to strong probabilities. Thus his statement that the deceased was shot outside the car and then placed back inside is inconsistent not only with the evidence of Zulu but also with the probabilities. When the deceased's body was found the police found the six empty cartridge cases inside the car. It seems most unlikely that the deceased's murderer or murderers would, after shooting him outside, take the trouble to place the empty cartridge cases inside the car. There would appear to be no reason for doing so, and one would imagine that an assassin who has

just

just fired six shots with an unsilenced firearm would like to get away as soon as possible. Indeed, for the same reason it seems unlikely that the murderers would first remove the deceased from the car, then shoot him, and then return him. No reason for this conduct suggests itself.

On the other hand it must be conceded that two of the spent bullets were never recovered, and that no damage was done in the shooting to the interior of the car. These features do suggest that the shooting may have taken place outside, but I do not think that they prevail against those indicating the contrary. As far as damage to the car is concerned, it is to be noted that the four bullets that were found, were still inside the deceased's body, or were

found

found in his clothes. If one assumes that the remaining two passed through his body they would presumably have been all but spent when they emerged, and would probably not have caused any damage. It does, however, remain puzzling that they were not found.

A further error in the first appellant's confession relates to the firearm. It will be recalled that in his evidence in the trial-within-a-trial the appellant told the court that force was exerted to induce him to produce his firearm, and that he pretended to do so, but that no firearm was in fact found in the room which he pointed out. The State evidence was that after the first appellant's arrest he directed the police to a certain Mzimonde. They

could

could however not find Mzimonde before the day after the arrest, when he produced the first appellant's firearm (it should be noted that this firearm was not the one used in the killing). On both versions therefore the first appellant's firearm had not yet been produced when he made his confession. It is consequently difficult to understand why he should have said that he had given the police his firearm in a room in Dube.

What is one then to make of these discrepancies?

Firstly, do they provide support for the appellant's version that the statement emanated from the police, and not from him? There would appear to be as little reason for the police to attribute false statements to the appellant as there

would

would be for him to make them spontaneously. At the time when the confession was made the police knew that the shooting of the deceased had probably taken place in his car, and that the first appellant's firearm had not been recovered. Why should they induce the first appellant to "confess" to a version which they knew to be wrong, thus casting doubt both on the accuracy of the confession and on the reliability of other witnesses? In this regard it is worthy of mention that Zulu gave a statement to the police as early as 5 May 1985, i.e., more than a week before the arrest of the two appellants and the police would thus presumably have known what his version would be.

Taking everything into account, I do not think that the discrepancies in the confession provide any support

for

for the evidence given by the first appellant in the trial-within-a-trial. Mr. Tiedemann also, in his heads of argument, criticized some of the State evidence in the trial-within-a-trial. However, in my view the State evidence was overwhelmingly strong, and that of the first appellant improbable and exaggerated. I therefore agree with the finding of the court that the confession was proved beyond a reasonable doubt to have been freely and voluntarily made by the first appellant. Why the confession contained the strange features to which I have referred is something which only the first appellant can explain.

The next question is whether the defects in the confession are such as to render it unsafe for a court to act upon it. For the purpose of this argument one must assume that the confession emanated from the appellant and

was

was freely and voluntarily made. The question is then

whether there is a reasonable possibility that the appellant

falsely confessed to a murder in which he did not participate.

Theoretically two possibilities fall to be considered. The

first is that the first appellant was not involved at all,

not even as a witness. The second is that he may have been

present innocently at or near the scene of the murder.

The possibility that the first appellant had no

first-hand knowledge of the events at all, may I think, be

summarily discarded. His description of the killing, al-

though flawed, nevertheless showed a great deal of knowledge

of how the murder was committed. So did his pointing out

and the statements made to Mpeke. It is of course pos-

sible

sible that this information may have been gained otherwise than by witnessing the events, but this is not what the appellant said. His evidence was that he did not make the confession at all and did not point out any spot or make any statement to Mpeke. His evidence on all these points was rejected, and Mr. Tiedemann did not, for the purposes of this argument, contend that the court a quo was wrong in doing so. In these circumstances the inference can readily be drawn, in my view, that the appellant at least witnessed the events which he described.

The further possibility suggested in argument was that the first appellant may have been present only as an innocent spectator. This suggestion would entail that

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the appellant might innocently have come to know some of the facts of the murder and then pretended falsely to have been a party to it. Why he would have done so is difficult to comprehend. However, be that as it may, this line of argument was based on the premise that Zulu's evidence exculpated the first appellant, and that the appellant's statement to Mpeke confirmed Zulu's version. It was then contended that, in so far as the first appellant's confession attributed a greater degree of participation to him, it should be rejected in view of the discrepancies already mentioned. The basic fallacy in the argument, it seems to me, lies in the assumption that Zulu's evidence exculpated the first appellant. In my view it did nothing of the kind. Zulu's

evidence

evidence placed the first appellant with the second appellant and Zulu when they left Dube in the deceased's car, and the suggestion was that he had arrived there with the deceased. The first appellant then, according to Zulu, apparently followed them. When the deceased had parked, the signal for his killing was apparently given by the first appellant's driving past. After the killing the first appellant returned to pick up the second appellant and Zulu, and took them home. In the absence of any explanation by the first appellant the inference is irresistible that he was a party to the killing by generally supervising what was happening and by helping the actual perpetrator or perpetrators to get away. Even if it may be possible to imagine a plausible version

which

which would be consistent both with Zulu's evidence and with the first appellant's innocence, no such version was presented to the court. The first appellant confined himself in evidence to a lying alibi and a denial that he made the statements to Mpeke on which his counsel now relies.

To sum up: Whether one accepts the version deposed to by Zulu or that contained in the confession, the evidence as a whole allows of no reasonable doubt that the first appellant participated in the murder of the deceased.

In view of the foregoing the first appellant's appeal against his conviction of murder must fail. No serious attack was made on the finding that no extenuating circumstances were present, or on the conviction and sentence

on

on the second count, and in my view these decisions were correctly made. It follows therefore that the first appellant's appeal should be dismissed in toto.

I turn now to the second appellant. He is a 32 year old man. The case against him rests to a large extent on the evidence of Zulu, which I have summarized above.

In addition there was evidence by one Sibisi. Sibisi was a vegetable seller outside the Dube hostel. He knew both the second appellant and Zulu. His evidence was as follows. On 14 May 1985 he heard that the second appellant had been arrested. He left his business to go and find out what had happened to the second appellant. After enquiring at two police stations, he was finally told at the third, Moroka,

that

that the appellant was being detained there. He did not immediately visit him because, he said, he did not want to leave his business for too long a period. He returned the next day and spoke to the appellant. The appellant asked him to take a message to Three (Zulu). The message was that Zulu should go and stay at Tembisa, and take the firearm with him. He also told Sibisi to go to a certain Shabedi at Emdeni, and tell him to get an attorney for the appellant. Sibisi took the message to Zulu. The two of them drove to Emdeni but did not find Shabedi there.

Zulu's evidence about the firearm was as follows.

The day after the murder the second appellant showed him the firearm, and hid it behind a calendar on the wall. There

the

the firearm remained, undiscovered even by the police search when the appellant was arrested. Later Sibisi came and told Zulu, according to the latter's evidence, that the second appellant had said that Zulu should take the firearm and keep it. Zulu says he then removed the firearm from its hiding place behind the calendar and concealed it below a table next to his bed. He left it there when he went to his home in Natal. When he returned it was gone.

I turn now to an assesment of the evidence of Zulu and Sibisi. Regarding Zulu, the trial court said the following:

"The Court has given anxious consideration to the question whether reliance can be placed on the evidence of Caiphas Zulu, implicating accused number 2 as the person who fired the fatal shots

in

in the back of the deceased. The Court is of the view that it is open to question whether Caiphas Zulu has been entirely open and frank to the Court as to his own part in the events that he described. He has not, for example, satisfactorily explained why he should have accompanied accused number 1 and 2 and the deceased to Nancefield Hostel. He is a single witness and cannot safely be regarded as other than an accomplice to whose evidence the ordinary cautionary rule must be applied."

Mrs Borchers, who appeared for the second appellant, contended that the evidence of Zulu was so unsatisfactory and unreliable that no credence at all should have been given to it. However, at least certain aspects of Zulu's evidence seem quite acceptable. He gave detailed evidence on when, where and how the deceased was murdered. This evidence ties in with the police evidence, the medical evidence and

and the probabilities. There is no reason to question it.

Where Zulu's evidence is questionable is when he described

his own role in the events. He was at great pains to dis-

tance himself from the murder, and his evidence in this

regard often does not ring true. This appears not only from

the example given by the court a quo in the above quoted pas-

sage, but also from other parts of the evidence. The like-

lihood is that he tailored his evidence so as to avoid, as far as possible, any

association with the murder. This can also be seen in his

evidence about the firearm. Quite obviously he must have

known (despite his protestations to the contrary) that the

firearm concealed by the second appellant was that used in

the killing of the deceased, and it is difficult to accept

that

that, after receiving the message from Sibisi, he would have taken the firearm from a safe hiding place and dealt with it as casually as he said he did. There are also other examples, but after they have all been considered one is left, in my view, with the same conclusion as that reached by the court a quo, namely, that Zulu has not been open and frank as to his own part in the events that he described, and that he is to be regarded as an accomplice with all that is entailed thereby.

Regarding Sibisi's evidence the court a quo said the following:

"He is not an accomplice and there is no reason in the Court's view why he should be treated as such."

Mrs.

Mrs. Borchers contended that the court a quo had misdirected itself in this passage. Sibisi was, she said, on his own version an accessory after the fact. I do not agree. Sibisi stated throughout that he did not associate the message which he was to deliver with the arrest of the second appellant. On this version he consequently did not have the required animus to be an accessory after the fact to the second appellant's crime. But, whether he is to be regarded as an accessory or not, Sibisi was clearly not a good witness. He contradicted himself on a number of points, and there are several improbabilities in his version. Moreover, as appears from the above summary of their evidence, Sibisi and Zulu give different versions of the

message

message alleged to have been sent by the second appellant.

On the other hand, Sibisi could hardly have been mistaken about the main features of the evidence, i.e., whether he did in fact visit the second appellant, and whether he was given some message to take to Zulu about a firearm. The defects in Sibisi's evidence are not sufficient, in my view, to justify any clear conclusion that he must have been lying. They are consistent with a version given by an honest but somewhat muddled witness. The fact that these defects exist must nevertheless be taken into account when assessing the weight, if any, to be attached to his evidence. He was also a witness to be treated with caution.

The final evidence linking the second appellant

with

with the offence related to points pointed out by him.

The evidence here is that the appellant positioned a car at point D on Exhibit E, which is roughly where the deceased's car was found after the shooting, and that he indicated a point on the road on which the first appellant was alleged to have picked up Zulu and the second appellant, but some distance from the point indicated by Zulu and the first appellant. Judging from the photographs, the distance must have been of the order of 30 to 50 metres.

The evidence against the second appellant thus consisted of somewhat suspect evidence by Zulu, corroborated to some extent by Sibisi. Sibisi's evidence, if accepted, would tend to confirm that Zulu and the second appellant were jointly involved in some enterprise which involved a firearm.

Sibisi

Sibisi was, however, also unsatisfactory. Further confirmation was offered by the pointing out of the scene of the murder, and of a point on the road near to where Zulu and the first appellant said that the latter had picked up Zulu and the second appellant.

How did the second appellant answer this case?

His evidence consisted of a series of denials - he denied all knowledge of the killing, he denied pointing out any spot to the police and he denied having been visited by Sibisi. The court a quo specifically rejected the evidence of the second appellant concerning the pointing out, and the appellant's counsel has not contended that this finding was wrong. The court a quo also accepted Sibisi's evidence in preference

to

to that of the second appellant, and in my view sufficient grounds have not been shown to entitle us to interfere with this finding. Although the trial court did not advert expressly to the appellant's credibility save in these two respects, it is a clear inference that, having found the appellant to have been a liar in these two vital respects, the court was not prepared to accord any weight to his bare denial of complicity in the killing. At the end of the case the position therefore was that the second appellant was implicated by the rather unsatisfactory evidence of Zulu and Sibisi, and by his own acts of pointing out. This case was not overwhelmingly strong, but the absence of any acceptable evidence by the appellant to be placed in the scale against

against it leads ineluctably, in my view, to the conclusion that the court a quo was entitled to consider that the cautionary rule regarding the evidence of an accomplice had been satisfied in regard to Zulu.

Finally Mrs. Borchers contended that the court a quo had erred in accepting the evidence of Zulu despite the conflict between his evidence and the confession by the first appellant. Technically the first appellant's confession was admissible as evidence only against himself: it was not admissible as evidence for or against the second appellant; and this was how the trial court treated it. But apart from technicalities, I cannot accept that the confession cast any doubt on Zulu's evidence. The confession confirmed that the murder

murder had taken place substantially in the manner described by Zulu, and it confirmed the second appellant's role in the murder. The main difference between the contents of the confession and Zulu's evidence was whether the deceased was shot inside or outside the car. As far as this conflict is concerned I have already indicated that the objective evidence and probabilities support Zulu's version. This conclusion would tend also to bolster Zulu's version as to how the deceased was taken from Dube to Nancefield, a matter on which there also was a discrepancy between Zulu's evidence and the confession. But even if one were to assume that there were no intrinsic grounds for preferring Zulu's evidence on this point, I cannot agree that Zulu's version

is

is to be doubted merely because it is contradicted by an unsworn statement made extra-curially and repudiated on oath at the trial by the person who made it.

My overall conclusion consequently is that the trial court cannot be faulted for the way in which it dealt with the evidence concerning the second appellant, and that no grounds have been shown for upsetting its conclusion. It follows that the conviction for murder must stand. As in the case of the first appellant, no independent argument was addressed against the finding that no extenuating circumstances were present, or against the conviction and sentence for the unlawful possession of ammunition. The appeal of the second appellant must also be dismissed.

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In the result the appeals of both appellants
are dismissed.

E M GROSSKOPF, JA

SMALBERGER, JA } Concur
STEYN, JA }