

142/91

IN THE SUPREME COURT OF SOUTH AFRICA

Case No. 252/91

APPELLATE DIVISION

In the matter between

MICHAEL GWALAFirst Appellant
OBED MKHWANAZISecond Appellant
MPHLYPHELI NGCOBOThird Appellant
EDWARD MOTHALENTOA DIHALO.....Fourth Appellant
BONGINKOSI ZITHAFifth Appellant
JOSEPH MHLANGWANESixth Appellant

and

THE STATERespondent

CORAM : HEFER, VIVIER et GOLDSTONE JJA.

HEARD : 4 NOVEMBER 1991.

DELIVERED : 14 NOVEMBER 1991.

J U D G M E N T

HEFER J A

GRIFFIER, HOOGGEREGSHOF VAN SUID-AFRIKA	
BIBLIOTHEEK	14-11-1991
	REGISTRAR, SUPREME COURT OF SOUTH AFRICA

HEFER J A:

On 6 January 1989 mr Gobin Gokul ("the complainant") was plying his trade as a hawker in the Jesmond Dene area near Pietermaritzburg. His grandmother Sonpathie Somai ("the deceased") who sometimes assisted him on his trips was seated under the canopy covering the back of his truck. They were driving slowly down Jesmond Dene Road when one of the complainant's old customers flagged them down. What he had in mind, however, was not to buy the complainant's wares. Immediately upon the latter stopping and proceeding to the back of the vehicle this person - and a number of others who rushed to the scene - attacked him. Then, having grievously wounded and knocked him unconscious, some of his assailants drove away in the truck with the deceased still in the back. Two days later the police found the vehicle abandoned and bogged down some ten kilometres away on a muddy road through a plantation. The deceased's body was under

the canopy. She had been beaten and stabbed to death.

The present six appellants were later indicted in the court a quo on three counts. On count 1 they were charged with the murder of the deceased; on count 2 with the attempted murder of the complainant and on count 3 with robbery with aggravating circumstances. Despite their pleas of not guilty they were convicted on all counts. On count 1 second and fifth appellants were sentenced to death, first, third and fourth appellants to 25 years imprisonment and sixth appellant to 20 years imprisonment. On each of the remaining two counts they were sentenced to terms of imprisonment ranging from 12 to 17 years which were ordered to run concurrently. With leave, where necessary, granted by the trial judge, they have now appealed against their convictions and sentences.

The prosecutors in the court in the court a quo were faced with two major problems. The first was that the complainant who was the only available eye-witness

deposed to having been attacked by five assailants but was only able to identify two of them. His evidence was to the effect that it was appellant no 4 who flagged him down and who struck the first blow after he had stopped his vehicle; that he was then stabbed from behind by a person unknown to him; that this person and appellant no 2 thereupon booted him to the ground where the former again stabbed him in his stomach, that appellant no 2, whilst treading on his throat, stabbed him above the left eyebrow; that he tried to rise when he heard the deceased crying but that someone then struck him from behind which caused him to lose consciousness. The other problem related to the death of the deceased. There was no evidence whatsoever indicating either where or by whom she had been killed. It will be recalled that some of the assailants drove away with her in the complainant's truck and that her body was only discovered two days later. Whether she was killed at the spot where the attack on the complainant took place

or elsewhere was entirely unknown.

In order to overcome these problems the State relied heavily on admissions made by the appellants in the proceedings in terms of sec 119 of the Criminal Procedure Act and, in respect of second, third and sixth appellants, on statements made by them to magistrates. Apart from first appellant's admissions in the sec 119 proceedings which will presently be discussed separately, it is unnecessary to refer in detail to these admissions and to the contents of the statements. For present purposes two general remarks will suffice. The first is that all the appellants admitted their presence at the attack upon the complainant and described with varying degrees of particularity their respective roles in the planning and execution thereof. The second remark is that the admissions and the statements by appellants no 2, 3 and 6 do not cast any light on the death of the deceased; fifth appellant admitted to having driven the vehicle away, and fourth appellant to having been

a passenger therein, until it got stuck in the mud; but, according to fifth appellant's version in the sec 119 proceedings, the vehicle was simply abandoned there.

Of the appellants only second appellant testified and his evidence was rejected as utterly unworthy of belief. The result was that their admissions stood uncontradicted and unexplained. This led to their conviction. The trial court found that the robbery had been carefully planned by all the appellants, that they were all present at and in varying degrees involved in the attack on the complainant and that the attack upon him as well as the murder of the deceased were committed in the execution of a common design. The court's reasoning appears from the following extract from its judgment:

"On all the evidence which is acceptable in this case and which we accept we are able to draw certain inferences beyond all reasonable doubt. The first is that it is quite clear that the participants in this robbery planned it beforehand. The robbery was a planned one and not one that occurred on the spur of the moment. It is

important to point out that Accused No 4 stopped the complainant and that at that time four of the Accused ran towards the vehicle. The fact that Accused No 4 stopped him and that the other four ran towards this vehicle and that no demands were made, that there was no talking, that they started attacking him immediately indicate that all of them were executing a preplanned manoeuvre. As I have stated Accused No 1, Accused No 2 and Accused No 3 and No 6 in various statements have in any event admitted that this was a preplanned robbery. This is not a case in which the Court is faced with the difficulty of an attack which occurs spontaneously where the Court has to decide whether a common purpose was formed. This is a case in which the common purpose was formed in the planning stage. As is apparent from what I said earlier, some of the Accused were well known to the complainant and they knew very well that the complainant and either his mother or grandmother would be in charge of this vehicle, and they knew that they would visit this area regularly. They thus knew that if they were to commit the robbery and were later to be found they would be identified by the complainant and his companion, his mother or grandmother and identified to the police for purposes of prosecution. It is important to point out that dangerous weapons such as knives and an iron rod or rods were used in the assault, that the assaults were committed immediately without any prior demands, that there had been no attempt on the part of those known

to the complainant to disguise themselves. It is furthermore clear that the complainant was left for dead and it is quite clear that both the complainant and the deceased were viciously assaulted. The Accused have not taken us into their confidence as to what was precisely discussed because they have declined to give evidence other than Accused No 2 who gave lying evidence.

From the known facts we conclude that the only reasonable inference is that their purpose was to ensure that there should be no resistance to the robbery, that no alarms should be raised by either of the two victims, then or thereafter and that they would be safe from identification and thus arrest thereafter. The only reasonable inference is that all those who were involved in this robbery intended to kill the complainant and the deceased.

The question which the Court has to decide is whether all the Accused were involved in this robbery and the attempted murder and the murder. The complainant of course identified Accused No 2 and 4 positively. The other four Accused including Accused No 1 placed themselves upon the scene in their admissions..... The question does arise when the deceased was assaulted. This must be seen against a background of what the purpose was of these assailants when they attacked the complainant and the deceased on that day. The only evidence from the complainant is that shortly before he himself was struck down he heard the deceased cry out. As I have said we are satisfied that their purpose was to ensure that there should be no resistance to the

robbery and in particular that no alarm should be raised, and in these circumstances the only reasonable inference was that she was seriously assaulted there at the scene. Whether she was killed finally later or not does not matter considering that their overall purpose was to kill both these people."

The finding that there was a conspiracy to rob and kill the complainant and the trial court's reasoning in this regard are beyond reproach and were not challenged in this court. The finding must obviously stand. The complainant's trip that fateful Friday afternoon first took him to a compound where some of the conspirators were living and where they were drinking at the time. It was plainly then that the plan was hatched. Having decided what to do they proceeded to the spot in Jesmond Dene Road where the complainant was waylaid and eventually attacked and robbed of his truck and its contents. Every conspirator who took part in or actively associated himself with the execution of the plot is thus guilty on counts 2 and 3. The only question as far as these two counts

are concerned is thus whether the trial court's finding that all the accused were parties to the conspiracy and either took part in or actively associated themselves with its execution can be faulted. Counsel who represented appellants nos 2, 3, 4, 5 and 6 in this court frankly conceded that they could not seriously challenge it. I do not propose to analyse the evidence against each of them. All that need be said is that the concessions were unavoidable in the light of the complainant's evidence and the admissions and statements referred to earlier. These five appellants' appeals against their conviction on counts 2 and 3 accordingly cannot succeed.

Appellant no 1, however, is in a different position. The relevant part of the record of the sec 119 proceedings reads as follows (the "accused" referred to therein being first appellant):

"ACCUSED We were five people altogether. We were sitting at the compound and we were

drinking liquor. We consumed the liquor and thereafter we parted as we were walking away. It was on a Thursday when we were drinking the liquor. On Friday we went back to the compound. Your Worship, the Indian man who was selling goods, things like bread and some other items appeared there. As the Indian man was still there at the top we left him and we walked down. The other people were carrying their weapons. Later the man who was selling also came down and he found us on the way. One of our companions stopped the vehicle. When the vehicle was stationary the man who was selling the goods alighted from the vehicle with the keys and he walked to the back of the vehicle. He was then assaulted. After he was assaulted the other four got into the vehicle and they drove off. When the other four were driving along with the van the Indian lady was seated at the back of the van. They drove away with the Indian lady. I do not know where did they go to. I returned to the house. As I was sitting in the house Sergeant Stone arrived. He took me to the Mountain Rise Police Station. At the police station Sergeant Stone searched me and he also questioned me as to why did I do such a thing by taking an old lady away. I denied that. I was assaulted until I got injured as the Court can see that I am injured on the right side of my face. That is all Your Worship

COURT Did you say that later on when the vehicle in which he was travelling was stopped, he then walked to the rear of the vehicle and was then assaulted?

ACCUSED He was assaulted.

COURT Did you assault him?

ACCUSED I also assaulted him.

COURT What did you assault him with?

ACCUSED I assaulted him with a pipe.

COURT Where on his body?

INTERPRETER The Accused indicates on his right ribs.

COURT And how many times?

ACCUSED Once Your Worship.

COURT And did your four other companions assault him as well?

ACCUSED They were the people who stabbed the man.

COURT And was it your companions that drove the vehicle away?

ACCUSED Yes, it was them.

COURT Why did you assault this man?

ACCUSED They said they were committing a robbery."

The complainant's evidence was to the effect that he knew first appellant well since he was an old and regular customer. On the day in question he passed first appellant's house and saw the latter outside. He asked first appellant whether he wanted anything whereupon the latter indicated with his hands that he did not and then started walking back to his house. The complainant proceeded down Jesmond Dene Road until he reached the point where

fourth appellant flagged him down and where the attack took place. (According to other evidence this point is about 100 metres from first appellant's house.) Elsewhere in his evidence he testified that he pointed out three people to the police after his discharge from hospital. They were first, second and fourth appellants. Asked why he had pointed out first appellant his answer was :

"Well you see he was the last place that I actually I did my business before I got into this intersection.
What do you mean by the last place that you did your business? What do you mean by that?
.....Before I got to the intersection. And then when I saw him in prison, I knew he did nothing. I never saw him doing anything, but I left it to the law to see what was he doing here."

In cross-examination he agreed that the last he had seen of first appellant on the day of the assault was "at his house when he said I don't want to buy anything".

Complainant's evidence which was accepted by the trial court in all respects as being that of an

excellent witness differs to such an extent from first appellant's version in the sec 119 proceedings that the two cannot possibly be reconciled. In his judgment the trial judge said the following:

"In this regard Mr Bagwa has submitted on behalf of Accused No 1 that the complainant in evidence contradicted the admission made by Accused No 1 in the section 119 proceedings.

In this regard I should say immediately that he did not contradict that statement. What he said was that he did not pay attention to the four people who came running and in effect that he did not see Accused No 1 at the scene where he was assaulted. It is quite clear that he did not see all of his assailants at the scene. He did not for instance see the person who hit him from behind resulting in his losing consciousness. Accused No 1 has not testified whereas his statement in Exhibit H places him fairly and squarely on the scene as one of the assailants who were intent upon robbing the complainant."

It appears to me that the trial court did not appreciate the full import of the difference between the two versions. According to first appellant he and four others left the compound and walked to the spot where the complainant was waylaid and where the complainant found them. On

complainant's version, this simply could not have happened.

If first appellant's version is correct, he must have been one of the four who rushed at the complainant after the vehicle had stopped. If that were so, bearing in mind that the incident happened in broad daylight and that the complainant had seen first appellant only minutes earlier at the latter's house, it is inconceivable that he would not immediately have recognised him. The trial court's reasoning seems to imply the possibility that first appellant pursued complainant's vehicle down Jesmond Dene Road and that he was the person who struck the last blow from behind. On the complainant's evidence this is certainly a possibility but on first appellant's version there is no way in which this could have happened. Quite apart from the obvious impossibility of first appellant accompanying the other assailants from the compound to the scene of the attack and of pursuing complainant's vehicle from his house at the same time, first appellant's version is that he

struck the complainant once on the ribs. That could not have been the blow that rendered him unconscious.

Faced with this difficulty and stressing the improbability of an innocent person falsely confessing his involvement in the commission of a serious offence, counsel for the State submitted that first appellant might have been involved in the attack upon the complainant in a manner other than the one described by him in the sec 119 proceedings. This submission detracts from rather than supports the case against first appellant because it presupposes the falsity of the very admission which is the only evidence against first appellant. It is not for us to speculate upon the reasons why first appellant might have incriminated himself falsely. The fact of the matter is simply that his admission which, I say again, is the only evidence against him has been shown to have been false. It cannot be said that his involvement either in the conspiracy or in the attack has been proved beyond reasonable doubt. In

my view he should have been acquitted on all three counts.

What remains for consideration (apart from the sentences) is the other appellants' conviction on count 1. This is based entirely on the trial court's finding of the existence of a common purpose to kill, not only the complainant, but his assistant as well. That finding was arrived at by way of inference and what the question boils down to is whether the inference that the complainant's assistant would also be killed is the only one that can reasonably be drawn from all the proved facts.

In my view it is not. In the passage from the judgment cited above the trial judge rightly mentioned that some of the appellants were well known to the complainant, that he would thus be able to identify them, and that this was the reasons why he had to be killed. There is no evidence that any of them were known to the deceased. According to the complainant his mother usually accompanied him on his trips and, although this was not the first occasion on

which the deceased stood in for complainant's mother, there is no reason to believe that she had come to know some of her grandson's regular customers. The complainant's evidence is to the effect that the person who accompanied him - whether it be his mother or his grandmother - would always be seated under the canopy of his truck among the merchandise and assisted him merely by collecting money or finding change or passing goods to him. This being so it is by no means clear that either his mother or his grandmother ever was in a position to get to know his customers. Nor is it clear that the complainant always had an assistant. The only evidence to that effect was given by second appellant whom the trial judge described as an "appalling" witness; the less said about his evidence the better.

Be that as it may. To suggest that the possibility of the complainant having an assistant of the day in question was considered when the plot was devised, is sheer speculation. And so is a suggestion that, had such a

possibility been considered, it was decided to do away with her. The conclusion that there was a decision to kill the complainant derives from the way in which his assailants set upon him immediately after he had alighted from the vehicle. But there is no evidence that the deceased was treated similarly. The trial court's inference (from the fact that the complainant heard her crying out) that she was also attacked does not appear to me to be the only reasonable one for she might have done so for other reasons; and even on the assumption that she was attacked on the scene there is always the possibility that one or more of the conspirators did so on the spur of the moment. In that event the others can only be held responsible if this was a foreseen or reasonably foreseeable possibility which has not been proved. There is yet a further possibility. It may well be that nothing was done to the deceased on the scene and that the decision to deal with her was only taken after the vehicle

had been driven away. In that event fourth and fifth appellants might have been held responsible or an answer might have at least have been expected of them. In view of these possibilities it cannot in my view be held that the common design embraced the murder of the deceased or that her death has been shown to have been a foreseen or reasonably foreseeable possibility. Second, third, fourth, fifth and sixth appellants ought therefore to have been discharged on count 1.

There is no need to dwell on the sentences imposed in respect of counts 2 and 3. Appellants' counsel conceded that it cannot seriously be suggested that the sentences are in any way improper. The result is as follows:

1. The appeal by appellant no 1 against his conviction on counts 1, 2 and 3 is upheld. His convictions and sentences on these counts are set aside.

2. The appeals by appellants nos 2, 3, 4, 5 and 6 against their conviction on count 1 is upheld. Their convictions and sentences on this count are set aside.
3. The appeals by appellants nos 2, 3, 4, 5 and 6 against their convictions and sentences on counts 2 and 3 are dismissed.

J J F HEFER JA.

VIVIER JA)
GOLDSTONE JA) CONCUR.