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IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

NELSON NHINHI BOSS FIRST APPELLANT

SKUMBUZO JANTJIES SECOND APPELLANT

MCEDISI BOSS THIRD APPELLANT

and

THE STATE RESPONDENT

CORAM : E M GROSSKOPF, KUMLEBEN JJA
et NIENABER AJA

HEARD : 25 MAY 1990

DELIVERED : 30 MAY 1990

J U D G M E N T

KUMLEBEN JA/...

KUMLEBEN JA:

The three appellants initially stood trial with a fourth accused in the South Eastern Cape Local Division of the Supreme Court on two counts: murder and kidnapping. During the trial accused no 1 absconded and the case proceeded against the three appellants, to whom I shall refer as accused nos 2, 3 and 4 respectively. Each was found guilty on both counts. The court found extenuating circumstances in the case of accused no 4 but not in the case of the other two, who were sentenced to death. On the murder count accused no 4 was sentenced to 15 years' imprisonment. On the other count, that of kidnapping, each received a sentence of 5 years' imprisonment. Leave to appeal against their convictions and sentences was refused. This court, however, granted leave to accused nos 2 and 3 to appeal against their convictions and sentences on both counts and to accused no 4 to

appeal against his conviction on each count.

The charges arose from the kidnapping of Themba Mtshiya at Kwa-Nobuhle township, Uitenhage district, on Sunday 30 November 1986 and his subsequent death. On that day a local boxing hero, Wonderboy Mene, had won a match and a celebratory procession ensued. It proceeded along Huna street, rounded the corner of this street and Lupuwana street and continued along the latter. The State witness Sizakele was one of those celebrating in this manner. Shortly after the crowd had turned down Lupuwana street, the deceased was accosted at the corner of those two streets and forcibly placed in the boot of a car, which drove off with him. The next morning his burnt body was found at a dumping site on the outskirts of the township.

The State case implicating the accused in the kidnapping, and hence the murder, of the deceased depends upon the evidence of the sole eye witness, the youngster Sizakele, who was 14 years old at the time of the incident and 17 years old when giving evidence. He was a nephew of the deceased.

He explained how he came to witness the kidnapping. As the procession reached the corner of those two streets, he noticed his uncle standing there. He stopped to have a word with him and then ran off to catch up with the procession. Soon afterwards a young lad made a report to him on the strength of which he ran back to that corner. There he saw the deceased being abducted by 5 men, one Naponi Boss and the four accused. Naponi Boss opened the lid of the boot of a motor car and the accused placed their victim in the boot. He remembers that accused nos 3 and 4 each held

a leg, whilst accused no 1 held him by the shoulder and accused no 2 held his left forearm. After the car had driven off with the five assailants in it, he reported the matter post haste to his grandmother, the mother of the deceased.

Accused nos 1, 2, 4 and Naponi Boss were brothers and well known to Sizakele. They stayed not far from his home. At that time he knew accused no 3 by sight and only later found out his name. He is in fact a cousin of the other accused but Sizakele said at the trial that he was unaware of this. The incident took place at dusk (at about 7 p.m.) directly under a street light, which was burning at the time. Sizakele saw what took place from another corner of the street at an estimated distance of 10 paces.

The trial court (Cooper J sitting with two

assessors) appreciated that Sizakele's evidence was the corner-stone of the State case; that special caution is called for in the assessment and acceptance of the evidence of a young person; and that identification may be faulty, though not deliberately false. Mindful of these considerations, the court carefully evaluated his evidence and concluded that:

"Sizakele was an impressive witness who gave his evidence unhesitatingly, and in a forthright manner. His evidence carries conviction. He created the impression of an intelligent and honest witness. There were no contradictions in his evidence on any material aspect, and there were no improbabilities in his evidence. Sizakele readily admitted that he felt bitter towards the accused and that his uncle's death had caused him hurt. At the same time he did not claim that the accused had actually injured his uncle or that his uncle had sustained any visible injuries. Although he was invited by defence counsel to say that the accused were responsible for his uncle's death, he declined to say so because as he said he was not present at the time of his uncle's death. This is a good illustration of Sizakele's intelligence and his ability to express an objective view.

At the time Sizakele was testifying he knew accused No. 3's first name was Skumbuzo. Nevertheless he testified that on 30 November 1986 he did not know accused No. 3's name but only knew him by his facial features. This is another indication of Sizakele's candour and his readiness to make an admission favourable to the accused. Likewise he agreed that accused No. 4 was a sick person and that there was a customary union (healing ceremony) at accused No. 4's place on the day of the deceased's abduction."

These favourable comments on his evidence are fully borne out by the record. Any reasonable possibility of his being mistaken can be confidently discounted. It is of note that he said that he had recognised each of them as they placed the deceased in the boot at a time when he was viewing them side-on. As they entered the car he observed them full-face. This served to confirm his identification of them. An observant person, as this witness was shown to be, seeing persons known to him loading a person into the boot of the car under a street lamp at a distance of about ten paces, could

hardly be mistaken about their identity. A further factor adding accuracy and credence to his evidence is that, as I have said, at the time he did not know that accused no 3 was related to the others. It would have been a startling coincidence for him falsely or mistakenly to have included a person who turned out to be related to all the others involved.

Mr Skweyiya, who with Mr Majiedt appeared on behalf of the appellants, argued in the alternative that Sizakele had been deliberately dishonest in implicating the accused. Counsel suggested a twofold motive: past trouble between the two families and the fact that a relative of Sizakele, belonging to the Ama-Africa group, had been chased from the township by the Comrades, a gang or faction of which the accused were members or supporters. Sizakele convincingly denied that he knew of any such problems between the two

families or factions. The evidence for the defence certainly did not point to any such motive: in fact accused no 2 and his mother said that there was no such animosity between the two families. There is no basis for concluding that Sizakele had reason to implicate them falsely.

The accused countered the evidence of this eye witness by relying on alibis.

It was common cause that accused no 4 was a tuberculosis sufferer at the time. In the hopes of curing him, a healing ceremony, conducted according to Xhosa custom, was held at his home. The evidence was that this ceremony began on the Saturday (29 November 1986) and continued until the Monday morning. Two of his brothers, accused nos 1 and 2, were at the ceremony entertaining the guests with food and liquor. Accused

no 1 was, however, not in constant attendance. It was said that accused no 2 was appointed by his father to act as host and could therefore not have left the ceremony at any stage until it was over. Whether or not he did so would depend on how conscientiously he fulfilled this task. This, however, is by the way. The essence of the alibi was that according to custom the patient is required to remain in the hut throughout the ceremony with his mother, or at times a locum tenens, present with him all the time. The mother and accused no 4 both said that he never left the hut and that it would be quite contrary to belief and custom for him to have done so. (The mother added that he was in any event too ill to have been involved in the crime as alleged, but other evidence convincingly refutes this.) An anthropologist, Mr Manona, was called by the defence to give expert evidence on this ceremony. He confirmed that the patient should be present throughout

the ceremony itself but added that it usually lasts for only a day, although guests might remain until the refreshments, (or, one may add, until they themselves) were exhausted. On this evidence, as a probability, the ceremony would have ended by the Sunday evening. Be that as it may, this evidence which seeks to place accused no 4 in the hut at the time of the kidnapping, depends upon the credibility of accused nos 2 and 3 and their mother, Mrs Eveline Boss. The trial court closely examined the evidence of these witnesses and found it to be unsatisfactory in a number of material respects. It would serve no purpose for me to repeat in detail the criticism of their evidence or the cogent reasons given for its rejection, particularly since Mr Skweyiya understandably did not contend that their evidence was without serious flaws.

The alibi of accused no 3 was of a different

kind. That afternoon, according to him, he drank at a shebeen and returned home to watch the boxing match on television. Whilst doing so he continued drinking and when it was over at about 7 p.m. he fell asleep. His mother, who said she had been to the healing ceremony in the morning, was called to confirm his evidence. She said that he did watch the boxing match and was by the end of it so intoxicated that he was just capable of reaching a bed on which to pass out. What has been said about the other alibi witnesses applies equally - if not to a greater extent - to these two persons. Their evidence was unsatisfactory in a number of material respects. Accused no 3, for instance, said that at the time of his arrest in March 1987 he had made a statement to the investigating officer, Lt. Kilian, in which he had disclosed his alibi as testified to in court. Kilian was recalled and produced a document on which what this

accused had said was recorded. It reads: "Ek weet nie waarvan u praat nie, ek was nie by nie." This answer, on the accused's case, was accurate and he was of course not obliged to say more. The fact remains that in the witness-box he falsely claimed to have disclosed his alibi. (Kilian's evidence in this regard was not challenged.) His mother said that when she visited her son after his arrest, he simply said that he had been told that he was supposed to know something about the deceased's death. Had she been able to support his alibi, he would most certainly have raised the matter in more detail with her. Moreover, during the court hearing they were staying together in Grahamstown and over that period, according to her, no discussion between the two of them about the case ever took place. Under cross-examination she gave a detailed account of various events which in the nature of things could never have been remembered with that

degree of accuracy. As in the case of the other defence witnesses, there were ample grounds for rejecting the evidence of both these witnesses.

In the circumstances Mr Skweyiya's argument concentrated on the evidence of Sizakele and the court's approach to it. I can best deal with his argument - and I trust do it justice - by examining seriatim the points he raised in argument before us.

He first criticised the evidence of Sizakele - in fact imputed dishonesty to him - with reference to his inability to name the boy who spoke to him in Lupuwana street or the names of any of the onlookers, some of whom must also have seen the deceased being placed in the boot of the car. It was suggested that he deliberately refrained from doing so because, if traced, they would have refuted his evidence. This

could hardly apply to the young boy because there is no evidence that he returned to the scene. But, in any event, with Sizakele's attention understandably riveted on the abduction of his uncle, one would hardly expect him to have taken note of the names and faces of others who may have also witnessed it. There is no evidence on how many were present, where they were standing or how they reacted. What one does know is that as soon as the car left, Sizakele ran to report the matter to his grandmother rather than give attention to witnesses who would be in a position to corroborate him. Counsel also sought to make something of the fact that the accused were arrested some considerable time after the incident and after Sizakele, on his evidence, had identified them. This, it was suggested, tended to show that his identification was not immediate or genuine. But the investigating officer was not asked to explain this delay, for which there may have

been a number of plausible reasons. Finally, with reference to the quality of Sizakele's evidence, it was suggested that he might have had a motive for implicating them. But, as I have said, the evidence simply does not support this contention.

Mr Skweyiya next turned to criticise the judgment in certain respects. At its conclusion Cooper J said:

"Three factors militate against the defence case. Firstly, the failure to call Toto Jantjies who apparently was an eyewitness of the abduction, the failure to call the father of accused No. 2 and No. 4 who was in charge of the ceremony, and the failure to call the woman who is alleged to have kept watch over accused No. 4. Secondly, the failure of the accused to substantiate allegations of a feud made on their instructions. Thirdly, the failure of the accused to suggest any valid reason why Sizakele should falsely implicate them."

As to the first factor, it was submitted that the court was wrong in counting against the accused the failure

to call those three persons as witnesses. In the course of cross-examination it was stated on behalf of the defence that Toto Jantjies would be called to contradict the evidence of Sizakele. The court was therefore justified in commenting on the failure to do so. It is true that the accused, on whom no onus lay to prove their alibi, were under no duty to call more witnesses than were deemed necessary. But if the court's reference to the other two persons as potential witnesses is to be regarded as a misdirection, it is in the circumstances an unimportant one. It is clear from the judgment as a whole that the decision on the guilt of the accused was based primarily - in fact decisively - on the evidence of Sizakele and the poor showing of the accused and the defence witnesses. In the context of the judgment these three further factors mentioned were no more than a makeweight. (It was not suggested that the second or third ought not to have

into account.)

It was also submitted that the court was wrong in penalising the accused for not furnishing details of their alibi to the policemen at the earliest opportunity. Not so. The criticism as regards accused no 4 was of another kind, namely, that he initially said that he was in hospital that Sunday and this was proved false. Accused no 2 said that at the time of his arrest he had told Kilian that he was at home when the offences were committed and that he had signed a statement to that effect. This was refuted by Kilian and by a note (unsigned by the accused) which was handed in by this witness (exhibit Q). According to this exhibit this accused refused to make any statement. I have already referred to the evidence of accused no 3 in this regard.

In the course of counsel's argument it was said to be improbable that accused no 4, being a sickly person, would have taken part in the criminal venture that afternoon. But the evidence in no way indicates that this accused was not capable of walking about on that day or of assisting in the loading of the deceased into the boot by holding his one leg.

Finally, it was argued that the court attached undue weight to the fact that all five (the four accused and Naponi Boss) were related to each other. This is, however, a feature of obvious relevance and I find no indication that undue weight was given to it.

In the alternative, and on the basis that Sizakele was an honest witness, it was submitted that he may possibly have been mistaken in his

identification of accused no 3 because he was not well-known to him at the time. There is no substance in this contention. Sizakele had seen this person before and, as mentioned, it is significant that he is also a member of the Boss family.

In the result there are no good grounds for holding that the court a quo , in a thorough and well-reasoned judgment, was wrong in its conclusion on the facts.

On an acceptance of the facts as proved, counsel nevertheless argued that the accused ought not to have been convicted of murder. He relied on the fact that the deceased's burnt body was found only the next day and that there was no evidence as to what took place during the intervening period or any direct evidence indicating who was actually responsible for

his death. It was stressed that there was a great deal of civil disturbance and killing in that township at that time. It was reasonably possible, so it was submitted, that after the deceased had been released by his captors, some other person or persons could have killed him. I cannot agree. In the absence of any evidence from any of the accused or any other source, suggesting some other reason for the kidnapping, or disclosing at what stage and for what reason they released him, one can but conclude that their objective was to kill him and that it was attained. This is consistent with all the proved facts and the only reasonable inference to draw from them.

There is little that could be advanced in extenuation. Counsel in this context again referred to the possibility that there might have been a family dispute or that gang or political rivalry or dissension

might have been the reason for the killing. As I have pointed out, this is not borne out by the evidence and it is in any event doubtful whether these considerations, particularly the second, could be regarded as mitigating factors. We were referred to the quantity of liquor the accused was said to have consumed that day. But the evidence in this regard was unreliable and belied by their actions. There is no suggestion that they did not set about loading the deceased into the boot in a sober and workmanlike manner. The probabilities are that it was a planned kidnapping with a view to a murder of a most gruesome kind.

The appeal of all three appellants is dismissed.

M E Kumleben
M E KUMLEBEN
 JUDGE OF APPEAL

E M GROSSKOPF JA)
 NIENABER JA) - Agree