

MAKHOSONKE GEORGE MYAKA

APPELLANT

and

THE STATE

RESPONDENT

JUDGMENT BY:

NESTADT, JA

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between

MAKHOSONKE GEORGE MYAKA

APPELLANT

and

THE STATE

RESPONDENT

CORAM: GROSSKOPF, NESTADT et KUMLEBEN JJA

DATE HEARD: 13 MAY 1988

DATE DELIVERED: 23 MAY 1988

J U D G M E N T

NESTADT, JA:

At about 6 p m on Sunday 21 September

1986/

1986 Martha Ngwenya, aged about 50, was stabbed eight times. The attack on her took place in a street in Killarney, a residential suburb of Johannesburg. She died almost instantly from two of the injuries sustained. The one was a nine centimetre wound over the anterior aspect of the neck. It severed the carotid artery, the jugular vein, the trachea and the oesophagus. The other was a three centimetre wound in the left chest. It penetrated the left lung and pulmonary artery.

Deceased's death led to the trial of appellant before WEYERS J and assessors in the Witwatersrand Local Division on a charge of murder.

The/

The State case was that he was her assailant.

Reliance was placed, in this regard, on the evidence of two eye witnesses to the attack on her.

In support of his plea of not guilty, appellant denied that it was he who killed deceased. He

testified that he was not present when she met her

death. The trial court, by a majority (one assessor

dissented), for reasons which will appear, rejected

appellant's alibi defence. He was, accordingly, found

guilty of murder. No extenuating circumstances having

been proved, he was sentenced to death. This is an

appeal, with the leave of WEYERS J, against the con-

viction (only).

The/

The following was not in dispute.

Appellant, Mhlabanzime Gcwabase, Mjaheni Gumede and Sam Myaka (a brother of appellant) worked and lived at various apartment blocks in Killarney. They knew each other. In particular, Gcwabase and Gumede had known appellant for a number of years. They also knew the deceased. She was the girlfriend of Felize Ngubane, a co-worker of theirs. On the day in question the four of them (i e appellant, Gcwabase, Gumede and Myaka) proceeded to Jeppe, a suburb some distance away from Killarney. They returned at about 5 p m. They sat drinking liquor in the yard of the building where Gcwabase was employed. At about 6 p m Myaka

left/

left. He walked down the road in front of the flats.

He was followed almost immediately by the other three.

It is not clear where the others were going, but Gcwabase

was making for a nearby place where he was intending to

sell the five litres of liquor that he was carrying in

a container. It was now after sunset and in the words

of one witness, "getting dark". But there was, so it

would seem, still sufficient natural light to see fairly

well. As Myaka proceeded along the road he came across

the deceased walking towards him. They passed each other

and he went on his way. Shortly afterwards, Gcwabase

and Gumede met deceased. Whether, at this stage,

appellant was also present and what then happened is,

as/

as will be seen, in dispute.

According to Gcwabase and Gumede, who both gave evidence for the State, appellant was with them when they met deceased coming up the road. Gcwabase described what then happened as follows. Deceased asked him for some liquor. He poured her a small container-full which he gave her. She paid him 50 cents for it. Whilst she was drinking it, he, apparently fearful of being seen publicly selling liquor, went and secluded himself behind some bushes adjoining the road. This was about six to ten paces away from where appellant, Gumede and deceased were (still in the road). He next heard the deceased screaming. He looked up to

see/

see Gumede running away down the hill. He also noticed appellant "pressing" deceased down on the surface of the road next to the one pavement. He emerged from his hiding place and went to appellant. Appellant was bending over deceased. He was "cutting" her neck. He had an "object" in his hand which Gcwabase described as a knife, though he immediately added that he did not see it properly. He asked appellant what had happened. Appellant's reply was that "he had finished her off". The witness then immediately ran off in the same direction as Gumede.

Gumede's evidence was to similar effect save that he was able, in certain respects, to

describe/

describe what happened in more detail. He stated

that whilst deceased was drinking the liquor supplied

to her by Gwabase, appellant "hit her in the chest".

He had a handkerchief wrapped around his hand. Initially,

he could not see what was in appellant's hand. Appellant

and deceased grabbed each other. Deceased fell.

Appellant "pressed" her to the ground. She screamed

that he should not kill her. He then saw that appellant

had a knife. At this stage he, Gumede, ran away. In

the course of doing so, he saw Gwabase following him

from behind.

Appellant's version was, as already

indicated, a denial that it was he who killed deceased.

He testified that on leaving the place where they had

been/

been drinking, Gcwabase and Gumede went ahead of him.

He did not follow them. Instead, he proceeded on his own along a different route to a cafe in the vicinity.

There he purchased some food. He then returned to his place of work. He never saw the deceased that day.

It was therefore not he who killed her.

On the State evidence, appellant was correctly convicted. The killing of deceased was clearly unlawful. And it is to be inferred that it was intentional (in the form of dolus directus). The question that faced the trial court, however, was whether the State had established that it was appellant who committed the crime and that his version was therefore false. This involved a credibility issue not

in/

in the sense of whether the observations of the State witnesses were reliable, but whether their identification of appellant, as deceased's assailant, was honest. There can be no question of them having been genuinely mistaken. They both knew appellant well. They had been with him most of the day. And there was adequate opportunity for them to observe him. Their evidence that it was appellant who killed deceased was thus either the truth or a deliberate fabrication. The majority view of the trial court was that it was the former.

Before us this finding was attacked on behalf of appellant on a number of grounds.

The/

The evidence of Gcwabase and Gumede was subjected to a detailed criticism on the strength of which it was submitted that they should have been held to have been unsatisfactory witnesses. This was not the majority view of the trial court. It was impressed by Gumede and, though alive to certain unsatisfactory features of Gcwabase's evidence, regarded him as reliable on the vital aspects of the case. In my opinion, there is no warrant for differing from the trial court. Myaka (who was a defence witness) alleged that Gcwabase had told him that he (Gcwabase) had not witnessed deceased's killing. But Gcwabase (on being recalled) denied this. Mrs Trim, for appellant, understandably did not pursue the suggestion, which/

which appellant had made in his evidence, that by reason of certain faction fights which had taken place in 1974 between members of his and the witnesses' families, Gcwabase and Gumedē had a motive to falsely implicate him in the murder. On the contrary, it is apparent that they were on good terms with appellant. This perhaps explains the impression that one gains from a reading of their evidence that they were honest witnesses who did not seek to exaggerate the case against appellant. Their failure to go to the assistance of the deceased, or to report what they had witnessed to the police (or even to Ngubane), whilst to be condemned, was rightly rejected by WEYERS J as a factor which adversely/

adversely affected their credibility. It is apparent that they did not want to become involved in what had happened; literally and figuratively they wished to distance themselves from the occurrence. Equally, Gcwabase's conduct in proceeding, after he left the scene of the murder, to a nearby spot where he sold his liquor, though suggesting indifference, is not inconsistent with him having witnessed what he says he did.

There was no real conflict, as was suggested, between Gcwabase's description of how appellant was cutting deceased's throat and the opinion of the doctor, who carried out the post-mortem examination of deceased, as to how the injury to the throat/

throat was probably caused. Equally, the fact that Gumede only saw appellant stab deceased twice (whereas, as indicated, there were a number of other stab wounds on her body) cannot avail appellant. Gumede did not purport to have witnessed the whole assault on deceased. No doubt Gcwabase's account of a previous incident (which took place about six months before deceased's murder) when deceased threw a bottle at appellant, thereby injuring him, was confusing and contradictory. But, as I have said, WEYERS J did not overlook this. It was, in fact, the reason for his qualified acceptance of this witness' evidence.

It is true that he and Gumede contradicted each other in certain respects and that Gcwabase's evidence in particular also differs

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from that of Myaka. I do not propose to detail what these contradictions and differences are. Suffice it to say that in my opinion, to the extent that they are conflicts, not only are they understandable in the circumstances, but they are peripheral to the central issue of whether it was appellant who killed deceased.

On this point, as I have said, Gcwabase and Gumede are ad idem. Their version is, moreover, supported by an observation of Myaka. Contrary to what Ngubane sought to suggest, he said that, as he proceeded along the road, he saw Gcwabase and Gumede and appellant following him. This is hardly consistent with appellant's evidence. I read it to mean that

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at no stage after he, Gcwabase and Gumede left the yard in Killarney, was he walking with them.

Appellant was found not to be a good witness.

It may be, and I am prepared to so assume, that some of the reasons that WEYERS J gives for this assessment are not sound and that his approach was an over-critical one in this regard. Furthermore, the learned judge would appear to have accepted Ngubane's testimony (he gave evidence for the State) that, on the conclusion of the bottle-throwing incident, appellant threatened that he would "get" deceased. I do not think any fault can be found with this. Appellant did not effectively deny what he was supposed to have said to the deceased on this occasion.

But/

But, insofar as WEYERS J regarded the assault on appellant as supplying a motive for him to murder deceased, he may have erred. In view of the evidence that, subsequent to the incident, deceased and appellant appeared to be friendly towards each other, Mr Hayes, for the State, did not argue that a motive was established.

Even so, reviewing the cumulative effect of the considerations to which I earlier referred, I am satisfied that appellant's alibi defence was correctly rejected. It was not necessary for the State to prove that appellant had a motive to kill deceased. It sufficed if it adduced acceptable evidence that it was indeed appellant who murdered her. This it did in the form of two

eye/.....

eye witnesses. Gumedde's evidence to this effect, for good reason, impressed the trial court. It was corroborated by that of Gcwabase. There is no reason to doubt that they, in fact, witnessed the actual murder. Neither of these witnesses, whose version is supported by Myaka, had any ostensible motive to conspire to falsely accuse appellant of having committed it. It was never suggested, and there is no reason to believe, that one or both of them, might have been the murderer or that he might have been a different person altogether whose identity they did not wish to disclose. Nor is there any basis at all for the view of the dissenting assessor that

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the attack on deceased might have been perpetrated
by Ngubane's wife (possibly at some place other than
that testified to by the State witnesses).

The appeal is accordingly dismissed.

NESTADT, JA

GROSSKOPF,	JA	)	
		)	
		)	CONCUR
		)	
KUMLEBEN,	JA	)	