

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

CASE NO: 90/90

In the appeal of

EASTER NDWANYANA

APPELLANT

and

THE STATE

RESPONDENT

Coram: BOTHA, NESTADT JJA; GOLDSTONE AJA

Date heard: Tuesday 18 September 1990

Date delivered: Wednesday 26 September 1990

J U D G M E N T

GOLDSTONE AJA

The appellant, Easter Ndwanyana, appeared before Lategan J and two assessors in the Cape Provincial Division on a charge of murder. He was convicted and, no extenuating circumstances having been found, he was sentenced to death. The appellant was given leave by the learned Judge a quo to appeal against the sentence. He was refused leave to appeal against the conviction. In consequence of a petition directed to the Chief Justice, the appellant was also granted leave to appeal against his conviction.

On the evening of Saturday, 4 March 1989, Jonathan Cana (to whom I shall refer to as "the deceased") was a visitor at

the home of Jantjie Jonkers and Dinah Jonkers (to whom I shall refer as "Jonkers" and "Dinah" respectively). Also present were the Jonkers' daughter, Hannah, and their son-in-law, Freek Storm (to whom I shall refer to as "Storm"). The five of them were sitting in the yard outside the front of their house. Jonkers was playing on a guitar and they were having a sing-song. They had been drinking during the afternoon and they were in a jovial mood.

On behalf of the State, three eye-witnesses testified as to what occurred at approximately 20h15 on that day. The witnesses were Jonkers, Dinah and Storm. According to them, the appellant arrived and joined their group. He was known to Jonkers and Dinah as the son of their landlady, Miriam Ndwanyana. He had been seen briefly by Jonkers and Dinah on the previous Wednesday when he came to their house to seek directions to his mother's home. He was seen by them even more briefly

on the Thursday when he waited outside their house whilst his mother spoke to Dinah. Storm had not seen the appellant before the evening in question. A short while after the appellant joined the group, he stood up, walked to the wall of the house and urinated. The deceased remonstrated with him. The appellant responded by saying words to the effect that he was entitled to urinate there as it was his "mother's place". With that he approached the deceased and attacked him. The deceased received nine stab wounds. One of them penetrated his heart and was fatal.

The appellant pleaded not guilty. He denied that he was present at the scene of the murder. On the evening in question, so he testified, between 19h00 and 20h00 he went to visit his friend, Samuel Sithole. They drank wine and talked about their young days together. They went to a nearby café to purchase cigarettes after which they returned to Sithole's

home. When they had finished the wine, they set off for the house of the appellant's mother. On the way there they came across the appellant's mother who was returning home from the café. Sithole stayed with the appellant for a while.

When Sithole went home, appellant joined his girlfriend who was already in bed asleep. He did not go out again that night.

Sithole broadly corroborated the version of the appellant.

In a statement to the police, Sithole stated that the appellant had arrived at his home "omstreeks so`voor 9-uur". He explained that remark with reference to his having asked his sister the time when he and the appellant were leaving for the latter's house. She said it was "before 9 o'clock". The appellant's mother also testified on his behalf. Whilst she, too, corroborated the broad detail of the version of the appellant, she had problems in explaining a contradictory version contained in her statement to the police.

The learned Judge a quo correctly stated that the enquiry was whether the appellant's denial that he was present at the scene of the crime could reasonably possibly be true. That enquiry was to be approached, he said, having regard to the totality of the evidence. He found that the three State witnesses were simple but honest and that they supported each other with regard to the cardinal aspects of their evidence. He found that they had no motive to falsely implicate the appellant. He was particularly impressed with and attached much weight to the words alleged to have been uttered by the appellant to the effect that the house in question belonged to his mother. That evidence, if true, constituted strong evidence as to the identity of the appellant as the assailant.

Mr Saner, who appeared on behalf of the appellant, submitted that the identification of the appellant was less than reliable.

With reference to the evidence of the State witnesses he referred to the scant contact which two of them had with the appellant and to the fact that Storm had never previously set eyes on him. He pointed to the apparently poor eyesight of Dinah.

With regard thereto she said that:

"...ek kan iets naby my sien, maar nie vêr van my af nie..."

"...ek kan nou so h entjie sien, maar ek kan nie verder sien nie. Dit is net of my oë vaal is."

Counsel then referred to the poor light at the scene of the attack on the deceased. According to the three State witnesses it was dark at the time. The only source of light was a street lamp which was situated behind the house. The house itself caused a shadow to be cast over the area where the group was sitting and where the front gate was situated. On this issue

the learned Judge a quo said:

"Ons verstaan egter die situasie so dat vanweë
refleksie van die lig dit nie beteken dat dit binne-
in die omheining heeltemal stikdonker was nie."

There is no evidence at all on the record about reflected
light. In any event, there can be no doubt that the light
at the scene was bad.

There is a material discrepancy between the evidence of Jonkers
on the one hand and Storm and Dinah on the other as to whether
the assailant had hair on his head. According to the former,
his head was "kaalgeskeer", whereas the latter two witnesses
said that he had hair approximately 1cm in height.

Mr Saner referred us to contradictions concerning the events

which had preceded the arrival of the deceased on the scene.

Jonkers said that the group had sat together from 17h00 and had shared only a small bottle of wine. Each had then gone his or her way and they re-assembled after dark. Storm, on the other hand, said that they came together at 14h00 and shared a two litre can of wine between 14h00 and 15h00. They then sat around until 17h00 when they started singing to the accompaniment of the guitar. At no time, said Storm, did they part company. As regard the state of drunkenness of the participants in the sing-song, it is relevant that the alcohol content of the blood of the deceased was found to have been 0,37 grams per 100 millilitres. He must have been very drunk indeed. According to Jonkers, however,

"Hy was nie dronk gewees nie".

Storm said that the deceased was more under the influence

of alcohol than the rest of them.

In short, the position is that:

- (a) the light at the relevant time and place was poor;
- (b) the appellant was not well known to the three State witnesses;
- (c) there is a material difference between them as to whether the assailant had hair on his head;
- (d) there was a reluctance to admit that they or the deceased were drunk at the time;
- (e) there were material differences in their versions as to the events preceding the attack on the deceased.

In these circumstances I cannot agree with the following remarks made by the learned Judge a quo:

"Daar is wel kleinere verskille onderling tussen die drie getuies maar dit is in ons oordeel onbelangrike geskille wat n mens sal verwag wanneer drie baie ongesofistikeerde en eenvoudige mense soos hierdie gevra word om in herinnering te roep en te vertel presies wat ses maande gelede plaasgevind het. Desnieteenstande was ons beïndruk met die wyse waarop die verhaal wat hier ontvou het in wesentlike opsigte alles presies dieselfde was. Dit was asof drie foto's voor ons geplaas was, elkeen net uit n verskillende hoek geneem van wat daardie aand gebeur het."

The Court a quo failed to have regard to any of the five factors

summarised above. Apart from that, the trial Court does not appear to have warned itself of the need for caution in approaching evidence concerning identification. Indeed, counsel for the State referred us to the following passage from the judgment of Holmes JA in S v Mthetwa 1972 (3) SA 766 (A) at 768 A - C:

"Because of the fallibility of human observation, evidence of identification is approached by the Courts with some caution. It is not enough for the identifying witness to be honest: the reliability of his observation must also be tested. This depends on various factors, such as lighting, visibility, and eyesight; the proximity of the witness; his opportunity for observation, both as to time and situation; the extent of his prior knowledge of the accused; the mobility of the scene; corroboration; suggestibility; the accused's face, voice, build, gait,

and dress; the result of identification parades, if any; and, of course, the evidence by or on behalf of the accused. The list is not exhaustive. These factors, or such of them as are applicable in a particular case, are not individually decisive, but must be weighed one against the other, in the light of the totality of the evidence, and the probabilities..."

There is no suggestion in the judgment of the Court a quo that it embarked upon this cautionary exercise.

The Court a quo also appears to have overlooked the most significant omission on the part of the State witnesses to have identified the appellant to the policeman who arrived on the scene shortly after the attack upon the deceased. The evidence of Constable Dawson, in this regard, reads as follows:

"Ek het hulle net gevra of hulle weet wie dit is en ek was nog besig met die ondersoek, toe kom adjudant Beyers daaraan.

En wat het hulle gesê toe jy vra of hulle weet wie dit is? --- Hulle het my nie geantwoord direk wie dit is nie - hulle het net gesê die man was nou hier gewees, maar hy het nou hier opgehardloop in die pad.

Is dit al wat hulle gesê het? --- Dit is reg, ja."

If the three State witnesses (or indeed any of them) were aware at the time of the occurrence, of the identity, and, indeed, the home address, of the assailant, then it is inexplicable that they would not have reported those facts immediately to Constable Dawson. It also renders strange the evidence of the State witnesses that when they made statements to the police on the Monday after the incident,

they were at pains to describe the dress and physical characteristics of the appellant. According to Jonkers, at the time of the attack on the deceased they even knew the first name of the appellant. It is significant that nowhere in the record does it appear when it was that the police were told of the name and whereabouts of the appellant. In the same vein, when asked during his evidence-in-chief how he identified the appellant at a police identification parade held on the Thursday, Jonkers replied:

"Ek het hom geken aan sy klere wat hy aangehad het."

After referring in some detail to those clothes he added that on the night in question the appellant had been wearing the same clothes. If Jonkers knew the actual identity of the appellant it is strange that he paid so much attention to his dress and so little to his name and address.

With regard to the words allegedly used by the appellant on the night of the attack concerning his "mother's place" the learned Judge a quo said:

"Ons is heeltemal tevrede en oortuig dat hierdie drie Staatsgetuies nie h leuen vertel het nie toe hulle verhaal het wat die man wat daar teen die muur gestaan en urineer het, gesê het. Ons is van mening dat hulle net nie die vermoë het om so h diaboliese leuen te fabriseer oor wat daar gesê is nie want dit sou inderdaad h leuen moes gewees het met die doel om die beskuldigde in sameswering tussen hulle drie te impliseer."

It was submitted, however, by the appellant's counsel that it was quite possible that one of the witnesses later suggested to the others that the assailant said something about his

mother's house. That possibility, to quote from counsel's helpful heads of argument:

"coupled with a suggestion that the attacker was the accused, would implant in their simple and suggestive minds the firm conviction that this was said and that the intruder was indeed the accused."

That possibility was also apparently not considered by the Court a quo.

In my judgment, if one weighs the evidence of the State witnesses against the totality of the evidence and considers it in the light of the aspects referred to above, it is not sufficient to render the testimony of the three State witnesses as to the identification of the appellant as reliable as was found by the Court a quo.

Little need be said of the identification parade held by the police some three days after the incident. It was riddled with material irregularities. Perhaps the most serious of these was that immediately before it was held the witnesses saw the members of the parade arrive and walk into the building where they were waiting. Shortly thereafter they witnessed the arrival of the appellant in a police vehicle and they watched as he was taken, in custody, into the same building. That was compounded by the witnesses being told by a policeman that the person concerned would be on the parade and that they were to point him out. Counsel for the State properly conceded that no weight at all could be given to the pointings out of the appellant at that identification parade. The learned Judge a quo pitched it far too high when he said in his judgment that:

"die effek van die uitkenningsparade met omsigtigheid
beskou moet word..."

and that:

"in ons oordeel was die uitkenningsparade in elk geval
nie so belangrik in die hele identifikasieketting nie."

The Court a quo appears, quite incorrectly, to have placed
some weight on the evidence concerning the identification
parade. How much, one cannot ascertain.

In summary, then, I am of the opinion that the identification
of the appellant as the assailant on the night in question
was not convincing beyond a reasonable doubt. Had the Court
a quo correctly warned itself of the dangers inherent in that
type of evidence and had it taken all the relevant facts and

factors into account it is unlikely that it would have come to the emphatic conclusion that it did.

I turn to consider the evidence of Sithole. The only basis upon which this was approached by the Court a quo was that having regard to the time given by Sithole, the appellant could have been at the scene of the murder at the time it was committed ie. approximatley 20h15. He could thereafter have gone to Sithole's house as testified by him and by Sithole. Again, the Court a quo apparently failed to have regard to the fundamental improbability of the appellant committing a foul murder at 20h15 and then before 21h00 joining his friend and calmly sharing a bottle of wine and having a relaxed conversation about the "old days". Such conduct borders on the unthinkable. In my view, the evidence of Sithole is quite inconsistent with the guilt of the appellant. The Court a quo did not reject that evidence and ex facie the record there

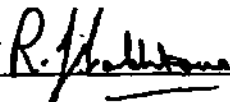
is no reason to do so.

The evidence of the State witnesses that the assailant said that the house was that of his mother was clearly cogent evidence directly implicating the appellant. However, viewed together with the totality of the evidence, the trial Court, in my judgment, should have entertained a reasonable doubt as to whether the guilt of the appellant was established. The appellant should have been given the benefit of that doubt and acquitted.

The appeal is upheld and the conviction and sentence are set aside.

BOTHA JA) Concur

NESTADT JA)


R.J. GOLDSTONE