590/90

590/90

G.P.-S. 3-00117

219

Saak No. 590/90
Case No.

IN DIE HOOGGEREGSHOF VAN SUID-AFRIKA
IN THE SUPREME COURT OF SOUTH AFRICA

S

(Appellate Afdeling)
Division)

APPÈLSAAK : APPEAL CASE

Luyanda Mkize
Appellant

teen/versus

The State
Respondent

Mev Frey 92/5/26 10 20
Prokureur van Appellant / Appellant's Attorney: Symington & De Kok

Lieb Loots 92/5/26 10h05
Prokureur van Respondent / Respondent's Attorney: A-G. Grahamstown

Advokaat van Appellant / Appellant's Advocate: T L. Sikweyiya with S A Majiedt

Advokaat van Respondent / Respondent's Advocate: L S Moffett

Op die rol geplaas vir verhoor op / Set down for hearing on: 22/5/92 9.11.15

SOKPA ER

Coram: Nestadt, Milne, van der Heever J.J.A.

Sikweyiya 9.40-10 26
Moffett 10-26-11.00
Sikweyiya 11 00 - 11 02

CAV

Allowed
22/5/92

Uitspraak Hof 1 Woensdag 27/5/92 9h45

Botha AR
NMS
van der Heever AR

IN THE SUPREME COURT OF SOUTH AFRICA

APPELLATE DIVISION

In the matter between:

LUYANDA MKIZE — Appellant
(Accused No. 2 in Court a quo)

and

THE STATE — Respondent

APPEAL AGAINST THE CONVICTION OF MURDER BY HIS LORDSHIP MR ACTING JUSTICE S G REIN AND 2 ASSESSORS ON 11 MAY 1990 IN THE SOUTH EASTERN CAPE LOCAL DIVISION OF THE SUPREME COURT OF SOUTH AFRICA.

ATTORNEYS FOR APPELLANT:

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THE ATTORNEY-GENERAL
SUPREME COURT
BLOEMFONTEIN

VOLUME 6

Pages 503-621

IN THE SUPREME COURT OF SOUTH AFRICA

(SOUTH-EASTERN CAPE DIVISION) PORT ELIZABETH

CASE NO: CC50/89

STATE versus VUYISILE KOOS NDIMA & THREE OTHERS

JUDGMENT ON APPLICATION 1990-05-04

REIN AJ:

The original allegations against the four accused were that they were guilty of murder "deurdat die beskuldigdes op of omtrent 16 November 1986 en te of naby Kwazakele in die distrik Port Elizabeth, wederregtelik en opsetlik vir Gens Paul Bassel Lorck, in lewe 'n 44-jarige Duitse Blanke man doodgemaak en aldus vermoor het."

Shortly after the trial commenced, Mr Tyler, for the State, indicated that he intended to amend the charge as per Exhibit A, which reads as follows, "Deurdat die beskuldigdes op of omtrent 16 November 1986 en te of naby Kwazakele in die distrik Port Elizabeth, wederregtelik en opsetlik vir Gens Paul Bassel Lorck, in lewe 'n 44-jarige Duitse Blanke man, of 'n man, die identiteit en verdere besonderhede van wie aan die Staat onbekend is, doodgemaak en aldus vermoor het."

After some discussion between counsel it was decided that this application would be made at a later stage. Yesterday, and apparently after leading all the evidence for the State which, by the way , does not incriminate accused Nos 3 and 4 - Mr Tyler renewed his application and the amendment now proposed is set out in Exhibit R which reads as follows, "Deurdat die beskuldigdes op of omtrent die tydperk 16 tot 19 November 1986 en te of naby Kwazakele in die distrik van Port Elizabeth, wederregtelik en opsetlik vir Gens Paul Bassel Lorck, in lewe 'n 44-jarige Duitse Blanke man, of 'n persoon, die verdere

beskrywing en besonderhede van wie aan die Staat onbekend is, doodgemaak en aldus vermoor het."

It will be noticed that the proposed amendment concerns, firstly, the alteration of the date, and, secondly, the identification of the person allegedly murdered.

Mr Majiedt, for the accused, opposes the application. His only basis of opposition is that the accused will be prejudiced if the amendment is granted.

I deal firstly with the second amendment. Section 86 of the Criminal Procedure & Evidence Act 51 of 1977 reads as follows:

"(1) Where a charge is defective for the want of any essential averment therein, or where there appears to be any variance between any averment in a charge and the evidence adduced in proof of such averment, or where it appears that words or particulars that ought to have been inserted in the charge have been omitted therefrom, or where any words or particulars that ought to have been omitted from the charge have been inserted therein, or where there is any other error in the charge, the court may, at any time before judgment, if it considers that the making of the relevant amendment will not prejudice the accused in his defence, order that the charge, whether it discloses an offence or not, be amended, so far as it is necessary, both in that part thereof where the defect, variance, omission, insertion or error occurs and in any other part thereof which may be come necessary to amend.

(2) The amendment may be made on such terms as to an adjournment of the proceedings as the court may deem fit.

(3) Upon the amendment of the charge in accordance with the order of the court, the trial shall proceed at the appointed time upon the amended charge in the same manner and with the same consequences as if it had been originally in its amended form.

(4) The fact that a charge is not amended as provided in this section, shall not, unless the court refuses to allow the amendment, affect the validity of the proceedings hereunder."

Mr Majiedt argues, firstly, that if one reads section 86 together with section 87 of the Act, then he is unable to ask for any further particulars to the charge as amended. However, he has frankly, and in my view correctly, conceded that if he were to request any further particulars, such request would be identical with the first one. It seems to me therefore that no possible prejudice could result in the circumstances of this case.

Secondly, Mr Majiedt submits that if the amendment were granted concerning the identification, then this would make the case easier for the State to prove. If one looks at the provisions of section 86, then it will be seen that when an amendment is sought by the State, it is mostly in order to rectify some defect in the charge. This in itself presupposes that an amendment can be, and in many instances is, granted to assist the State in remedying a defect which thus makes it easier for the State to secure a conviction than otherwise. There is therefore no substance in this submission.

Furthermore, having regard to accused No 1 and 2's defence foreshadowed in cross-examination, it is clear to me that had the original charge included the amendment, the conduct of the trial would not have differed one iota from the way in which the trial has been conducted hitherto.

I turn now to the amendment concerning the dates. As far as No 2 accused is concerned, I cannot understand why the State should ask for the amendment, having regard to the provisions of section 92(2) of the Act. This section reads:-

"If any particular day or period is alleged in any charge to be the day on which or the period during which any act or offence was committed, proof that such act or offence was committed on any other day or during any other period not more than three months before or after the day or period alleged therein shall be taken to support such allegation if time is not of the essence of the offence: Provided that -

(a) proof may be given that the act or offence in question was committed on a day or during a period more than three months before or after the day or period stated in the charge unless it is made to appear to the court before which the proceedings are pending that the accused is likely to be prejudiced thereby in his defence on the merits;

(b) if the court considers that the accused is likely to be prejudiced thereby in his defence on the merits, it shall reject such proof, and the accused shall be deemed not to have pleaded to the charge."

Concerning No 1 accused, it would appear that his defence
an alibi has been foreshadowed during cross-examination on
behalf, and in his case he is afforded protection by vir-
of the provisions of section 93, which section can be
arded as an extension of the protection which already
ts in terms of section 92(2)(b), to which I have just
rred. Section 93 reads:

"If the defence of an accused is an alibi and the Court before which the proceedings are pending is of the opinion that the accused may be prejudiced in making such defence if proof is admitted that the act or offence in question was committed on a day or at a time other than the day or time stated in the charge, the court shall reject such proof notwithstanding that the day or time in question is within a period of three months before or after the day or time stated in the charge, whereupon the same consequences shall follow as are mentioned in proviso (b) of section 92(2)."

y view, therefore, as far as No 1 is concerned, an amend-
affecting the date could well prejudice him in his
nce. That amendment is therefore refused.

The amended charge therefore reads as follows, "Deurdat
beskuldigdes op of omtrent 16 November 1986 en te of naby
akele in die distrik van Port Elizabeth, wederregtelik en
tlik vir Gens Paul Bassel Lorck, in lewe 'n 44-jarige
se Blanke man, of 'n persoon, die verdere beskrywing en
nderhede van wie aan die Staat onbekend is, doodgemaak en
s vermoor het."

Finally, I would like to bring to the attention of coun-
what was said by WILLIAMSON in S v Grey 1983 (2) 536 (C)

at/...

539 F - H. This was a case which concerns an amendment a charge-sheet and the final paragraph of the judgment eads,

"We have also been asked,as a matter of guidance,to indicate whether the charge-sheet should itself be physically altered so as to reflect any amendment. It is difficult to be dogmatic about something of this nature because circumstances vary considerably. However, it does seem to me that it is desirable that there should be some indication on the charge-sheet itself that it has been amended. If there is sufficient space to do so neatly, then I think that it is not inappropriate to insert a few words and by a suitable legend indicate that these words were inserted pursuant to amendment granted on such a date. If the amendment is lengthy and would make the charge-sheet messy, then it is, I think, better to physically attach to the charge-sheet the amended charge set out in full,and indicate by an appropriate note on the charge-sheet that the charge is amended on such and such a date in terms of the document annexed to the charge-sheet. No hard and fast rule can be laid down, but it is well to bear in mind that the object of the exercise is to produce a record which is neat and easy to follow."

.....

S G REIN

ACTING JUDGE OF THE SUPREME COURT

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60/89

CASE NO. CC50/89

IN THE SUPREME COURT OF SOUTH AFRICA

(SOUTH EASTERN CAPE LOCAL DIVISION)

DATE: 11.5.1990

THE STATE versus: V K NDIMA + 3 OTHERS

J U D G M E N T

REIN, A.J.:

Originally four accused were charged with the crime of murder, the allegation being, in terms of the amended charge sheet, that on or about 16 November 1986 and at or near KwaZakhele in the district of Port Elizabeth they unlawfully and intentionally killed and thus murdered Gens Paul Bassel Lorck, in his lifetime a 44 year old German white man or a person whose further description and details are unknown to the State.

At the end of the State case, there being no acceptable evidence against No. 3 and 4 accused, they were found not guilty and they were discharged.

The evidence for the State established that the charred remains found at the graveyard site on 19 November 1986 were in fact those of Bassel Lorck to whom we shall refer as the deceased who is mentioned in the charge sheet.

The State called Professor Phillips, an oral pathologist, who, on examination of the teeth, found at the scene, established in our view beyond any reasonable doubt that they were those of the deceased.

Mr Majiedt explained to us why the defence did not lead any evidence on this particular issue and in fact did not argue that Professor Phillips's evidence should be rejected.

The State called one eyewitness, Nontshembiso Heshu. We do not intend to deal with her evidence in detail. At the

/time...

time in November 1986 she was 13 years old. She had only minimal schooling. Her demeanour was só unsatisfactory and her evidence só full of inherent improbabilities and inconsistencies that we can place no reliance on her evidence whatsoever. Indeed Mr Tyler, for the State, did not attempt to argue otherwise.

We shall deal separately with accused No. 1 and accused No. 2.

It is convenient firstly to deal with No. 1 accused's defence which is an alibi and which was foreshadowed in cross-examination. The onus rests on the State to prove that it was the accused who committed the crime and not upon the accused to prove his alibi. What the accused must do is to lead evidence from which it appears there is a reasonable possibility that the alibi can be true. This defence must be considered by the Court against the background of all the evidence in the case as well as the Court's evaluation of the witnesses. It is on this basis that the Court must then decide whether the alibi may possibly be true.

The accused did not elect to give any evidence and the only witness called in support of his defence of an alibi was Monica Mtsewu. Her evidence was not much better, if at all, than that of Heshu. Her demeanour was also unimpressive. On numerous occasions she fabricated evidence when in difficulties. In many respects the story she told us was most improbable and we have come to the conclusion that we cannot rely on her evidence. Furthermore, what she says must be read in conjunction with the statements made by the accused which were admitted as having been made freely and voluntarily and without any undue influence.

We have therefore come to the conclusion that the alibi cannot possibly be true.

The accused made two statements, one to Captain Jonker who was a lieutenant at the time but to whom I shall refer as captain, and one to the magistrate, Mr Morgenthal. This is what he said to Captain Jonker:-

"Dit was op 16 November laasjaar, dit was op 'n Sondag. Ngqayinga het by Mampinga se huis gekom. Hy het gesê hulle het 'n witman gevang. Hy sê toe ek moet saam met hulle gaan. Ek het ook saam gekom. Ons het toe na hierdie plek toe gekom. Ons het die witman hier gekry. Die ander "comrades" het die klein outjies gestuur om buitebande te gaan haal. Die witman het toe op die grond gesit. Die ander mense was gestuur om te gaan kyk of daar nie voertuie of die polisie kom nie. Ek het die witman vasgehou en hom op die grond vasgedruk. Ek was gehelp deur Koni om die man vas te hou. Mancane het die witman met 'n mes gesteek terwyl ons hom vasgehou het. Ek het toe eenkant toe gestaan. Die ander ouens het toe petrol en buitebande op die witman gesit. Iemand het die man toe met 'n vuurhoutjie aan die brand gesteek, die man het toe geskree. Die witman het ook gesê 'Oh my friends, I want to go home'. Na die witman stilgeraak het, het elkeen sy eie pad huis toe geloop. Ons het die man hier gelos, hy het nog gebrand."

The statement which he made to Mr Morgenthal reads as

/follows...

follows:-

"Op 16 November verlede jaar, dit was 'n Sondag gewees, het 'n sekere swartseun met die naam van Nggayinga aangekom by ene Mampinga se huis. Ek was by die vrou se huis gewees. Hy het my vertel dat hulle 'n boer gevang het. Ek het gevra waar was die boer gewees. (Tolk: Die woord boer verwys na 'n blankeman). Hy het vir my gesê hy is by die begraafplaas. Ek het toe uitgegaan. Toe ek by die hek aankom het hy gaan staan met 'n klomp 'comrades'. Hy het toe vir ons beduie in watter rigting om te gaan. Ek en ene Koni het na die begraafplaas toe gegaan waar ons 'n blankeman aangetref het. Ene Luyanda en ander klomp 'comrades' was by die blankeman gewees, ons was baie gewees, meer as 40. Luyanda het gesê ons moet die blankeman vashou. Ons het hom vasgehou. Luyanda en ene Mancane het hom gesteek. Hy het hom met 'n vaste lem mes gesteek. Ek en Khoni het hom losgemaak. Aangesien 'n klomp jong seuns reeds gestuur was deur die Soweto 'comrades' om buitebande te gaan soek, het ons gewag vir die seuns. Die seuns het aangekom met buitebande. Die buitebande is bo die blankeman gesit. Ons is daarna beveel om dop te hou om te kyk vir aankomende voertuie. Die 'comrades, van Soweto het brandstof op die blankeman gegooi. Hulle het ons daarna

/beveel...

beveel om weg te loop aangesien dit agterdogtig sou wees vir 'n klomp mense om saam te drom op een plek. Daarna is ons uitmekaar uit. Dit is al wat gebeur het."

It will be immediately seen that the statement made to the magistrate is much more incriminating than that to Captain Jonker and we have had to decide whether we can use the statement which he made to the magistrate against the accused or whether we should in all the circumstances have regard only to what he said to Captain Jonker.

In S v YELANI 1989 (2) SA 43 at p.50A-D the Court said:

"Although a Court is entitled to reject exculpatory portions of an accused's extracurial statement while accepting parts thereof which incriminate him (S v KHOZA 1982 (3) SA 1019 (A) at 1039A) it should do so only after a proper consideration of the evidence as a whole. It is true that the appellant denied making the statement which Toise says he did. Nor did he confirm the exculpatory portion thereof when giving evidence. In VALACHIA's case the accused repudiated confessions which contained exculpatory statements which were not subsequently repeated when they gave evidence. A situation in principle similar to the present. Yet this did not detract from the fact that they were entitled to have the exculpatory portions of the statements considered. As GREENBERG, J.A., stated

/in...

in VALACHIA's case at 837:

'Naturally, the fact that the statement is not made under oath, and is not subject to cross-examination, detracts very much from the weight to be given to those portions of the statement favourable to its author as compared with the weight of which would be given to them if he had made them under oath, but he is entitled to have them taken into consideration, to be accepted or rejected according to the Court's view of their cogency.'

(See also S v FELIX & ANOTHER 1980 (4) SA 604 (A) at 609-10)."

On that basis we must now ask ourselves whether it has been proved by the State that the accused made common purpose with the group and that he is responsible for the murder of the deceased. In order to prove the case against the accused on the basis of common purpose it is necessary for the State to prove the following beyond all reasonable doubt:-

1. that the accused was present when the violence upon the deceased was committed;
2. that the accused was at the time aware of the assault upon the deceased;
3. that the accused intended to make common cause with those who perpetrated the assault;
4. that he manifested his sharing of the common purpose with the perpetrators of the common assault with himself performing some act of

/association...

association with the conduct of the others;

5. that he had the requisite mens rea.

See S v MGEDEZI & OTHERS 1989 (1) SA 687 (A).

In the present case it has been proved that the accused was present at the place where the deceased was burnt and that he was aware of the assault upon the deceased. The question is, however, whether it has been proved that he intended to make common cause with the burning and whether he manifested his sharing of the common purpose by himself performing some act of association with the conduct of those who actually were responsible for the burning of the deceased.

It was agreed by the prosecution and the defence that the cause of death was incineration, following burning with the use of tyres commonly known as "a necklace method" and that the district surgeon, Dr Lang, who examined the corpse on 20 November 1986 was unable during such examination to establish whether the deceased had been injured prior to burning or whether or not he was dead or alive prior to its burning.

Accused No. 1 told Captain Jonker that he held the deceased and pressed him to the ground. Mancane then stabbed the deceased with a knife whilst "we were holding him". He then stood on one side whilst other boys poured petrol and placed tyres on the white man. As far as the statement to Captain Jonker is concerned, the only other part thereof which associates No. 1 with what happened thereafter is " onshet die man hier gelos". Prima facie this does imply some sort of association. One would have expected him to use the word "hulle" instead of "ons". However, he was merely a bystander after the stabbing had

/taken...

taken place. We do not think that this is sufficient in itself to establish his association with what took place immediately after the stabbing and when he stood to one side.

We have therefore come to the conclusion that No. 1 can only be found guilty in respect of his association with the stabbing of the deceased. There is no evidence as to how many times the deceased was stabbed, where he was stabbed, what was the consequence of the stabbing. We know that a knife was used.

We therefore find that No. 1 accused is GUILTY OF ASSAULT WITH INTENT TO DO GRIEVOUS BODILY HARM.

We now turn to No. 2 accused. The evidence against him is that of a pointing out to Major Jonker and the statement which he made to the major and to the magistrate, Mr Smith. This is what he said to Major Jonker:-

> "In Novembermaand verlede jaar ek en Koos Ngqayinga en Sigododo asook Sincelo het besluit om by Mampinga se huis bymekaar te kom. Omtrent 7.00 daardie aand hoor ek mense buite skree, een sê, 'Hier is 'n boer.' Ons hardloop toe na buite. Ek sien toe die wit boer op die grondpad naby die begraafplaas hardloop en die ander het hom toe gejaag. 'n Hele ent verder het ek hom ge"trip". Hy val toe op die grond. Ek het hom teen die grond vasgedruk. Die boer skree toe in die Engelse taal "Help me, help me, please my friend". Ons sleep hom tot by die plek waar ek hom daar weer vasgedruk het teen die grond. Dis nou die plek wat ek aan kaptein gewys het. Daar het ons 'comrades'

/besluit...

besluit dat die boer gebrand moet word. Daar het toe baie mense gekom. Een van die groep gaan haal toe 'n "tyre" daar naby. Daar het ook 'n kan met petrol gekom. Koos sny toe van die boer se hare af met sy mes. Hy sê dat die toordokter sulke hare soek. Die boer het steeds hard gehuil en gesoebat dat ons hom moet los. Ons sit die "tyre" om die boer se skouers. Ons gooi die kan petrol oor die wit boer. Ons steek hom toe aan die brand. Die boer het baie hard geskree toe die vlamme op sy lyf brand. Ek het gesê 'Hou jou bek'. Ek gooi hom toe met twee klippe teen die kop. Ons hardloop toe weg nadat Koos die boer met 'n mes verskeie kere gesteek het. Ek gaan slaap toe by my huis. Dis al."

We should like to say at this stage that we do not consider that the time stated by accused No. 2 is of any importance even though we must accept that at that particular time the deceased was present at the Four Winds Folk Club in Port Elizabeth.

To Mr Smith he made the following statement:-

"Op 'n sekere dag te Veeplaas in die omgewing van Mampinga se huis het daar 'n blankeman opgedaag. 'n Ander jong seuntjie het toe vir Khosi hulle gaan roep. Ons het toe die blankeman begin jaag. Ek het toe twee klippe opgetel en hom daarmee gegooi. Toe ons by die plein by die bushalte kom, het ek die blankeman ingehaal en hom gepootjie. Hy het toe

/geval...

geval. Khosi en ander het toe bygekom. Khosi het toe die hare van die blankeman met 'n mes afgesny en toe die blankeman verskeie houe met sy mes gesteek. Die blankeman het toe gesterf. 'n Klomp jeugdiges het toe saamgedrom by die lyk van die blankeman. Die jeugdiges het toe die lyk gevat tot by die begraafplaas. Ek het toe daar by 'n ou kar gaan staan en sien toe hulle steek die lyk aan die brand. Terwyl ek nog daar staan het die klomp jeugdiges geskree dat die Hipo kom. Ek kon sien dat die lyk van die blankeman brand. Ek weet nie wie die buitebande en die brandstof gebring het nie, want ek was ver van die klomp jeugdiges gewees. By die plein waar hy doodgemaak was, het hy geskreeu. Ek het baie jammer gevoel vir die blankeman toe ek sien hy sterf en hy skreeu. Ek het begin senuweeagtig word en dit is daarom dat ek nie nader gegaan het toe hy aan die brand gesteek word. Daarna is ons uitmekaar uit na verskillende gedeeltes, sommige na Guguleto en sommige na B.F. Dit is al."

It will be noticed that whereas the statement to Major Jonker incriminates the accused in many serious respects, the one made to Mr Smith is a very much watered down version with some exculpatory passages.

We have carefully considered whether, as in the case of No. 1 accused, we should rely on what the accused told

/Mr Smith...

Mr Smith or whether we can have regard to what he told Major Jonker. We have come to the conclusion that we are entitled and in fact should take cognizance of everything he said to Major Jonker. It is unthinkable that the accused,who at no stage suggested that he was told what to say, would só seriously incriminate himself unless that was in fact what happened. In this case the accused was only brought before the magistrate on the day after he made a statement to the major and his second statement is no doubt as a result of some reflection on his part and possibly some "advice" from other sources. He himself did not see fit to give evidence and we therefore approach his case on the aforesaid basis.

We should also add,that when answering questions before the magistrate,accused appeared to convey that what he was now relating to the magistrate was the principal statement and what he told Major Jonker was incomplete.

The questions and answers 12 to 14 of EXHIBIT P read as follows:

"12. Het u vantevore 'n verklaring van dieselfde aard in verband met hierdie betrokke voorval gemaak? --- Ja, kortliks aan 'n kaptein.

13. Indien wel, wanneer en aan wie? --- Gister aan 'n wit kaptein.

14. Waarom verlang u dan om die verklaring te herhaal? --- Die kaptein het my uitgeneem uit die sel en toe gaan wys ek hom die misdaad toneel en toe skryf hy net dit af. Die speurder sê toe as ek 'n verklaring wil maak kan ek dit by hom maak,

/by

by 'n magistraat, toe sê ek ek sal
dit by die magistraat gaan maak."

If one therefore has regard to what he told Major Jonker, there cannot be any doubt at all that he at all times fully associated himself with the killing of the deceased and indeed was one of the principal actors. Even when the deceased was burning and screaming out aloud the accused said to him " hou jou bek" and then he threw two stones at his head. Mr Majiedt submitted that there was no nexus between the charred remains of the deceased and the confession of the accused. When No. 2 accused was arrested by Warrant Officer Els, he was informed of the charge against him and we accept on the basis of the evidence of Warrant Officer Els that there was no problem in communication with the interpreter and as far as he was concerned the charge was understood by the accused. Having heard the allegations against him, the accused takes Major Jonker to the exact spot where the deceased's remains were found and that, together with his statement, these events took place in November 1986, make it abundantly clear to us that the State has proved a nexus beyond a reasonable doubt and that in his pointing out in his statement to Major Jonker, the accused was referring to the burning of the deceased in this case.

Mr Majiedt has further submitted that when the accused uses the word "ons" in his statement, this does not necessarily mean his own personal association. He has referred us to two unreported cases, S v ANDILE DYWILI & ANOTHER Eastern Cape Division, Case No. CC19/89 and S v THEMBILE LUBELWANA, appellate Division, Case No. 303/87. Both these cases are distinguishable. In DYWILI's case the accused gave evidence explaining his use of the word "we" in his written

/statement...

statement as referring to the group but not to any person involved in the actions committed. In the LUBELWANA case there was evidence from the interpreter that the word "ons" does not necessarily mean that the person associates himself with the group. No such evidence was led in this case and we cannot speculate as to any interpretation.

In any event, however, we have already referred to the accused's personal involvement at the end of his statement and this makes it abundantly clear that he himself personally fully associated himself with the murder. (10

We therefore unanimously find accused No. 2 GUILTY OF MURDER as charged.

S G REIN

ACTING JUDGE OF THE SUPREME COURT

IN THE SUPREME COURT OF SOUTH AFRICA

(SOUTH EASTERN CAPE LOCAL DIVISION)

DATE: 11.05.1990

THE STATE versus: V.K. NDIMA AND OTHERS

S E N T E N C E

REIN, A.J.:

No. 1 accused you have been somewhat fortunate in this case of having been found guilty of a relatively innocuous offence in this particular case. Your record does not show any previous violence and you have also spent two years awaiting trial, which is a considerable amount. I propose to give you the benefit of a suspended sentence. Your SENTENCE is of ONE YEAR'S IMPRISONMENT SUSPENDED FOR 5 YEARS on condition that during the period of suspension you are not found guilty of any offence involving violence for which a sentence of imprisonment is imposed. Do you understand?

ACCUSED: Not clearly M'Lord.

COURT: Well just tell him what it is. Tell him again, explain it to him.

ACCUSED: I understand, thank you M'Lord.

COURT: Yes, no. 2 accused, in considering your sentence I have to take into account three features; the interests of the society, your personal circumstances, and the nature of the crime. I want to say immediately that I have taken into account everything your counsel has placed before me and if I have not mentioned any specific point, that does not mean that I have overlooked it. S v PILLAY 1977(4) SA 531A at 535B - D.

As far as your personal circumstances are concerned,

you/....

you were 19 at the time, you are illiterate. You come from a social environment which is often conducive to the performing of criminal acts. I have accepted your account of what transpired as told by you to Major Jonker. The nature of the crime which is disclosed in that statement, shows that it was one of the most brutal and savage attacks I have had the misfortune to come across. It is difficult to imagine how any human being can watch another one burning to death and then tell him to shut up and throw two stones at him, whilst he is screaming in agony.

As far as the interests of society are concerned, society must obviously be protected from people like you. Your SENTENCE is one of 16 YEARS' IMPRISONMENT.

S.G. REIN

ACTING JUDGE OF THE SUPREME COURT

IN THE SUPREME COURT OF SOUTH AFRICA

(EASTERN CAPE DIVISION)

CASE NO.: CC50/89

In the matter between:

THE STATE

versus

LUYANDA MKIZE Accused No. 2

APPLICATION FOR LEAVE TO APPEAL IN TERMS OF SECTION 316(1) OF THE CRIMINAL PROCEDURE ACT, NO.51 OF 1977

BE PLEASED TO TAKE NOTICE THAT the abovenamed Accused, who was Accused No. 2 at the trial, hereby applies for leave to appeal to the Appellante Division of the Supreme Court of South Africa, against his conviction of murder by His Lordship Mr Acting Justice S.G. Rein and 2 assessors on 11 May 1990.

BE PLEASED TO TAKE NOTICE FURTHER THAT the application is based on the following grounds:

1. In convincing the Accused of murder, the Court erred in relying on Exhibit "N" (the extra-curial statement to Captain Jonker) and in disregarding completely the contents of Exhibit "P" (the extra-curial statement to Magistrate Smith).

   It is submitted that the Court in so doing erred in law in that:

   1.1 An accused person is entitled to have not only incriminating, but also exculpatory portions of evidence considered by a Court of law, where such evidence exists.

This/...

This is so in the case of an extra-curial statement which contains both incriminating and exculpatory portions in the same document.

See:

R v Valachia 1945 AD 826 at 837
R v Vather 1961(1) SA 350 (A) at 353H-354
S v Bruce 1972(4) SA 547 (N) at 549 A-C
S v Felix & ano. 1980(4) SA 604 (A) at 609H-610A
S v Yelani 1989(2) SA 43 (A) at 50 C (10
S v Nomakhlala & ano. 1990(1) SACR 300 (A) at 301 e-f

It is submitted that the above approach is also to be applied in a case (such as the present one) where there are 2 extra-curial statements made by an accused person - incriminating, the other largely exculpatory;

2.1 The Court erred in convicting the Accused as aforesaid, when ex facie Exhibit "P", the Accused had furnished an explanation which, on the proved (20 facts, cannot be regarded as either "manifestly untrue" or "clearly inconsistent with the general facts of the case".

See:

S v Bruce (supra) at 549E ("clearly inconsistent with the general facts of the case")

S v Nomakhlala & ano. (supra) at 301e ("manifestly untrue") (30

This is especially so where the 2 statements constitute the only evidence implicating the Accused;

1.3 The Court erred in finding that, as Exhibit "P" was made subsequent to Exhibit "N", that the Accused probably had "time to reflect" and "probably received advice". It is submitted that there is no objective factual basis for drawing such an inference adverse to the Accused. In the premises, the Court's reasoning amounts, with respect, to mere conjecture or speculation.

See:

Caswell v Powell Duffryn Associated Collieries Ltd 1940 AC 142 (HL), per Lord Wright, as quoted with approval by Muller J.A. in:

S v Essack & another 1974(1) SA 1 (A) at 16 D

1.4 The Court erred in convicting the Accused of murder on the basis of Exhibit "N" when, on the evidence as a whole, there existed reasonable doubt of his guilt, particularly with reference to Exhibit "P".

A Court of law must, at the end of the trial, satisfy itself beyond reasonable doubt of the accused's guilt.

See:

S v Mbambo 1975(2) SA 549 (A) at 554 C

2. The Court erred in finding that the State has proved a nexus between Exhibit "P" and Exhibit "N" on the one hand, and the commission of the offence on the other, particularly in the light of the fact that in both these statements, there is no exact date furnished by the Accused as to when the offence was committed.

KINDLY/...

KINDLY set the matter down for hearing accordingly.

DATED at PORT ELIZABETH this 23rd day of MAY 1990.

S. NKANUNU & CO.

(sgd) S. NKANUNU

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PROKUREUR-GENERAAL
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1990-05-25
GRAHAMSTOWN
ATTORNEY-GENERAL

TO: THE REGISTRAR
Supreme Court
Eastern Cape Division
GRAHAMSTOWN

AND TO: THE ATTORNEY-GENERAL
GRAHAMSTOWN

CASE NO. CC50/89

IN THE SUPREME COURT OF SOUTH AFRICA

(SOUTH EASTERN CAPE LOCAL DIVISION)

DATE:

LUYANDA MKIZE versus: THE STATE

J U D G M E N T ON LEAVE TO APPEAL

REIN, A.J.:

The applicant in this matter was No. 2 accused in a murder trial.

At the conclusion of the trial he was found guilty as charged. Extenuating circumstances having been found to be present, he was sentenced to sixteen years imprisonment.

Mr Majiedt sought leave to appeal to the Appellate Division against the conviction.

After hearing argument from Mr Majiedt and Mr Tyler, who appeared for the State, I dismissed the application and indicated that I would give my reasons later. Here are these reasons.

Mr Majiedt's argument was substantially the same as the one which he advanced at the trial. He has furnished written heads and most of the cases cited by him have also been referred to previously. The substance of his argument is that the Court should have regard to the exculpatory statement which the appellant made to the magistrate as per EXHIBIT P. His argument is based on the dicta in the various authorities to which he referred that when the accused makes a statement then the inculpatory aspects as well as the exculpatory must both be taken into account. The authorities cited by Mr Majiedt do not assist in this particular case.

We are not here concerned with portions of one statement but two different statements made on two different occasions.

/When...

When we came to the conclusion that we were entitled to disregard the second statement we did so only after a proper consideration of the evidence as a whole and on the basis that a Court is entitled on such occasions to reject exculpatory portions of an accused's extracurial statement whilst accepting parts thereof which incriminate him. (See S v KHOZA 1982 (3) SA 1019 (A) at 1039).

In our view we had ample grounds for disregarding the statement made to the magistrate. We considered that no person in his sound and sober senses would have freely and voluntarily made the admissions to Major Jonker which the appellant made in this case unless they were true.

The statement to the magistrate was made some twenty four hours later and the two statements are totally inconsistent. If the one is true then the other must be false. The appellant himself did not elect to give evidence. We consider such failure to be of cardinal importance. (See KHOZA's case supra at 1039F and compare S v BRUCE 1972 (4) SA 547 (N) at 349D-E). Mr Majiedt has submitted that in EXHIBIT P the appellant furnished an explanation which on the proved facts cannot be regarded as manifestly "untrue" or "clearly" inconsistent with the facts of the case".

As already stated, this submission is illfounded.

When it was indicated in the judgment that the accused had probably time to reflect or had probably received advice which caused him to make a different statement to the magistrate, that did not amount to any speculation. It was simply an attempt to explain what probably happened, but this had no effect on our conclusions. Our only concern was whether we could accept the truth of the confession to Major Jonker. What prompted the accused to change his mind later was really

/of...

of no concern to us especially as he did not give evidence.

Having therefore found that what the accused said to Major Jonker was in fact the truth we had no hesitation in coming to the conclusion that the guilt of the accused was proved beyond any reasonable doubt.

I have therefore not been persuaded in this matter that there is any reasonable prospect of success on appeal and the application was accordingly dismissed.

S G REIN

ACTING JUDGE OF THE SUPREME COURT

CASE NO. 319/90

DEPARTMENT OF JUSTICE

IN THE SUPREME COURT OF SOUTH AFRICA

APPELLATE DIVISION

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ENQUIRIES: Mrs Gouws BLOEMFONTEIN 9300

YOUR REFERENCE: H SYMINGTON/la/Cm.0291 4 September 1990

MESSRS SYMINGTON & DE KOK
P O BOX 760
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Sir /Gentlemen

LUYANDA MKIZE vs THE STATE

with reference to the petition lodged in this office on 20 July 1990 I am directed by the Honourable the Chief Justice to inform you that condonation and leave to appeal against conviction was granted on 3 September 1990.

Yours faithfully

(sgd) D H OLIVIER
REGISTRAR 1990-09-06

Important Note: Please state your name in future petitions for easy reference and submit the petition with a covering letter.