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CASE NO. 418/83
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IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between

SIPHIWO ZONO

APPELLANT

and

THE STATE

RESPONDENT

CORAM: KOTZé, CILLIé JJA et ELOFF AJA

HEARD: 16 AUGUST 1984

DELIVERED: 11 SEPTEMBER 1984

JUDGMENT

ELOFF/

ELOFF, AJA

The appellant was convicted in the Eastern Cape Division on one count of murder, one of rape, one of robbery with aggravating circumstances, and one of attempted robbery. On the first count he was sentenced to death, on the second he was sentenced to 8 years' imprisonment, and on the remaining counts, taken together, he was sentenced to 10 years' imprisonment. An application for leave to appeal was refused by the trial Court, but leave was granted by this Court to appeal against the convictions and sentences.

I turn firstly to the convictions on the first two counts, which can conveniently be

discussed/

discussed together. The findings by the trial Court were that on 20 February 1981 the witness, G.D., had intercourse with the late Zwelakhe Doctor Gwele in a bushy area near Beaconsfield, East London. Immediately thereafter a black man pounced on the deceased, bludgeoned him to death with a heavy instrument and removed some possessions from his person. He subsequently forced the witness to have sexual intercourse with him. He then sat in her presence folding and smoking a cigarette, whereafter he suddenly struck her a few blows on her head which dazed her. He then disappeared.

Counsel for the appellant in the first instance criticised the finding of the Court a quo

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it was proven beyond reasonable doubt that the appellant was the assailant in question. He contended that on the question of identity the case for the State rested solely on the evidence of G.D.. He emphasised that her evidence had not only to be clear and satisfactory in every material respect, but that the possibility of error had to be excluded. He argued that the evidence of the appellant, namely that he had not been near the scene of the attack on 20 February 1981, might reasonably be true.

The trial Court found G.D. to be an "excellent witness" who was both intelligent and honest, and whose evidence of identification was

reliable/

reliable. The Court appears to have accepted that there was nothing in addition to her evidence to support the State case (an approach with which I do not entirely agree, and to which I shall revert later), and it was found that her evidence sufficiently justified a conviction. The evidence of the appellant was rejected.

Appellant's Counsel endeavoured to persuade us that the trial Court's high opinion of G.D.'s honesty was misplaced. A number of points of criticism were raised. I do not think it necessary to detail them. They were all on peripheral questions and unimportant matters. They lack substance and I

am/

am not persuaded that- the Court a quo erred in its view that the witness was honest. I proceed to the question whether it was rightly found that there was no reasonable ground for thinking that she may have been mistaken.

When giving evidence G.D. stated that she took special note of the appearance of her assailant while he was going through the possessions of the deceased, and thereafter, while he was folding his cigarette and smoking it. His outstanding feature was a scar on the left side of his neck in the region of his jaw. She also studied his general appearance. She testified that she observed him carefully so that she

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would be able to identify him afterwards.

Five months later, on 22 July 1981, after the appellant had been apprehended, an identification parade was held. The appellant and nine other black men of comparable ages and build were used. The witness studied each of the persons on parade in turn, and when she came to the appellant, he held his head aslant. She asked him to straighten his head, for she was looking for a person with a scar on the left side of his neck, and the appellant was holding his head so that his scar was obscured. When he straightened his posture G.D. saw the scar and informed the officer in charge that the appellant

was/

was the man who had attacked the deceased and raped her.

While it is no doubt correct to say, as Counsel contended, that the witness was in a state of fright while her assailant was in her presence, and he was moreover a complete stranger to her, the Court a quo was in my opinion correct in saying that she had an adequate opportunity to observe him and to take note of his features. The most important factor is of course the distinguishing scar on the left side of his neck. The mark was described by the District Surgeon, who had examined him as

"... a very prominent scar to the left side of his neck which is

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about 12 cms in length and extends from up to down in a vertical direction. It is a wide scar, about three quarters of a centimetre in width..."

G.D. at one point in her evidence referred to it

as follows -

"On this side of the neck it is like a scar or burning scar".

She later said "there was a mark on the left side of the face or cheek." When cross-examining Counsel took her up on her statement that the mark was on the cheek as well, she testified that she "cannot be specific as to whether it is the jaw or the cheek, but it is on the left side of the face."

Much was made by Counsel of the

apparent/

apparent contradiction between the evidence of the district surgeon, who made reference solely to a mark on the neck, and to that of G.D., who at one stage alluded also to a mark on the face. I do not think that anything of importance arises therefrom. G.D. seemed to think that the scar on the neck extended higher up on to the cheek. She may have been mistaken, that is not significant; what is important is that her description of the general locality of the scar, clumsy as it was, seems to accord substantially with that given by the district surgeon.

In my view there is a significant

feature/

feature of the description of the scar given by G.D., which was not commented on by the Court a quo, namely that the scar on the neck "is like a scar or burning scar". That accords markedly with the description of appellant's scar given by one of the complainants on the fourth count, Kisi Mntwaphi. He testified about an attack on him by appellant some five weeks after that on G.D.. He also identified the appellant inter alia by reference to the scar on the left side of his neck which to him seemed as if appellant "had a burn on that side". Kisi's identification of the appellant was, as I shall indicate later, found by the trial Court to be correct beyond reasonable doubt, and

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for reasons given later in this judgment I agree with that finding.

I should, while referring to Kisi's evidence, point out that he identified the appellant not only by reason of the scar on the left side of his face, but also on account of another scar, like an inverted C, on the right upper side of appellant's face. G.D. did not see that scar. That was probably due to the fact that at the time of the attack on her the appellant wore a cap which covered the C shaped scar.

There is a further aspect of G.D.'s description which is in accord with that of Kisi. She said that her assailant wore a

checked/

checked shirt with red spots. I think this factor serves to strengthen the value of G.D.'s identification.

It is, in my judgment, of importance that according to the evidence' of the investigating officer, G.D. told him about the scar on the neck of her assailant before being taken to the identification parade. That shows that the witness did not, on seeing the appellant on the parade and afterwards in Court, belatedly decide that her attacker had a scar. Counsel for the appellant argued that a danger lay in this aspect. He contended that after being told that G.'s attacker had a scar on the side of his neck,

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police were on the lookout for a man answering to that simple description. There might have been several persons with scars on the left side of their necks, and appellant, who by chance found himself in a police cell on another charge, might coincidentally be one of those. Is it not possible that the moment G.D. saw a scar-faced man at the identification parade she without more ado also decided he was the culprit? I think that the chances that there was more than one black in the East London area with a scar on the left side of his neck "like a burning scar", are extremely remote. It is also of importance that at the parade G.D. did not see the scar on the neck of the

appellant/

appellant at once. As I said before, she thought he might well be her attacker, and became sure when, at her request, he lifted his tilted head.

Counsel also criticised G.D.'s identification because she could not recall whether her assailant wore a beard or a moustache. I do not think that is important. There seems to be a likelihood that in February 1981 appellant had a diminutive beard and a small moustache, but these are not such special features as the other which I discussed.

The conclusion of the trial Court that the identification parade was fairly conducted was criticised on a number of grounds. Counsel firstly

argued/

argued that the evidence of G.D. showed that she was conveyed to the police station where the parade was to be held in the same police vehicle as the complainants on the other charges - there might then have been the opportunity to compare notes before the parade. There seems to be some doubt whether it was borne out by the evidence that all the complainants came to the parade in the same vehicle. G.D. testified that just before the parade started she and the other complainants were kept in one vehicle, but the witnesses Kisi Mntwaphi and Abigail Malina testified that they were conveyed to the police station in a vehicle other than that in which G.D. arrived. In any event, these

witnesses/.....

witnesses were at all relevant times under police supervision, and it was never suggested that in fact any discussion between them took place before the parade.

Counsel argued that the appellant differed markedly from the others on the parade since he appeared to be older, and he was the only one with a moustache. The appellant does not however, judging by photographs of the persons on parade, appear to be older than the others, and his moustache was not a particularly noteworthy feature.

Appellant's Counsel also contended that the parade would only have been fair if the other persons/

persons on the parade were also scarred. The way things were arranged created the danger - so it was argued - that G.D. would single out the first person whom she saw with a scar on his neck. I think that such concern as one might have over the fact that no one on the parade other than appellant was scarred is relieved by the fact that according to G.D. the appellant managed to conceal the scar on the left side of his neck by tilting his head.

The organisation of the parade was further queried. It appeared that another person on the parade at some stage changed his position. This was not noticed by the Officer in charge. I do not

however/

however think that that gives rise to any uncertainty concerning the fairness and value of the parade.

Counsel rightly pointed out that there appeared to be some inconsistency between the State witnesses on the question whether, when the complainants on the various counts left the quadrangle in the prison building wherein the parade was held, they left by the same door as that by which they had entered. I do not however think that there is any reason to doubt the evidence of the witness Sergeant Mabece, who was in charge of the parade, that there was no opportunity for the complainants to communicate until the parade was over.

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When giving evidence the appellant testified that before the parade started he saw that the complainants were brought to a room from which they could see him. This evidence was countered by that of several state witnesses, all of whom were, for good reason I think, believed by the trial Court. I agree with the trial Court that in all material respects the parade was fairly conducted.

Counsel pointed out that the form concerning the parade proceedings states that G.D. pointed out the appellant without hesitation. G.D. testified that, in accordance with instructions she first examined all of the persons on the

parade/

parade and then confronted the appellant. That, in my judgment, does not signify hesitation.

I believe that the factors which I discussed are such as to exclude the reasonable possibility of error. As to the evidence of the appellant, I share the view of the Court a quo that he was significantly discredited by his effort to question the identification parade proceedings. His denial that he was the attacker cannot stand against the weighty evidence of G.D..

I conclude that the trial Court correctly found it proven beyond reasonable doubt that appellant was the attacker.

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The next point raised by Counsel was that there was no satisfactory proof that the injuries from which the deceased died were inflicted by the appellant. The contention was that G.D. could not say whether the deceased was dead or fatally injured when she left the scene, and the possibility exists that some other person may have finished off the deceased, after she had left. This possibility is to my mind so far fetched as not to merit serious consideration. While the body of the deceased was already so decomposed when it was ultimately found that the fatal wounds could not be clearly identified, the probability that the injuries described by G.D. led to the death of

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the deceased is overwhelming.

The last point argued by Counsel in regard to the episode under discussion is that the appellant may have believed that she was a willing party to sexual intercourse with him. I consider that the appellant must have realised that G.D. did not offer resistance to having intercourse with him as she feared suffering the same fate as had befallen her late companion.

In my judgment the appellant was rightly convicted on the first two counts.

That brings me to the conviction on counts 3 and 4.

The account of the two complainants

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some similarity to that of G.D.. On 21 March 1981, while they were having sexual intercourse, they were attacked by a black man who, after striking the complainant Kisi Mntwaphi several blows with a stick, removed some R58 in cash from his possession. He next searched Kisi Mntwaphi's companion, Abigail Malima, for money; but it could not be clearly established whether he found or took anything. He then again assaulted Kisi Mntwaphi with the stick, and disappeared. There was no real dispute concerning the nature of the attack, only the evidence of identification was in dispute. Abigail Malima did not contribute anything to this question. Kisi Mntwaphi was sure however, that

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25. it was

appellant. He identified him mainly by reference to his stature and his scars. He also, as I said earlier, noticed that his attacker wore a checked shirt with red spots. As far as scars are concerned he not only described the scar on the left side of appellant's neck, but also the other scar, like an inverted C, to which I alluded earlier. He also pointed appellant out at the identification parade of 21 July 1981.

The Court a quo accepted Kisi Mntwaphi's evidence and rejected appellant's denial that he was the attacker. The argument presented by Counsel for the appellant was mainly directed at Mntwaphi's credibility. He argued that the trial Court should have

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his evidence to be unsatisfactory for a number of reasons.

It was (argued Counsel) inconsistent with that of Abigail.

Mntwaphi said that he observed appellant in their vicinity

before he and Abigail had intercourse, and that appellant

briefly disappeared from sight; while Abigail made no

reference to anyone coming into sight before they had

intercourse. It does not however appear that she was ever

asked whether she saw their assailant at any stage before

the actual attack. Counsel pointed out that Kisi Mntwaphi

testified that the appellant had a full-faced beard at the

time of the identification parade, while that is not borne

out by the photograph taken of those on the parade. The

answer, I think, is that

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appellant's beard may have been full-faced it does not appear to have been thick, and would not necessarily have been shown distinctly on the photograph. It was next argued that Kisi Mntwaphi was shown to be unreliable when he tried to account for the fact that he saw the mark on appellant's head although the latter wore a cap - the witness said that at some stage during the attack the cap moved back revealing the scar like an inverted C. This version does not strike me as improbable. Appellant's Counsel mentioned a number of matters on which Kisi Mntwaphi was inconsistent. The suggested contradictions appear to me to be more imaginary than real. I am not persuaded that the trial Court erred in accepting

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the evidence of identification, and in rejecting appellant's evidence. In my judgment appellant was rightly convicted on these counts as well.

It remains to consider the question of the sentences imposed on counts 2, 3 and 4. The sentence for the rape was, as I have said, 8 years' imprisonment, and that on the other two counts, taken together, 10 years' imprisonment. For a first offender these sentences are certainly severe. There does not however appear to be any misdirection, nor was any relevant consideration left out of account. I cannot say that any of the sentences are startlingly inappropriate, and there is no basis on which I can intervene.

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The appeals are dismissed.

ELOFF, AJA

KOTZé, JA)
CILLIé, JA)) CONCUR