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IN THE SUPREME COURT OF SOUTH AFRICA

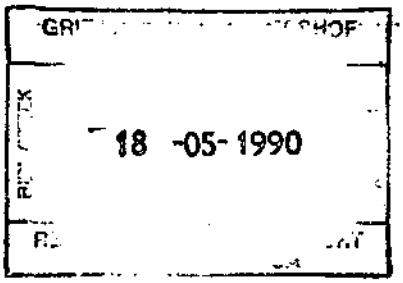
(APPELLATE DIVISION)

CASE NO. 545/89

In the matter of:

VUKANI SIPHIWE NGCOBO	First Appellant
NKOSINATHI MAHLABA	Second Appellant
SOLOMON LUTHULI	Third Appellant
NKOSINATHI ZUMA	Fourth Appellant

and



THE STATE Respondent

Coram: BOTHA et KUMLEBEN JJA; GOLDSTONE AJA

Date heard: 8 May 1990

Date delivered: 17 May 1990

J U D G M E N T

GOLDSTONE AJA

The four appellants, as accused numbers 1,2,3 and 5, respectively, together with a fifth accused, were charged with murder in the Natal Provincial Division. They were tried by Combrink J sitting with two assessors. The fifth accused (no 4 in the Court below) was found not guilty and discharged. The appellants were found guilty of having murdered one Ferrington Mpumlelo Shange (the deceased). In the case of the first, second and third appellants extenuating circumstances were found to be present. The first and third appellants were each sentenced to twelve years' imprisonment. The second appellant was sentenced to six years' imprisonment. In the

case of the fourth appellant no extenuating circumstances were found and he was sentenced to death. The appellants now appeal against their convictions and sentences.

It was not in issue between the State and the appellants that at the time of the murder of the deceased, there was a school boycott in force at the Mpolweni Secondary School. Pupils refused to attend school or write examinations. An organization called the Mpolweni Youth Organization was active at the time, taking an interest in issues such as education and other community facilities such as clinics, water supply, roads and transport. The first, third and fourth appellants testified that they were members of the organization, as was the deceased. The first and third State witnesses, James Masikane and Mduduzi Zondi, respectively, claimed they knew of the organization, were not members of it and had never attended its meetings. Mpumalane Zwane, the second witness for the State, stated that

he was not a member but that he had an interest in the organization and attended certain of its meetings.

On the evening of 28 October 1987, a meeting of the Mpolweni Organization took place. It was held in a grazing camp adjoining the Mpolweni area in the district of New Hanover. The circumstances in which the deceased came to be at this meeting and the identity of his assailants are the essential facts in dispute. It is common cause that the deceased was suddenly struck in the chest with a weapon (knife or bush knife) by a person present at the meeting. The deceased fled, was pursued, and thereafter was again stabbed, 19 times in all, in the chest, back, neck and head.

Before considering the manner in which the various participants came to attend the meeting, it will be convenient to consider

the respective versions of the State and of the defence concerning the events at the meeting itself. The State's version is the following. The deceased was brought to the meeting together with the persons who attended it. He was questioned at the meeting by fourth appellant. At some stage during this intercourse, fourth appellant turned towards the deceased, who was sitting next to him, and suddenly stabbed him in the chest with a knife. The deceased thereupon cried out, leapt up and ran away. Fourth appellant then said "I have struck him" and exhorted the group to follow the deceased and do the same. According to Masikane, first, second and third appellants pursued the deceased. According to Zwane, he saw second and fourth appellants pursue the deceased. The deceased eventually fell to the ground and his pursuers caught up with him. He was then assaulted by first and second appellants who took turns in striking him with a cane knife. Then fourth appellant handed a knife around, exhorting every member of the group also to stab the deceased. Fourth appellant

then delivered the final blow. The witnesses were not agreed as to whether, at that point, the deceased was already dead or not.

The appellants' version, on the other hand, is the following. The three appellants who testified, viz nos 1,2 and 4, said that they had each received a message to attend the meeting. Fourth appellant went to the meeting in the company of two friends who had informed him thereof. First and second appellants arrived independently after the commencement of the meeting. The meeting had been called to discuss the school boycott and the situation regarding expelled and suspended pupils. During the course of the meeting, James Masikane arrived accompanied by Aaron Mfeka and Dumo Ndlovu. Masikane was drunk. He was holding the deceased by the scruff of his neck. According to fourth appellant the deceased was bleeding around the nose and mouth. Masikane said "Here is the traitor

who is still going to school". Msizi Kheswa then leapt up and struck the deceased on the chest with a bush knife. The deceased cried out and fled. Masikane, Mfeka Ndlovu and Kheswa pursued the deceased. The rest of the group followed. They came upon the deceased lying on his back on the ground. Masikane was striking the deceased with a cane knife. First appellant grabbed hold of Masikane and tried to pull him away. Masikane broke loose and returned to the deceased. He said he wanted to "finish this traitor and others like him". First appellant walked away. He later met up with the second and fourth appellants and they went home.

I turn now to consider and evaluate other aspects of the evidence led on behalf of the State. James Masikane testified that he and Aaron Mfeka became involved with the group when it approached them as they were standing by the roadside engaged in a conversation. Masikane suggested to Mfeka that they

should flee. Mfeka disagreed because the group was already upon them. Masikane was afraid of them because they were armed. Fourth appellant was part of the group. He approached Masikane and Mfeka and told them to come with the group. Masikane made an excuse that he had to go and visit someone at Ngubane's kraal and he left the group. His failure to flee at this, and indeed at any later stage, was not satisfactorily explained by him. He explained only under cross-examination that he feared being assaulted by the group and this was the reason why he did not attempt to leave. First and second appellants subsequently came to fetch him from Ngubane's kraal, whereupon they rejoined the group and proceeded to the deceased's house. Masikane added, under cross-examination, that he had agreed to go with first and second appellants only because second appellant had hit him with a bush knife. On the way to the deceased's house, fourth appellant said that they were going to kill the deceased. Masikane suggested that they should not kill him and that

if they were angry with him they should talk to him and hit him instead of killing him. The group eventually agreed to these suggestions. This I find highly improbable. On reaching the deceased's house, fourth appellant instructed Masikane, Mfeka and Ndlovu to go and call the deceased. At the point when the deceased was being stabbed as he lay on the ground Masikane said that he, too, was instructed by fourth appellant to stab the deceased. When he feigned a blow, the crowd protested and he then stabbed the deceased "slightly" in the stomach. The Court a quo found all of these aspects to constitute an attempt by Masikane to minimize his role in the proceedings. The effect of his testimony, however, goes further than that. His version lacks credibility and he comes across as a wholly unreliable witness. In my judgment it would be dangerous to attach any weight at all to his evidence.

Mpumalane Zwane, the second witness for the State, also gave an unsatisfactory account of the events. He testified that

he was standing in the road together with Masikane and Mfeka when they were approached by the group. Zwane could not explain why Masikane had omitted to mention his presence. His version of what happened at Ngubane's kraal is very different to that of Masikane. He did not hear Masikane's suggestion, on seeing the group, that they should flee. He did not hear Masikane's pleas to fourth appellant not to kill the deceased. After the deceased fled, Zwane claims that he followed him for no particular reason. This is unconvincing. Zwane further testified that Masikane feigned blows on the deceased's body, yet he denies that there was any response to this from those present. This does not accord with the version of Masikane to which reference has already been made.

Under cross-examination, Zwane came across as a dishonest and lying witness. He testified that he was told by police that unless he agreed to their version he would also be charged

with the offence, that he would be assaulted and that he would be detained for a long time. Zwane claimed he had made a mistake when he said in his examination in chief that he had been assaulted by the police. He said that other prisoners had been assaulted. The police then gave him a written statement recording the story with which they wished him to agree and threatened him with assault if he did not sign it. He signed it and claimed it was the truth. However, he added that he would in any event have signed the statement had it contained false information. Masikane and Zwane were friends. Masikane returned to Zwane's cell after being interrogated. They confided in each other. Masikane told Zwane what he had told the police but Zwane denied complicity. Zwane further testified that the police regarded fourth appellant as a trouble maker and were eager to blame him for killing the deceased. In the light of all these features no reliance at all should have been placed on the testimony of this witness.

Mduduzi Zondi's evidence was also unsatisfactory in several respects. His explanation of how he joined the group is highly improbable and unconvincing. He explained that he was waiting at the Mantshali bus stop on an errand for his mother. On meeting the group, which was quite coincidental, he abandoned his chore and chose to accompany them. Zondi was not interested in the purpose of the group's mission, who they were, or where they were going. It is hard to understand why he would have joined them. Indeed, he could not explain that conduct.

Zondi also testified that he initially saw the first and second appellants at the bus stop where he was met by the group. Subsequently, he stated that the first time he saw second appellant was when the deceased was being attacked whilst lying on the ground.

Zondi also testified, only under cross-examination, that he did not believe fourth appellant was serious about killing the deceased. This was clearly an afterthought. One gains

the impression that he was unperturbed at the prospect of assaulting the deceased. He stated that he was only 'suspicious' that the deceased might be killed and for that reason he did not leave the group. Zondi spent some time in the same cell as Masikane and Zwane. He said that there was no discussion between them concerning the events. This, too, is highly improbable.

Throughout his testimony, Zondi was consistently unable to give details of what he saw and heard, save where the accused were concerned. Furthermore, he could not remember a single item that was discussed at the meeting. His selectiveness in recalling these important aspects only emphasizes his mendacity as a witness.

The Court a quo pointed out that there were several

improbabilities in the defence version. First, it was not clear why Masikane, Mfeka and Ndlovu would want to kill the deceased in public. This consideration, however, applies equally to the State's version. The Court a quo also found the "transition from a peaceful normal attendance by Mzizi and Bongani of a meeting to a vengeful pursuit of the deceased improbable". This consideration is counter-balanced by the improbability in the State version that fourth appellant would suddenly stab the deceased in the middle of a conversation and then move the entire group to pursue and kill him. A further aspect that the Court a quo found unsatisfactory was the manner in which the appellants reacted on finding Masikane stabbing the deceased. Fourth appellant did not try to assist first appellant pull Masikane away, and both first and fourth appellants left the scene very soon after first appellant's unsuccessful attempt. In the light of the fact that Masikane was alleged to have been drunk and armed, and that he had threatened to kill "the traitor and others like him", it appears

to me that the behaviour of the appellants is not as improbable as the Court a quo held.

The Court a quo correctly held that the physical damage to the shirt and jersey of the deceased was consistent with the evidence of the State witnesses and probably inconsistent with the version of the appellants. Due weight is to be given to this consideration. However, having regard to the defects in the State case it cannot be regarded as decisive.

In his judgment, the learned Judge a quo recognised that as the State witnesses, Masikane, Zwane and Zondi, were accomplices, their evidence was to be approached with caution. In R v Ncanana 1948 (4) SA 399 at 405 406, SCHREINER JA said that:

"... the trier of fact should warn himself ... of

the special danger of convicting on the evidence of an accomplice; for an accomplice is not merely a witness with a possible motive to tell lies about an innocent accused but is such a person peculiarly equipped, by reason of his inside knowledge of the crime, to convince the unwary that his lies are the truth.

.....

The risk that he may be convicted wrongly... will be reduced, and in the most satisfactory way, if there is corroboration implicating the accused. But it will also be reduced if the accused shows himself to be a lying witness or if he does not give evidence to contradict or explain that of the accomplice. And it will also be reduced, even in the absence of these features, if the trier of fact understands the peculiar danger inherent in accomplice evidence and appreciates that acceptance of the

accomplice and rejection of the accused is, in the circumstances, only permissible where the merits of the former and the demerits of the latter are beyond question."

In the present case the peculiar danger referred to in that passage was especially present. The State witnesses clearly had inside knowledge concerning the events in question. Masikane was alleged by the appellants to have played a major role in the attack on the deceased. Thus the accomplices had the motive for conspiring against the appellants and the opportunity to do so. There was no corroborating evidence implicating the appellants. Although the Court a quo correctly found that those of the appellants who gave evidence were unsatisfactory witnesses, the merits of the State witnesses and the demerits of the appellants were anything but beyond question. As was pointed out by MILLER JA in S v Dladla 1980

(1) SA 526 (A) at 529 G - H:

> "In Ncanana's case ibid it was recognised by SCHREINER JA that, although the risk attaching to accomplice evidence would best and most effectively be reduced by corroboration implicating the accused in the crime, it could also be effectively reduced if the accused failed to give evidence to contradict or explain that of the accomplice or if the accused was shown to be a lying witness. But this necessarily presupposes that the evidence of the accomplice implicating the accused is at least worthy of belief."

In my opinion, for the reasons already given, the evidence of the three accomplices, in material respects, was patently dishonest and unreliable. The learned Judge a quo said of it that

"the evidence of the State witnesses certainly cannot be said to be models of clarity".

In my judgment, this understates the position to the extent that it amounts to a misdirection.

In the course of an able argument, Mr Lotz, who appeared for the State, submitted with some persuasion that the version of the State witnesses may indeed have been more probable than that of the appellants. Even if that is so, having regard to the demerits of the witnesses who testified to that version, it would be unwarranted and dangerous to convict the appellants on the strength thereof. Those probabilities were not such as to establish that the version of the State was true beyond a reasonable doubt. In short, the State cannot be said to have discharged the onus of proof resting upon it.

The appeal is upheld. The convictions and sentences are set aside.

R J GOLDSTONE

BOTHA JA) CONCUR

KUMLEBEN JA)