

SOUTH AFRICA / JUDGMENT

S v Zimu and Another (210/84) [1984] ZASCA 141 (26 November 1984)

[1984] ZASCA 141**COURT**

Supreme Court of Appeal

BEFORE

Wessels, Jansen, Joubert, Galgut, Eloff

CASE / FILE NUMBER

210/84

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CASE NO. 210/84 /CCC

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between LESI NKOSI ZIMU FIRST APPELLANT

VONGO BONGINKOSI KHWELA SECOND APPELLANT

AND THE STATE RESPONDENT CORAM: WESSELS, JANSEN, JOUBERT JJA et

GALGUT, ELOFF AJJA

HEARD: 5 November 1984

DELIVERED: 26 November 1984

JUDGMENT

ELOFF, / 2. ELOFF, AJA: The two appellants were convicted in the Durban and Coast Local Division of murder, and, no extenuating circumstances having been found, they were sentenced to death. With the leave of the court a quo they appeal against their conviction and sentence. The unchallenged evidence led in the court a quo established that in the early hours of Sunday 12 April 1983, a couple of black men descended on the house of one Luthuli in order to commit robbery. Luthuli was not at home and his kraal was occupied only by the deceased, who was his/

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his wife, and their three young children Nompumelelo, aged 14, Vusumuzi, aged 13, and Ntombenhle, aged 10. The attackers first noisily beat on the door of the house, broke some windows and demanded entrance. The deceased told Nompumelelo and Vusumuzi to flee, and they hurriedly left the house through a window. They ran to and hid at a spot within hearing distance from their kraal. Ntombenhle, the youngest child, remained in the house. The attackers continued to hammer on the door, and demanded money. They were armed with assegais and threatened that if money was not produced, they would kill the deceased. At that stage the deceased told Ntombenhle to leave

the/4. the house through a window, which she did. She found and joined her brother and sister where they were still hiding. In the meantime the deceased endeavoured to appease the intruders by telling them that although she had no money, she would be able to give them something in the morning when her husband returned from work. That did not satisfy the men, and they stabbed and bludgeoned the deceased to death. After putting the beds in the house alight they left. The three young children remained in hiding until day broke, when they sought refuge in the house of a neighbour.

The point in issue in the court a quo/

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a quo was that of the identity of the assailants. Ntombenhle testified that they were the two accused, and Vusumuzi said that he recognised the voice of one of the men as being that of the second appellant. Both the appellants denied that they had anything to do with the attack.

The trial court recognised that the state case depended very largely on the evidence of Ntombenhle. It acknowledged the need to be cautious in assessing the testimony of so young a child. Making due allowance therefor, the court found that it could accept her word -

"The Court was impressed by this young

girl/

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girl. She was a bright intelligent child and gave her evidence well."

The admitted fact that Ntombenhle knew the appellants well, and had often seen them at her parents' kraal, was found to be a factor of considerable importance. A supportive feature was found to lie therein that the two appellants testified that during the early hours of that fateful morning they happened to be

together - that was something which Ntombenhle would not have known unless she in fact saw the two of them

in each other's company. The fact, established by

the evidence, that Ntombenhle gave the names of the

two appellants to the police during the day, was held

to/ 7. to enhance her reliability. And the court found the confirmatory evidence of voice identification by Vusumuzi acceptable. He had also previously seen the appellant concerned at his parents' kraal, and had often heard him speak. There was also evidence before the court which was led by the state in relation to an alibi defence which was foreshadowed when the two appellant's enlarged on their plea of not guilty. Their counsel then informed the court that they would say that they spent the night at the house of one Mpanza. One Siphiwe Gumede was called by the state, and testified that he was at Mpanza's house

together/

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together with the appellants and a number of other persons during the night in question. They were all members of a soccer club who had met preparatory to a match which was due to be played the following day. At about 1 a m the non-players had however to leave to make room for the players to sleep. Gumede said that he and the two appellants had for that reason to depart. It was put to him by cross-examining counsel that the appellants would say that they stayed at the "football camp" the whole night. When the appellants testified however, they no longer claimed that they were at Mpanza's kraal the whole night. They admitted that they left together with Gumede, but they

denied/9. denied that that was at 1 a m. It was about 6 a m. 'They left - so they testified - to find liquor at the kraal of a certain Mkhize, and they returned some time later to Mpanza's kraal to join the other members of the soccer club in their journey by bus to the venue of the soccer match which had been planned for the Sunday.

The trial court found the evidence of both appellants to be unsatisfactory, and rejected it. In its view the appellants, having heard the evidence of Gumede, decided "to tailor their evidence to fit, insofar as it could, with the evidence of Siphiwe Gumede."

Before/ 10. Before I discuss the arguments presented by counsel for the appellants in support of their appeal, I turn to deal with a petition to this court launched by them on 3 October 1984, after their appeal was noted. It is for an order setting aside their convictions and sentences, and remitting the matter to the court a quo for the purpose of hearing the evidence of two witnesses called Themba Mpanza and Dumisani Makhanya. The names of these persons were mentioned during the trial in the court a quo. Counsel who then appeared for the appellants informed the court that he had been instructed to call them in support of the alibi, but that they could not be found. The investigating officer testified that

he/

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he had not been able to locate them; he explained that in the wake of recent faction fights a number of people, including the two persons concerned, had left the area. In an affidavit lodged in support of the appellants' application of 3 October 1984, a clerk employed by their attorneys said that the two persons were traced and were brought to interview appellants' counsel. They both made statements which were recorded in the form of draft affidavits. When these were submitted to Mpanza and Makhanya they refused to sign them. Their explanation was that their families had brought pressure to bear on them not to become involved in the matter for fear of repercussions/

12. repercussions. Counsel for the appellants contended that if the matter were to be remitted to the trial court the attendance of Mpanza and Makhanya could be ensured by the issue of a subpoena. That, in my view, still leaves a question-mark on whether these reluctant witnesses will, if compelled to attend and testify, adhere to what they told counsel. However, the real difficulty in the way of the application appears to me to be that even if Mpanza and Makhanya were to give evidence in accordance with what they told counsel, it will not assist the appellants. According to the document prepared for signature by Mpanza, he was the owner/

13.

owner of the kraal at which the soccer players and members of the club met during the night in question. The appellants were also present as supporters. The draft goes on -

"7. Zimu and Khwela also slept in a hut at my place, and although I cannot specifically say that I saw them actually go to sleep, I know that they were with us when we were preparing to go to sleep. We went to sleep between 10 p m and 10.30 p m.

8. The persons who slept over at my place were not only players, but some supporters were allowed to stay with the players for the night. 9. I know a person by the name of Siphawe Gumede. He was present at the camp that night, but if I remember correctly, Siphawe left during the night.

10. I woke at about 6 o'clock the following morning. Both Zimu and Khwela were in the/

14.

the hut when I awoke." In the document prepared for signature by Makhanya it is recorded that he was also at Mpanza's kraal. It goes on -

"4. The accused persons in this case, Zimu and Khwela were present at Mpanza's kraal as supporters.

5. When we went to sleep in a hut

Zimu and Khwela were with us, and the next morning they were still with us."

It will be seen that if Mpanza

and Makhanya were to testify in accordance with what they informed counsel, they will not be able to exclude the possibility that the appellants did exactly that which they said in their evidence

they/ 15. they did, viz leave Mpanza's kraal at some time during the night or early hours of the morning, and return before the others at Mpanza's kraal woke up. It seems to me that to remit the case to enable the appellants to call Mpanza and Makhanya will be an exercise in futility, and that the application should be dismissed.

I return to the arguments presented in the appeal.

Counsel submitted that it was doubtful whether the circumstances for identification as described to the court *quo* were adequate. The attackers could only be seen in the light of a candle

which/ 16. which was inside the house at a stage when they were about one and a half to two metres away from the partly open door of the house. There does not however seem to me to be any reason to doubt the positive evidence of Ntombenhle that the light was adequate and the attackers sufficiently close to enable her to identify them. Counsel placed emphasis on the shortness of time for identification, but I think that since the assailants were well known to Ntombenhle, even a brief glimpse would have been adequate. It was contended that Ntombenhle was probably horror-stricken; that however does not seem to me to be a reason to question her powers of observation. It was urged that Ntombenhle contradicted

herself/

17.

herself; she at one stage said that when the attackers were at the door she was carrying a candle, but under cross-examination she stated that the candle was on a table near the door of the kitchen. I do not discern a real contradiction. The candle may at one stage have been on the table and at another stage in her hand. It was in any event clearly established that there was a burning candle on the table in the kitchen. That was proved by the unchallenged evidence of Nompumelelo, who said that earlier during the night she lit the candle when she went to urinate, and left it burning. If Ntombenhle made

a mistake in saying that she held the candle while it

was/

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was in fact on the table, it was of no consequence.

In regard to the finding of the trial court that Ntombenhle would not have known that the two appellants were together in each other's company that night, counsel urged that the evidence indicated that they on previous occasions came together to her parent's house to drink. I think, however, that the court

a quo rightly held that the evidence of Vusumuzi clearly brought out that when the two appellants came

to the Luthuli house, they were not always in each other's company. The point made by the trial court was, in my opinion, a valid one.

It was next contended that the

trial/ 19 trial court should not have placed reliance on the voice identification by Vusumuzi in the absence of evidential material to indicate that it was reliable. I think it is correct that that part of Vusumuzi's evidence was presented somewhat sketchily. He should at least have been asked whether there was anything special about the voice of the second appellant which caused him to recognise it, and if so, what it was (c.f. *R v Chitate* 1966(2) S A 690 (R., AD) at p 692 B-E; *S v M*, 1972(4) S A 361(T) at p. 365 A). In the absence of a more specific and detailed enquiry about these matters Vusumuzi's evidence has but limited value. It seems to me however that in the light of all the

other/ 20. other matters supportive of the evidence of Ntombenhle there was good reason to accept it even though the reliance by the court on the evidence of voice identification was questionable. The impression of the trial court of Ntombenhle as a bright intelligent child is in my opinion borne out by the record of her evidence. Her responses to questions seem to me to be entirely adequate, and she displayed a reasonably intelligent appreciation of what was going on. Her evidence was "of a simple kind", and related "to a subject matter clearly within the field of (her) understanding and interest" (c.f. *Rex v Manda* 1951(3) S A 158 (AD) at p. 163 B). I am

not/

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not persuaded that the court a quo erred in accepting her evidence. Counsel for the appellants (rightly in my view) forebore any criticism of the conclusion reached by the trial court that the evidence of the appellants stood to be rejected.

I do not think that there is any ground for interfering with the finding that it was established beyond reasonable doubt that the appellants were the two men who murdered the deceased. It was not contended that the court a quo should have found that there were extenuating circumstances. In my view the appeals have no merit.

The/

22.The following orders are made -

- (a) The applications to set the conviction and sentence aside and to have the matter remitted to hear the evidence of Themba Mpanza and Dumisani Makhanya, are dismissed.
- (b) The appeals are dismissed.

ELOFF, AJA

JANSEN JA)

JOUBERT JA) CONCUR WESSELS AJA)

GALGUT AJA |

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