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CASE NUMBER: 262/88

IN THE SUPREME COURT OF SOUTH AFRICA
(APPELLATE DIVISION)

In the matter between:

HUMPHREY PAKADE MAGWAZA

Appellant

and

THE STATE

Respondent

CORAM:

E M GROSSKOPF, STEYN et F H GROSSKOPF JJA

HEARD ON:

15 NOVEMBER 1990

DELIVERED:

29 NOVEMBER 1990

J U D G M E N T

STEYN JA

Appellant and six others were arraigned before Broome J and assessors in the Durban and Coast Local Division on a charge of murder and 8 other charges, all relating to events on Saturday morning the 21st May 1983 in the Durban area. All pleaded not guilty to all the charges. Appellant was accused no 4. Accused no 1 was Baba Sibaya and accused no 2, Moroka Moloka. The three of them were convicted of murder (i.e. on count 1). Extenuating circumstances having been found, all three were sentenced to imprisonment which in appellant's case was a term of 8 years. With leave of this Court he appealed to the full bench of the Natal Provincial Division against his conviction and sentence. His appeal was dismissed. With further leave of this Court he now appeals against his conviction only, leave having been refused in respect of his sentence. Accused 1 and 2 did not appeal at all.

The murder charge relates to the death of

Bongani Thomas Mkhize (the deceased) at Lamontville on the aforementioned date. It is not in dispute that:

(a) the deceased was murdered near his home by a group of persons who jointly assaulted him, *inter alia* with knives, and by pouring acid over him;

(b) the cause of death was a penetrating incised wound on the back between the right shoulder blade and the spine which penetrated medially downwards for 5-6 cms and ended in a 1 cm, clean-cut wound on the posterior surface of the right lung which collapsed that lung and caused fatal asphyxia and loss of blood;

(c) there were 9 other stab-wounds, all on the back, the majority of which were serious, but none were fatal;

(d) there were extensive acid burns on the deceased's body, which had a parchment-like appearance.

The only issues in the present appeal are whether appellant was one of the assailants and, if so, whether he had the intention to murder the deceased.

The events of that day relevant to the murder charge were described by the two state witnesses, Reggie Msomi (Reggie) and the deceased's sister, Anastasia Mkhize (Anastasia). The appellant did not testify. Reggie is an intimate personal friend of Thokoza Mtshali, a cripple. The events of that day as testified to by Reggie and Anastasia are chronologically as follows. At about 07h30 Reggie received a message at his home in Lamontville from Thokoza to go to him. Whenever Thokoza wanted to go out Reggie usually accompanied him in order to assist him. He went to Thokoza. Accused no 1 was there. He is a friend of Thokoza's. Another person and two girls were with accused no 1. A friend of his and of Thokoza, Khulani, had been killed during the early hours of that morning. The party consisting of Thokoza, Reggie, accused no 1 and his companions departed for the KwaGijima township in a car in which they had been given a lift. On the way they encountered appellant. Accused

no 1 caused the car to stop. Appellant got in, carrying a bottle and shoulder bag. Reggie knew appellant well. Thereafter the party continued on their way and left the car at a spot known as stage 13. Accused no 2 joined them there. They then went by taxi to the dwelling of a close friend of the late Khulani. He wasn't home. They left again. They then stopped at various places, travelling in different taxi's. At one of these places accused no 2 fetched a shoulder bag. Eventually Reggie, Thokoza, appellant and accused no's 1 and 2 alighted at the corner of Roads 3 and 5 in Lamontville. Accused no 1 told Reggie and Thokoza to wait there because Thokoza was a cripple. Accused no's 1 and 2 and appellant then departed. Reggie and Thokoza waited a while, but Thokoza became impatient and left in a taxi. Reggie could not accompany him because the taxi was full.

In the meanwhile Anastasia was in the dining room of her family home at about 10h30-11h00. The

deceased was in the bathroom. (He was also known as "Sash", and was a member of the Mashawelina gang.) Two persons entered by the front door. One was accused no 1, whom she knew; the other was a stranger whom she could not identify. Accused no 1 entered knife in hand. His companion held a hand-gun. Accused no 1 asked where Sash was. The deceased came out of the bathroom dressed only in underpants and shoes. Accused no 1 made straight for him, still with knife in hand. The deceased grabbed a spade and parried the attack. The deceased then fled out of the house, hotly pursued by accused no 1 and his companion. They caught up with him outside and stabbed him as he ran. There were many others outside the house but Anastasia was unable to identify any of them.

In the meanwhile Reggie started following Thokoza's taxi on foot and soon met up with a girl called Veronica. They went on together. It was then already late in the morning. As they were walking Veronica drew

his attention to something happening in the road. The road in question was Road 3, also called Gwala Street. He looked and saw at a distance of $\frac{1}{4}$ km accused no's 1 and 2, appellant and two others known to him as Ricky and Nkosana, assaulting a naked man. All of them were "hitting him", as Reggie put it. The naked man was on his feet. Reggie saw three of the assailants stabbing him - accused no 1 with a "bush knife", Ricky and Nkosana with pocket knives. The naked person then fled, running in Reggie's direction, pursued by his assailants. Reggie then lost sight of them and continued on his way accompanied by Veronica. Reggie did not know the deceased and could not identify the naked man. Reggie was under the impression that the naked man was being stabbed on his chest, but conceded that he may be mistaken as to that. He also admitted that he may be mistaken as to the said distance. He was, however, adamant that he clearly saw who were assaulting the naked

man. Reggie said that he only noticed the assault after it had already commenced.

In the meanwhile Anastasia had left home, looking for the deceased. She found him lying naked in the road covered in blood and with only one shoe on. He was still alive. She started wiping the blood off him. Whilst she was doing so accused no 1 and his companions arrived. Accused no 1 remarked to the deceased "Oh, you are still alive! We want to kill you because if we leave you alive you will have us arrested." One of the group had a bottle and was shaking it. Another said they were going to pour acid over the deceased. They then grabbed him and moved off with him, followed by Anastasia and her mother who pleaded with them to leave deceased alone. They did not heed the women's pleas and proceeded with the deceased to a street named "Gwala" where they told Anastasia and her mother "to go back" as they did not want them to see what they were going to do to the

deceased. She and her mother then "went back".

In the meanwhile Reggie and Veronica were still on their way. Reggie testified as follows as to what then happened: "I then saw those who had been in the company of accused no 1 coming back. I saw blood on accused no 1 and Nkosana and Ricky." He added that the blood on accused no 1 was on his hands and his clothing. He and Veronica then continued on their way.

As Anastasia and her mother were on their way home somebody shouted to her that "they" had let go of the deceased, and that he was in a toilet. She went back and found him in the toilet of Mpanza's house in Gwala Street. He was sitting on the wash basin trying to open the tap but was too weak to do so. He then had injuries on him which "were just like sand". (She was obviously referring to the "parchment-like" acid burns.) She had him conveyed to hospital, but he died on the way. After the deceased had been removed to hospital she looked for

and found his underpants in the road along which accused no 1 and his companions had chased the deceased in the direction of the place where she had found him naked and bleeding as aforementioned. The said pants had been torn open.

During cross-examination of Reggie by appellant's counsel the following crucially important passage appears (question and answer):

"I am going to put it to you that accused 4 did join you in the taxi but that he was not carrying a bottle. -- He did have it.
He did have a shoulder-bag? -- He had both."

It was also put to Reggie that appellant took Thokoza home and had not left in the company of accused no's 1 and 2. Reggie emphatically denied that appellant did so and repeated that he had left with the two said accused.

Accused no's 1 and 2 testified on the merits and denied any participation in the assault upon the deceased. The trial Court however found both of them to

have been lying witnesses and rejected their said denials. The Court in fact found that accused no 1 had been "the ring leader or prime mover" in the assault upon the deceased.

The trial court accepted the evidence of Reggie and Anastasia and also relied on the evidence of two other state witnesses who identified appellant as one of those seen later in the day at various other places in the company of accused no 1. The Court regarded this continued association of appellant with accused no 1 as a strong indication that appellant was with him during the fatal assault upon deceased and that he participated therein. The State has now conceded, rightly to my mind, that these two last-mentioned witnesses were most unsatisfactory and that no reliance should be placed upon their evidence. There were also misdirections of fact by the trial court pertaining to appellant, but they were in respect of peripheral matters which clearly could not,

and did not, play any significant role in the decision of the Court.

Anastasia and Reggie were, however, quite clearly very impressive witnesses, and there were no material misdirections of fact by the trial court in dealing with and accepting their evidence. This Court will consequently only interfere with the trial court's findings of credibility if it is convinced that it is wrong (R v DHLUMAYO AND ANOTHER 1948 (2) SA 677 (A) at 706 par 8). (This applies also to findings in respect of particular witnesses even in cases where a trial court's findings regarding the credibility of other witnesses are clearly wrong.) I am not convinced that the trial court's finding in regard to Anastasia and Reggie were wrong. On the contrary, I am satisfied that they are correct. Their versions dovetail to such a remarkable degree on so many different aspects that the possibility of a conspiracy between them to concoct a story falsely

implicating appellant can be discounted. Reggie and Anastasia clearly witnessed different stages of the same assault. There can be no reasonable doubt that the naked man Reggie saw being assaulted was the deceased. That they did not conspire to falsely implicate appellant in the murder is demonstrated by the fact that she did not identify him as one of the assailants and that Reggie did not allege that he assaulted the deceased with a weapon. Reggie and Anastasia corroborated each other to a remarkable degree that accused no 1 was a party to the assault upon deceased and that he played a leading role in the group concerned. The admission made on appellant's behalf that he was in the company of Reggie and accused no 1 materially reduces the danger of a mistaken or wilfully false identification of him by Reggie as one of those who assaulted the deceased. Reggie saw him actually participating in that assault. Appellant's failure to testify was decisive of the

matter. It converted what had been a strong **prima facie** case against him into a decisive one. The group were clearly acting in the execution of a common purpose to assault the deceased. The nature of the assault and the statements made during the course thereof indicate beyond reasonable doubt that the purpose of that assault was to kill the deceased. Appellant was clearly a member of that group throughout the assault. When Reggie testified that he "then saw those who had been in the company of accused no 1 coming back" (i.e. after having poured acid over deceased and letting him go) he clearly included appellant in the group. He had previously named those whom he had seen "in the company of accused no 1" and had specifically stated that the appellant was one of them. It is clear, therefore, that appellant must have been present when accused no 1 told Anastasia that they were going to kill the deceased. In continuing to participate in the assault thereafter, appellant demonstrated that he

shared that intention. To my mind the appellant was rightly convicted of murder.

The appeal is dismissed.

M T STEYN JA

CONCUR:

E M GROSSKOPF JA)
F H GROSSKOPF JA)